

20642

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

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

Case No. 2012-CP-14-00024

RECEIVED

SEP 11 2013

SC Court of Appeals

Andreal Holland Appellant

v.

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

RECORD ON APPEAL
Volume 1

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06-06-049

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

MAY 19 2009

W.C.C. 0607813

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)
Andreal Holland)
Claimant)
v.)
JC Witherspoon,)
Employer)
AND)
Capital City Insurance Company)
Carrier,)
Defendants.)

ADMINISTRATIVE ORDER

A Motion regarding the following issue (s) has been received:

Motion to Quash Subpoena
Attorney's Fee
Adjourn Scheduled hearing
Self- Insurance Privileges
Motion to Dismiss

X Other: Motion to Appoint Peggy Holland Knox as Guardian ad Litem
for Andreal Holland.

The following dispositions have been made:

Denied

Granted

CERTIFICATE OF SERVICE

Columbia, SC This is to certify that the undersigned has this date
April 13, 2009 served this order in the above entitled action upon all
parties to this cause by depositing a copy herewith, postage paid, in the United States mail addressed to
the attorney or attorneys for said parties.

This 18th day of May, 2009

By Amy A. S. - 4 -
Administrative Assistant to the Commissioner

Commissioner, SCWCC

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File #: 0607813

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)
)
Andreal Holland)
)
Claimant,)
v.)
JC Witherspoon)
)
)
)

MOTION TO APPOINT PEGGY KNOX
AS GUARDIAN ad Litem FOR
ANDREAL HOLLAND.

TO: SOUTH CAROLINA WORKERS COMPENSTION COMMISSION,
JUDICIAL DIRECTOR AND MARK CAUTHEN, ESQUIRE, ATTORNEY
FOR THE DEFENDANTS.

PLEASE TAKE NOTICE that the Claimant's attorney, Thomas K. Fowler, Jr.
moves this Commission for the appointment of a Guardian ad Litem, pursuant to
South Carolina Regulations 67-215 and 67-216.

That Regulation 67-216 states that a "Guardian ad Litem shall represent the minor
or mentally incompetent."

Andreal Holland was injured in a workers compensation injury on June 1, 2006
where he sustained a closed head injury. Mr. Holland is now suffering from brain
damage that has rendered him unable to handle day to day activities.

(Exhibit #1). On September 5, 2008, a Petition and Order for Appointment of
Guardian ad Litem was approved. The Honorable Beulah Roberts, Clerk of Court
for Clarendon County. This appoints Peggy Holland Knox, the claimant's mother,
as his Guardian ad Litem.

As a result of this Petition and Order, the Commission should appoint a Guardian
ad Litem to protect Andreal Holland's interests. Claimant's attorney moves to
have Peggy Holland Knox appointed as Andreal's Guardian ad Litem.

Claimant's attorney's opinion is based upon Exhibit #1 and the facts that Peggy Holland Knox is Andreal's mother, and she has already been appointed Guardian through Clarendon County Probate Court.

Respectfully submitted,

sf
Thomas K. Fowler, Jr. Esquire
Peake, Fowler & Associates, P.A.
9357 Two Notch Road, Suite 103
Columbia, SC 29223
803-788-4370
803-788-3290 fax

Attorney for Claimant

April 13, 2009
Columbia, South Carolina

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0607813

Andreal Holland, ✓
Claimant ✓

v.

AFFIDAVIT OF MAILING

JC Witherspoon,
Defendant
_____ /

I, the undersigned, of the Law Offices of Peake, Fowler & Associates, P.A., attorneys for the claimant do hereby certify that I have served all counsel of record in this action with a copy of the pleading herein below specified by mailing a copy of same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Mark Cauthen, Esquire
PO Box 7217
Columbia, SC 29202

PLEADINGS:

Motion To Appoint Guardian ad Litem

 S /

Monica Jenkins

Columbia, South Carolina
4/13/2009

claimant's Form 50. Counsel for the parties were in agreement that the claimant's Guardian Ad Litem be permitted to attend and participate in the deposition of the claimant.

THEREFORE, IT IS ORDERED that the Defendants motion to compel claimant's deposition testimony is hereby granted with the condition that the claimant's Guardian Ad Litem, Peggy Knox, be permitted to attend and participate in the deposition.

AND IT IS SO ORDERED.



T. Scott Beck, Commissioner

Columbia, South Carolina
September 27, 2009

CERTIFICATE OF SERVICE

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

This 16th day of October, 2009

By Amy A. Beach
Administrative Assistant to the Commissioner

MDC

TKF

AKM, Inc. ©

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Andreal Holland,
Claimant,

vs.

J.C. Witherspoon, Jr., Inc.,
Employer,

and

Capital City Insurance Company,
Carrier.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

) WCC FILE NO.: 0607813

) **ORDER ADDING**
) **PARTY DEFENDANT**

The above referenced matter came before the undersigned Commissioner on May 20, 2009 for a hearing on the claimant's Form 50. Counsel for the claimant and the employer/carrier also jointly moved to add A&K Mulch, LLC as employer/defendant. The claimant's Form 50 alleges injuries to the nose, face, teeth, brain and psychological arising from an injury that occurred on June 1, 2006. The Form 50 named J.C. Witherspoon, Jr., Inc., a timber harvesting operation, as the claimant's employer. However, a question subsequently arose as to whether A&K Mulch, LLC, an affiliated company specializing in cypress mulch, was the actual employer. It appears from payroll records that the claimant was paid by check from J.C. Witherspoon. However, the claimant testified in his deposition that he also worked in the mulching operation but he considered himself an employee of both companies. Additionally, counsel for the parties

stipulated that the same workers' compensation policy with Capital City covered both company's operations on the date of the accident.

Based upon the above, IT IS THEREFORE ORDERED that the motion to add A&K Mulch, LLC as employer/defendant is hereby granted and the hearing scheduled for May 20, 2009 shall be postponed. The undersigned Commissioner shall also retain jurisdiction of this file and the hearing may be reset upon proper request of either party.

AND IT IS SO ORDERED.


T. Scott Beck, Commissioner

Columbia, South Carolina
September 27, 2009

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

This 6th day of October, 2009
By Amey A. Bragg
Administrative Assistant to the Commissioner

Served on A&K Mulch with
a copy of Form 50.

MDC
TKF
AKM, Inc. (C)

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

Andreal Holland by his Guardian Ad
Litem Peggy Knox

Plaintiff,

vs.

Morbark, Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc.

Defendants,

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-00461.

CONSENT STIPULATION
OF DISMISSAL OF DEFENDANT

A & K MULCH, LLC
CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 8/03/10

Bentley N. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

WHEREAS, Plaintiff, by and through its undersigned counsel, brought suit against Co-Defendant A&K Mulch, LLC upon belief that Andreal Holland was employed by J.C. Witherspoon, Jr., Inc.; and

WHEREAS, through discovery in this action, Plaintiff has determined and is satisfied that he was employed by both A&K Mulch, LLC and J.C. Witherspoon, Jr., Inc., at the time of the accident that is subject of the claims against Defendants; and

WHEREAS, Andreal Holland was paid workers' compensation benefits pursuant to The South Carolina Workers' Compensation Act (S.C. Code Ann. § 42-1-10 et seq.) and the policy of insurance issued to J.C. Witherspoon, Jr., Inc. and A&K Mulch, LLC; and

WHEREAS, Plaintiff agrees that his sole and exclusive remedy against A&K Mulch, LLC, is by and through the South Carolina Workers' Compensation Act; and

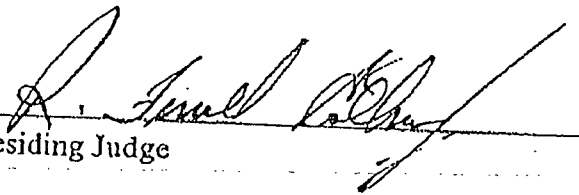
WHEREAS, the parties acknowledge and agree that A&K Mulch, LLC, should be dismissed from this liability action as expressed by the signatures of counsel for all parties, affixed below;

NOW, THEREFORE, upon the Motion of John Ecton, Esquire, attorney for A & K Mulch, LLC, and with the consent of the attorney for the Plaintiff, Donald E. Jonas, Esquire, and with the consent of Peggy Knox, the duly appointed guardian ad litem for the Plaintiff, with the consent of Curtis Ott, Esquire, attorney for Mobark, Inc., Saunders M. Bridges, Esquire, attorney for Watford Industry, Inc., J. Calhoun Land, IV, Esquire, attorney for Precision Husky Corporation, Joel C. Bailey, Esquire, attorney for Precision Husky Corporation, and Darrell W. Carter, Esquire, attorney for Axis Insurance Company;

IT IS ORDERED, pursuant to Rule 41 of the South Carolina Rules of Civil Procedure and the exclusive remedy provisions of the South Carolina Workers' Compensation Act (S.C.

Code Ann. § 42-1-10 et seq.), that the Defendant A&K Mulch, LLC, be dismissed as a party to this action, with prejudice. This dismissal does not affect any subrogation rights to recovery by A&K Mulch, LLC, such as those available pursuant to S.C. Code Ann. § 42-1-560.

AND IT IS SO ORDERED.


Presiding Judge

Clarendon County, South Carolina

Aug 20, 2010

WE SO MOVE AND CONSENT:

By: 
John A. Ecton
7825 Broad River Road, Ste. 300
Irmo, South Carolina 29063
Attorney for Defendant A&K Mulch

By: _____
Donald E. Jonas, Esquire
1328 Blanding St.
Columbia, SC 29201
Attorney For Plaintiff Andreal Holland

By: _____
Peggy Knox,
G.A.L. for Andreal Holland

By: _____
Curtis L. Ott, Esquire
Turner, Padgett, Graham & Laney, PA
PO Box 1473
Columbia, SC 29202
Attorney for Morbark, Inc.

By: _____
Saunders M. Bridges, Jr., Esquire
Aiken, Bridges, Nunn, Elliott, & Tyler, PA.
PO Box 1931
Florence, SC 29506

) BEFORE THE SOUTH CAROLINA WORKERS'
) COMPENSATION COMMISSION

WCC FILE NO.: 0607813

ORDER

ORDER

ORDER

ORDER

ORDER

ORDER

ORDER

Originally set for December 17, 2010 in Columbia,
South Carolina.

The Claimant, Andreall Holland, was represented by Thomas K. Fowler, of Peake & Fowler Law Firm, P.A., P.O. Box 23601, Columbia, S.C. 29224.

Defendants, J.C. Witherspoon, Jr., Inc. and A&K Mulch, Employer, and Capital City Insurance Company, Carrier, were represented by Mark D. Cauthen, Esquire, of McKay, Cauthen, Settana & Stuble, P.A., Post Office Box 7217, Columbia, South Carolina, 29202-7217.

To determine whether Claimant elected his remedy by failing to timely file a Form S-2 after commencement of a third-party lawsuit.

The Honorable T. Scott Beck, Commissioner.

March 30, 2011

APA SUBMISSIONS

DEFENDANTS' EXHIBITS

The Defendants rely on the APA submissions of the Claimant as well as the following exhibits:

TAB	NAME OF PHYSICIAN/OTHER	DATE OF REPORTS	NO.
1	Palmetto Health Richland	06/01/06-07/17/06	1-49
2	Carolinas Rehabilitation	06/14/06-10/30/06	50-103
3	Hoadwonic & Associates Case Management & Consulting Services	07/18/07	104-107

EXHIBITS:

1	Deposition transcript of Claimant
2	Deposition transcript of J.C. Witherspoon
3	Deposition transcript of Paula Dyches
4	Deposition transcript of Peggy Knox
5	Employment records from J.C. Witherspoon, Jr., Inc. and A&K Mulch
6	Summons & Complaint, Andrean Holland by his GAL, Peggy Knox v. Morbark, Inc., et.al.
7	Form S-2s
8	Defendant's Form 58s, 11/10/09 and 5/11/09
9	Order Adding Party Defendant 9/29/09
10	Deposition transcript of James M. Fennell, Esquire
11	Deposition transcript of Donald E. Jonas, Esquire
12	Complaint filed 9/05/08

CLAIMANT'S EXHIBITS

EXHIBITS:

9	Administrative Order & Motion Granting Peggy Knox GAL
10	Complaint on A&K Mulch, LLC
11	Amended Complaint on A&K Mulch, LLC
12	Answer of A&K Mulch, LLC
13	Defendant A&K Mulch, LLC's Responses to Plaintiffs' Request to Admit
13A	Glen K. Adams, MRC, CRC, CEES 11/2/10
14	S-2 Notice of Party of Third Party Action Employee 5/14/09
14A	Dr. Douglas Ritz 9/2/08
15	S-2 Notice of Party of Third Party Action Employee 10/13/09
16	S.C. Secretary of State regarding A&K Mulch, LLC
17	S.C. Secretary of State regarding J.C. Witherspoon, Jr., Inc.

18	Federal ID numbers for J.C. Witherspoon, Jr., Inc. & A& K Mulch, LLC
19	Deposition of Paula Dyches
20	Employee File-First Report & Time Sheets
21	Paula Dyches Answers to questions
22	Letter and check for our portion of Warren Group bill
23	Carrier clocked copy of Amended Complaint
24	J.C. Witherspoon, Jr. Deposition
25	State of South Carolina Articles of Organization
26	Dismissal of Defendant A&K Mulch, LLC
27	Unpaid Hospital bill Charlotte Hospital
28	Unpaid Hospital bill Columbia Oral and Maxillofacial
29	Deposition of Donald E. Jonas, Esquire
30	Deposition of James M. Fennell, Esquire
31	Form 51
32	Form 58 w/ Certificate of Service
33	Order for Deposition of Claimant

STIPULATIONS

The parties agree to the following stipulations:

1. That this matter is properly before the Undersigned Commissioner to determine issues set forth in Defendant's Form 21 hearing request relating to Election of Remedies.
2. That notice of this hearing was timely and properly served on all parties of interest.
3. That venue is proper.
4. That the issue of Election of Remedies is to be determined based on the APA's and legal briefs that have been submitted by the parties.
5. That the Workers' Compensation Commission has the authority to hear and determine the contested issues in this case.
6. That the Commission's file is made a part of the record with the exception of self serving statements and unstipulated medicals.

STATEMENT OF THE CASE

The facts of this case as related to the defense of election of remedies, per S.C. Code Ann. §42-1-560, are largely undisputed. The Claimant suffered compensable injuries to multiple body

parts, including his head/brain, on or about June 1, 2006. These injuries occurred as a result of the Claimant's head being struck by the door of a wood chipper. He has been represented by counsel throughout the majority of this case and continuously since at least 2007. The accident that gave rise to this workers' compensation claim also gave rise to a third party action (products liability) against other parties, including the manufacturer of the equipment the Claimant was using at the time the accident occurred.

On October 10, 2008, the Claimant, through counsel, filed a third party civil action seeking damages for injuries arising from the same accident. An amended complaint was filed on March 3, 2009. It is undisputed that the Claimant failed to file the requisite "S-2" notification with the Commission, and serve the S-2 on the Defendants until May 14, 2009. Such being the case, notice of the third party claim and service of the S-2 was in excess of the thirty day limitation for filing this notification required by §42-1-560.

Subsequent to the filing of the S-2, the Defendants raised the affirmative defense of election of remedies pursuant to §42-1-560 and its interpretation by the Supreme Court in *Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). This issue was originally scheduled to be heard, along with additional issues raised by the Claimant, at a prior Form 50 hearing scheduled for May 20, 2009. That hearing was postponed. The hearing on Claimant's Form 50 was later rescheduled for December 17, 2010. However, on the day of the hearing, Claimant withdrew his Form 50.

The issue of election of remedies is now before the Commission on the Defendants' Form 21, which alleges election of remedies and was filed on August 10, 2010. The attorneys for the respective parties agreed to have the issue of election of remedies determined based on the APA's submitted and legal memorandums filed by the parties.

ELECTION OF REMEDIES

The accident which gives rise to this claim for benefits took place on or about June 1, 2006, and also gave rise to third party civil action. The Claimant filed a third party civil action on October 10, 2008, and subsequently amended it March 3, 2009. The Form S-2, notice of third party action - employee, was not filed with the SCWCC or served upon the Employer/Carrier until May 14, 2009.

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

It is undisputed that a Form S-2 notifying the Defendant Employer/Carrier and the S.C. Workers' Compensation Commission of this third party action was not served until May 14, 2009, more than seven months after commencement of the third party civil action and more than two months after filing the amended complaint. Therefore, pursuant to S.C. §42-1-560, and corresponding S.C. case law, including but not limited to Supreme Court's decision in *Callahan v. Beaufort County School District*, 375 S.C. 92, 651 S.E.2d 311 (2007), the Claimant, by failing to comply with the mandated statutory notice requirements for his third party action, has elected his remedy. Accordingly, the Claimant is barred from further workers' compensation benefits from his employer.

In *Callahan*, the Claimant filed a third party action, but did not properly notify the Commission, the defendant employer, and carrier of the third party action via an S-2 until

approximately six months after the commencement of the third party action. The court therefore reasoned that:

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:

Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C.Code Ann. § 42-1-560(b).

An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) (“[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.”).

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of § 42-1-560 and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.

Callahan at 95-6, 313 (emphasis added).

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

We find the circuit court erred by excusing compliance with the statute based on the “equitable adjustment of the rights of all the parties.” Even though the employer had not lost its right of subrogation against the potentially responsible third-party, the statutory provision mandates notice to the employer, carrier, and Commission within thirty days of filing the third-party suit. It was improper for the circuit court to conduct an equity analysis to carve an exception to the workers' compensation notice requirement. See *Wigfall, supra*; *Santee Cooper Resort, Inc. v. S.C. Pub. Serv.*

Comm'n., 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (holding that a court's equitable powers must yield in the face of an unambiguously worded statute).

Callahan at 96-7, 314

The *Callahan* court ultimately ruled that claimant Callahan was entitled to continue receiving benefits in workers' compensation while proceeding against the third party tortfeasor. However, the only reason this was permitted is because the Claimant essentially cured the defective S-2 notification issue by voluntarily dismissing her claim under Rule 41 FRCP. The court's reasoning being that:

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

Callahan at 97, 314

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

This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher*, *supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).

Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson*, *supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all")(citing *Stroy v. Millwood Drug Store*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

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

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

By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a workers' compensation claim simultaneously with a third part action, and held that:

[I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]

The Law of Workers' Compensation in South Carolina, 5th ed., 2008, at p. 477.

The Claimant's attorney, in an effort to counter the Defendants' assertion of election of remedies, argues that the Defendants failed to properly raise the issue and that the following nine issues preclude the Defendants from utilizing the defense of election of remedies: (1) Actual notice of the third party claim; (2) "Unclean hands"; (3) Mental Incapacity of the Claimant; (4) §42-1-560 does not require this statutory notification after a certain period of time for filing the third party action has elapsed; (5) *laches*; (6) Waiver; (7) Estoppel (equitably); (8) Estoppel (judicially); and (9) The addition of a second named employer (A&K Mulch) after the filing of the third party claim started, or restarted, the time period for filing the S-2. For the reasons explained below, the Claimant's arguments fail to negate his election of remedies.

METHOD OF ASSERTING THE DEFENSE

The Claimant argues that the Defendants failed to raise the election of remedies defense in their Form 51 response filed on February 19, 2009, and therefore, use of this defense should be barred. First, the arguments pertaining to this issue are superfluous as the issue of election of remedies was raised via the Defendants' own Form 21. Secondly, Claimant's arguments appear to be based on an incorrect theory that the only proper way to raise election of remedies is by a Form 51. If this were the case, a Claimant could thwart the dictates of §42-1-560 by simply never filing a Form 50 (on an already accepted claim) thereby never giving the Defendant the opportunity to raise the election of remedies on a Form 51.

The Defendants could not have raised the election of remedies issue in their February 19, 2009 Form 51 as they had no notice of the filing and non-service of the S-2. The Carrier was never served with an S-2 notice of the original Complaint in the third party action, filed on October 10, 2008. As indicated in the Claimant's own brief, the amended third party complaint itself, filed March 3, 2009, was not received by the Carrier until March 10, 2009. Furthermore, at that time, and as noted by the Claimant in his own legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; then timely serving the S-2. No such action to cure this defect was ever taken by the Claimant. The Defendants properly raised the election of remedies defense on their Form 58, filed May 11, 2009, for the corresponding Form 50 hearing on May 20, 2009. Moreover, at the time of this hearing, the statute of limitations had still not run on the third party action.

The Claimant also asserts that the Form 58 Pre-Hearing Brief filed by Defendants on May 11, 2009 was untimely for the May 20, 2009 Form 50 hearing. This is not accurate. May 10, 2009, the actual due date of the Defendants' Form 58, PHB, was a Sunday. Pursuant to Reg. 67-609 'Computation of Time,' "Sundays...are included unless the designated time period ends on

a...Sunday...in which case the next day that is not a Saturday, Sunday, State, or Federal holiday is included as the last day [for filing].” (emphasis added). Accordingly, Defendants’ Form 58 Pre-Hearing Brief was timely filed on May 11, 2009. Furthermore, this issue is of no consequence as: (a) the current issues are before the Commission on the Defendant’s Form 21, not a Form 50; (b) at the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; and (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had requested.

In addition, the Claimant notes that the Carrier, “did not pursue its request to be allowed to allege the election [of remedies]” at the May 20, 2009 Form 50 hearing, and thereby has waived this defense even if it was properly raised, back in May of 2009. Again, this argument is also without merit. The Claimant elected not to go forward with his Form 50 hearing on May 20, 2009. The Defendants did not procedurally have the ability to force a Form 50 hearing to go forward when the Claimant withdrew the hearing request or otherwise chose not to go forward.

ACTUAL NOTICE

The Claimant repeatedly references the Defendants’ knowledge of, and cooperation in, the third party litigation as a bar the assertion of election of remedies at this point. This argument is of no consequence as a claimant must comply with the, “notice requirements of §42-1-560, even though the carrier had actual knowledge of the third-party suit,” in order to maintain the workers’ compensation action simultaneously. *Callahan v. Beaufort County Sch. Dist.*, 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007)(at Footnote 2)(internal citations omitted). Furthermore, even if Defendants knew the Claimant was planning on prosecuting a third party claim-Defendants did not have notice, actual or otherwise, that the claim had actually been filed until well after thirty days of the filing of the original third party action.

UNCLEAN HANDS

The Claimant asserts the doctrine of 'unclean hands' as a counter to the Defendants' assertion of election of remedies to bar further benefits. 'Unclean hands' is solely an equitable doctrine, which acts to bar a party that seeks equitable relief from obtaining such relief when that party has, itself, acted inequitably in association with the litigated matter. (See *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (internal quotations and citations omitted).

This argument is not relevant, nor pertinent, to the affirmative defense of election of remedies in this case for a number of reasons. First, the doctrine 'unclean hands' serves to bar a party seeking equitable relief from receiving such relief if they have acted inequitably. The Defendants are asserting election of remedies which is a statutory defense under S.C. Code Ann. §§42-1-540, -550, -560. Therefore, 'unclean hands' does not apply. Secondly, the Claimant has failed to demonstrate inequitable behavior on the part of the Defendants.

INCAPACITY

The Claimant raises mental incapacity for the purpose of arguing that such incapacity excused or tolled the 30 day time period for filing and serving his S-2 notification. The Defendants concede the Claimant has suffered significant physical injuries in association with this case, including a physical brain injury. However, Defendants dispute that Claimant's impairment rises to the level of mental incapacity.

Under certain circumstances, mental incapacity/incompetency can toll the applicable time period for asserting ones rights in legal proceedings or associated statute of limitations. However, those circumstances are not present in the instant case. Assuming *arguendo* that the Claimant is incapacitated, such a claim for tolling or excusing compliance with the statute (§42-1-560) would be

unfounded and unsupportable under the facts of this case. The Claimant was, and has been, represented by competent legal counsel during the pendency of his workers' compensation claim and his third party lawsuit. To that end, the third party civil action filed by the Claimant in October of 2008 was filed on his behalf by an attorney representing the Claimant in a fiduciary capacity. It would be logically inconsistent to hold that the Claimant was, on one hand, unable to properly proceed with his workers' compensation proceeding due to incapacity/incompetency despite being represented by counsel, while, on the other hand, simultaneously capable of pursuing through legal counsel his third party civil action.

**ONGOING OBLIGATION TO NOTIFY THE EMPLOYER, CARRIER,
AND THE COMMISSION PER S.C. CODE ANN. §42-1-560**

The Claimant further asserts that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required when benefits have been paid for over one year (or presumably when an S-3 has not been filed by the Employer/Carrier). This position is unfounded. First, §42-1-560 is devoid of any mechanism providing for excusal of the Claimant's burden of notification. The requirements of the employee for proceeding with a third party claim (simultaneously or prior to his or her workers' compensation claim) are outlined in §42-1-560 subsection (b). This subsection mandates notice by the Claimant to the other parties and the Commission within thirty days of the commencement of a civil action.

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

Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee,..., **and the rights and obligations of the parties shall be as provided by subsection (b) of this section.**

S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

Hence, because the Defendants did not institute a third party action on behalf of the injured Claimant Holland within the statutory time period, this non-action by the employer/carrier effectuates a re-assignment of the right of action back to the Claimant. The Claimant then maintains the same burden of "...obligations...as provided by subsection (b) of this section [42-1-560]," which of course includes the thirty day notification requirement by the Claimant to the Employer, Carrier and the Commission. Subsection (c) obviously contemplates the situation where a year of benefits (or more) has been paid by the defendant carrier, because the time period for the Employer/Carrier to bring the third party suit under §42-1-560(c) does not even start until, "one year after the carrier accepts liability for the payment of compensation or makes payment pursuant to an award under this Title[.]" (Definition of the "one year period" from §42-1-560(b) as referenced in subsection (c)).

Claimant's arguments on this point are not persuasive given the statutorily mandated burden to notify the Commission and opposing parties in the workers' compensation claim. This obligation exists regardless of the amount of time for which workers' compensation benefits have been paid, and regardless of when in the course of his workers' compensation claim the Claimant chooses to file the third party action.

LACHES

"*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999) (citations omitted). Under the doctrine of *laches*, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. *Id.* at 296, 519 S.E.2d at 599. The party asserting *laches* has the burden of showing negligence, the opportunity to act sooner, and material prejudice. *Id.* at

297, 519 S.E.2d at 599. The other aspect of the *laches* defense is that the party asserting *laches* must show prejudice to their defense of the case, or that they have incurred expenses or otherwise detrimentally changed their position in the case due to the *laches* of the opposing party in not acting sooner. *Laches* is an affirmative defense available in workers' compensation claims. See *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004).

In the current case, *Laches* does not bar the defense of election of remedies. First, the burden of proving this defense is on the Claimant. The issue is election of remedies, premised upon the Claimant's failure to comply with the express notification requirement dictated by S.C. Code Ann. §42-1-560 for simultaneously pursuing a workers' compensation claim and a third party civil action for the same accident. It is undisputed that the Claimant filed a third party civil action in October of 2008, but did not file and serve his S-2 notification, per §42-1-560, until seven months later. Essentially, the affirmative defense of election of remedies was a complete and viable defense at 31 days after the filing of the third party action. Defendants were not even aware of this defense, election of remedies, until receipt of the S-2 notification several months later.

There is no evidence in the record to support a finding that the Claimant's failure to more timely serve the S-2 notification came about through actions, omission, or representations made by the Defendants to the Claimant which could have caused him to file and serve his S-2 after the time period permitted by the statute. The Defendants did not become aware of the third party actions' filing until several months after it took place. Furthermore, South Carolina Courts have held "that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit." (*Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007) at Footnote 2) (internal citations omitted) (emphasis added).

WAIVER

Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.App.2004). The equitable doctrine of *laches* is equivalent to the legal doctrine of waiver, which is the “voluntary and intentional relinquishment or abandonment of a known right,” *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both *laches* and waiver require a party to have known of a right, and that the party was knowingly not asserting (*laches*) or knowingly abandoning (waiver) that right. The Claimant’s assertion of waiver by the Defendants is without merit.

The Defendants have raised election of remedies at every contested hearing in this case since the defense became viable. There is no legal or factual evidence in the record indicating the Defendants have waived or abandoned their right to assert election of remedies as a defense in this claim. The Claimant previously withdrew his Form 50 hearing request in 2009, and the case has been postponed several times for the purpose of giving the parties additional time for possible settlement, discovery and other reasons. Nevertheless, none of this is evidence of a waiver or abandonment of the defense of elections of remedies by the Defendants.

ESTOPPEL (EQUITABLE)

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

For the same reasons outlined above under the argument sections of waiver and *laches*, there is no basis for find the Defendants to be estopped from raising the defense of election of remedies in this claim. There are no actions, or omissions made by the Defendants in this case which created the circumstances that gave rise to the election of remedies defense. Furthermore, the Claimant did not rely on any representations of the Defendants as the basis for his own failure to timely file or properly serve notice under S.C. Code Ann. §42-1-560. Therefore, no basis exists for estopping the Defendants' election of remedies argument.

ESTOPPEL (JUDICIAL)

The other type of estoppel is judicial estoppel. South Carolina officially recognized the validity of judicial estoppel in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Id.* 327 S.C. at 251, 489 S.E.2d at 477. Essentially, stated:

[a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Hayne at 252, 477.

This argument is inapplicable to the present case. The Defendants have consistently asserted the election of remedies defense at every hearing in this matter since the defense was viable. Furthermore, at no time have the Defendants taken a contrary position in this case before the Commission in order to gain some other legal or factual advantage over the Claimant.

ADDING A SECOND DEFENDANT EMPLOYER

This claim was originally accepted as a compensable claim following the accident of June 1, 2006. The originally named Employer, J.C. Witherspoon, Jr. Inc., and its Carrier, Capital City Insurance Co., have admitted liability for this claim and have been paying benefits from the date of the accident forward. By consent order dated September 29, 2009, A&K Mulch, LLC, a mulching

operation also owned by J.C. Witherspoon, Jr., Inc., was added as an additional defendant employer to this claim. Following this, claimant served another S-2 on October 13, 2009. Notably, A&K Mulch was not substituted for J.C. Witherspoon, which continues to cover this claim through its workers' compensation insurance policy with Capital City.

There is no legal basis for arguing that the addition of another party defendant to the workers' compensation claim would somehow negate the express notification requirements of S.C. Code Ann. §42-1-560. If this were allowed, the adding of any potential party defendant (after the time period for the S-2 had run) could be used to abrogate the notification requirement of the statute entirely. Moreover, §42-1-560 requires timely service of the S-2 on the employer, the insurance carrier, and the Commission. As noted in the consent order, both A&K Mulch and J.C. Witherspoon were covered by the same policy with Capital City. Therefore, there was never a question regarding the identity of the carrier. A&K. Mulch, LLC and J.C. Witherspoon, Jr., Inc. are intertwined companies with the same workers' compensation insurance carrier.

South Carolina Courts have interpreted the 30 day notification requirements of §42-1-560, to be binding on the Claimant whether he is bringing the third party action simultaneously with or even prior to the pursuit of the workers' compensation claim.

We therefore hold that, irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b).

Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, __ (Ct. App. 1998).

Therefore, the Claimant's notice of the third party action would have been defective as to both A&K. Mulch, LLC and J.C. Witherspoon, Jr., Inc. as well as Capital City Insurance as the respective carrier for either of the Defendant employers.

FINDINGS OF FACT

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That venue for the hearing was proper.
3. That notice of the hearing was timely and properly served upon all parties of interest.
4. That the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.
5. That this matter is properly before the undersigned Commissioner based on Defendants' Form 21.
6. That the circumstances of this claim gave rise to a third party civil action, and that the Claimant availed himself of pursuing that third party civil action by filing a lawsuit on or about October 10, 2008.
7. That the Claimant initially served a WCC Form S-2 on or about May 14, 2009.
8. That service of the Form S-2 was made well in excess of 30 days after the commencement of the third party action and was therefore untimely under S.C. Code Ann. §42-1-560.
9. That this failure to notify the Defendants by proper service of a Form S-2 within thirty days of commencement of the third party action constitutes an election of remedies and operates as a bar to further workers' compensation benefits for the Claimant.
10. That there was no detrimental reliance by the Claimant on the actions of the Defendants or their representatives, which led to Claimant's failure to give notice of the third party action within the requisite time period.
11. That there is no basis on which the S-2 notification of the third party claim can be excused under the facts of this case.
12. That the Defendants have not waived, are not estopped, nor otherwise barred from now asserting the defense of election of remedies in this claim.

13. That incompetency of the Claimant is irrelevant as the Claimant was represented by counsel in association with his rights in both this workers' compensation claim, and his third party civil action during all relevant time periods in question which were material to the defense of election remedies.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of this Commissioner that:

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, Claimant, Andreal Holland, was a covered employee with J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident June 1, 2006.

3. Under § 42-1-140, J.C. Witherspoon, Jr. Inc. and/or A&K Mulch, is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between Andreal Holland and J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident.

5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.

6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

7. Under § 42-1-40 the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.

8. This matter is properly before the Undersigned Commissioner based on the Defendants' Form 21, which alleges election of remedies and was filed on August 10, 2010.

9. That pursuant to §42-1-560(b), an S-2 must be filed within thirty days of the commencement of a third party action to avoid an election of remedies.

10. That pursuant to the holding in *Callahan v. Beaufort County Sch. Dist.*, 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007), the proper filing of an S-2 is mandatory to avoid an election of remedies.

11. That pursuant to the holding in *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982), the proper filing of an S-2 is mandatory to avoid an election of remedies even in the event the Employer/Carrier has actual notice of the third party action.

12. Pursuant to §42-1-560 and Regs. § 67-203(B)(2)), the Claimant filed a third party action, but failed to notify the Defendants by service of a Form S-2 within the requisite time period of the commencement of that action, 30 days.

13. No waiver, estoppel, or other defense - or excuse - is applicable in this case to overcome the clear statutory mandates of §42-1-560, and no detrimental reliance was made by the Claimant on the actions of the Defendants, in his failure to timely satisfy the requirement of §42-1-560. (See *Callahan, supra*).

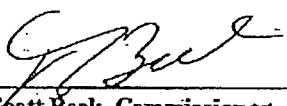
14. Defendants request to stop payment of benefits is granted, and the Claimant is entitled to no further benefits under the Workers' Compensation Act, S.C. Code Ann. Title 42.

ORDER

IT IS THEREFORE ORDERED that the Claimant elected his remedy by failing to comply with S.C. Code §42-1-560(b), which the South Carolina courts have determined should be strictly construed and applied. Thus, Defendants are entitled to stop payment of benefits, and the Claimant's request for any further benefits under the Workers' Compensation Act is denied.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

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

March 30, 2011

By: Amy Bracy, Administrative Assistant to Commissioner Beck

ORDER OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
WCC FILE NO.: 0607813

Andreal Holland,

Claimant,

vs.

J.C. Witherspoon, Jr., Inc.,

Employer,

and

Capital City Insurance Company,

Carrier.

DECISION & ORDER

HEARING:

Pursuant to the agreement of the parties, this case was determined without oral argument, and based on the evidence in the record in conjunction with SCWCC file, and legal memoranda and appellate briefs filed by the parties.

APPEARANCES:

The Claimant/Appellant, Andreal Holland, was represented by Thomas K. Fowler, Esquire, of Peake & Fowler Law Firm, P.A., P.O. Box 23601, Columbia, S.C. 29224.

Defendants/Respondents, J.C. Witherspoon, Jr., Inc. and A&K Mulch, Employer, and Capital City Insurance Company, Carrier, were represented by Mark D. Cauthen, Esquire, of McKay, Cauthen, Settana & Stublely, P.A., Post Office Box 7217, Columbia, South Carolina, 29202-7217.

PURPOSE:

To determine if the single Commissioner erred as a matter of fact and/or law for the reasons set forth in the Claimant's/Appellant's grounds for appeal raised in his Forms 30.

OPINION:

Commissioner Susan S. Barden, Appellate Panel Chair
Commissioner David W. Huffstetler
Commissioner Derrick L. Williams

FILED:

12/14, 2011.

BACKGROUND AND PROCEDURAL POSTURE

The claimant sustained compensable injuries when he was struck by the door of a wood chipper on or about June 1, 2006, including a physical brain injury. He has been represented by counsel throughout the majority of this case and continuously since at least 2007. The circumstances of the workers' compensation claim gave rise to a third party civil action against other parties which included the manufacturer of the machinery the Claimant was using at the time the accident occurred. On October 10, 2008, the Claimant, through counsel, filed a third party civil action for damages which arose from this same accident. An amended complaint was filed on March 3, 2009 in regards to the third party civil action. The primary issue involved in the Form 21 hearing from which the Claimant now appeals relate to whether or not an election of remedies has taken place in his workers' compensation claim based on actions or omission that have taken place in conjunction with the ongoing third party action. Most of the pertinent facts of this case revolving around the affirmative defense of election of remedies, per S.C. Code Ann. §42-1-560, are largely undisputed.

It is undisputed that the Claimant did not file the requisite "S-2" notification with the Commission, and first served the S-2 notification on the Defendant Employer/Carrier in this case on or about May 14, 2009. The first notice to the Defendants that a third party action had actually been filed, as well as service of the S-2, took place well in excess of the thirty day limitation for filing this notification as prescribed by S.C. Code Ann. §42-1-560.

Subsequently, the Defendants in this workers' compensation action raised the affirmative defense of election of remedies pursuant to §42-1-560 and as interpreted by the Supreme Court in *Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). This issue was originally scheduled to be determined - in addition to issues raised by the Claimant - in a Form

50 hearing scheduled in May, 2009. That hearing was postponed, and the Form 50 requesting the hearing was subsequently withdrawn.

The current issues associated with the election of remedies then came before the Commission on the Defendants' Form 21 hearing request. This case had been postponed multiple times, and was most recently scheduled to be heard before Commissioner T. Scott Beck on December 17, 2010. During a teleconference on December 16, 2010, counsel for the respective parties agreed to have the issue of election of remedies, raised on the Form 21 of the Defendants, determined based on the APA's submitted into the record and legal memorandums to be submitted by the parties.

Legal memoranda were filed by the parties, in addition to the APA's and exhibits that were submitted. The Hearing Commissioner subsequently ruled that the Claimant had elected his remedy due to failure to comply with the mandated statutory dictates of §42-1-560 and as interpreted by the Supreme Court in *Callahan, supra*. The Claimant appealed the hearing Commissioner's Order to the Appellate Panel of the Commission via a timely filed Form 30 appeal. The parties submitted their appellate briefs to the full Commission panel, and oral argument was set for a date certain. Prior to oral argument, and per the request of Claimant's counsel and consent of Defendant's counsel, the appellate panel was asked to determine this case on the record, and pursuant to the evidence in the record and the briefs filed by the parties. In the Claimant's/Appellant's Form 30 and addendum, he cited twelve (12) separate points of error addressed to the single Commissioner's ruling. These grounds for appeal are as follows:

ISSUES ON APPEAL:

1. Is §42-1-560 unconstitutional as being vague, unambiguous (sic)?
2. Is §41-1-560 unconstitutional as failing to provide equal protection under the law?

3. Did the Single Commissioner err in the application of *Callahan v. Beaufort* and/or §42-1-560?
4. Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills?
5. Did the Single Commissioner err in failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration?
6. Did the Single Commissioner err in failing to rule that the Claimant was under disability until a GAL was appointed?
7. Did the Single Commissioner err in failing to find the Carrier/Employer(s) waived the election of remedies defense?
8. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to *laches*?
9. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to equitable estoppel?
10. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to waiver?
11. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their unclean hands?
12. Did the Single Commissioner err in failing to deny the Carrier/Employer's relief due to their failure to comply with §42-1-560?

STATEMENT OF THE CASE

Upon review of the evidence and legal memoranda submitted by the parties, the single Commissioner made the following thirteen (13) findings of fact and fourteen (14) conclusions of law, ultimately finding that the Respondent Employer/Carrier was entitled to stop payment of benefits to the Appellant, Claimant, due to an election of remedies.

Findings of Fact (by the Hearing Commissioner)

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.

2. That venue for the hearing was proper.
3. That notice of the hearing was timely and properly served upon all parties of interest.
4. That the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.
5. That this matter is properly before the undersigned Commissioner based on Defendants' Form 21.
6. That the circumstances of this claim gave rise to a third party civil action, and that the Claimant availed himself of pursuing that third party civil action by filing a lawsuit on or about October 10, 2008.
7. That the Claimant initially served a WCC Form S-2 on or about May 14, 2009.
8. That service of the Form S-2 was made well in excess of 30 days after the commencement of the third party action and was therefore untimely under S.C. Code Ann. §42-1-560.
9. That this failure to notify the Defendants by proper service of a Form S-2 within thirty days of commencement of the third party action constitutes an election of remedies and operates as a bar to further workers' compensation benefits for the Claimant.
10. That there was no detrimental reliance by the Claimant on the actions of the Defendants or their representatives, which led to Claimant's failure to give notice of the third party action within the requisite time period.
11. That there is no basis on which the S-2 notification of the third party claim can be excused under the facts of this case.
12. That the Defendants have not waived, are not estopped, nor otherwise barred from now asserting the defense of election of remedies in this claim.
13. That incompetency of the Claimant is irrelevant as the Claimant was represented by counsel in association with his rights in both this workers' compensation claim, and his third party civil action during all relevant time periods in question which were material to the defense of election remedies.

Conclusions of Law (by the Hearing Commissioner)

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of this Commissioner that:

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under § 42-1-130, Claimant, Andreal Holland, was a covered employee with J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident June 1, 2006.
3. Under § 42-1-140, J.C. Witherspoon, Jr. Inc. and/or A&K Mulch, is a covered employer.
4. Under § 42-1-150, there was an employer/employee relationship between Andreal Holland and J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident.
5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.
6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.
7. Under § 42-1-40 the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.
8. This matter is properly before the Undersigned Commissioner based on the Defendants' Form 21, which alleges election of remedies and was filed on August 10, 2010.
9. That pursuant to §42-1-560(b), an S-2 must be filed within thirty days of the commencement of a third party action to avoid an election of remedies.
10. That pursuant to the holding in Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007), the proper filing of an S-2 is mandatory to avoid an election of remedies.
11. That pursuant to the holding in Fisher v. S.C. Dept. of Mental Retardation-Coastal Center, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982), the proper filing of an S-2 is mandatory to avoid an election of remedies even in the event the Employer/Carrier has actual notice of the third party action.

12. Pursuant to §42-1-560 and Regs. § 67-203(B)(2)), the Claimant filed a third party action, but failed to notify the Defendants by service of a Form S-2 within the requisite time period of the commencement of that action, 30 days.

13. No waiver, estoppel, or other defense - or excuse is applicable in this case to overcome the clear statutory mandates of §42-1-560, and no detrimental reliance was made by the Claimant on the actions of the Defendants, in his failure to timely satisfy the requirement of §42-1-560. (See Callahan, supra).

14. Defendants request to stop payment of benefits is granted, and the Claimant is entitled to no further benefits under the Workers' Compensation Act, S.C. Code Ann. Title 42.

ANALYSIS OF THE ISSUES ON APPEAL

Election of Remedies Generally

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

S.C. Code Ann. §42-1-560(b) requires that, when an injured employee chooses to assert a third party claim for benefits, in addition to a workers' compensation claim, a notification of the, "commencement of the [third party] action **shall be given** within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission." (emphasis added). The 'prescribed form' of the Commission is the 'S-2.' (See S.C. Code of Regs. § 67-203(2)). However, a Form S-2 notifying the Respondent Employer/Carrier and the S.C. Workers' Compensation Commission of this third party action was not filed until May of 2009, several months after the commencement of the third party civil action.

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

Is §42-1-560 unconstitutional as being vague, ambiguous? Is §41-1-560 unconstitutional as failing to provide equal protection under the law? (Claimant's/Appellant's Appeal Issues No's 1 and 2).

As neither of the above two issues addressing the constitutionality of S.C. Code An. §42-1-560 was raised before the trial Commissioner, the Respondent Employer Carrier argues the full Commission Panel should not consider either of these arguments for the first time on appeal, as the constitutionality of S.C. Code Ann. §42-1-560 was not challenged or raised to the hearing Commissioner. Therefore, the Claimant/Appellant should be precluded from now raising these arguments for the first time on appeal.

The Appellate Panel agrees that issues not raised to the trial court are generally deemed abandoned on appeal, and cannot be raised for the first time to an appellate body reviewing the decision of the trial officer who originally heard the case. Otherwise, the trial Judge or Commissioner would never have had the opportunity to consider and determine the issue in the first instance. Hence, issues of error cannot be taken with the findings of a hearing Commissioner who never had the opportunity to consider these arguments, as they were never raised. This principle holds true for both factual and legal issues, including a challenge to the constitutionality of a statute. (See *State v. Nichols*, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review."). Constitutional arguments are no exception to

the rule, and if not raised to the trial court are deemed waived on appeal. *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998) (emphasis added).

Did the Single Commissioner err in the application of *Callahan v. Beaufort County School District* and/or §42-1-560? (Claimant/Appellant's Appeal Issue No's. 3 and 12).

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

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:

Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C.Code Ann. § 42-1-560(b).

An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) ("[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the

requirements of § 42-1-560 and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). **Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.**

Callahan at 95-6, 313 (emphasis added).

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

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

Callahan at 96-7, 314

The *Callahan* court ultimately ruled that claimant Callahan was entitled to continue receiving benefits in workers' compensation while proceeding against the third party tortfeasor. However, the *only* reason this was permitted is because the Claimant Callahan had essentially cured the defective S-2 notification issue by voluntarily dismissing her claim under Rule 41 FRCP. The court's reasoning being that:

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

Callahan at 97, 314

However, it is abundantly clear from the *Callahan* opinion that the failure to properly file an S-2 notification of the commencement of a third party action would serve as a bar to further

benefits under the Workers' Compensation Act. In addition, the *Callahan* court takes the opportunity to explain that strict compliance with the requirements of §42-1-560 is required despite several of the arguments raised by the Claimant Holland's appeal brief and prior legal memorandum:

This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).

Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson, supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all") (citing *Stroy v. Millwood Drug Store*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

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

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

By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a workers' compensation claim simultaneously with a third part action, and held that:

[I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously

with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]

The Law of Workers' Compensation in South Carolina, 5th ed., 2008, at p. 477.

In support of his appeal, the Claimant contends, in part, that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required after a year of compensation has been paid (or presumably when an S-3 has not been filed by the Employer/Carrier). The Respondents argued that this position is unfounded – the appellate Panel agrees with Respondents arguments on this point.

First, a review of §42-1-560 indicates no excusal of the Claimant's burden of notification, per subsection (b), under any generally or particularly defined circumstance. If anything, this statute portrays *exactly* the opposite instruction. The requirements of the employee for proceeding with a third party claim (simultaneously or prior to his or her workers' compensation claim) are outlined in subsection §42-1-560 subpart (b).

This section includes the mandated statutory notice by the Claimant to the other parties and the Commission within thirty days of the commencement of a civil action. Furthermore, the requirements of the employer/carrier for *proceeding with a third party action* are similarly outlined in subsection (c). However, subsection (c) clearly states in pertinent part that:

Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee,..., **and the rights and obligations of the parties shall be as provided by subsection (b) of this section.**

S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

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

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

Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills? (Claimant's/Appellant's Appeal Issue No. 4).

In support of this ground for judicial review, on page 7 of the Claimant's/Appellant's brief to the full Commission, the Claimant simply states:

The Carrier had failed to pay benefits due and the Claimant's dental bill remains unpaid [to monetary amounts listed and providers and APA cited]. As a result, Carrier was not entitled to stop payment or cease benefits for any reason. It's hands in this regard were unclean too.

The above paragraph is the entirety of the Claimant's argument on this issue. No authority is cited in support of the above argument be it public policy, case law precedent, statutory authority or otherwise. Respondent Employer/Carrier argued that without some basis

of authority for the conclusory arguments made by the Claimant on this point, the Defendants are unable to properly respond, and the argument has essentially been waived or abandoned. The Appellate Panel concurs with the arguments of the Respondent Employer Carrier on this point.

South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). In *Brown v. Theos*, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct.App.1999), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001), we held that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal: "Brown states in a one sentence paragraph that he had raised an action for 'intentionally negligent and malicious conduct' We note Brown's argument is so conclusory that it may be deemed abandoned." (citation omitted).

Glasscock Inc. v. U.S. Fidelity and Guaranty Co. 348 S.C. 76, 81, 557 S.E.2d 689, __ (Ct. App. 2001).

Did the Single Commissioner err in failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration? (Claimant's/Appellant's Appeal Issue No. 5).

The Respondent Employer/Carrier asserted that this issue has not been preserved for review, because the issue was not properly raised before the hearing Commissioner. Therefore, the Claimant is precluded from raising this issue for the first time on appeal. Upon review of the record, the Appellate Panel concurs with the argument of the Respondents that this issue has not been properly preserved for appeal. Note: "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)(Also See *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E. 2d 357 (1996)(arguments not raised to the Workers' Compensation Commission are not preserved for appeal)).

Alternatively, such an agreement among the parties does not absolve the Claimant of his notification responsibilities per §42-1-560. While it is true that in her deposition the representative for the Defendant Carrier, stated she had spoken with Claimant's (prior) counsel, "... maybe about a couple of times in regards to the third party [claim]." (Depo. of Paula Dyches, p. 20 lines 20-22), South Carolina Courts have previously indicated that failure to provide the proper statutory notice is still a bar to an injured workers' ability to proceed in both workers' compensation and a third party civil action – thereby constituting an election of remedies, even when the Defendants had *actual knowledge* of the third party suit.

As set forth in the second footnote of *Callahan, supra*: "This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of §. 42-1-560, **even though the carrier had actual knowledge of the third-party suit.** *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*) (emphasis added). This section of *Fisher*, on this point, was most recently cited with approval by the Court of Appeals in *Wise v. Wise* (S.C. Ct. App. Opinion No. 4879, filed August 24, 2011).

Alternatively, and quite notably, despite having discussed an agreement to split costs in pursuing the third party claim between the insurer and the Claimant, the record does not provide that the Defendant Carrier in this case had any actual notice of the claim being filed in the circuit court in October of 2008, nor within thirty days of it being filed. The evidence in the record indicates that, at the earliest, the Carrier would have discovered that a third party action had been filed as early as March 10, 2009 (Claimant's APA No. 23).

Yet again, even if 'actual knowledge' were sufficient to satisfy or extinguish the notice requirements of §42-1-560, there is no evidence in the record to indicate that the Employer/Carrier had actual knowledge of the filing of the third party suit within 30 days of its commencement in October of 2008. The complaint received by the Carrier's representative in March of 2009 was a copy of an amended complaint filed in 2009 by the Claimant in the third party action subsequent to the original complaint which was filed in October of 2008. Furthermore, this copy of the amended complaint was not an S-2 notification nor within 30 days of the original filing.

Did the Single Commissioner err in failing to rule that the Claimant was under disability until a GAL was appointed? (Claimant's/Appellant's Appeal Issue No. 6).

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

Notably on this point, the Claimant/Appellant was, and has been, represented by competent legal counsel during all relevant time periods in question for his workers' compensation claim and his third party lawsuit. To that end, the third party civil action, filed by the Claimant in October of 2008, was filed on his behalf by an attorney representing the Claimant/Appellant in a fiduciary capacity. It is factually antithetical, and logically inconsistent to argue that the Claimant was, on one hand, unable to properly proceed with his workers' compensation proceedings, or rather incapable of complying with the worker's compensation Act, due to incapacity/incompetency while, on the other hand, simultaneously pursuing through legal counsel his third party civil action.

The Respondent Employer/Carrier argues that incapacity of the Claimant cannot, and should not be imputed to Claimant's/Appellant's counsel for the purpose of tolling or excusing proper compliance with the Worker's Compensation Act. During his purported time of legal disability, the Claimant, through counsel, had filed a Form 50 hearing request and pre-hearing briefs/APA evidentiary submissions. The Employer/Carrier asserted that the Claimant/Appellant cannot use the sword and the shield, and should be judicially estopped from making inconsistent arguments as to his capacity to comply with the Workers' Compensation Act. Generally speaking, the doctrine of judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. (Adopted by South Carolina in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997)).

Respondents further asserted that it would therefore be logically inconsistent that the Claimant could both actively litigate his workers' compensation claim (through the assistance of counsel), as well as his third party civil action, (also by and through counsel), yet was contemporaneously legally incapacitated and therefore unable to serve and file the required S-2 notification letters in a timely manner. The Appellate Panel agrees with these arguments.

Did the Single Commissioner err in failing to find the Carrier/Employer(s) waived the election of remedies defense? (Claimant's/Appellant's Appeal Issue No's. 7 and 10).

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

Despite the fact that the hearing before the single Commissioner from which the Claimant appeals was set on the Form 21 hearing request of the Defendants, the

Claimant/Appellant argues that the Defendants/Respondents failed to raise the election of remedies defense in their Form 51 response filed on February 19, 2009. This was a hearing request which was ultimately withdrawn by the Claimant/Appellant, and on which no hearing ever took place.

Furthermore, the Defendants/Respondents could not have raised the election of remedies issue in their February 19, 2009 Form 51 without some knowledge of the filing of the third party action (and subsequent non-service of the S-2). The Carrier was never served with an S-2 notice of the original Complaint in the third party action. That third party action was filed on October 10, 2008. As indicated in the Claimant's/Appellant's appellate brief, the amended third party complaint (filed in 2009), was not even received by the Carrier until March 10, 2009. (Claimant's APA 23). Furthermore, at that time, as asserted by Claimant in his own legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; then timely serving the S-2. Even accepting this argument by the Claimant, as the hearing drew closer, no such action to cure this defect was ever taken by the Claimant. Accordingly, the Defendants did raise the election of remedies defense on their Form 58, filed on Monday, May 11, 2009, for the corresponding Form 50 hearing on May 20, 2009. (Note: The three year Statute of Limitations for the third party civil action expired on June 1, 2009).

The Defendants/Respondents further asserted that claimant's argument was meritless in light of the fact that: (a) The current issues are before the Commission on the Defendant's Form 21, not a Form 50; (b) At the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; and (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had originally requested; (d) The

Defendants/Respondents had no authority or ability to force the Claimant to proceed on a Form 50 hearing request in Order to assert their own defenses to that Form 50 or the claim in general.

The Appellate Panel agrees with the arguments of the Respondents on this point, that the issue of election of remedies was properly before trial Commissioner in this matter pursuant to the Form 21 hearing request of the Respondent Employer/Carrier.

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to laches? (Claimant's/Appellant's Appeal Issue No. 8).

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

Laches is inapplicable to the case at bar to avoid the defense of election of remedies. First, the burden of proving *laches* is on the Claimant/Appellant. The issue is election of remedies, premised upon Claimant Holland's failure to comply with the express notification requirement dictated by S.C. Code Ann. §42-1-560 (for simultaneously pursuing a workers' compensation claim and a third party civil action for the same accident). It is undisputed that the Claimant filed a third party civil action in October of 2008, but did not file and serve his S-2 notification, per §42-1-560, until several months later (May of 2009).

The affirmative defense of election of remedies was a complete and viable defense, available to the Employer/Carrier at 31 days after the filing of the third party action (with no notice having been provided). Defendants/Appellants were not even aware of the viability of this defense, election of remedies, until receipt of the S-2 notification several months later – or at the earliest upon information and belief that a third party action had been filed in this case (which came in approximately March of 2009). There is no evidence in the record to support a finding that the Claimant's failure to timely serve the S-2 notification resulted from any action or omission made by the Employer/Carrier to the Claimant or Claimant's counsel.

The Claimant/Appellant has not shown, and the evidence in the record does not support a finding that his failure to file the S-2 notification within 30 days of his civil action was based on some inexcusable neglect or delay of the Defendants, upon which the Claimant relied – to his detriment – in failing to act sooner by more timely filing the S-2. Under the facts of this case, this cannot be demonstrated, as the Defendants did not even become aware of the third party actions' filing until several months after it took place.

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to equitable estoppel? (Claimant's/Appellant's Appeal Issue No. 9).

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

Given their derivation from the legal doctrine of waiver, the doctrines of *laches* and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment. See 7 S.C. Jur. *Estoppel and Waiver* § 28. Thus, it is possible to assert only one of these equitable defenses (estoppels or *laches*) - yet have successfully pled both. (See Analysis by *Strickland v. Strickland*, 375 S.C. 76, 85-86, 650 S.E.2d 465, 470-1 (S.C. 2007)).

For the same reasons outlined above under the argument sections of waiver and *laches* the Appellate Panel finds no basis for preclusion of Respondent's election of remedies defense on grounds of estoppel. There were no actions, or omissions, made by the Defendants/Respondents in this case which created the circumstances that gave rise to the election of remedies defense. Furthermore, the Claimant did not rely on any representations of the Defendants in failing to timely file or properly serve notice under S.C. Code Ann. §42-1-560.

The election of remedies defense became viable through the Claimant's/Appellant's failure to provide timely notice under the statute of commencement of the third party action. Election remedies is an affirmative defense which arose from the actions/omissions of the Appellant. Therefore, no basis exists for the Commission to find that the Respondents should be estopped from asserting this defense.

The Appellant asserts that an S-2 was timely served following the addition of A&K Mulch as a party to the workers' compensation claim in September, 2009. We disagree. This claim was originally accepted as a compensable claim following the accident of June 1, 2006. The originally named Employer, J.C. Witherspoon, Jr. Inc., and its Carrier, Capital City Insurance Co., admitted liability for this claim and had been paying benefits from the date of the accident forward. By consent order dated September 29, 2009, A&K Mulch, LLC, a mulching

operation also owned by J.C. Witherspoon, Jr., Inc., was added as an additional defendant employer to this claim. Following this, claimant served another S-2 on October 13, 2009. Notably, A&K Mulch was not substituted for J.C. Witherspoon, which continued to cover this claim through its workers' compensation insurance policy with Capital City.

There is no legal basis for arguing that the addition of another party defendant to the workers' compensation claim would somehow negate the express notification requirements of S.C. Code Ann. §42-1-560. If this were allowed, the adding of any potential party defendant (after the time period for the S-2 had run) could be used to abrogate the notification requirement of the statute entirely. Moreover, §42-1-560 requires timely service of the S-2 on the employer, the insurance carrier, and the Commission. As noted in the consent order, both A&K Mulch and J.C. Witherspoon were covered by the same policy with Capital City. Therefore, there was never a question regarding the identity of the carrier. A&K. Mulch, LLC and J.C. Witherspoon, Jr., Inc. are intertwined companies with the same workers' compensation insurance carrier.

South Carolina Courts have interpreted the 30 day notification requirements of §42-1-560, to be binding on the Claimant whether he is bringing the third party action simultaneously with or even prior to the pursuit of the workers' compensation claim.

We therefore hold that, irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b).

Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, __ (Ct. App. 1998).

Therefore, the Claimant's notice of the third party action would have been defective as to both A&K Mulch, LLC and J.C. Witherspoon, Jr., Inc. as well as Capital City Insurance as the respective carrier for either of the Defendant employers.

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their unclean hands? (Claimant's/Appellant's Appeal Issue No. 11)

The Appellant argues the equitable doctrine of 'unclean hands' is a bar to the Respondents Employer's/Carrier's right to raise the affirmative statutory defense of election of remedies. 'Unclean hands' is solely an equitable doctrine, which serves to block a party that seeks *equitable* relief from the court from obtaining *equitable* relief when that party has, itself, acted inequitably in association with the litigated matter. (See *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (internal quotations and citations omitted).

Defendants/Respondents assert that this argument is not relevant, nor pertinent, to the affirmative defense of election of remedies in this case because the doctrine 'unclean hands' bars parties that are seeking equitable relief from the court from doing so when they have acted inequitably. The Defendant Employer/Carrier has asserted election of remedies which is a statutory defense under S.C. Code Ann. §§42-1-540, -550, -560. Therefore, 'unclean hands' would not apply. The Appellate Panel agrees with the argument of the Employer/Carrier on this issue that the doctrine of 'unclean hands' is inapplicable to the statutory defense of election of remedies.

STANDARD OF REVIEW

When reviewing evidence in the award of a Single Commissioner, the Appellate Panel makes its own Findings of Fact and reaches its own Conclusions of Law either consistent or inconsistent with those of the Single Commissioner. S.C. Code Ann. § 42-17-50 (1985); *Lowe v. Am-Can Trans Servs., Inc.*, 283 SC 534, 324 SE 2d 87 (Ct. App. 1984).

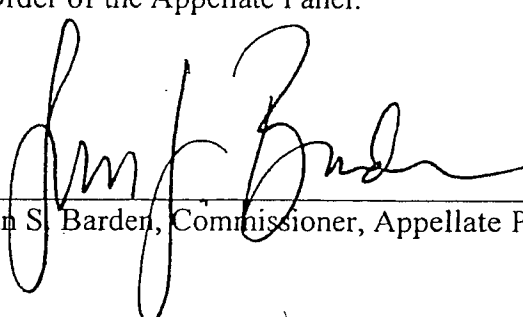
APPELLATE PANEL DECISION

Pursuant to S.C. Code Ann. 42-17-50 (1985), we, the Appellate Panel, have reviewed the decision of the Single Commissioner, weighed the evidence as presented at the initial hearing, and considered all issues raised by Claimant's Form 30 and in the briefs of the parties. After careful review of the instant case, the Appellate Panel has determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. We find that such Findings of Fact and Conclusions of Law are hereby included in this Order by reference, and by such reference, the requirements of Baldwin v. James River Corporation, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991), as well as Section 1-23-350 of the South Carolina Code of Laws have been met [See also D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW at 5-109 (1983)]: Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Accordingly, the Findings of Fact, Conclusions of Law, and Order set forth in the Single Commissioner's Decision shall become, and hereby are, the law of the case. Therefore, the Order and Decision is sustained in its entirety. Along with the above analysis of the case, the hearing Commissioner's decision is incorporated by reference as if set forth verbatim herein.

APPELLATE PANEL ORDER

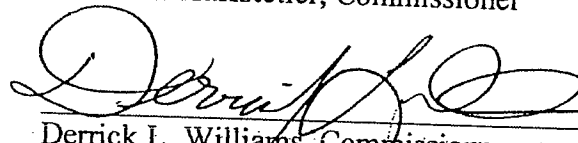
IT IS HEREBY ORDERED that the Findings of Facts, Conclusion of Law, and Order from the single Commissioner's Decision and Order, are hereby fully affirmed, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS SO ORDERED.



Susan S. Barden, Commissioner, Appellate Panel Chair

David W. Huffstetler, Commissioner


Derrick L. Williams, Commissioner

Columbia, South Carolina

12/14, 2011.

CERTIFICATE OF SERVICE

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

This 14 day of December, 2011
By Valerie D. Petter

Administrative Assistant to the Commissioner

Mark S. Cauthers
Thomas K. Failer Jr.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Andreal Holland,

Claimant/Appellant,

vs.

J.C. Witherspoon, Jr., Inc., et al.,

Employers,

and

Capital City Insurance Company,

Carrier,

Defendants/Respondent.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2012-CP-1400024

In Re: Workers' Compensation Appeal
SCWCC File No.: 0607813

AMENDED ORDER

BEULAH G. ROBERTS, CLERK OF COURT, CLARENDON COUNTY, SC.

HEARING:

June 27, 2012.

APPEARANCES:

The Claimant/Appellant, Andreal Holland, was represented by Thomas K. Fowler, Esquire, of Peake & Fowler Law Firm, P.A., P.O. Box 23601, Columbia, S.C. 29224.

Defendants/Respondents, J.C. Witherspoon, Jr., Inc. and A&K Mulch, Employer, and Capital City Insurance Company, Carrier, were represented by Peter P. Leventis, IV, and Mark D. Cauthen, Esquire, of McKay, Cauthen, Settana & Stubley, P.A., Post Office Box 7217, Columbia, South Carolina, 29202-7217.

PURPOSE:

To determine issues raised by the Appellant Andreal Holland in regards to the Appellate Panel Decision of the S.C. Workers' Compensation Commission.

OPINION BY:

The Honorable Judge R. Ferrell Cothran, Jr.

FILED:

_____, 2012.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

11/28/12

Beulah B. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC.

BACKGROUND AND PROCEDURAL POSTURE

The Claimant sustained compensable work related injuries when he was struck by the door of a wood chipper on or about June 1, 2006, including a physical brain injury. He has been represented by counsel throughout the majority of this case and continuously since at least 2007. The circumstances of the injury also gave rise to a "third party" civil action against other parties which included the manufacturer of the machinery the Claimant was using at the time the accident occurred. On October 10, 2008, the Claimant Andreal Holland, through counsel, filed a third party civil action for damages which arose from this same accident. An amended complaint was filed on March 3, 2009 in regards to the third party civil action. The Defendant Employer / Insurance Carrier in the workers' compensation case subsequently filed a Form 21 hearing request to terminate ongoing workers' compensation benefits to the Claimant based on the defense of election of remedies. Defendants/Respondents allege that the Claimant's failure to comply with the dictates of S.C. Code Ann. §42-1-560 in his pursuit of the 'third party' civil action bars the Claimant from further benefits in his workers' compensation claim.

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The single Commissioner found for the Defendants/Respondents in this matter, ruling that the Claimant had elected his remedy and was therefore no longer entitled to benefits under the Workers' Compensation Act (S.C. Code Ann. Title 42). The Claimant then appealed the Order of the single Commissioner on multiple grounds to the Appellate Panel of the Workers' Compensation Commission.

The Appellate Panel of the Workers' Compensation Commission issued an Order on December 14, 2011 fully affirming the findings of the single Commissioner, and further finding that certain grounds and other appellate issues raised by the Claimant/Appellant had been

abandoned on appeal as they were not originally raised to the hearing Commissioner, or were not sufficiently supported by legal authority.

Within the requisite time period the Claimant/Appellate appealed the Order of the Appellate Panel to the Circuit Court citing numerous grounds of error, and particularly whether or not an election of remedies has occurred in his workers' compensation claim based on actions or omissions that have taken place in conjunction with the ongoing third party civil action. Most of the pertinent facts of this case revolving around the affirmative defense of election of remedies, per S.C. Code Ann. §42-1-560, are largely undisputed.

It is undisputed that the Appellant did not file the requisite "S-2" notification with the Commission, and first served the S-2 notification on the Defendant Employer/Carrier in this case on or about May 14, 2009. The first notice to the Defendants that a third party action had actually been filed, as well as service of the S-2, took place well in excess of the thirty day limitation for filing this notification as prescribed by S.C. Code Ann. §42-1-560.

As noted, the Defendants/Respondents in this workers' compensation action raised the affirmative defense of election of remedies pursuant to §42-1-560 and as interpreted by the Supreme Court in *Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). This issue was originally scheduled to be determined - in addition to issues raised by the Claimant - in a Form 50 hearing scheduled in May, 2009. That Form 50 hearing was initially postponed, and the Form 50 requesting the hearing was subsequently withdrawn by the Claimant.

The issues associated with the election of remedies then came before the Commission on the Defendants' Form 21 hearing request. The Form 21 hearing was postponed several times, and finally scheduled to be heard before Commissioner T. Scott Beck on December 17, 2010.

During a teleconference on December 16, 2010, Commissioner Beck and the attorneys for the respective parties agreed to have the issue of election of remedies, raised on the Form 21 of the Defendants, to be determined on the record without a hearing.

Legal memoranda were filed by the parties, in addition to the APA trial exhibits that were submitted. In his appeal to the Appellate Panel, the Claimant/Appellant cited twelve (12) separate points of error in the single Commissioner's Order. The parties submitted their appellate briefs to the full Commission panel, and oral argument was set for a date certain. Prior to oral argument, and per the request of Claimant's counsel and consent of Defendant's counsel, the appellate panel was asked to determine this case on the record, and pursuant to the evidence in the record and the briefs filed by the parties without oral argument. Following the Appellate Panel's ruling, the Claimant/Appellant appealed this matter to the Circuit Court of Clarendon County.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005)

(internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

The fifteen (15) grounds for appeal cited by the Claimant/Appellant in his petition for judicial review to the Circuit Court are as follows:

ISSUES ON APPEAL:

The Claimant alleges that the Appellate Panel of the Workers' Compensation Commission erred in the following:

1. In failing to rule that §42-1-560 is unconstitutional as being vague, unambiguous (sic);
2. In failing to rule that §42-1-560 is unconstitutional as failing to provide equal protection of the law;
3. In the application of *Callahan v. Beaufort* and/or §42-1-560;
4. In granting relief to the Carrier/Employer(s) who had failed to pay medical bills;
5. In failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration;
6. In failing to rule that the Claimant was under disability until a GAL was appointed;
7. In failing to find the Carrier/Employer(s) waived the election of remedies defense;
8. In failing to deny Carrier/Employer(s) relief due to *laches*;
9. In failing to deny Carrier/Employer(s) relief due to equitable estoppel;
10. In failing to deny Carrier/Employer(s) relief due to waiver;

11. In failing to deny Carrier/Employer(s) relief due to their unclean hands;
12. In failing to deny the Carrier/Employer's relief due to their failure to comply with §42-1-560;
13. In failing to determine the Appellant's true employer;
14. In ruling that Appellant had made an election of remedies justifying cessation of his workers' compensation benefits;
15. In finding and ordering that the Claimant's benefits be stopped.

STATEMENT OF THE CASE

The hearing Commissioner, as fully and unanimously affirmed by the Appellate Panel of the full Commission, made (or subsequently adopted) the following thirteen (13) findings of fact and fourteen (14) conclusions of law, ultimately finding that the Respondent Employer/Carrier was entitled to stop payment of benefits to the Appellant / Claimant, due to an election of remedies.

Findings of Fact (by the Hearing Commissioner and Appellate Panel)

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.
2. That venue for the hearing was proper.
3. That notice of the hearing was timely and properly served upon all parties of interest.
4. That the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.
5. That this matter is properly before the undersigned Commissioner based on Defendants' Form 21.
6. That the circumstances of this claim gave rise to a third party civil action, and that the Claimant availed himself of pursuing that third party civil action by filing a lawsuit on or about October 10, 2008.
7. That the Claimant initially served a WCC Form S-2 on or about May 14, 2009.

8. That service of the Form S-2 was made well in excess of 30 days after the commencement of the third party action and was therefore untimely under S.C. Code Ann. §42-1-560.

9. That this failure to notify the Defendants by proper service of a Form S-2 within thirty days of commencement of the third party action constitutes an election of remedies and operates as a bar to further workers' compensation benefits for the Claimant.

10. That there was no detrimental reliance by the Claimant on the actions of the Defendants or their representatives, which led to Claimant's failure to give notice of the third party action within the requisite time period.

11. That there is no basis on which the S-2 notification of the third party claim can be excused under the facts of this case.

12. That the Defendants have not waived, are not estopped, nor otherwise barred from now asserting the defense of election of remedies in this claim.

13. That incompetency of the Claimant is irrelevant as the Claimant was represented by counsel in association with his rights in both this workers' compensation claim, and his third party civil action during all relevant time periods in question which were material to the defense of election remedies.

Conclusions of Law
(by the Hearing Commissioner and the Appellate Panel)

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of this Commissioner that:

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, Claimant, Andreal Holland, was a covered employee with J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident June 1, 2006.

3. Under § 42-1-140, J.C. Witherspoon, Jr. Inc. and/or A&K Mulch, is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between Andreal Holland and J.C. Witherspoon, Jr. Inc. and/or A&K Mulch on the date of accident.

5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.

6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

7. Under § 42-1-40 the Claimant's average weekly wage is \$441.04 with a corresponding compensation rate of \$294.04.
8. This matter is properly before the Undersigned Commissioner based on the Defendants' Form 21, which alleges election of remedies and was filed on August 10, 2010.
9. That pursuant to §42-1-560(b), an S-2 must be filed within thirty days of the commencement of a third party action to avoid an election of remedies.
10. That pursuant to the holding in Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007), the proper filing of an S-2 is mandatory to avoid an election of remedies.
11. That pursuant to the holding in Fisher v. S.C. Dept. of Mental Retardation-Coastal Center, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982), the proper filing of an S-2 is mandatory to avoid an election of remedies even in the event the Employer/Carrier has actual notice of the third party action.
12. Pursuant to §42-1-560 and Regs. § 67-203(B)(2)), the Claimant filed a third party action, but failed to notify the Defendants by service of a Form S-2 within the requisite time period of the commencement of that action, 30 days.
13. No waiver, estoppel, or other defense - or excuse is applicable in this case to overcome the clear statutory mandates of §42-1-560; and no detrimental reliance was made by the Claimant on the actions of the Defendants, in his failure to timely satisfy the requirement of §42-1-560. (See Callahan, supra).
14. Defendants request to stop payment of benefits is granted, and the Claimant is entitled to no further benefits under the Workers' Compensation Act, S.C. Code Ann. Title 42.

In addition to the above findings of fact and conclusions of law, the Appellate Panel further found that the Claimant/Appellant had failed to raise issue of constitutionality to the hearing Commissioner, and therefore these two grounds for appeal were precluded from being argued for the first time on appeal, Appellant's issues number "1" and "2." (See Appellate Panel Order dated December 14, 2011 at pp. 8-9). As to appeal ground number "4" above relating the Respondent's alleged failure to pay medical bills in some way negating the election of remedies defense, the Appellate Panel held this ground for appeal was abandoned by the Appellant for failure to satisfactorily argue this claim in his brief, except for a conclusory statement. (See

Appellate Panel Order at pp. 13-14, and *Glasscock Inc. v. U.S. Fidelity and Guaranty Co.* 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). The Appellate Panel also ruled that as to appeal ground numbered "5" above, pertaining to an alleged "breach" of an agreement by the employer/carrier to pursue the third party litigation jointly, that this ground was also abandoned on appeal as it had not been raised to the trial Commissioner either. (See Appellate Panel Order at pp. 14-16).

ANALYSIS OF THE ISSUES ON APPEAL

Pursuant to the applicable standard of review (as cited above), the factual findings of the Appellate Panel must be upheld if supported by substantial evidence in the record (unless clearly erroneous in light of the evidence in the record, otherwise governed by some error of law, or the factual findings would implicate the jurisdictional relevance of the Commission to determine the contested issue in the case). As I do find there is substantial evidence in the record to uphold the factual findings of the Appellate Panel of the full Commission, I hereby affirm such findings in their entirety.

Based on my review of the record, I also affirm the findings of the Appellate Panel that the two constitutional issues raised had been abandoned on appeal and are precluded from being argued at this time. I further affirm the ruling of the Appellate Panel that the issue of "breach of agreement to pursue the third party action" alleged by the Claimant, was also not raised to the trial Commissioner, and therefore had been abandoned from being further argued on appeal. I also affirm the finding of the Appellate Panel that the issue pertaining to the "failure to pay medical bills" by the Respondents was not sufficiently argued to preserve this issue for review by the Appellate Panel, and therefore this issue is also no longer viable for appeal to the Circuit Court.

Election of Remedies

The accident which gives rise to this claim for benefits took place on or about June 1, 2006. The claim also took place under circumstances that gave rise to 'third party' civil action. The Claimant filed a third party civil action in October of 2008, and subsequently amended it in January of 2009. The Form S-2, notice of third party action - employee, was not filed along with this third party lawsuit, nor within thirty days afterwards. It was not filed with the SCWCC or served upon the Employer/Carrier until approximately May of 2009.

S.C. Code Ann. §42-1-560(b) requires that, when an injured employee chooses to assert a third party claim for benefits, in addition to a workers' compensation claim, a notification of the, "commencement of the [third party] action ~~shall be given~~ within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission." (emphasis added). The 'prescribed form' of the Commission is the 'S-2.' (See S.C. Code of Regs. § 67-203(2)). However, a Form S-2 notifying the Respondent Employer/Carrier and the S.C. Workers' Compensation Commission of this third party action was not filed until May of 2009, and was therefore untimely.

Pursuant to S.C. §42-1-560, and corresponding S.C. case law, including but not limited to the Supreme Court's decision in *Callahan v. Beaufort County School District*, 375 S.C. 92, 651 S.E.2d 311 (2007), the Claimant, by failing to comply with the mandated statutory notice requirements for his third party action, has elected his remedy and is barred from further workers' compensation benefits from his employer. None of the factual or equitable bases raised by the Claimant/Appellant cure such defect or permit non-compliance with the statute, which is to be strictly construed as per *Callahan*. (See Also, see also *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117, (Ct. App. 2011).

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Did the Single Commissioner err in the application of *Callahan v. Beaufort*
County School District and/or §42-1-560?

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

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:

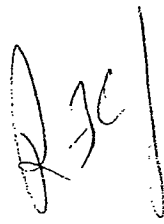
Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C.Code Ann. § 42-1-560(b).

An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) ("[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, **we strictly construe the requirements of § 42-1-560** and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). **Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.**



Callahan at 95-6, 313 (emphasis added).

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

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

Callahan at 96-7, 314

The *Callahan* court ultimately ruled that claimant Callahan was entitled to continue receiving benefits in workers' compensation while proceeding against the third party tortfeasor. However, the *only* reason this was permitted is because the Claimant Callahan had essentially cured the defective S-2 notification issue by voluntarily dismissing her claim under Rule 41 FRCP. The court's reasoning being that:

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

Callahan at 97, 314

However, it is abundantly clear from the *Callahan* opinion that the failure to properly file an S-2 notification of the commencement of a third party action would serve as a bar to further benefits under the Workers' Compensation Act. In addition, the *Callahan* court takes the opportunity to explain that strict compliance with the requirements of §42-1-560 is required

despite several of the arguments raised by the Claimant Holland's appeal brief and prior legal memorandum:

This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).

Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson, supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all") (citing *Stroy v. Millwood Drug Store*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

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

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

By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a workers' compensation claim simultaneously with a third part action, and held that:

[I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]

The Law of Workers' Compensation in South Carolina, 5th ed., 2008, at p. 477.

In support of his appeal, the Claimant/Appellant contended, in part, that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required after a year of compensation has been paid (or presumably when an S-3 has not been filed by the Employer/Carrier). The Respondents argued that this position is unfounded.— the undersigned agrees with the Appellate Panel and the Respondents on this point.

First, a review of §42-1-560 indicates no excusal of the Claimant's burden of notification, per subsection (b), under any generally or particularly defined circumstance. If anything, this statute portrays exactly the opposite instruction. The requirements of the employee for proceeding with a third party claim (simultaneously or prior to his or her workers' compensation claim) are outlined in subsection §42-1-560 subpart (b).

This section includes the mandated statutory notice by the Claimant to the other parties and the Commission within thirty days of the commencement of a civil action. Furthermore, the requirements of the employer/carrier for *proceeding with a third party action* are similarly outlined in subsection (c). However, subsection (c) clearly states in pertinent part that:

Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee, ..., and the rights and obligations of the parties shall be as provided by subsection (b) of this section.

S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

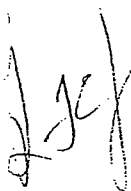
Because the Defendants did not institute a third party action on behalf of the injured Claimant Holland within the statutory time period, this non-action by the employer/carrier

effectuates a re-assignment of the right of action back to the Claimant. The Claimant then maintains the same burden of "...obligations...as provided by subsection (b) of this section [42-1-560]," which of course includes the thirty day notification requirement by the Claimant to the Employer, Carrier and the Commission. The Claimant did proceed in this case with a third party action, and therefore, was bound to comply with notification requirements provided for in §42-1-560(b).

Did the Single Commissioner err in failing to rule that the Claimant was under disability until a GAL was appointed?

The undersigned finds that the Appellate Panel correctly ruled that the purported disability of the Claimant/Appellant did not operate as a bar to the defense of election of remedies raised by the Defendants/Respondents. Perhaps first and foremost, there has been no showing whatsoever that the asserted incapacity or incompetency of the Claimant/Appellant bore any relationship (actually, allegedly or theoretically) to the failure to provide the mandated statutory notices which gave rise to the defense of election of remedies.

Mental incapacity/incompetency can, under certain circumstances, toll the applicable time period for asserting ones rights in legal proceedings or associated statute of limitations. Notably on this point, the Claimant/Appellant was, and has been, represented by legal counsel during all relevant time periods in question for his workers' compensation claim and his third party lawsuit. To that end, the third party civil action, filed by the Claimant in October of 2008, was filed on his behalf by an attorney representing the Claimant/Appellant in a fiduciary capacity. It is factually antithetical, and logically inconsistent, to construe and hold that the Claimant/Appellant was, on one hand, unable to properly proceed with his workers' compensation proceedings, or rather incapable of complying with the worker's compensation Act, due to incapacity/incompetency while, on the other hand, simultaneously pursuing through



legal counsel his third party civil action. Of note, the Claimant/Appellant actually was continuing – again through representative counsel – to actively litigate this workers' compensation case as well during this time period.

The incapacity of the Claimant cannot, and should not be imputed to Claimant's/Appellant's counsel for the purpose of tolling or excusing proper compliance with the Worker's Compensation Act. During his purported time of legal disability, the Claimant, again through counsel, had filed a Form 50 hearing request and pre-hearing briefs and APA evidentiary submissions. I agree with the Defendants/Respondents argument that the Claimant/Appellant cannot use the sword and the shield, and should be judicially estopped from making inconsistent arguments as to his capacity to comply with the Workers' Compensation Act. Generally speaking, the doctrine of judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. (Adopted by South Carolina in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997)).

Here the Claimant/Appellant would be both requesting ratification of his actions (before the Circuit Court in his third party action, and the Workers' Compensation Commission, through his continued pursuit of benefits under both mechanisms of recovery – which is permitted under §42-1-560 so long as the statutory mandates are complied with), yet at the same time asking for any legal deficiencies which might have taken place to be excused and vacated due to an alleged disability.

I find it would therefore be logically inconsistent that the Claimant could both actively litigate his workers' compensation claim (through the assistance of counsel), as well as his third party civil action, (also by and through counsel), yet was contemporaneously legally

incapacitated and therefore unable to serve and file the required S-2 notification letters in a timely manner.

Did the Appellate Panel of the Commission err in failing to deny the defense of election of remedies due to a waiver of such defense by the Defendants/Respondents?

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

The Defendants/Respondents contend that the argument of waiver of the election of remedies defense is without merit. The Defendants point out that they have raised this defense, election of remedies, at every contested hearing in this case since the defense became viable, and was known to them.

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

Furthermore, the fact remains that the hearing before the single Commissioner from which the Claimant appeals to this court, was set on the Form 21 hearing request of the Defendants. The crux of the Claimant's/Appellant's arguments, as to waiver, is that the Defendants/Respondents failed to raise the election of remedies defense in their Form 51 Answer filed on February 19, 2009. However, this was a hearing request where ultimately no hearing ever took place.

Furthermore, the Defendants/Respondents could not have raised the election of remedies issue in their February 19, 2009 Form 51 without some knowledge of the filing of the third party action (and subsequent non-service of the S-2). The Carrier was never served with an S-2 notice for the original Complaint in the third party action. That third party action was filed on October 10, 2008. As indicated in the Claimant's/Appellant's prior appellate brief, the amended third party complaint (filed in 2009), was not even received by the Carrier until March 10, 2009. (Claimant's APA 23). Furthermore, at that time, as previously asserted in the Appellant Holland's prior legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; and then timely serving the S-2. Even accepting this argument by the Claimant, as the hearing drew closer, no such action to cure this defect was ever taken by the Claimant. Accordingly, the Defendants did raise the election of remedies defense on their Form 58, filed on Monday, May 11, 2009, for the corresponding Form 50 hearing on May 20, 2009. (Note: The three year Statute of Limitations for the third party civil action expired on June 1, 2009).

The Defendants/Respondents further asserted that claimant's argument was meritless in light of the fact that: (a) The current issues are before the Commission on the Defendant's Form 21, not a Form 50; (b) At the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had originally requested; and (d) The Defendants/Respondents had no authority or ability to force the Claimant to proceed on a Form 50 hearing request in Order to assert their own defenses to that Form 50 or the claim in general.

The undersigned agrees with the arguments of the Respondents on this point, and the findings and analysis of the Commission thereto. The issue of the election of remedies defense

was properly before the hearing Commissioner as well as the Appellate Panel. The original hearing in this matter on appeal was premised on the hearing request of Respondent Employer/Carrier. Furthermore, no waiver of the right to raise this defense of election of remedies has been shown by the underlying facts and circumstances of this case.

Did the Appellate Panel of the Commission err in failing to deny the defense of election of remedies due to laches, waiver, estoppel or "unclean hands"?

The primary basis for each of the above issues, as to *laches*, waiver, estoppel and "unclean hands," is largely a factual determination that will rest on the circumstances of a given case. (Also see "waiver" as outlined above). I find that there is substantial evidence in the record to support the underlying factual determinations made by the Commission as to each of these issues, and also find no error with the Commission's legal reasoning as to each of the appellate grounds as to *laches*, waiver, estoppel, and "unclean hands."

The factual basis for *laches* has not been met. Furthermore, there is no evidence that some act or omission of the Defendants has led the Claimant/Appellant to take, or fail to take, any action that gave rise to the election of remedies defense which barred further benefits. As to the doctrine of "unclean hands," I do not find that the Claimant has met his burden of showing any inequitable actions of the Defendants which would give rise to finding "unclean hands" on the part of the Respondents.

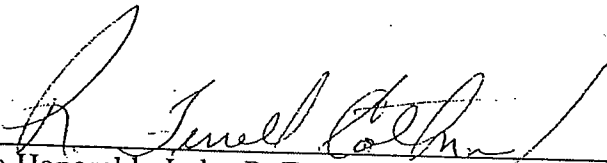
Moreover, even had such been shown, I am in agreement with the conclusion of the Appellate Panel that this is an equitable doctrine whereby a party seeking equity will not be entitled to equitable relief from the court if it is shown that the moving party seeking such relief has acted inequitably itself. Here, even assuming *arguendo* that the Defendants acted inequitably, the election of remedies defense arose from statutory obligations of the Claimant

that were not met. The Defendants have not raised an equitable bar to benefits, but rather a codified statutory defense under S.C. Code Ann. §42-1-560.

ORDER

IT IS THEREFORE ORDERED that the Findings of Facts, Conclusion of Law, and Order of the Appellate Panel of the Workers' Compensation Commission is hereby fully

AFFIRMED.

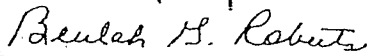

The Honorable Judge R. Ferrell Cothran, Jr.

Clarendon, South Carolina

Nov. 14, 2012.

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OF ORIGINAL FILED IN THIS OFFICE

DATE 11/28/12


CLERK OF COURT

CLARENDON COUNTY, SC

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BEULAH S. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Andreal Holland by his Guardian Ad
Litem Peggy Knox

Plaintiff,

vs.

Morbark Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc. and John Doe,

Defendants,

COMPLAINT

(Jury Trial Requested)

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
2008 OCT 10 PM 3:30

The Plaintiff Andreal Holland by his duly appointed Guardian Ad Litem would
respectfully show:

JURISDICTION AND VENUE

1. Plaintiff Andreal Holland is a citizen and resident of Clarendon County, State of South Carolina and, on June 1, 2006, was employed as a machine operator in Clarendon County, South Carolina where he suffered a severe and permanent head injury while operating a Morbark, Model 58, 150 h.p. wood chipper machine, serial # 914.

2. Peggy Holland is the mother of Andreal Holland and was appointed his conservator by the Clarendon County Probate Court and was duly appointed as his guardian ad litem for the purpose of prosecuting this action.

3. Upon information and belief, the Defendant Morbark Inc., hereafter Defendant Morbark, is a corporation duly organized under the laws of the State of Michigan and is a successor corporation to various Morbark entities that designed, manufactured, marketed, sold and distributed the Morbark Model 58, 150 h.p. wood chipper machine, serial # 914, that was operated by Plaintiff on June 1, 2006.

4. Upon information and belief the Defendant Morbark produced, manufactured, distributed, promoted the sale of its products and services, including the Morbark wood chipper model here involved, and placed into the stream of commerce Morbark equipment through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products, support and parts services would be purchased, used and consumed in South Carolina.

5. That the acts and omissions hereafter alleged against Defendant Morbark caused injury to the Plaintiff.

6. Upon information and belief Defendant Precision Husky Corporation is a corporation duly organized under the laws of the State of Alabama and, on or about February 2006, was a reseller and distributor of the Morbark Model 58 wood chipper machine here involved.

7. Upon information and belief the Defendant Precision Husky Corporation promoted the sale of its products, equipment and services, including the Morbark wood chipper machine here involved, through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products would be purchased, used and consumed in South Carolina.

8. Upon information and belief Defendant Precision Husky Corporation offered for sale and actually sold the Morbark Model 58 wood chipper machine here involved, including support and parts services for equipment it sold and/or distributed, for use in Clarendon County, South Carolina.

9. That the acts and omissions hereafter alleged against Defendant Precision Husky Corporation caused injury to the Plaintiff.

10. Upon information and belief the Defendant Watford Industry, Inc., is a South Carolina Domestic Corporation doing business throughout South Carolina and including the installation and rigging of the Morbark Model 58 wood chipper machine here involved in Clarendon County, South Carolina.

11. The Defendant A & K Mulch, LLC is a South Carolina limited liability corporation with its principal place of business located in Clarendon County, South Carolina and, upon information and belief, was the purchaser and owner of the Morbark Model 58 wood chipper machine here involved.

12. The Defendant "John Doe" is a euphemism for all those defendants, not yet identified, that committed acts or omissions that resulted in injury to the Plaintiff from the negligent and/or defective design, manufacture, distribution, installation, maintenance and/or operation of the Morbark Model 58 wood chipper machine here involved.

13. The Court has jurisdiction of Defendant Morbark and Defendant Precision Husky Corporation pursuant to S.C. Code Ann. § 36-2-803 (1976).

14. The Court has jurisdiction of the remaining Defendants A & K Mulch, LLC, Watford Industry, Inc. and John Doe pursuant to S.C. Code Ann. § 36-2-802 (1976).

15. The venue of this action is properly placed in Clarendon County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence-All Defendants)

16. On June 1, 2006, at approximately the end of his shift, the Plaintiff powered off and locked out the Morbark Model 58 chipper machine he was operating in preparation for cleaning and changing the cutting knives. As the machine slowed Plaintiff heard a noise from the turning wheel cutting area of the machine and went to consult his supervisor. When he

returned to the machine he mistakenly determined the wheel had stopped turning and attempted to open the hood access door to the wheel.

17. As the Plaintiff attempted to move the hood it came in contact with the rotating fan blades which caused the hood to suddenly kick back and strike the Plaintiff in the head causing severe and permanent injuries to the Plaintiff.

18. The Defendant Morbark is engaged in the business of forest products processing equipment machine design, manufacture and sale and specifically including the manufacture and sale of the wood chipper machine here involved.

19. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to design and manufacture a machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance procedures and adequate warnings of the foreseeable dangers to the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

20. That the above set forth incident and Plaintiff's resulting injuries and damages were proximately caused by the negligence, gross negligence, reckless, willful and wanton acts of the Defendant Morbark, in one or more of the following particulars:

- a. In designing and manufacturing the wood chipper machine without an interlock to prevent the hood from opening until the rotating wheel had stopped turning;
- b. In designing and manufacturing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;

- c. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- d. In designing and manufacturing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating wheel was turning;
- e. In promoting, selling and distributing the wood chipper machine without an interlock to prevent the hood/cutter access door from opening until the rotating wheel had stopped turning;
- f. In promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;
- g. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- h. In failing to inspect and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

21. The Defendant Precision Husky Corporation is engaged in the business of machine design, manufacture and sale of forest products processing equipment and specifically including wood chipper machines.

22. At all times mentioned, the Defendant Precision Husky Corporation undertook a duty to inspect, advertise, sell and distribute the chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to advertise, sell and distribute the machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance

procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

23. The Defendant Precision Husky Corporation failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- 
- a. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine here involved without an interlock to prevent the hood/cutter access door from opening until the rotating cutting wheel had stopped turning;
 - b. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating cutting wheel had stopped turning;
 - c. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured pins and fitted pins upon which to rotate;
 - d. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

24. The Defendant Watford Industry is engaged in the business of machine rigging and installation and including the installation of forest products processing equipment and including wood chipper machines.

25. At all times mentioned, the Defendant Watford Industry undertook a duty to install, inspect and make ready for use the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and

understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

26. The Defendant Watford Industry failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- a. In rigging and installing the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;
- b. In rigging and installing the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;
- c. In rigging and installing the wood chipper machine here involved without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- d. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;
- e. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

27. Upon information and belief, the Defendant A & K Mulch is engaged in the business of processing forest products and owns, operates and maintains various processing machines including the wood chipper machine here involved.

28. Upon information and belief, the Defendant A & K Mulch undertook a duty to install and maintain the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

29. The Defendant A & K Mulch failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- a. In purchasing, erecting, installing and maintaining the wood chipper machine here involved without operating and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use;
- b. In installing and operating the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;
- c. In installing and operating the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;
- d. In installing and operating the wood chipper machine here involved without a securely fitted hood access door with positively secured fitted pins upon which to rotate;
- e. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;

- f. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

30. That as a direct and proximate result of the joint and several acts and omissions of the defendants, Plaintiff has been seriously injured and damaged in the following particulars::

- a. Was struck in the head and as a result sustained serious and permanent injuries and damage;
- b. Suffered severe, serious and painful injuries from which the Plaintiff is informed and believes he will have permanent adverse effect and disability; that the expected duration of his permanent disability is governed by §19-1-150, *Code of Laws of South Carolina, 1976*, as amended;
- c. Has and will experience extreme pain, mental anguish, suffering and discomfort over a long period of time;
- d. Has been temporarily and permanently prevented from attending to his usual and ordinary household duties;
- e. Has incurred expenses for medical treatment as a result of his injuries;
- f. Is informed and believes that he will incur expenses for medical treatment in the future as a result of this accident;
- g. Has lost the ability to fully engage in certain activities that he previously enjoyed;
- h. Has experienced a loss of wages and income earning capacity.

31. That as a direct and proximate result of the joint and several acts, delicts and omissions Plaintiff is entitled to an award of actual and punitive damages in such amount as may be awarded by a jury.

FOR A SECOND CAUSE OF ACTION
(Strict Liability-Defendants Morbark, Precision Husky Corporation)

32. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

33. The Morbark wood chipper machine here involved was defective at the time that it was manufactured, sold, resold and ultimately purchased and installed in Calhoun County, South Carolina.

34. Upon information and belief, at no time was the Morbark wood chipper machine altered or changed in any material manner and, at the time of the accident on June 1, 2006, Plaintiff was using the machine in a manner in which it was intended.

35. The Defendant Morbark and Defendant Precision Husky Corporation sold the Morbark wood chipper here involved in a defective condition unreasonably dangerous to the Plaintiff and similarly situated consumers and users.

36. As a direct and proximate result of the Defendants acts, omissions and delicts, Plaintiff was seriously injured and said Defendants are strictly liable for Plaintiff's injuries and damages pursuant to §15-73-30 et seq. of the Code of Laws of the State of South Carolina, 1976, as amended, in manufacturing, distributing and/or selling a defective chipper wood machine and Plaintiff is entitled to an award of actual and consequential damages in such amount as may be awarded by a jury.

FOR A THIRD CAUSE OF ACTION

(Implied Warranty-Defendants Morbark, Precision Husky Corporation)

37. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

38. Defendant Morbark had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

39. Defendant Morbark impliedly represented that it had the skill, knowledge and expertise to properly design, manufacture and distribute the Morbark chipper machine free of defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

40. Defendant Precision Husky Corporation had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

41. Defendant Precision Husky impliedly represented that it had the skill, knowledge and expertise to properly inspect, advertise, sell and distribute the Morbark chipper machine free of defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

42. The Morbark wood chipper machine here involved was in fact defective and was not fit for the purpose for which it was intended due to the defects heretofore alleged.

41. The Defendant Morbark and Defendant Precision Husky Corporation breached their duty and implied warranty of merchantability by distributing and/or selling a Morbark wood chipper machine that was defective in design, testing and manufacture that did not contain operating and maintenance features and characteristics that complied with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and without prominently displayed and understandable instructions advising the user of the cleaning and maintenance procedures and adequate warnings to the operator of the foreseeable dangers created by the heavy rotating wheel that continued to turn after the electrical power had been shut off.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

First Cause Of Action-Negligence

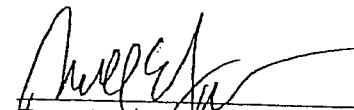
Plaintiff prays for judgment against all the Defendants, jointly and severally, for an award of actual and punitive damages in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper;

Second Cause Of Action-Strict Liability and Third Cause Of Action- Implied Warrantny

Plaintiff prays for judgment against the Defendants Morbark and Precision Husky Corporation, jointly and severally, for an award of actual and consequential damages in such amount as may be awarded in amount in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper.

Columbia, S.C.

September 30, 2009


Donald E. Jonas, Esquire (Bar No. 3084)
1328 Blanding Street
Columbia, SC 29202
(803) 254-1570/(803) 309-2535
Facsimile-(803) 254-7522
jonastrialatty@netscape

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Andreal Holland by his Guardian Ad
Litem Peggy Knox

Plaintiff,

vs.

Morbark Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc.

Defendants,

AMENDED COMPLAINT

(Jury Trial Requested)

2009 MAR -3 AM 11:02

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

The Plaintiff Andreal Holland by his duly appointed Guardian Ad Litem would
respectfully show:

JURISDICTION AND VENUE

1. Plaintiff Andreal Holland is a citizen and resident of Clarendon County, State of South Carolina and, on June 1, 2006, was employed as a machine operator in Clarendon County, South Carolina where he suffered a severe and permanent head injury while operating a Morbark, Model 58, 150 h.p. wood chipper machine, serial # 914.

2. Peggy Holland is the mother of Andreal Holland and was appointed his conservator by the Clarendon County Probate Court and was duly appointed as his guardian ad litem for the purpose of prosecuting this action.

3. Upon information and belief, the Defendant Morbark Inc., hereafter Defendant Morbark, is a corporation duly organized under the laws of the State of Michigan and is a successor corporation to various Morbark entities that designed, manufactured, marketed, sold and distributed the Morbark Model 58, 150 h.p. wood chipper machine, serial # 914, that was operated by Plaintiff on June 1, 2006.

4. Upon information and belief the Defendant Morbark produced, manufactured, distributed, promoted the sale of its products and services, including the Morbark wood chipper model here involved, and placed into the stream of commerce Morbark equipment through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products, support and parts services would be purchased, used and consumed in South Carolina.

5. That the acts and omissions hereafter alleged against Defendant Morbark caused injury to the Plaintiff.

6. Upon information and belief Defendant Precision Husky Corporation is a corporation duly organized under the laws of the State of Alabama and, on or about February 2006, was a reseller and distributor of the Morbark Model 58 wood chipper machine here involved.

7. Upon information and belief the Defendant Precision Husky Corporation promoted the sale of its products, equipment and services, including the Morbark wood chipper machine here involved, through nationally circulated trade publications, internet advertising and various means intended to reach customers in South Carolina with the reasonable expectation that those goods and products would be purchased, used and consumed in South Carolina.

8. Upon information and belief Defendant Precision Husky Corporation offered for sale and actually sold the Morbark Model 58 wood chipper machine here involved, including support and parts services for equipment it sold and/or distributed, for use in Clarendon County, South Carolina.

9. That the acts and omissions hereafter alleged against Defendant Precision Husky Corporation caused injury to the Plaintiff.

10. Upon information and belief the Defendant Watford Industry, Inc., is a South Carolina Domestic Corporation doing business throughout South Carolina and including the installation and rigging of the Morbark Model 58 wood chipper machine here involved in Clarendon County, South Carolina.

11. The Defendant A&K Mulch, LLC is a South Carolina limited liability corporation with its principal place of business located in Clarendon County, South Carolina and, upon information and belief, was the purchaser and owner of the Morbark Model 58 wood chipper machine here involved.

12. The Court has jurisdiction of Defendant Morbark and Defendant Precision Husky Corporation pursuant to S.C. Code Ann. § 36-2-803 (1976).

13. The Court has jurisdiction of the remaining Defendants A & K Mulch, LLC, Watford Industry, Inc. and John Doe pursuant to S.C. Code Ann. § 36-2-802 (1976).

14. The venue of this action is properly placed in Clarendon County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence-All Defendants)

15. On June 1, 2006, at approximately the end of his shift, the Plaintiff powered off and locked out the Morbark Model 58 chipper machine he was operating in preparation for cleaning and changing the cutting knives. As the machine slowed Plaintiff heard a noise from the turning wheel cutting area of the machine and went to consult his supervisor. When he returned to the machine he mistakenly determined the wheel had stopped turning and attempted to open the hood access door to the wheel.

16. As the Plaintiff attempted to move the hood it came in contact with the rotating fan blades which caused the hood to suddenly kick back and strike the Plaintiff in the head causing severe and permanent injuries to the Plaintiff.

17. The Defendant Morbark is engaged in the business of forest products processing equipment machine design, manufacture and sale and specifically including the manufacture and sale of the wood chipper machine here involved.

18. At all times mentioned, the Defendant Morbark undertook a duty to design, manufacture, inspect, sell and distribute the wood chipper machine here involved with operational and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to design and manufacture a machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance procedures and adequate warnings of the foreseeable dangers to the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

19. That the above set forth incident and Plaintiff's resulting injuries and damages were proximately caused by the negligence, gross negligence, reckless, willful and wanton acts of the Defendant Morbark, in one or more of the following particulars:

- a. In designing and manufacturing the wood chipper machine without an interlock to prevent the hood from opening until the rotating wheel had stopped turning;
- b. In designing and manufacturing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;
- c. In designing and manufacturing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- d. In designing and manufacturing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating wheel was turning;

- e. In promoting, selling and distributing the wood chipper machine without an interlock to prevent the hood/cutter access door from opening until the rotating wheel had stopped turning;
- f. In promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating wheel had stopped turning;
- g. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- h. In failing to inspect and thereafter promoting, selling and distributing the chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

20. The Defendant Precision Husky Corporation is engaged in the business of machine design, manufacture and sale of forest products processing equipment and specifically including wood chipper machines.

21. At all times mentioned, the Defendant Precision Husky Corporation undertook a duty to inspect, advertise, sell and distribute the chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to advertise, sell and distribute the machine with prominently displayed and understandable instructions advising the user/operator of the cleaning and maintenance procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

22. The Defendant Precision Husky Corporation failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- a. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine here involved without an interlock to prevent the hood/cutter access door from opening until the rotating cutting wheel had stopped turning;
- b. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a motion detector to determine when the rotating cutting wheel had stopped turning;
- c. In failing to adequately inspect and thereafter promoting, selling and distributing the wood chipper machine without a securely fitted hood/cutter access door with positively secured pins and fitted pins upon which to rotate;
- d. In failing to inspect and thereafter promoting, selling and distributing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning.

23. The Defendant Watford Industry is engaged in the business of machine rigging and installation and including the installation of forest products processing equipment and including wood chipper machines.

24. At all times mentioned, the Defendant Watford Industry undertook a duty to install, inspect and make ready for use the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

25. The Defendant Watford Industry failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- a. In rigging and installing the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;
- b. In rigging and installing the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;
- c. In rigging and installing the wood chipper machine here involved without a securely fitted hood/cutter access door with positively secured and fitted pins upon which to rotate;
- d. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;
- e. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

26. Upon information and belief, the Defendant A & K Mulch is engaged in the business of processing forest products and owns, operates and maintains various processing machines including the wood chipper machine here involved.

27. Upon information and belief, the Defendant A & K Mulch undertook a duty to install and maintain the wood chipper machine here involved to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to

12-1
equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

28. The Defendant A & K Mulch failed to exercise due care and was negligent, grossly negligent, willful and wanton in the following particulars:

- a. In purchasing, erecting, installing and maintaining the wood chipper machine here involved without operating and maintenance features complying with industry standards and practices adequate to assure the machine was safe to use;
- b. In installing and operating the wood chipper machine here involved without an interlock to prevent the hood from opening until the rotating cutting wheel had stopped turning;
- c. In installing and operating the wood chipper machine here involved without a motion detector to determine when the rotating cutting wheel had stopped turning;
- d. In installing and operating the wood chipper machine here involved without a securely fitted hood access door with positively secured fitted pins upon which to rotate;
- e. In rigging and installing the wood chipper machine without prominently displayed cleaning, maintenance and operating instructions and warnings conveying the serious nature of injury or death that would result from opening the hood/cutter access door while the rotating cutting wheel was turning;
- f. In failing to inspect the installation and operation of the machine to assure its operating and maintenance features were in accord with industry standards and practices adequate to assure the machine was safe to use and including the duty to equip the machine with instructions and warnings adequate to warn the user/operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continued to turn after the electrical power had been shut off.

29. That as a direct and proximate result of the joint and several acts and omissions of the defendants, Plaintiff has been seriously injured and damaged in the following particulars::

- a. Was struck in the head and as a result sustained serious and permanent injuries and damage;
- b. Suffered severe, serious and painful injuries from which the Plaintiff is informed and believes he will have permanent adverse effect and disability; that the expected duration of his permanent disability is governed by §19-1-150, *Code of Laws of South Carolina, 1976*, as amended;
- c. Has and will experience extreme pain, mental anguish, suffering and discomfort over a long period of time;
- d. Has been temporarily and permanently prevented from attending to his usual and ordinary household duties;
- e. Has incurred expenses for medical treatment as a result of his injuries;
- f. Is informed and believes that he will incur expenses for medical treatment in the future as a result of this accident;
- g. Has lost the ability to fully engage in certain activities that he previously enjoyed;
- h. Has experienced a loss of wages and income earning capacity.

30. That as a direct and proximate result of the joint and several acts, delicts and omissions Plaintiff is entitled to an award of actual and punitive damages in such amount as may be awarded by a jury.

FOR A SECOND CAUSE OF ACTION
(Strict Liability-Defendants Morbark, Precision Husky Corporation)

31. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

32. The Morbark wood chipper machine here involved was defective at the time that it was manufactured, sold, resold and ultimately purchased and installed in Calhoun County, South Carolina.

33. Upon information and belief, at no time was the Morbark wood chipper machine altered or changed in any material manner and, at the time of the accident on June 1, 2006, Plaintiff was using the machine in a manner in which it was intended.

34. The Defendant Morbark and Defendant Precision Husky Corporation sold the Morbark wood chipper here involved in a defective condition unreasonably dangerous to the Plaintiff and similarly situated consumers and users.

35. As a direct and proximate result of the Defendants acts, omissions and delicts, Plaintiff was seriously injured and said Defendants are strictly liable for Plaintiff's injuries and damages pursuant to §15-73-30 et seq. of the Code of Laws of the State of South Carolina, 1976, as amended, in manufacturing, distributing and/or selling a defective chipper wood machine and Plaintiff is entitled to an award of actual and consequential damages in such amount as may be awarded by a jury.

FOR A THIRD CAUSE OF ACTION
(Implied Warranty-Defendants Morbark, Precision Husky Corporation)

36. The pertinent allegations of the preceding paragraphs are realleged as fully as if repeated verbatim.

37. Defendant Morbark had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

38. Defendant Morbark impliedly represented that it had the skill, knowledge and expertise to properly design, manufacture and distribute the Morbark chipper machine free of

defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

39. Defendant Precision Husky Corporation had a duty to the Plaintiff/machine operator and undertook an implied warranty of merchantability that the wood chipper machine was fit for the particular purpose for which it was intended, as heretofore alleged.

40. Defendant Precision Husky impliedly represented that it had the skill, knowledge and expertise to properly inspect, advertise, sell and distribute the Morbark chipper machine free of defects and further warranted its operating and maintenance features and characteristics were in accord with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and including the duty to equip and install the machine with prominently displayed and understandable instructions advising the user of the cleaning, maintenance and operating procedures and adequate warnings of the foreseeable dangers adequate to alert the operator of the machine of the serious hazard created by the heavy rotating cutting wheel that continues to turn after the electrical power is shut off.

41. The Morbark wood chipper machine here involved was in fact defective and was not fit for the purpose for which it was intended due to the defects heretofore alleged.

42. The Defendant Morbark and Defendant Precision Husky Corporation breached their duty and implied warranty of merchantability by distributing and/or selling a Morbark

wood chipper machine that was defective in design, testing and manufacture that did not contain operating and maintenance features and characteristics that complied with industry standards and practices adequate to assure the machine was safe to use and suitable for the expected and intended use and without prominently displayed and understandable instructions advising the user of the cleaning and maintenance procedures and adequate warnings to the operator of the foreseeable dangers created by the heavy rotating wheel that continued to turn after the electrical power had been shut off.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

First Cause Of Action-Negligence

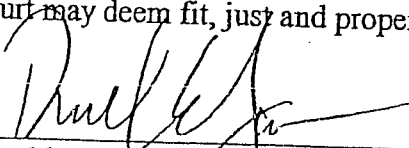
Plaintiff prays for judgment against all the Defendants, jointly and severally, for an award of actual and punitive damages in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper;

Second Cause Of Action-Strict Liability and Third Cause Of Action- Implied Warranty

Plaintiff prays for judgment against the Defendants Morbark and Precision Husky Corporation, jointly and severally, for an award of actual and consequential damages in such amount as may be awarded in amount in such amount as a jury may award, together with costs of this action, and for such further relief as this Court may deem fit, just and proper.

Columbia, S.C.

February 29, 2009


Donald E. Jonas, Esquire (Bar No. 3084)
1328 Blanding Street
Columbia, SC 29202
(803) 254-1570/(803) 309-2535
Facsimile-(803) 254-7522
jonastrialatty@netscape

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON)

Andreal Holland by his Guardian Ad
Litem Peggy Knox

Plaintiff,

vs.

Morbark Inc., Precision Husky
Corporation, A&K Mulch, LLC,
Watford Industry, Inc.

Defendants.

Civil Action No. 2008-CP-14-0461

ANSWER OF A&K MULCH, LLC

2009 APR -6 AM 11:07

BEULAH D. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

Defendant A&K Mulch, LLC ("A&K") answers the Plaintiff's Amended Complaint
as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Defendant A&K expressly denies each and every allegation contained in
the Amended Complaint not specifically admitted herein.

FOR A SECOND DEFENSE

2. Answering Paragraph 1, A&K admits only so much that Plaintiff is a
resident of Clarendon County and was employed by A&K at the time incident. A&K is
without information or knowledge sufficient to form a belief as to the truth of the
remaining allegations and therefore denies the same.

3. Answering Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Plaintiff's
Amended Complaint, A&K is without information or knowledge sufficient to form a
belief as to the truth of the allegations and therefore denies the same.

4. Answering Paragraph 11, A&K admits the allegations contained therein.
5. Answering Paragraphs 12 and 13, A&K is without information or knowledge sufficient to form a belief as to the truth of the allegations and therefore denies the same.
6. Answering Paragraph 14, A&K denies that it is a proper party to this action and thus venue may not be proper in this county.
7. Paragraphs numbered 15 and 16 of Plaintiff's Amended Complaint are denied.
8. Paragraphs 17, 18, 19, 20, 21, 22, 23, 24 and 25 of Plaintiff's Amended Complaint contain allegations against Defendants other than A&K to which no Answer is required by A&K; however, to the extent any allegation contained in those paragraphs requires an answer by A&K, the same is denied.
9. Answering Paragraph 26, A&K admits the allegations contained therein.
10. Answering Paragraph 27, A&K believes this Paragraph calls for a legal conclusion to which no answer is required, but does admit only so much that A&K employees, including Plaintiff, maintained the equipment in accordance with industry standards and denies all allegations contained therein that infer or suggests that the equipment was not maintained in accordance with industry standards or that it did not provide adequate instruction and/or warnings to its employees.
11. A&K denies the allegations of Paragraphs 28 and 29, including all subparts thereof, and demands strict proof of the same.
12. A&K denies the allegations of Paragraph 30.

13. Paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 42 of Plaintiff's Amended Complaint contain allegations against Defendants other than A&K to which no Answer is required by A&K; however, to the extent any allegation contained in those paragraphs requires an answer by A&K, the same is denied.

14. A&K denies all allegations contained the WHEREFORE paragraphs of Plaintiff's Amended Complaint and denies that Plaintiff is entitled to any relief against A&K.

FOR A THIRD DEFENSE
(Improper Party/ Jurisdiction)

15. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

16. Plaintiff Holland was an employee of A&K at the time of the alleged accident and was within the scope of his duties with A&K, thus he is subject to the application of the South Carolina Workers Compensation Exclusive Remedy, whereby all actions by Plaintiff against A&K must take place before the South Carolina Workers Compensation Commission.

17. A&K is an improper party to this Circuit Court action and subject matter jurisdiction is improper in the Circuit Court.

FOR A FOURTH DEFENSE
(Exclusive Remedy)

18. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

19. Plaintiff Holland was an employee of A&K at the time of the alleged accident and was within the scope of his duties with A&K, thus he is subject to the

application of the South Carolina Workers Compensation Exclusive Remedy, whereby all actions by Plaintiff against A&K must take place before the South Carolina Workers Compensation Commission.

20. Plaintiff's remedy for any action against his employer A&K is exclusively subject to those provided under the South Carolina Workers Compensation Act (S.C. Code Ann § 42-1-10 et seq). Thus, Plaintiff's action against A&K is barred by this exclusive remedy.

FOR A FIFTH DEFENSE
(Failure to State Claim)

21. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

22. Plaintiff's action against A&K fails to state facts sufficient to constitute a cause of action upon which relief may be granted by this Court against A&K and thus, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE
(Improper Venue)

23. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

24. Defendant A&K alleges venue is improper.

FOR A SEVENTH DEFENSE
(Other Action Pending)

25. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

26. Plaintiff currently has a workers' compensation claim pending against A&K for the same claimed injuries, thus this action should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

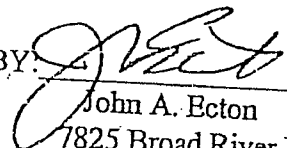
FOR A EIGHTH DEFENSE
(Notice of Lien)

27. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

28. Defendant A&K, by and through its workers compensation carrier, paid workers compensation benefits to Plaintiff pursuant to the South Carolina Workers Compensation Act and is hereby notifying all parties that it has a lien and subrogation interest, pursuant to S.C. Code Ann. § 42-1-560, in proceeds received by Plaintiff from any third party.

WHEREFORE, having fully answered the Amended Complaint of Plaintiff herein, Defendant A&K prays that the Amended Complaint be dismissed as to A&K, with costs, and for such other and further relief as may be just and proper.

ECTON LAW FIRM, PA

BY: 

John A. Ecton

7825 Broad River Rd, Suite 300

Irmo, South Carolina 29063

(803) 771-9800

(803) 771-9811 (facsimile)

jecton@ectonlawfirm.com

ATTORNEY FOR DEFENDANT A&K

Irmo, South Carolina
April 3, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CLARENDON)

Andreal Holland by his Guardian Ad
Litem Peggy Knox

Plaintiff,

vs.

Morbark Inc., Precision Husky
Corporation, A&K Mulch, LLC,
Watford Industry, Inc.

Defendants.

Civil Action No. 2008-CP-14-0461

ANSWER OF A&K MULCH, LLC

2009 APR -6 AM 11:07

BEULAH J. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

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as follows:

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(General Denial)

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the Amended Complaint not specifically admitted herein.

FOR A SECOND DEFENSE

2. Answering Paragraph 1, A&K admits only so much that Plaintiff is a
resident of Clarendon County and was employed by A&K at the time incident. A&K is
without information or knowledge sufficient to form a belief as to the truth of the
remaining allegations and therefore denies the same.

3. Answering Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Plaintiff's
Amended Complaint, A&K is without information or knowledge sufficient to form a
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10. Answering Paragraph 27, A&K believes this Paragraph calls for a legal conclusion to which no answer is required, but does admit only so much that A&K employees, including Plaintiff, maintained the equipment in accordance with industry standards and denies all allegations contained therein that infer or suggests that the equipment was not maintained in accordance with industry standards or that it did not provide adequate instruction and/or warnings to its employees.
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14. A&K denies all allegations contained the WHEREFORE paragraphs of Plaintiff's Amended Complaint and denies that Plaintiff is entitled to any relief against A&K.

FOR A THIRD DEFENSE
(Improper Party/ Jurisdiction).

15. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

16. Plaintiff Holland was an employee of A&K at the time of the alleged accident and was within the scope of his duties with A&K, thus he is subject to the application of the South Carolina Workers Compensation Exclusive Remedy, whereby all actions by Plaintiff against A&K must take place before the South Carolina Workers Compensation Commission.

17. A&K is an improper party to this Circuit Court action and subject matter jurisdiction is improper in the Circuit Court.

FOR A FOURTH DEFENSE
(Exclusive Remedy)

18. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

19. Plaintiff Holland was an employee of A&K at the time of the alleged accident and was within the scope of his duties with A&K, thus he is subject to the

application of the South Carolina Workers Compensation Exclusive Remedy, whereby all actions by Plaintiff against A&K must take place before the South Carolina Workers Compensation Commission.

20. Plaintiff's remedy for any action against his employer A&K is exclusively subject to those provided under the South Carolina Workers Compensation Act (S.C. Code Ann. § 42-1-10 et seq). Thus, Plaintiff's action against A&K is barred by this exclusive remedy.

FOR A FIFTH DEFENSE
(Failure to State Claim)

21. Defendant A&K reiterates all of the preceding defenses, not inconsistent herewith, as it set forth verbatim herein.

22. Plaintiff's action against A&K fails to state facts sufficient to constitute a cause of action upon which relief may be granted by this Court against A&K and thus, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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(Improper Venue)

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24. Defendant A&K alleges venue is improper.

FOR A SEVENTH DEFENSE
(Other Action Pending)

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26. Plaintiff currently has a workers' compensation claim pending against A&K for the same claimed injuries, thus this action should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

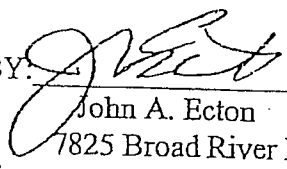
FOR A EIGHTH DEFENSE
(Notice of Lien)

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WHEREFORE, having fully answered the Amended Complaint of Plaintiff herein, Defendant A&K prays that the Amended Complaint be dismissed as to A&K, with costs, and for such other and further relief as may be just and proper.

ECTON LAW FIRM, PA

BY: 

John A. Ecton
7825 Broad River Rd, Suite 300
Irmo, South Carolina 29063
(803) 771-9800
(803) 771-9811 (facsimile)
jecton@ectonlawfirm.com

ATTORNEY FOR DEFENDANT A&K

Irmo, South Carolina
April 3, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS

Andreal Holland by his Guardian AD
Litem Peggy Knox

Plaintiff,

v.

Morbark Inc., Precision Husky Corporation,
A& K Mulch, LLC, Watford Industry, Inc.

Defendant

Civil Action No. 2008-CP-14-0461

CERTIFICATE OF SERVICE

BEULAH G. JOHNSON
CLERK OF COURT
CLARENDON COUNTY, SC
2009 APR -6 AM 11:14

I, the undersigned assistant of Ecton Law Firm., Attorney for the Defendant herein, do hereby certify that I have served the following Counsel in this action with a copy of the document (s) hereinbelow specified by mailing a copy of same this date by United States Mail, postage prepaid, to the following addresses:

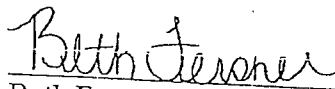
PLEADINGS:

Answer of A&K Mulch, LLC

COUNSEL:

Donald E. Jonas, Esq.
1328 Blanding Street
Columbia, SC 29202

April 3, 2009


Beth Fersner



ECTON LAW FIRM, PA

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John A. E
Attorney at
Admitted in SC

Insurance • Litigation • Subrogation • Collec
IRS Tax Problem Reso.

April 3, 2009

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, South Carolina 29102

RE: Andreal Holland by his Guardian Ad Litem Peggy Knox vs. Morbark Inc.,
Precision Husky Corporation, A&K Mulch, LLC, Watford Industry, Inc.,
Civil Action No. 2008-CP-14-0461

Dear Ms. Roberts:

Please find enclosed for filing with your office one original and one copy of Defendant's Answer of A&K Mulch, LLC to Plaintiffs Amended Complaint in the above matter. We would appreciate your office filing this and returning a clocked copy to our office in the enclosed envelope.

If you need any additional documentation, please let me know.

Sincerely,

Beth Fersner

Beth Fersner
Legal Assistant

Enclosures

Cc: Bill Coffey, Esq.

Martha Odom

2009 APR -6 AM 11:07

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-00461

Andreal Holland by his Guardian Ad
Litem Peggy Knox)

Plaintiff,)

vs.)

Morbark, Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc.)

Defendants,)

Defendant A&K Mulch, LLC's
Responses to Plaintiff's Request
To Admit

TO: DONALD E. JONAS, ATTORNEY FOR PLAINTIFF:

The Defendant A&K Mulch, LLC, by and through the undersigned Counsel, responds to Plaintiff's Request For Admissions as follows:

1. J.C. Witherspoon, Jr., Inc., is a South Carolina corporation incorporated on May 31, 1982 and is the successor of Jimmy's Trucking, Inc. and Witherspoon Forest Products, Inc. that were each merged with J.C. Witherspoon, Jr., Inc. on Sept. 30, 2004.

RESPONSE: Admitted

2. J.C. Witherspoon, Jr., Inc. performs logging and timber trucking operations and is not involved in the sawmill and mulch production business operated at 2374 Alderman Camp Rd., Alcolu, SC 29001 since 2003. (Depo. J.C. Witherspoon, p. 21).

RESPONSE: Denied as written. Defendant responds that J.C. Witherspoon Jr. Inc. does contract trucking for A&K Mulch, LLC. A&K Mulch LLC does not have an address of 2374 Alderman Camp Rd. A&K Mulch LLC address is 3467 Hwy 301 North, Manning, SC 29102.

3. A&K Mulch, LLC, is a South Carolina limited liability corporation, incorporated on November 17, 2003, that was formed by J.C. Witherspoon, Jr., to operate a sawmill and produce and sell timber mulch. (Depo. J.C. Witherspoon, pp. 21, 22).

RESPONSE: A&K Mulch admits that it is a South Carolina limited liability corporation, incorporated on November 17, 2003 for purposes of operating a sawmill. Defendant

denies that it was formed by J.C. Witherspoon, Jr., individually. A&K Mulch, LLC was formed by J.C. Witherspoon, Jr., Inc.

4. Both A&K Mulch, LLC and J.C. Witherspoon, Jr., Inc. are operated from the sawmill location at 2374 Alderman Camp Rd., Alcolu, SC 29001.

RESPONSE: Denied. A&K Mulch is operated at 3467 Hwy 301 North, Manning, SC 29102.

5. A&K Mulch, LLC and J.C. Witherspoon, Jr., Inc. maintain separate accounting records and are separate businesses. (Depo. Witherspoon, pp. 19, 23, 24, 84, 85).

RESPONSE: Admitted.

6. Andreal Holland was hired on April 5, 2004 as an employee of A&K Mulch, LLC, and always remained an employee of A&K Mulch, LLC, and was never an employee of J.C. Witherspoon, Jr., Inc. (Depo. Witherspoon, pp. 24, 25).

RESPONSE: Admitted.

7. On June 1, 2006, the day that Andreal Holland was injured, he was an employee of A&K Mulch, LLC. (Depo. Witherspoon, p. 26)

RESPONSE: Admitted.

8. Everyone that worked at the sawmill at 2374 Alderman Camp Rd., Alcolu, SC from 2003 until the present, including Andreal Holland, except the office staff, are employees of A&K Mulch, LLC. (Depo. Witherspoon, pp. 29-31).

RESPONSE: Denied. The sawmill is operated at 3467 Hwy 301 North, Manning, SC 29102.

9. Andreal Holland's job with A&K Mulch, LLC, was to operate a chop saw at the saw mill and on occasion to change knife blades on the Morbark 48" Stationary R.H. Chipper (Witherspoon Depo. #7) located at the sawmill until that machine was replaced with a Morbark 58" Stationary R.H. Chipper (Serial # 914) sometime after April 6, 2006. (Depo. Witherspoon, pp. 35, 37, 45, 60, 61; Depo. Ex. #12).

RESPONSE: Defendant admits only that Andreal Holland's job was to operate a saw at the saw mill which encompassed the changing of blades, including the blades on the Morbark 48" Chipper.

10. Andreal Holland's job with A&K Mulch, LLC after April 2006 was to operate a chop saw at the saw mill and on occasion to change knife blades on the Morbark 58" Stationary R.H. Chipper (Serial # 914) located at the sawmill. (Depo. Witherspoon, pp. 35, 37, 45, 60, 61; Depo. Ex. #12).

RESPONSE: Admitted.

11. The normal process of removing the pins securing the moveable section of the machine hood of the Morbark 58" Stationary R.H. chipper (Serial # 914) required a hammer to knock out the pins. (Depo. Witherspoon, pp. 50-51, 70, 71, 92, 93).

RESPONSE: Defendant admits only that removing the pins sometimes required a hammer to knock out the pins.

12. Assuming there is no material being fed into the Mobark R.H. Stationay chipper machine at the time the operator turns off the power and locks out and tags out, it may take 15-20 minutes for the disc to stop tuning. (Depo. Witherspoon, pp. 55-56).

RESPONSE: Defendant denies the statement as written. Once power is cut off, no material is feed into the equipment. Defendant admits that it may take 15-20 minutes for the disc to stop turning once the power is cut off.

13. The time that it takes for the chipper disc to stop turning after the operator turns off the power and locks out and tags out depends on what is being fed into the machine and the condition of the machine. (Depo. Witherspoon, pp. 55-56).

RESPONSE: Defendant denies the statement as written. Once power is cut off, no material is feed into the equipment.

14. The Morbark 58" Stationary R.H. chipper (Serial # 914) was sold on Feb. 25, 2008.

RESPONSE: Defendant is not sure of the exact sale date, but admits it was sold in or around the February 25, 2008 date.

15. There are no written records of safety meetings of A&K Mulch prior to June 1, 2006.

RESPONSE: Admitted. Defendant has not been able to locate any written records of safety meeting prior to June 1, 2006.

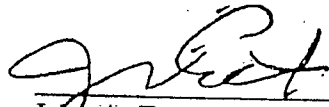
16. After the Mobark Model 58" stationary chipper machine, serial # 914, purchased from Precision Husky was delivered to A&K Mulch, LLC on or about April 6, 2006, J.C. Witherspoon, Jr. called Clayton at Precision Husky and discussed the fact that the machine had what Mr. Witherspoon believed to be a bearing noise. (Depo. Witherspoon, p. 138).

RESPONSE: Denied as written. Defendant admits that Clayton was called about possible bearing noise after the chipper was installed and operating.

17. In response to the discussion between J.C. Witherspoon, Jr. and Clayton at Precision Husky, Precision Husky sent a set of bearings to A&K mulch, LLC.

RESPONSE: Admitted.

August 13, 2010



John A. Ecton
7825 Broad River Rd., Suite 300
Irmo, SC 29063
(803) 771-9800

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2008 CP 14-00461

Andreal Holland by his Guardian Ad
Litem Peggy Knox,

Plaintiff,

vs.

Certificate Of Service

Morbark, Inc, Precision Husky
Corporation, A & K Mulch, LLC,
Watford Industry, Inc.

Defendants,

The undersigned hereby certifies that a copy of the within :

1. Defendant A&K Mulch's Responses to Plaintiff's Request To Admit To Defendant A&K Mulch, LLC.

was/were duly served on the attorneys referred to as shown below, by depositing said document(s) in the United States Mail, at Irmo, South Carolina, on August 13, 2010, with first-class postage duly affixed and a return address clearly indicated on the envelope; all in accordance with the *South Carolina Rules of Civil Procedure*, and by forwarding per electronic mail to counsel.


JOHN A. ECTON

Attorney For A&K Mulch, LLC

Donald E. Jonas, Esquire
1328 Blanding Street
Columbia, SC 29202

Saunders M. Bridges, Jr., Esquire
Aiken, Bridges, Nunn, Elliott, & Tyler, PA
PO Box 1931
Florence, SC 29503

J. Calhoun Land, IV, Esquire
Land, Parker & Welch, PA
PO Box 138
Manning, SC 29102

Gray Borden, Esquire
Joel C. Bailey, Esquire
Lightfoot, Franklin & White
Clark Building
400 20th St. North
Birmingham, AL 35203

Curtis L. Ott, Esquire
Turner, Padgett, Graham & Laney, PA
PO Box 1473
Columbia, SC 29202

Darrell W. Carter, Esquire
Sweeney Wingate & Barrow, P.A.
PO Box 12129
Columbia, SC 29211

WORKERS COMPENSATION - FIRST REPORT OF INJURY OR ILLNESS

EMPLOYER (NAME & ADDRESS INCL ZIP) A & K Mulch, LLC Po Box 289 Alcolu, SC 29001		CARRIER/ADMINISTRATION CLAIM NUMBER WCC# 0607813		REPORT PURPOSE CODE Sick	
JURISDICTION SC		JURISDICTION CLAIM NUMBER 1120		INSURED REPORT NUMBER WCC# 0607813	
SIC CODE 2000		EMPLOYER FEIN 570734562		EMPLOYER'S LOCATION ADDRESS (IF DIFFERENT) Alcolu, SC 29001	
				LOCATION #: 803-473-4885	
CARRIER/CLAIMS ADMINISTRATOR					
CARRIER (NAME, ADDRESS & PHONE NO) Capital City Insurance 3850 Fernandian Road Columbia, SC 29210		POLICY PERIOD 12-10-05 TO 12-10-06		CLAIMS ADMINISTRATOR (NAME, ADDRESS & PHONE NO) Southeastern Claims Services, Inc. Po Box 212128 Columbia, SC 29221	
		CHECK IF APPROPRIATE ☐ SELF INSURANCE			
CARRIER FEIN 01WC402684		POLICY/SELF-INSURED NUMBER 01WC402684		ADMINISTRATOR FEIN 01WC402684	
AGENT NAME & CODE NUMBER Davis-Garvin Agency, Inc.					
EMPLOYEE/WAGE					
NAME (LAST, FIRST, MIDDLE) Holland Andreal		DATE OF BIRTH 02/10/75		DATE HIRED 4/05/04	
ADDRESS (INCL ZIP) 5 Branchview Drive Manning, SC 29102		SEX ☒ MALE ☐ FEMALE ☐ UNKNOWN		MARRITAL STATUS ☒ UNMARRIED ☐ SINGLE/DIVORCED ☐ MARRIED ☐ SEPERATED ☐ UNKNOWN	
PHONE 803-225-2781		# OF DEPENDENTS 0		OCCUPATION/JOB TITLE machine operator	
RATE \$9.00 per hour		PER ☐ DAY ☐ MONTH ☐ WEEK ☐ OTHER		# DAYS WORKED/WEEK 5	
				FULL PAY FOR DAY OF INJURY? ☒ YES ☐ NO	
				DID SALARY CONTINUE? ☐ YES ☒ NO	
OCCURRENCE/TREATMENT					
TIME EMPLOYEE BEGAN WORK 7:00		DATE OF INJURY/ILLNESS 06/01/06		DATE EMPLOYER NOTIFIED 06/01/06	
CONTACT NAME/PHONE NUMBER Cindy Elmore 803-473-4885		TYPE OF INJURY/ILLNESS multiple		PART OF BODY AFFECTED jaw, nose, head	
DID INJURY/ILLNESS EXPOSURE OCCUR ON EMPLOYER'S PREMISES? yes		TYPE OF INJURY/ILLNESS CODE 156		PART OF BODY AFFECTED CODE 156	
DEPARTMENT OR LOCATION WHERE ACCIDENT OR ILLNESS EXPOSURE OCCURRED sawmill		ALL EQUIPMENT, MATERIALS, OR CHEMICALS EMPLOYEE WAS USING WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED none			
SPECIFIC ACTIVITY THE EMPLOYEE WAS ENGAGED IN WHEN THE ACCIDENT OR ILLNESS EXPOSURE OCCURRED cleaning chipper		WORK PROCESS THE EMPLOYEE WAS ENGAGED IN WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED none			
HOW INJURY OR ILLNESS/ABNORMAL HEALTH CONDITION OCCURRED, DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE ANY OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL door flew back and hit him in the left side of face					
CAUSE OF INJURY CODE 156					
DATE RETURN(ED) TO WORK 10/15/09		IF FATAL, GIVE DATE OF DEATH none		WERE SAFEGUARDS OR SAFETY EQUIPMENT PROVIDED? ☐ YES ☐ NO	
				WERE THEY USED? ☐ YES ☐ NO	
PHYSICIAN/HEALTH CARE PROVIDER (NAME & ADDRESS) Paula Dyches, Claims Specialist		HOSPITAL (NAME & ADDRESS) none		INITIAL TREATMENT ☐ NO MEDICAL TREATMENT ☐ MINOR BY EMPLOYER ☐ MINOR CLINIC/HOSP ☐ EMERGENCY CARE ☐ HOSPITALIZED > 24 HRS ☐ FUTURE MAJOR MEDICAL/ LOST TIME ANTICIPATED	
WITNESSES (NAME & PHONE #) none					
DATE ADMINISTRATOR NOTIFIED 10/15/09		DATE PREPARED 10/15/09		PHONE NUMBER 803-612-7786	
PREPARER'S NAME & TITLE Paula Dyches, Claims Specialist		INFORMATION/SIGNATURE Paula Dyches			

SEE BACK FOR IMPORTANT

INFORMATION/SIGNATURE

JUN-5-2006 10:57A FROM:

WORKERS COMPENSATION FIRST REPORT OF INJURY OR

Employer Name & Address: J. C. Witherspoon, Jr., Inc. P. O. Box 289 Alcola, SC 29001 SIC Code Employer FEIN 57-0734562	Carrier (Name, Address, Phone) Capital City Insurance Company 3850 Fernandian Road Columbia, S.C. 29210 803-731-7228	Policy Period To Check if appropriate Self Insurance	Claims Administrator Southeastern Claims Services, Inc. Post Office Box 212128 Columbia, S.C. 29221 803-731-1745
---	--	---	--

Carrier FEIN	Policy # 01WC 402684	Administrator FEIN
Agent Name & Code Number		

Employee Information		4-5-04	
Name (Last, First, Middle) HALLAND, ANDREAL	Date of Birth	Social Security #	Date Hired 4-5-2004
Address 226 Branchview Drive Manning, S.C. 29102	Sex ☒ Male ☐ Female ☐ Unknown	Marital Status ☒ Unmarried/Single/ Divorced ☐ Married ☐ Separated ☐ Unknown	State of Hire SC
Phone 803-565-1100	# of Dependents 0	Occupation/Job Title Machine Operator	
Rate \$9.00 Per hour	Month Other Production bonus	# Days Worked/Week 5	Employment Status Full time 2710
NCCI Class Code		Full pay day of injury? Y Did salary continue? N	

Occurrence/Exposure			
Time Employee Began Work 7:00am	Date of Injury/Illness 06/01/2006	Time of Occurrence am 4:15 p.m.	Last work date
Contact Phone 473-4885	Type of Injury/Illness facial injury	Part of body: L. face	Date employer notified 06/01/06
Did injury/illness/exposure occur on employer's premises? Yes		Type of injury/illness code BROKEN NOSE & JAW	Parts of body - code

Department/location where accident or injury exposure occurred: sawmill	All equipment, materials, or chemicals employee was using when accident or illness exposure occurred: Gloves, hard hat, safety glasses, steel toe shoes
Specific Activity employee was engaged in when accident or injury exposure occurred: cleaning chipper	Work process employee was engaged in when accident or illness exposure occurred: Cleaning chipper
How injury or illness/abnormal health condition occurred. Describe the sequence of events & include any objects or substances that directly injured the employee or made employee ill. Cleaning chipper and The door flew back and hit him in the left side of face	

Date returned to work IN HOSPITAL	If fatal, date of death:	Were safeguards/safety equipment provided? Were they used? Yes	Yes
Physician/Health care provider (Name & Address) ???	Hospital (Name & Address) Richland Memorial Hospital Columbia, S.C.	Initial Treatment 3 0 No medical treatment 1 Minor by employer 2 Minor (clinic/hospital) 3 Emergency care 4 Hospitalized > 24 hours 5 Future major medical	
Witnesses (Name, Phone) Albert Leroy Frerson	Date Administrator Notified 06/01/06		
Date Prepared 06/01/06	Preparer's Name & Title Cindy Elmore, Human Resource manager	Phone 803-473-4885	

RECEIVED

Workers' Compensation Commission
 12 Marion Street
 Carolina 29202-1715

W. File # _____
 Carrier File # WC071306
 Carrier Code # 440
 Employer FEIN _____

Name _____				SSN _____				J.C. Witherspoon Jr Inc., DBA A&K Mulch			
Branchview Drive				Manning		SC		3467 Hwy 301 N.			
Address				City		State		Alcolu		SC	
()				()				Address		Zip	
Home Phone				Work Phone				Capital City Insurance			
								Insurance Carrier			
Sharon White Mack								(803) 731-1745 ext. 220			
Preparer's Name								Phone #			

A. Total Wages Paid

Date of Injury: 6/1/2006
 month day year

- Check Applicable Method:
 - ☒ Report of earnings of injured employee based on four completed quarters.
 - ☐ Report of earnings of injured employee who did not complete four quarters based on actual time worked.
 - ☐ Report of earnings of similar employee. Injured employee did not work sufficient time before alleged injury. Hire Date: _____
 - ☐ Report of earnings of injured employee based on alternative method because Form 20 results in a compensation rate that is not fair and just. (Attach documentation to show how average weekly wage and compensation rate were calculated.)
- List total wages paid as reported to Employment Security Commission on the Employer Quarterly Contribution and Wage Reports during the four quarters immediately preceding the quarter in which the injury occurred. Do not include the quarter during which the injury occurred.

Quarter	Ending Date	Total Wages Paid
1st	_____	_____
2nd	_____	_____
3rd	_____	_____
4th	_____	_____

Total Paid 2. _____

- List total value of other allowances of any character made in lieu of wages during four quarters above. 3. _____
- Add lines 2 and 3. TOTAL WAGES PAID: 4. 22934.09
- List total number of weeks paid to employee during the four quarters immediately preceding the quarter in which the injury occurred. 5. _____

B. Average Weekly Wage

- To calculate average weekly wage, divide total wages (line 4) by total weeks paid (line 5).
 AVERAGE WEEKLY WAGE: 6. 441.04

C. Compensation Rate

- The general rule for calculating the compensation rate is to multiply average weekly wage (line 6) by .6667. Estimate compensation rate by multiplying average weekly wage (line 6) by .6667. See part 8 below to determine the actual compensation rate. 7. _____
- The compensation rate is as follows (choose one):
 - ☐ When average weekly wage (line 6) is less than \$75.00, the compensation rate is the average weekly wage. Enter average weekly wage on line 8.
 - ☐ When the estimated compensation rate (line 7) is less than \$75.00 and average weekly wage (line 6) is more than \$75.00, the compensation rate is \$75.00. Enter \$75.00 on line 8.
 - ☐ When the estimated compensation rate (line 7) is more than the maximum compensation rate for the year in which the injury occurred, enter the maximum compensation rate for the year in which the injury occurred on line 8.
 - ☐ Employee is within the exceptions listed in S.C. Code Ann. Section 42-7-65. List applicable exception here and enter appropriate compensation rate on line 8: _____
 - ☐ The calculated compensation rate (line 7) applies. Enter amount from line 7 on line 8.

WEEKLY COMPENSATION RATE: 8. 294.04

Employer's representative shall prepare a Form 20 and serve per R.67-211 a copy on the claimant within thirty days of beginning temporary compensation. See R.67-1603 when no temporary compensation is paid. NOTE: Average weekly wage represents average gross pay before taxes and other deductions. WHEN THE CLAIMANT DOES NOT AGREE WITH THE COMPENSATION RATE ON LINE 8, HE OR SHE SHOULD CONTACT THE EMPLOYER'S REPRESENTATIVE TO TRY TO REACH AN AGREEMENT AS TO THE COMPENSATION RATE. IF NO AGREEMENT CAN BE REACHED THE CLAIMANT SHOULD CONTACT THE CLAIMS DEPARTMENT AT (803) 737-5723.

South Carolina Worker's Compensation Commission
P. O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File 0607813
Carrier File # WC071306
Carrier Code #
Employer FEIN 57-0734562

Andreal Holland

Claimant's Name SSN
Branchview Drive Manning, SC 29102

Address City State Zip
803-473-0133

Home Phone Work Phone

James M. Fennell, Esquire

Preparer's Name

J.C. Witherspoon, Jr., Inc

Employer's Name

PO Box 289 Alcolu, SC 29001

Address City State Zip

Capital City Insurance Company

Insurance Carrier

803-788-4370

Phone #

Complete each blank. To request a hearing, check box 13 b, indicate the kind of benefits claimed by checking the box(s) at line 6, 7, 8 and 9, and file this form in duplicate. A claim for workers' compensation benefits is made based on the following grounds:

- 1a. The Claimant an accidental injury to the nose, face, teeth, brain, & psychological problems 6/1/06
part of body hurt month day year
In Clarendon State of South Carolina.
- 1b. Describe briefly how the accident occurred; claimant was found unconscious; details unavailable
2. Both Claimant and Employer were subject to the South Carolina Worker's Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of the injury.
4. At the time of the injury the Claimant was performing services in the course of employment.
5. Notice of the accidental injury was given to the employer on 6/1/06 in the following manner: immediate supervisor notified
- ☒ 6. Due to injury, the Claimant is in need of (check one): ☒ (a) medical examination and treatment for nose, teeth, face, brain, & psychological problems
☒ (b) additional medical examination and treatment for nose, teeth, face, brain, & psychological problems
- ☒ 7. Due to injury the Claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 6/1/06 to MMI
- ☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent: (check one) ☒ (1) General Disability: ☒ Total ☐ Partial ☒ (2) Specific Disability: ☒ Total ☐ Partial
- ☒ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of TBD.
- 10a. At time of injury, the Claimant was paid weekly wages of \$360.00 and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: not known
- 11a. Further grounds of claim: All applicable grounds under statute; all grounds of relief under SWCC
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: Palmetto Richland Hospital 5 medical park Columbia, SC 29203, Charlotte Institute of Rehabilitation 1100 Blythe Blvd Charlotte, NC 28203
- 11c. To the best of your knowledge, did you have any prior permanent disability? NO
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☒ 13a. I am filing a claim. I am not requesting a hearing at this time.
- 13b I am requesting a hearing

Signature of Claimant/Representative

Date

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615.

Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC Form #50 Rev. Date 9/90

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

JUN 19 2006

Division of



Claimant's Name: Andreal Holland SSN: _____ Employer's Name: JC Witherspoon
Address: Branchview Dr Address: PO Box 289
City: Manning State: SC Zip: 29102 City: Alcolu State: SC Zip: 29001
Home Phone: (803) 435-4916 Work Phone: (803) 225-2781 Insurance Carrier: Southeastern Claims
Preparer's Name: James M. Fennell Law Firm: Peake, Fowler & Associates PA Preparer's Phone #: (803) 788-4370

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

A claim for workers' compensation benefits is made based on the following grounds:
☒ Injury ☐ Illness ☐ Repetitive Trauma

Date of Injury or Illness: 6/1/2006

- 1a. The claimant sustained an injury to Brain, face, head, teeth, & physiological problems (Part(s) of Body Injured) on 6/1/2006 (Month/Day/Year) in county, state of _____
1b. Body part(s) affected are: Brain, face, head, teeth, & physiological problems
Briefly describe how the accident occurred. was hit by wood chipper door
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 6/1/2006 (Month/Day/Year) in the following manner:
was taken by ambulance from work
- ☒ 6. Due to injury, the claimant is in need of (check one):
☒ (a) medical examination and treatment for: Brain, face, head, teeth, & physiological problems
☒ (b) additional medical examination and treatment for: Brain, face, head, teeth, & physiological problems
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
6/1/2006 - MMI
- ☒ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
☒ (1) General Disability: ☒ Total ☐ Partial ☒ (2) Specific Disability: ☒ Total ☐ Partial
☐ (3) Wage Loss
- ☒ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of:
To be determined
- 10a. At the time of the injury, the claimant was paid weekly wages of \$TBD, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
none
- 11a. Further grounds or unusual aspects of claim:
All applicable grounds under statute; additional medical treatment
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Charlotte Rehab; Dr. Troyer; Dr. Dowdy
- 11c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13a. I am filing a claim. I am not requesting a hearing at this time.
☒ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: _____

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

Preparer's Signature: James M. Fennell Attorney: Peake, Fowler & Associates PA Email: jfennell@peakefowler.com
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.



WCC #: 0607813
Case File #: WC071306
Carrier Code #: 440
Employer FEIN #: 570734562

Claimant's Name: Andreall Holland SSN: _____

Address: Branchview Drive

City: Manning State: SC Zip: 29102

Home Phone: () Work Phone: ()

Date of Injury: 06/01/06

Employer's Name: J. C. Witherspoon, Jr. Inc.

Address: PO Box 289

City: Alcolu State: SC Zip: 29001

Insurance Carrier: Capital City Insurance

Preparer's Name: Mark D. Cauthen, Esquire Law Firm: McKay Law Firm Preparer's Phone #: (803) 256-4645

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

Date of Injury or Illness: 06/01/06

1. It is **admitted in part** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are: It is admitted that the claimant sustained injuries to his head/brain, face and teeth on or about 6/1/06. It is denied that the claimant sustained psychological injuries.
2. It is **admitted** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See #1.
3. It is **admitted** the relationship of employer and employee existed at the time in question. The reasons for denial are: See #1.
4. It is **admitted** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: See #1.
5. It is **admitted** notice of injury was given the employer. The reasons for denial are: See #1.
6. It is **admitted in part** the employee is entitled to additional medical care as a result of injury or illness. It is admitted that claimant is entitled to medical treatment for all causally related injuries. Deny that claimant is entitled to psychological treatment.
7. It is **admitted** the employee is entitled to temporary total disability for the period(s) of: TTD benefits are ongoing.
8. It is **denied** the employee is permanently disabled. The reasons for denial are: Defendants will require proof of permanent disability.
9. It is **denied** the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ Form 20 applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are: All defenses available under 42-9-60; 42-15-20; 42-15-40; 42-15-60; 42-15-80; 42-17-90 and 42-9-210, Code of Laws of South Carolina, 1976. Defendant/Carrier also reserves the right to amend this Answer. Any and all defenses available to employer and carrier in workers' compensation cases, including specifically, but not limited to, all affirmative defenses as set forth in R. 67-603. The Defendant/Carrier also raises the Defense enunciated in Cooper v. McDevitt & Street, regarding material false statement made in a job application.
12. Estimated time needed for hearing: 30 minutes

Certify I have served this document pursuant to R.67-212 by delivering a copy to:

Name: James A. Fennell

Address: PO Box 23601, Columbia, SC 29224

the February day of 5th, 2009 by ☒ first class mail ☐ personal service ☐ certified mail.
I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: Mark D. Cauthen Attorneys for Defendants
Title: _____

mcauthenmckayfirm.com
Email: _____

February 18, 2009
Date: _____

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



Claimant's Name: Andreal Holland Employer's Name: J.C. Witherspoon, Jr., Inc.
Address: Branchview Drive Address: PO Box 289
City: Manning State: SC Zip: 29102 City: Alcolu State: SC Zip: 29001
Home Phone: () Work Phone: () Carrier: Capital City Insurance
Preparer's Name: Mark D. Cauthen, Esquire Preparer's Phone #: (803) 256-4645

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$294.04 2. AWW: \$441.04 Date of Injury: 06/01/06
3. Type of injury and body part(s): Head, brain, face and teeth
4. Facts in controversy: Whether claimant elected his remedy and is barred from workers' compensation benefits due to failure to file Form S-2; Whether claimant is at MMI; Whether claimant is permanently and totally disabled; whether claimant is entitled to lifetime workers' compensation benefits and/or medical benefits; whether claimant sustained psychological injury
5. Legal issues involved: See No. 4.
6. Unusual aspects: Claimant has refused to provide deposition. Motion to Compel outstanding.
7. Witnesses (designate if expert):* Martha Odom or other representative of the employer/carrier, Hollie Hoadwonic, the claimant and any witnesses listed by the claimant (The Defendants reserve the right to cross-examine any expert submitted by the claimant pursuant to 1-23-330 (3). The Defendants reserve the right to amend their Pre-hearing brief upon receipt of additional information.
8. Exhibits: Employee records; Deposition transcript of Claimant (If so ordered pursuant to Defendant's Motion to Compel filed with the Commission on 05/05/09); Summons & Complaint, Andreal Holland by his GAL, Peggy Knox v. Morbark, Inc., et. al.
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See APA Submissions.
10. Name, address, and specialty, if any, of the treating physician: Devin Troyer, MD, Physical Medicine and Rehabilitation Outpatient Consultation; 2935 Colonial Drive, Columbia, SC 29203
11. Impairment rating(s); body part(s); physician and date of opinion: "20% whole person", Dr. Devin Troyer, dated 03/17/08
12. I am amending my Form 50/51 in the following manner: Defendants raise defense of election of remedies pursuant to claimant's failure to file WC Form S-2, Notice of Third-Party Action, along with Third Party Summons & Complaint

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

Signature: Mark D. Cauthen

Email: mcauthen@mckayfirm.com

Date of hearing: May 20, 2009 (Commissioner Beck)

Time needed for hearing: 1 Hour

On behalf of ☐ Claimant ☒ Employer

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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andreal Holland,

Claimant,

vs.

JC Witherspoon, Jr., Inc.,

Employer,

and

Capital City Insurance,

Carrier.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

) WCC FILE NO.: 0607813

) NOTICE OF WITNESSES AND
) WRITTEN REPORT(S)
) OR OTHER EVIDENCE TO BE
) INTRODUCED ON BEHALF OF
) THE EMPLOYER/CARRIER

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION THOMAS K.
FOWLER, JR., COUNSEL FOR THE CLAIMANT:

YOU ARE HEREBY NOTIFIED THAT THE employer/carrier, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330 (1976, as amended), herewith submits the following reports/physicians or other evidence on behalf of the employer/carrier, to wit:

TAB	NAME OF PHYSICIAN/OTHER	DATE OF REPORTS	NO.
1	Palmetto Health Richland	06/01/06-07/17/06	1-49
2	Carolinas Rehabilitation	06/14/06-10/30/06	50-103
3	Hoadwonic & Associates Case Management & Consulting Services	07/18/07	104-107

EXHIBITS:

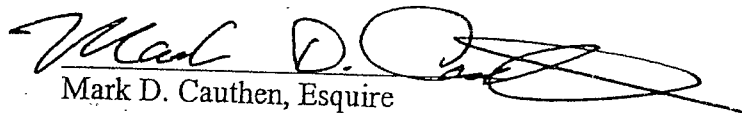
1	Employee records
2	Deposition transcript of Claimant (If ordered pursuant to Defendant's Motion to Compel filed 5/5/09)
3	Summons & Complaint, Andreal Holland by his GAL, Peggy Knox v. Morbark, Inc., et.al.

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER HEREBY NOTIFIED that the originals of the documents referred herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the employer/carrier.

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

Martha Odom or other Representative of the Employer/Carrier, Hollie Hoadwonic, Claimant and any witnesses listed by the Claimant.



Mark D. Cauthen, Esquire
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645.

Attorneys for Defendants

Columbia, South Carolina
May 11, 2009



11/20

AMENDED

Claimant's Name: Andreall Holland Employer's Name: J.C. Witherspoon, Jr., Inc. & A&K Mulch, LLC
Address: 726 Branchview Drive Address: PO Box 289
City: Manning State: SC Zip: 29102 City: Alcolu State: SC Zip: 29001
Home Phone: () Work Phone: () Carrier: Capital City Insurance
Preparer's Name: Mark D. Cauthen, Esquire Preparer's Phone #: (803) 256-4645

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$294.04 2. AWW: \$441.04 Date of Injury: 06/01/06
3. Type of injury and body part(s): Head, brain, face and teeth
4. Facts in controversy: Whether claimant elected his remedy and is barred from workers' compensation benefits due to failure to file Form S-2; Whether claimant is at MMI; Whether claimant is permanently and totally disabled; Whether claimant is entitled to lifetime workers' compensation benefits and/or medical benefits; Whether claimant sustained psychological injury
5. Legal issues involved: See No. 4.
6. Unusual aspects: _____
7. Witnesses (designate if expert):* Martha Odom or other representative of the employer/carrier, Hollie Hoadwonic, the claimant and any witnesses listed by the claimant (The Defendants reserve the right to cross-examine any expert submitted by the claimant pursuant to 1-23-330 (3). The Defendants reserve the right to amend their Pre-hearing brief upon receipt of additional information.
8. Exhibits: Employee records; Deposition transcript of Claimant; Summons & Complaint, Andreall Holland by his GAL, Peggy Knox v. Morbark, Inc., et. al.; Form S-2s
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See APA Submissions.
10. Name, address, and specialty, if any, of the treating physician: Devin Troyer, MD, Physical Medicine and Rehabilitation Outpatient Consultation; 2935 Colonial Drive, Columbia, SC 29203
11. Impairment rating(s); body part(s); physician and date of opinion: "20% whole person", Dr. Devin Troyer, dated 03/17/08
12. I am amending my Form 50/51 in the following manner: Defendants raise defense of election of remedies pursuant to claimant's failure to file WC Form S-2, Notice of Third Party Action, along with Third Party Summons & Complaint

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

Signature: Mark D. Cauthen

Email: mcauthen@mckayfirm.com

Date of hearing: November 20, 2009 (Commissioner Beck)

Time needed for hearing: 1 Hour

on behalf of ☐ Claimant ☒ Employer

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

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER HEREBY NOTIFIED that the originals of the documents referred herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the employer/carrier.

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

Martha Odom or other Representative of the Employer/Carrier, Hollie Hoadwonic, the Claimant and any witnesses listed by the Claimant.



Mark D. Cauthen, Esquire
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorneys for Defendants

Columbia, South Carolina
November 10, 2009



06-06-049 WC

The use of this form is required under the provisions of the South Carolina Workers' Compensation Law.

NOTICE
OF
THIRD PARTY ACTION
EMPLOYEE

In the Workers' Compensation Claim of

Andreal Holland, Employee

, Claimant(s)

vs.

J.C. Whitterspoon, Morbark, Inc., Precision Husky Corporation,
A&K Mulch, LLC, and Watford Industry, Inc., Employer

Southeastern Claims, Carrier

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above-named Carrier or Self-Insurer Employer:

PLEASE TAKE NOTICE that an action has been commenced against J.C. Whitterspoon, Morbark Inc., Precision Husky Corporation, AK Mulch, LLC, Watford Industry, Inc.

as defendant(s) in the Court of Common Pleas

County of Clarendon and State of South Carolina

under date of October 10, 2008

Andreal Holland

Employee or Surviving Workers'
Compensation Beneficiary

DATED: October 13, 2009

Attorney for Employee or Surviving Workers'
Compensation Beneficiary

A copy of this form must be served upon the South Carolina Workers' Compensation Commission, the Workers' Compensation carrier or self-insurer employer by personal service, registered or certified mail within thirty (30) days after third party action commenced; and, the third party action must be commenced within one (1) year after employer-carrier accepts liability for or makes payment of compensation as provided in the Workers' Compensation Law.



The use of this form is required under the provisions of the South Carolina Workers' Compensation Law.

NOTICE OF THIRD PARTY ACTION EMPLOYEE

In the Workers' Compensation Claim of

Andreal Holland

, Employee

, Claimant(s)

vs.

JC Witherspoon, Jr., Inc., ID # 070-06 & AK Mulch, LLC

, Employer

Capital City Insurance Company, Inc.

, Carrier

TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION and the above-named Carrier or Self-Insurer Employer:

PLEASE TAKE NOTICE that an action has been commenced against Morbark Inc., Precision Husky Corporation, AK Mulch, LLC, Watford Industry, Inc.

as defendant(s) in the Court of Common Pleas

County of Calhoun

and State of South Carolina

under date of October 10, 2008

Andreal Holland

Employee or Surviving Workers'
Compensation Beneficiary

DATED: May 14, 2009

Attorney for Employee or Surviving Workers'
Compensation Beneficiary

RECEIVED

Division of Claims
Claims Administrator
MAY 19 2009

A copy of this form must be served upon the South Carolina Workers' Compensation Commission, the Workers' Compensation carrier or self-insurer employer by personal service, registered or certified mail within thirty (30) days after third party action commenced; and, the third party action must be commenced within one (1) year after employer-carrier accepts liability for or makes payment of compensation as provided in the Workers' Compensation Law.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1333 Main Street, Suite 500
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0607813
Carrier File # WC071306
Carrier Code # 440
Employer FEIN 570734562

Andreal Holland
Claimant's Name SSN
Branchview Drive, Manning, SC 29102
Address City State Zip
() ()
Home Phone Work Phone

J.C. Witherspoon, Jr., Inc.
Employer's Name
PO Box 289, Atco, SC 29001
Address City State Zip
Capital City Insurance
Insurance Carrier

Mark D. Cauthen, Esquire
Preparer's Name (803)256-4645
Phone #

The date of injury reported on the Form 12A
is: 06/01/06

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

☒ I. Stop payment of compensation. Compensation payments are current as of 07/29/10 and shall continue until
date
otherwise ordered or until a Form 17 is signed by the claimant. A Form 17 was offered and refused on 08/10/10
date

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

- ☒ (a) The authorized health care provider states the claimant has reached maximum medical improvement.
☐ (b) The authorized health care provider states the claimant is able to return to the same or other suitable job and has assigned an impairment rating, if any, and the same or suitable job has been offered to the claimant.
☐ (c) The authorized health care provider states the claimant is unable to return to the same or other suitable job and has assigned an impairment rating, if any.

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

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

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

☒ III. Pay compensation in the amount of \$ 0, based on the following grounds: Claimant elected his remedy by failure to timely file Form S-2 after commencement of third-party lawsuit and is barred from workers' compensation benefits.

☒ IV. Request Credit for overpayment of temporary compensation.

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

Compensation payments are current as of _____ and shall continue until otherwise ordered or until a
date
Form 17 is signed by the claimant.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Thomas K. Fowler, Jr., Esquire
Peake, Fowler & Associates, P.A., PO Box 23601, Columbia, SC 29224

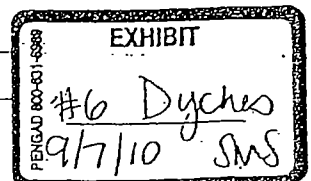
On
the 10th day of August, 2010 by x first class postage, _____ certified mail, _____ Personal service.


Preparer's Signature

Attorney for Employer/Carrier
Title

August 10, 2010
Date

Address



South Carolina Workers' Compensation Com.
1612 Marion St.
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739
www.wcc.sc.gov



11/2 SL LEMENTAL PRE-HEARING
BRIEF

Claimant's Name: Andreal Holland

Employer's Name: JC Witherspoon, Inc. & A&K Mulch, LLC

Address: Branchview Dr

Address: PO Box 289

City: Manning State: SC Zip: 29102

City: Alcolu State: SC Zip: 2900

Home Phone: (803) 435-4916 Work Phone: (803) 410-0397

Carrier: Capital City Insurance

Preparer's Name: Thomas K. Fowler, Jr.

Preparer's Phone #: (803) 788-4370

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

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$ 294.04 2. AWW: \$ 441.04 Date of Injury: 6/1/2006
3. Type of injury and body part(s): Brain, face, head, teeth, & physiological problems
4. Facts in controversy: Percentage of disability due to claimant's physiological problems, carpal tunnel, and dental issues; Whether claimant has reached maximum medical improvement; Whether Claimant is entitled to lifetime medical; Whether Claimant is entitled to continued TTD; Claimant's degree of permanency; as to Defendants claim of election of remedy, Claimant would aver the Defendant is barred from such relief upon the grounds of incapacity of Claimant, laches, estoppel, unclean hands, waiver.
5. Legal issues involved: See #4. All applicable statutes, regulations and case law; and See Addendum attached hereto.
6. Unusual aspects: None anticipated.
7. Witnesses (designate if expert):* Claimant, James M. Fennell; Don Jonas; Claimant reserve the rights to cross examine any expert submitted by the defense. Claimant reserves the right to amend the Pre-Hearing Brief upon receipt of any additional information.
8. Exhibits: Petition & Order For Appointment of Guardian Ad Litem; Administrative Order To Appoint Peggy Knox Guardian; Complaint filed against A&K Mulch; Amended Complaint against A&K Mulch; Answer of A&K Mulch; Defendant A&K Mulch Response's to Request to Admit; S-2 filed May 14, 2009; S-2 filed October 13, 2009; SC Secretary of State record of J.C Witherspoon, Jr., Inc.; Federal employer ID numbers for JC Witherspoon, Jr. Inc. and A&K Mulch, LLC; Deposition of Paula Dyches; Employer File; Carrier File; Correspondence from Paula Dyches to Daryl Starkey; Social Security Administration Decision on Claimant; Deposition of J. C. Witherspoon; Secretary of State's Articles of Organization; Dismissal of Defendants A&K Mulch
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See APA submissions and Supplemental APA Submissions.
10. Name, address, and specialty, if any, of treating physician: Dr. William Ross- PO Box 550 Manning, SC 29102- ER Physician
Dr. Lenwood Smith-5 Richland Memorial Park Drive Columbia, SC 29203 -Surgeon; Dr. Flora Hammond -Carolinas Rehabilitation
Dr. Devin Troyer 2935 Colonial Drive Columbia, SC 29203; Dr. Ernest Dowdy D.D.S; Dr. David Fulton Moore Othopaedics; Dr. Robert E. Deysach, PhD HealthSouth Rehabilitation
11. Impairment rating(s); body part(s); physician and date of opinion: 20% -whole person -Dr. Devin Troyer -3/17/08; 1% left upper extremity-Dr. David Fulton 6/22/2009
12. I am amending my Form 50/51 in the following manner: _____

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

Signature: _____

Email: fowlertk@peakefowler.com

Date of hearing: November 12, 2010

NOV 12 2010

Time needed for hearing: 1 day

On behalf of ☒ Claimant ☐ Employer

S.C. WORKER'S COMP COMM.

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

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

CERTIFICATE OF SERVICE

The undersigned employee of Peake & Fowler Law Firm on behalf of the Claimant does hereby certify that she has served the following named individuals(s) with a copy of the pleading indicated below by mailing a copy of same in the United States mail with sufficient postage affixed thereto and return address clearly marked on the date indicated below.

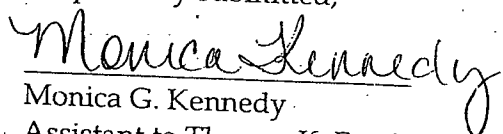
COUNSEL SERVED:

Mark Cauthen, Esquire
Post Office Box 7217
Columbia, SC 28202

PLEADING(S):

WCC Form 58, Notice of Witnesses
and Medical Reports to be submitted
by Claimant/Employee

Respectfully submitted,



Monica G. Kennedy
Assistant to Thomas K. Fowler, Jr., Esquire
9357 Two Notch Road
P.O. Box 23601
Columbia, SC 29224
Telephone: (803) 788-4370
Facsimile: (803) 788-7432

Columbia, South Carolina
November 8, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Andreal Holland
Claimant,

WCC FILE #: 0607813

vs.

JC Witherspoon, Inc & A& K Mulch
Employer.

SUPPLEMENTAL APA SUBMISSIONS *and*
NOTICE OF WITNESSES

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND Mark
Cauthen, Esq., ATTORNEY FOR EMPLOYER/CARRIER:

YOU ARE HEREBY NOTIFIED that the Claimant, pursuant to the provisions of the South Carolina Workers Compensation Act and the South Carolina Code of Laws, 1976, as amended, Section 1-23-330, and such regulations issued pursuant thereto, will move at such time as this case is heard before the Commission for the admission of the following reports as direct evidence, to wit:

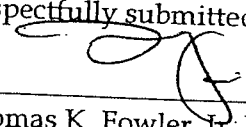
	MEDICAL EVIDENCE OR OTHER EVIDENCE	PHYSICIAN	DATES	PAGES
13	Adams & Wilkinson	Glen K. Adams, MRC,CRC,CEES	11/2/10	208-224

YOU ARE FURTHER NOTIFIED that you have the right to cross-examine or otherwise oppose this evidence and, should you desire to exercise this right, you are to promptly schedule the deposition of any provider whose records are submitted, for the purposes of cross-examination, or otherwise promptly submit opposing medical records into evidence.

YOU ARE FURTHER NOTIFIED that these records, or photocopies of the same, will be provided to the South Carolina Workers' Compensation Commission for insertion in their file and for consideration as evidence on behalf of the Claimant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of
the Claimant: Claimant

Respectfully submitted



Thomas K. Fowler, Jr. Esquire
Attorney for Claimant
9357 Two Notch Road Suite 202
Post Office Box 23601
Columbia, SC 29224
803 788-4370

Columbia, South Carolina
November 8, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS COMPENSATION
COMMISSION

ANDREAL HOLLAND, by and through)
His Guardian Ad Litem, PEGGY KNOX,)

Claimant,)

J.C. WITHERSPOON, INC.)

And)

A.K. MULCH, LLC,)

Employer,)

And)

CAPITAL CITY INSURANCE,)

Carrier.)

WCC FILE NO. 0607813

**CLAIMANT'S BRIEF
IN OPPOSITION TO
CARRIER'S FORM 21**

Carrier asserts Claimant has elected his remedy by commencing a Third Party action and failing to file and serve an S-2, within 30 days and should be barred from receipt of further workers compensation benefits . In response Claimant would show:

- 1) The defense is untimely, improperly raised and has been waived by Carrier; and
- 2) Even if available to Carrier, the defense of election is based upon factual and legal error and it is in fact the Carrier who has failed to abide the statutory notice duties; and,
- 3) Many equitable doctrines provide a basis to deny the relief requested by the Carrier, including:

-failure to pay benefits due

-unclean hands,

-estoppel,

-laches and

-waiver

4) Incompetency of Claimant.

ARGUMENTS:

1) The defense is untimely, improperly raised and has been waived by Carrier;

FACTS:

- A) The adjuster handling this claim, Ms. Paula Dyches, entered into an agreement to jointly pursue the Third Party action with Claimant's attorneys. As consideration of this agreement, Claimant's attorneys paid half the costs of the expert, engineering investigation into the machine in preparation of the Third Party action. (see APA 22 and APA 30, deposition of Fennell)
- B) Ms. Dyches participated in the investigation of the Third Party Action in concert with Claimant's attorneys. (See APA 21).
- C) Ms. Dyches discussed the Third Party case with Claimant's attorneys on several occasions. "I spoke with James Fennell maybe about a couple of times in regards to the third party". (see APA 19, Deposition of Dyches, page 20, lines 21-22)

- D) The Third Party Complaint was filed on October 10, 2008, (see APA 10), and A&K Mulch, LLC, was a named Defendant. The adjuster, Paula Dyches, testified about the contents of her file and stated she had the Third Party action documents Don Jonas, the attorney handling that case, had prepared. She explained "Mark Cauthen was sent the Complaint and to – for the file". (see APA 19, Deposition of Dyches, page 17, line 25) She also had a copy of the Amended Complaint in her file stamped indicating receipt by her apparently on March 10, 2009. (See APA 23)
- E) Carrier had Ms. Dyches, another adjuster, Mr. Cauthen and another attorney involved with the Third Party action. (see APA 19, deposition of Dykes page 17, lines 14-17, and page 30, line 14 through page 31, line 1, and page 31, line 15 through page 32, line 6)
- F) The Carrier filed its Form 51, on February 19, 2009, and did not raise the defense of election of remedies. The Carrier has waived the defense. (see APA exhibit 31). In that answer, Carrier raised seven (7) statutory and one regulation defense but omitted the defense of election, (see APA 31, Form 51).
- G) The original Form 51, served February 19, 2009, was never amended nor any other Form 51 served.
- H) The Carrier failed to raise the election claim timely and only then upon a Form 58.

I) With unreasonable delay, the election of remedy defense was never raised until May 11, 2009, nine (9) days prior to the scheduled hearing on May 20th, 2009, and only upon Carrier's Form 58. This was untimely and should not now be considered. (See APA 32, Carrier's Form 58, undated with accompanying Certificate of Service dated May 11, 2009);

J) Carrier never raised the defense of election by Form 51.

K) At the May 20, 2009, hearing, the Carrier failed to go forward on its claim to add the defense of election. The parties attended and an two (2) Orders issued (on September 29, 2009) adding which is the true Employer, A&K Mulch, LLC. (see APA 8, Order) and allowing the deposition of Claimant upon the condition the Guardian could attend and participate (see APA 33, Order for deposition of Claimant).

The Carrier did not pursue its request to be allowed to allege the defense of election.

L) Carrier has never since pursued not asked for a hearing upon its request to be allowed to allege election. Instead, Carrier has improperly attempted to raise the issue by Form 21, in complete derogation of §42-1-705.

A) STATUTORY REQUIREMENTS OF FORM 51 ANSWER AND DEFENSES and PROPER METHOD TO REQUEST TO PRESENT DEFENSE

OMITTED FROM FORM 51:

The Carrier's Form 51 is to contain all known defenses and the controlling statute, § 42-1-705, entitled "Employer's Answer to Request for Hearing (Form 51); specificity as to possible defenses", mandates that:

(A) The commission's Employer's Answer to Request for Hearing form, hereinafter referred to as Form 51, must describe with as much specificity as possible the defenses to be relied upon by the defendants. A Form 51 shall not state that "all defenses apply" or other similar language, unless such is actually the case. A Form 51 which does not conform to the requirements of this subsection shall not be considered at a hearing.

(B) Nothing in this section prohibits a commissioner from considering a defense not listed on a Form 51 if:

(1) it is proven to the satisfaction of the commissioner that the defendants **had no knowledge** of the facts supporting the defense on the date of the completion of the Form 51; and

(2) in the case of represented defendants, the defense omitted on the Form 51 is set forth on the commission's Pre-Hearing Brief form, and such **brief is timely filed with the commission and timely served upon the parties.**

(C) A Form 51 must be signed by an attorney, verifying that the contents of the form are accurate and true to the best of the attorney's knowledge. If the employer is unrepresented and completes a Form 51, the employer must sign the form, verifying that the contents are accurate and true to the best of the employer's knowledge. (emphasis added)

There is a two pronged test before a defense omitted from a Form 51, may be considered or raised later. Carrier fails to pass the test of Subsections B(1) and B(2).

1) Carrier must have no knowledge of the facts supporting the defense.

As set forth above, Carrier had knowledge of the Third Party and that no S-2, had been served upon it and could have alleged the defense but failed to do so. All subsequent attempts to raise the issue by additional Forms 58 served by Carrier, fail upon the same basis.

2) The Form 58 must be served and filed timely. The Carrier's initial Form 58, wherein election is first raised, is undated but the certificate of service confirms it being served on May 11th, nine (9) days prior to

the scheduled hearing on May 20th. Thus, Carrier failed to serve the Form 58 timely as Rules 67-611 and 67-211, require the same be served "at least ten (10) days before the hearing" required by Rule 67-611 and/or 67-211.

Due to these failures, §42-1-705 would bar the consideration of the defense of election of remedies.

Further, Rule 67-610, requires that:

"A. After a Request for Hearing and Answer are filed with the Commission, an "Amended" form must be filed to indicate a change in the nature of the claim, relief requested, or another defense." (emphasis added)

~~"B. A party may amend a form once as a matter of course at any time before or within thirty days after it is served. Otherwise, a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party."~~

The Carrier never served an Amended Form 51 nor any motion or other document asking for leave to do so. Further, Carrier waived and abandoned the defense and any rights to request leave to raise the defense by not pursuing the same at any scheduled hearing.

B) COMMON LAW AS TO WAIVER OF DEFENSE/AFFIRMATIVE
DEFENSE

As it has developed, the election of remedy defense in the workers compensation arena is in the nature of an affirmative defense and a defense or affirmative defense not raised is waived. The Carrier further waived the affirmative defense of election of remedies by not pursuing it at the hearing set for May 29th, 2009, just prior to the expiration of the statute of limitations.

A waiver is an intentional relinquishment of a known right. *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981). It may be either **express or implied**. *Lawrimore v. American Health and Life Insurance Co.*, 276 S.C. 112, 276 S.E.2d 296 (1981). **An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable.** *Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148 S.E.2d 369 (1966). (emphasis added)

Lyles v. BMI, Inc., et al

292 S.C. 153355 S.E.2d 282 at 285 (S.C.App. 1987)

Defendant further waived the defense of election for failure to raise it timely.

"[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."

Strickland v. Strickland,

375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007)

"Statutory prohibition is in the nature of an **affirmative defense** precluding enforcement of a contract and should be pled." *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct.App.2008) (citing *Costa and Sons Constr. Co. v. Long*, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991)); see also *Skiba*, 374 S.C. at 210, 648 S.E.2d at 606 (noting that section 40-11-370 is an **affirmative defense**). "The failure to **plead an affirmative defense** is deemed a waiver of the right to assert it."

The statutory prohibitions provided by §42-1-540, *et seq*, should have been plead. A review of the Form 51 clearly shows Carrier plead virtually every statutory defense known to man and certainly indicates it knew how but clearly chose not to assert election of remedies. This is a voluntary omission based upon facts actually known to Carrier at the time.

A Form 21, is not the proper manner in which to raise a defense. As stated above all defenses are to raised by Form 51. Carrier failed to pursue the issue at *any* prior, scheduled hearing.

- 2) Even if available to Carrier, the defense of election is based upon factual and legal error and it is in fact the

Carrier who has failed to abide by its statutory notice

duties;

Erroneously the Carrier takes the position that failure to file an S-2 within thirty (30) days of Claimant's commencement of a third party action acts as an election of remedies so as to bar the Claimant from receiving further Workers Compensation benefits. **That is not the law.**

FACTS:

- A) If the Third Party suit had been commenced within one (1) year of the accident, Carrier's contention might be viable but that is not what happened in this case. The Third Party action was not begun until well into the third year after the date of accident.
- B) Carrier never filed or served an S-1, as required by 42-1-560 (c); (see APA 30, deposition of Fennell)
- C) At the time of the Third Party action, the duty was actually upon the Carrier to serve and file notices which it has failed to do.

This is a case of the Carrier asking for relief without itself complying with the mandatory provisions of § 42-1-560. Our Supreme Court said:

"Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of §42-1-560 and leave it to the Legislature to amend and define its ambiguities."

Callahan v. Beaufort County School District
375 SC 92, 651 SE2d 311, (2007) at page 3

and doing so in this case means the Carrier should be denied the relief requested. The Carrier has failed to comply with the notice and filing requirements of the statute.

Further, in *Callahan, supra* the Claimant was allowed to cure the error of failing to file and serve the S-2, timely by being permitted to dismiss the Third Party Action without prejudice. Due to the actions of the Carrier herein, Claimant Holland was denied this opportunity if it was even necessary.

The majority of the cases decided on the issue of election of remedy by a Claimant involved settlements or finalized third party claims without notice to the carrier. Such is not the case here as the Third Party claim is ongoing and being pursued by joint agreement of the Claimant and Carrier.

STATUTORY REQUIREMENTS OF §42-1-560:

Specifically, after the first year following an accident, the law requires:

*".....the carrier **shall give the Industrial Commission, the injured employee.....notice , upon a form prescribed by the Industrial Commission, that action has been or will be commenced against the third party.**" [emphasis added/portion of 42-1-560 (c)]*

At the time the Third Party action was commenced, the notice duties were upon the Carrier who failed to abide them. Simply put, the Carrier in this case has failed to perform and satisfy its statutorily mandated duties and is therefore not entitled to the relief requested.

There are essentially two (2) distinct time and notice requirements set forth in Section 42-1-560.

1) Sub-section B:

If the Third Party action is commenced within the first year after the injury, Claimant has the right to do so and must file and serve an S-2 within 30 days of commencement of the action; but

2) Sub-section C:

If Claimant does *not* commence the Third Party action in the first year, the right is assigned to the Carrier and it **must**:

- a) serve notice of claim within 20 days; and
- b) file and serve an S-1 within the following 90 days.

The Third Party action was not commenced within one (1) year so Carrier's contention as to election is without merit. At the time of suit, the duty was upon the Carrier to provide notices.

The relevant statute, section B, plainly states that *if the action is brought within one (1) year of the date of accident*, the S-2 must be served and filed within thirty (30) days of the commencement of the action. If not commenced within the first year, the right of action becomes assigned to the Carrier.

The one case that even nearly resembles the facts in this case, is *Callahan*, cited above. However, there is a vast factual difference in the Court's ruling that the S-2 must be served and filed within 30 days of commencement of the Third Party action. In *Callahan*, following dates applied:

<u>Date of Injury</u>	<u>50 filed</u>	<u>3rd Party filed</u>	<u>S-2</u>
November 14, 2002	Jan. 17, 2003	Jan. 24, 2003	July 16, 2003

Suit was filed *within the first year*.

In this case the action was not commenced in year one (1) but rather year three (3) and the Carrier has yet to fulfill its obligations under the statute. As a result, the Carrier is not entitled to the relief requested.

In the second year and thereafter, Section C places the burden for notice and action upon the Carrier. Paragraph C, Section 42-1-560, S.C. Code of Laws, 1976, transfers the right to a third party action to the Carrier and **requires** it to

- 1) notify the injured employee (or his personal representative) that Claimant's failure to file a suit will operate as an assignment to the Carrier; *and*,
- 2) file and serve an S-1,

The Carrier has failed to do so. As quoted from *Callahan* we must "*strictly construe the requirements of §42-1-560*", against the Carrier as well.

There are numerous other reasons for denial of the relief requested.

Claimant has raised numerous other defenses including waiver, unclean hands, estoppel and laches against the claim herein of the Carrier.

- 3) Many equitable doctrines provide a basis to deny the relief requested by the Carrier, including *failure to pay benefits due, unclean hands, estoppel, laches and waiver*.

THE FACTS AS TO ALL DEFENSES:

- 1) There was a contract and agreement between the parties to pursue the Third Party claim jointly and for which money consideration was paid.
 - a) Claimant's attorneys and the Carrier agreed soon after the injury to investigate and pursue the Third Party action jointly (see deposition of Attorney Fennell and deposition of Paula Dyches) and,
 - b) In consideration of this agreement, Claimant paid a valuable consideration by reimbursing the Carrier for one-half the cost of the expert engineer who examined the equipment upon which Claimant was injured (see APA 22).

- 2) Carrier unreasonably delayed raising the issue of election until less than 20 days prior to the expiration of the statute of limitations thus forcing the Claimant to pursue the Third Party action instead of being able to dismiss without prejudice as in *Callahan*.
- 3) Carrier was represented and well aware of the defense but delayed raising the issue of election to the detriment of Claimant and while allowing him to pursue The Third Party at great expense of time and money for discovery.
- 4) The Carrier waited until May 11, 2009, after the agreement was consummated and suit commenced to first mention the issue of the S-2 and then did so by way of a an untimely served Form 58. This was within three (3) weeks of the expiration of the statute of limitations forcing the Claimant to continue the action rather than being able to elect to dismiss without prejudice as in *Callahan*. Claimant relied upon the agreement of the parties to pursue the Third Party action jointly to its own prejudice.
- 5) The Carrier failed to pursue the election at a hearing set for May 20, 2009. The defense is waived.

In other words, despite the agreement of the parties, the Carrier now attempts to ignore their contract and with unclean hands ask the Commission to award relief upon a defense it previously waived. Likewise, it has given no notice of claim as required by statute and regulation and has thus again **waived** any claim it may have otherwise had.

- 6) Carrier and the Employer maintained a pattern of deceptive and uncooperative conduct throughout the course of this claim: (see APA 29, Deposition of Jonas)

a) The Carrier has maintained since the First Report was filed that J.C. Witherspoon, Inc, was Claimant's employer at the time of the injury. This is untrue though it took considerable time and expense in discovery between the Third Party action and this case to determine the true employer was A.K. Mulch, LLC. A&K is a distinct legal entity with its own Federal I.D. number (see APA 16, 17 and 18, A&K filing with Sec of State and Letter of company attorney Billy Cook) The two companies perform different jobs. A.K. is a warehouse type, non-mobile mulching operation. J.C. Witherspoon is a logging operation. (See APA 24, Witherspoon deposition). He also testified, despite the representations of the Carrier in this case, that Claimant:

- 1) was always an A&K employee (not J.C. Witherspoon, Inc.)
page 7, lines 21-25, page 16, lines 21-23;
- 2) working on A&K premises when hurt, page 10, lines 13-17;
- 3) That A&K was a separate operation from Witherspoon, Inc.,
page 5, line 14 through page 7, line 3;

b) Not until September 29, 2009, was the true employer, A& K Mulch, LLC, made a party to the workers compensation case. This was the result of Claimant's efforts through discovery in the Third Party action. (see APA 8, Order Adding Party)

c) Once A&K was made a party, an S-2 was promptly served for the second time on October 13, 2009, with in thirty (30) days. (See APA 15)

d) In its answer to the Amended Complaint, A&K first raised its status as Employer and noticed the lien of the Carrier. (see APA 12, Answer of A&K)

- e) Finally, on August 13th, 2010, Responses to Requests to Admit in the Third Party action confirmed that at the time of injury Claimant was an employee of A&K. (see APA 13)
- f) Ultimately, A&K was dismissed from the Third Party action on August 23, 2010, due to its status as the true Employer. (See APA 26, Order of Dismissal)
- g) Even when A&K raised the defense in the Third Party action that it was the Employer, avowed itself entitled to the employer immunity and claimed the lien of the Carrier, the Carrier never admitted as much in this case but pursued the position that J. C. Witherspoon, Inc. was the employer.
- h) In fact, the Carrier asserted its lien by way of the Employer's counterclaim but failed to notify Claimant by service of the S-1.
- i) The Carrier has failed to pay benefits due and Claimant's dental bill remains unpaid in the amount of \$24,185.00 along with a Charlotte's Carolina Healthcare bill owed of \$113.00. (see APA 27 and 28)

COMMON LAW AS TO EQUITABLE DEFENSES

Unclean Hands:

This case is replete with misrepresentation and bad faith on behalf of the Carrier.

Carrier has failed to perform its duties of paying benefits and giving statutorily required notices. Further, Carrier entered into a binding contract/agreement to pursue the Third Party action jointly with Claimant.

" When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct.App.2005). " The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App. 1998). " ' He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or **bad faith** relative to the matter in which he seeks relief.' " *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (quoting *Precision Instrument Mfg.-Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). " The decision to grant equitable relief is in the discretion of the trial judge." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379. (emphasis added)

Straight v. Goss, et al.,
383 SC 180, 678 S.E.2d 443 at 458, (S.C.App. 2009)

Estoppel:

In South Carolina, a defendant may be estopped from claiming the benefit of a statute if some conduct or representation by the defendant has induced the plaintiff to delay or forego action in a timely manner *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (. Ct.App.2001). The Carrier failed to raise election until 20 days prior to the expiration of the statute of limitations and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations.

The Carrier did not disclose the name of the true employer and forced the Claimant to discover the truth through discovery.

" An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary." *Id.* An intentional misrepresentation is not required for the application of equitable estoppel. *Id.* at 361, 559 S.E.2d at 339. " It is sufficient if the plaintiff reasonably relied upon the **words or conduct** of the defendant in allowing the limitations period to expire." *Id.*

The " elements of equitable estoppel as to the party estopped are: (1) **conduct** by the party estopped which amounts to a **false representation or concealment of material facts**; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114.(2001).(emphasis added)

Laches:

When the Carrier delays unreasonably in raising an issue causing the Claimant prejudice or to incur expenses or obligations or change his position then the relief requested should be denied. The Carrier failed to raise election in its answer and only mentioned the same 20 days prior to the expiration of the statute of limitations in an untimely filed Form 58 and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations. Instead it has permitted Claimant to expend considerable time and money in the prosecution of the Third Party action when, had timely notice of the claim of election been made, Claimant could have cured the defect, if any, by voluntarily dismissing the Third Party action without prejudice as in *Callahan, supra*.

" Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Jones v. Leagan*, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct.App.2009). The equitable doctrine of laches is defined as " neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). " Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Hallums*, 296 S.C. at 199, 371 S.E.2d at 528. (emphasis added)

Robinson v. The Estate of Elois Pinckney Harris,
388 SC 616, 698 S.E.2d 214 at 221, (S.C. 2010)

4) Claimant was under a legal disability,
mentally incompetent, in this case until a GAL was
appointed on May 13th, 2009

This is an admitted case of brain injury and Claimant was under a disability until a Guardian *Ad Litem* was appointed on May 13, 2009. The GAL filed and served an S-2 the next day after her appointment on May 14, 2009.

On May 13th, 2009, pursuant to the provisions of R67-216, and upon motion of Claimant's attorney upon the ground of mental incompetence *and without objection of Carrier*, the Commission appointed a Guardian *Ad Litem* for Claimant. The GAL served an S-2, upon Carrier's attorney the next day on May 14th, 2009. At that time, the Commission had not ruled Carrier could raise the defense of election. (see APA 9)

Due to his brain injury, Claimant was under a legal disability until May 13, 2009, when the Commission appointed a Guardian *Ad Litem* for him. (See exhibit 26, Order appointing GAL) It was further Ordered that the GAL should be present and participate in the deposition the Carrier wished to take of Claimant. To this the Carrier did not object and thereby recognized the disability of Claimant. (See APA, 33, Order Compelling Deposition of Claimant)

Thus, he could not be held to the requirements of the statute until the disability had been removed. It is the position of Claimant that the appointment of the GAL and her prompt action to comply with Section 42-1-560, are further ground upon which the relief requested should be denied.

CONCLUSION

For the many reasons set forth above, Claimant requests that the Commission find and Order that the Carrier is not entitled to the relief requested and deny the same. Further, Claimant requests an award of costs and attorneys fee if the Commission deems the same proper.

Respectfully submitted,

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Wednesday, December 22, 2010

COUNTY OF RICHLAND

Claimant,

vs.

JC Witherspoon, Jr., Inc. and A&K Mulch,

Employer,

and,

Capital City Insurance,

Carrier.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO.: 0607813

**DEFENDANTS
LEGAL MEMORANDUM IN
SUPPORT OF ELECTION OF
REMEDIES**

FACTS

The facts of this case revolving around the defense of election of remedies, per S.C. Code Ann. §42-1-560, are largely undisputed. The Claimant suffered compensable injuries to multiple body parts on or about June 1, 2006, including injuries to his head/brain. He has been represented by counsel throughout the majority of this case and continuously since at least 2007.

The circumstances of the workers' compensation claim gave rise to a third party action (products liability) against other parties including the manufacture of the equipment the Claimant was using at the time the accident occurred. On October 10, 2008, the Claimant, through counsel, filed a third party civil action seeking damages for injuries arising from the same accident. An amended complaint was filed on March 3, 2009.

It is undisputed that the Claimant failed to file the requisite “S-2” notification with the Commission, and serve the S-2 on the Defendant Employer/Carrier in this case until May 14,

2009. In any circumstance the, notice of the third party claim, and service of the S-2 was well in excess of the thirty day limitation for filing this notification per §42-1-560.

Subsequently, the Defendants in this workers' compensation action raised the affirmative defense of election of remedies pursuant to §42-1-560 and the interpretation of this statute by the Supreme Court in *Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007).

This issue was originally scheduled to be heard in addition to issues raised by the Claimant at a prior Form 50 hearing requested back in 2009. That hearing was postponed, and the Form 50 requesting the hearing was later withdrawn. The current issue of election of remedies is now before the Commission on the Defendants' Form 21 hearing request. During a teleconference on December 16, 2010, Commissioner Beck and the attorneys for the respective parties agreed to have the issues of election of remedies determined based on the APA's submitted and legal memorandums to be filed by the parties.

ELECTION OF REMEDIES

This accident which gives rise to this claim for benefits took place on or about June 1, 2006. The claim also took place under circumstances that gave rise to third party claim civil action. The Claimant filed a third party civil action in October of 2008, and subsequently amended it in January of 2009. The Form S-2, notice of third party action - employee, was never filed along with this third party summons and complaint, nor within thirty days afterwards. It was not filed with the SCWCC or served upon the Employer/Carrier until May 14, 2009.

S.C. Code Ann. §42-1-560(b) requires that, when an injured employee chooses to assert a third party claim for benefits, as well as a workers' compensation claim, a notification of the, "commencement of the [third party] action shall be given within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial

Commission.” (emphasis added). The ‘prescribed form’ of the Commission is the ‘S-2.’ (See S.C. Code of Regs. § 67-203(2)). However, a Form S-2 notifying the Defendant Employer/Carrier and the S.C. Workers’ Compensation Commission of this third party action was not filed until May of 2009, several months after the commencement of the third party civil action.

Therefore, pursuant to S.C. §42-1-560, and corresponding S.C. case law, including but not limited to Supreme Court’s decision in *Callahan v. Beaufort County School District*, 375 S.C. 92, 651 S.E.2d 311 (2007), the Defendants assert that the Claimant, by failing to comply with the mandated statutory notice requirements for his third party action, has elected his remedy and is barred from further workers’ compensation benefits from his employer. The *Callahan* opinion is worth citing at length, as it succinctly summarizes much of the case law in this area. In *Callahan*, the Claimant filed a third party action, but did not properly notify the Workers’ Compensation Commission and the defendant employer and carrier of the third party action via an S-2 until approximately six months after the commencement of the third party action. The court therefore reasoned that:

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers’ compensation claim. The statute provides:

Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C.Code Ann. § 42-1-560(b).

An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) (“[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the

employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of § 42-1-560 and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.

Callahan at 95-6, 313 (emphasis added).

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

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

Callahan at 96-7, 314

The *Callahan* court ultimately ruled that claimant Callahan was entitled to continue receiving benefits in workers' compensation while proceeding against the third party tortfeasor. However, the only reason this was permitted is because the Claimant essentially cured the defective S-2 notification issue by voluntarily dismissing her claim under Rule 41 FRCP. The court's reasoning being that:

A voluntary dismissal leaves the situation as though no suit had ever been filed. 9 *Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure* 2d §

2367, at 321 (1995); Allen v. S. Ry. Co., 218 S.C. 291, 297-298, 62 S.E.2d 507, 511 (1950). Following this rule, the third-party suit originally filed in January 2003 became a nullity, and § 42-1-560 is not applicable. As a result, there is no violation of § 42-1-560 when the third-party suit is treated as never being filed.

Callahan at 97, 314

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

This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).

Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson, supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all")(citing *Stroy v. Millwood Drug Store*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

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

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

By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a

workers' compensation claim simultaneously with a third part action, and held that:

[I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]

The Law of Workers' Compensation in South Carolina, 5th ed., 2008, at p. 477.

Therefore, the Defendants assert that it is manifestly clear under S.C. case law and statutory authority that Mr. Holland, by failing to file a Form S-2 until several months after the third party action was commenced has elected his remedy. In contention to the Defendants' assertion of election of remedies, the Claimant's attorney raises eight primary issues: (1) "Unclean hands"; (2) Mental Incapacity of the Claimant; (3) That §42-1-560 does not require this statutory notification after a certain period of time for filing the third party action has elapsed; (4) That this defense should be barred on account of *laches*; (5) Waiver of this defense by the Defendants; (6) That the Defendant's should be estopped (equitably) from asserting election of remedies as a defense; (7) That the Defendants should be estopped (judicially) from asserting election of remedies as a defense; and/or (8) Because a second named employer (A&K Mulch) was not added to this claim until after the filing of the third party claim, the claimant asserts the time period for filing the S-2 did not begin to run until such time as A&K Mulch was

Defendant to the workers' compensation claim. The Defendants briefly address these arguments as indicated below.

UNCLEAN HANDS

In addition to incapacity or incompetency, the Claimant also asserts 'unclean hands' as a counter to the Defendants assertion of election of remedies to bar further benefits. 'Unclean hands' is solely an equitable doctrine, which acts to block a party that seeks equitable relief from obtaining such relief when that party has, itself, acted inequitably in association with the litigated matter. (See *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (internal quotations and citations omitted).

This argument is not relevant, nor pertinent, to the affirmative defense of election of remedies in this case for a number of reasons. First, and foremost, the doctrine 'unclean hands' blocks parties that are seeking equitable relief from doing so when they have acted inequitably. The Defendant Employer/Carrier is asserting election of remedies which is a statutory defense under S.C. Code Ann. §§42-1-540, -550, -560. Therefore, 'unclean hands' would not apply. Secondly, the Defendants assert that no inequitable behavior on the part of the employer/carrier has been properly asserted or is substantiated by the evidence of this case.

INCAPACITY

The Defendants concede the Claimant has suffered significant physical injuries in association with this case. This includes sustaining a physical brain injury. Presumably, the Claimant raises mental incapacity as a bar to the election of remedies defense, through his failure

to properly file an S-2, for the purpose of arguing that such incapacity excused or tolled the 30 day time period for filing and serving his S-2 notification.

Mental incapacity/incompetency can, under certain circumstances, toll the applicable time period for asserting ones rights in legal proceedings or associated statute of limitations. However, this is a completely meritless argument in the instant case. First, the Defendants do not necessarily concede that the Claimant is per se mentally incompetent or incapacitated due to his injuries arising from this accident, nor from other unrelated cause. However, assuming *arguendo* that the Claimant is so incapacitated, such a claim for tolling or excusing compliance with the statute (§42-1-560) would still be unfounded and unsupportable under the facts of this. The Claimant was, and has been, represented by competent legal counsel during all relevant time period in question for his workers' compensation claim and his third party lawsuit. To that end, the third party civil action filed by the Claimant in October of 2008 was filed on his behalf by an attorney representing the Claimant in a fiduciary capacity. It is factually antithetical, and logically inconsistent to argue that the Claimant was, on one hand, unable to properly proceed with his workers' compensation proceedings due to incapacity/incompetency while, on the other hand, simultaneously pursuing through legal counsel his third party civil action. Furthermore, incapacity of the Claimant cannot, and should not be imputed to Claimant's counsel for the purpose of tolling or excusing proper compliance with the statutes.

ONGOING OBLIGATION TO NOTIFY THE EMPLOYER/CARRIER

AND THE COMMISSION PER S.C. CODE ANN. §42-1-560

The Claimant further asserts that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required after a year of compensation has been paid (or presumably when an S-3 has not been filed by the

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

Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee,...., **and the rights and obligations of the parties shall be as provided by subsection (b) of this section.**

S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

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

Subsection (c) obviously contemplates the situation where a year of benefits (or more) has been paid by the defendant carrier, because the time period for the Employer/Carrier to bring the third party suit under §42-1-560(c) does not even start until, "one year after the carrier accepts liability for the payment of compensation or makes payment pursuant to an award under

this Title[.]” (Definition of the “one year period” from §42-1-560(b) as referenced in subsection (c)). Therefore, neither of the Claimant’s arguments on this point is persuasive in light of a mandated statutory burden to notify the Commission and opposing parties in the workers’ compensation claim. This obligation is in effect regardless of the amount of time for which workers’ compensation benefits have been paid, and regardless of when in the course of his workers’ compensation claim the Claimant chooses to file the third party action.

LACHES

Laches is an affirmative defense available in workers’ compensation claims. See *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004). In *Richey* a Claimant had alleged injuries in October of 1987 and subsequently filed a F50, and a hearing was set for March of 1989. The hearing was cancelled for some unknown reason, but the claim apparently remained open. The Claimant did not file another Form 50 or otherwise request a hearing before the Commission until approximately 11 years later in March of 2000. No evidence existed to show that *Richey* had tried to pursue his rights against the Carrier/Employer during the intervening 11 years, and *Richey* was unable to show good excuse for failure to do so. Furthermore the *Richey* court found material prejudice to the Defendants due to the intervening delay.

“*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999) (citations omitted). Under the doctrine of *laches*, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. *Id.* at 296, 519 S.E.2d at 599. The party asserting *laches* has the burden of showing negligence, the opportunity to act

sooner, and material prejudice. *Id.* at 297, 519 S.E.2d at 599. The other aspect of the *laches* defense is that the party asserting *laches* must show prejudice to their defense of the case, or that they have incurred expenses or otherwise detrimentally changed their position in the case due to the *laches* of the opposing party in not acting sooner.

Laches is inapplicable to the case at bar to block the defense of election of remedies. First, the burden of proving this defense is on the Claimant. The issue is election of remedies, premised upon the Claimant's failure to comply with the express notification requirement dictated by S.C. Code Ann. §42-1-560 for simultaneously pursuing a workers' compensation claim and a third party civil action for the same accident. It is undisputed that the Claimant filed a third party civil action in October of 2008, but did not file and serve his S-2 notification, per §42-1-560, until several months later (May of 2009). Essentially, the affirmative defense of election of remedies was a complete and viable defense at 31 days after the filing of the third party action (with no notice having been provided). Defendants were not even aware of this defense, election of remedies, until receipt of the S-2 notification several months later. Defendants assert that no evidence in the record will support a finding that the Claimant's failure to more timely serve the S-2 notification emanated from or came about through actions, omission or representations made by the Employer/Carrier to the Claimant which could have caused him to file and serve his S-2 after the time period permitted by the statute.

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

the parties additional time for settlement, discovery and other reasons. Nevertheless, none of this is evidence of a waiver or abandonment of the defense of elections of remedies by the Employer/Carrier.

ESTOPPEL (EQUITABLE)

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

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

For the same reasons outlined above under the argument sections of waiver and *laches* the Defendants assert there is no basis for estopping them from raising the defense of election of remedies in this claim. There are no actions, or omissions made by the Defendants in this case which created the circumstances that gave rise to the election of remedies defense. Furthermore, the Claimant did not rely on any representations of the Defendants in failing to timely file or

properly serve notice under S.C. Code Ann. §42-1-560. Therefore, no basis exists for estopping the Defendants' election of remedies argument.

ESTOPPEL (JUDICIAL)

The other type of estoppel is judicial estoppel. South Carolina officially recognized the validity of judicial estoppel in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Id.* 327 S.C. at 251, 489 S.E.2d at 477. Essentially, stated:

[a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Hayne at 252, 477.

This argument is inapplicable to the case at bar. The Defendants have consistently asserted the election of remedies defense at every hearing in this matter since the defense was viable. Furthermore, at no time have the Defendants taken a contrary position in this case before the Commission (arguing that election of remedies would not apply) in order to gain some other legal or factual advantage over the Claimant. The record and Commission filings will clearly reflect this to be the case, and to that end, a finding of judicial estoppel to bar the election of remedies defense asserted by the Employer Carrier cannot stand.

ADDING A SECOND DEFENDANT EMPLOYER

This claim was originally accepted as a compensable claim following the accident of June 1, 2006. The originally named Employer, J.C. Witherspoon, Jr. Inc., and its Carrier, Capital City Insurance Co., have admitted liability for this claim and been paying benefits from the date of the accident forward. By consent order dated September 29, 2009, A&K Mulch, LLC, a

mulching operation also owned by J.C. Witherspoon, Jr., Inc., was added as a second defendant employer to this claim. Following this, claimant served another S-2 on October 13, 2009. Notably, A&K Mulch was not substituted for J.C. Witherspoon, but only added as a Defendant Employer. To date, and for the past four years, this claim continues to be covered by the Employer J.C. Witherspoon through its workers' compensation insurance policy with Capital City.

To the degree that the Claimant may argue that adding a second Defendant Employer would restart, toll, or excuse an untimely filing of the Form S-2 notification required under §42-1-560, the Defendants argue as follows. First, as to J.C. Witherspoon, through Capital City Insurance, timely notice of the October 2008 third party action was not served via an S-2 until May of 2009. There is no legal basis for arguing that the addition of another party defendant to the workers' compensation claim would somehow negate the express notification requirements of S.C. Code Ann. §42-1-560. Furthermore, if this were possible, the adding of any potential party defendant (after the time period for the S-2 had run) could be used to abrogate the notification requirement of the statute entirely. J.C. Witherspoon was a known Defendant in the workers' compensation claim that had already accepted liability for this accident through its policy with Capital City Ins. for over two years at the time of the filing of the third party action. Therefore, the addition of further party defendants would not serve to negate an otherwise viable election of remedies defense. Moreover, §42-1-560 also requires timely service of the S-2 on the insurance Carrier and the Commission. As noted in the consent order, both A&K Mulch and J.C. Witherspoon were covered by the same policy with Capital City. Therefore, there was never a question regarding the identity of the carrier.

As to A.K. Mulch, LLC, notably, this company was only added as a party defendant in the case. A.K. Mulch has never been adjudicated or found to be the sole employer for this action. Furthermore, as A.K. Mulch, LLC and J.C. Witherspoon are similarly intertwined companies with the same workers' compensation insurance carrier, the Defendants did not object to adding A.K. Mulch as a party Defendant. Especially so in light of the fact that J.C. Witherspoon, and its Carrier, had already admitted this accident and been providing benefits for over three years by the date of the Commission Order adding A.K. Mulch as a defendant employer. Of note, by the time the Claimant moved to add A.K. Mulch as a party defendant in 2009, the two year statute of limitations for filing an action against A.K. Mulch would have run, therefore, the Defendants would have been entitled to raise the statute of limitations if claimant had sought to substitute the employers or asserted that A&K was the sole employer. (S.C. Code Ann. 42-15-40). However, in spite of any of these issues, South Carolina Courts have interpreted the 30 day notification requirements of §42-1-560, to be binding on the Claimant whether he is bringing the third party action simultaneously with or even prior to the pursuit of the workers' compensation claim.

We therefore hold that, irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b).

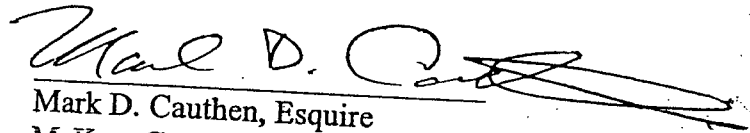
Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, __ (Ct. App. 1998).

Therefore, the Claimant's notice of the third party action would have been defective as to both A.K. Mulch, LLC and J.C. Witherspoon, Jr., Inc. as well as Capital City Insurance as the respective carrier for either of the Defendant employers.

CONCLUSION

In conclusion, the Defendants assert that none of the numerous arguments raised by the Claimant would apply, or are factually supportable, under the evidence of this case to bar the affirmative defense of election of remedies. As a result, the claimant should be barred from further workers' compensation benefits.

Respectfully Submitted,



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December 23, 2010

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December 23, 2010

VIA EMAIL & US MAIL

The Honorable T. Scott Beck
Commissioner
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: *Andreal Holland v. J. C. Witherspoon, Jr., Inc. & A&K Mulch*
WCC File No: 0607813
DOI: 06/01/06
Claim No.: WC071306
Our File No.: 2301-0017

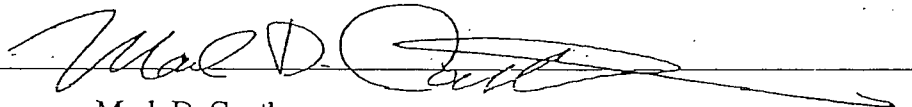
Dear Commissioner Beck:

Enclosed please find Defendants' Legal Memorandum in Support of Election of Remedies in regard to the above matter.

By copy of this letter to Thomas K. Fowler, Jr., counsel for the claimant, I am serving him with a copy of the same.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Mark D. Cauthen

MDC/msb
Enclosure

cc: Thomas K. Fowler, Jr., Esquire (Via Email & US Mail)
Ms. Paula Dyches

RECEIVED

DEC 29 2010

S.C. WORKER'S COMP COMM.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS COMPENSATION
COMMISSION

ANDREAL HOLLAND, by and through)
His Guardian Ad Litem, PEGGY KNOX,)

WCC FILE NO. 0607813

Claimant,)

J.C. WITHERSPOON, INC.)

**CLAIMANT'S OBJECTIONS
And RESPONSE**

And)

A.K. MULCH, LLC,)

Employer,)

And)

CAPITAL CITY INSURANCE,)

Carrier.)

a) OBJECTIONS:

1) Claimant has previously, and hereby confirms, its objection to consideration of the brief of Employer/Carrier as being untimely submitted. In a phone conference between the hearing Commissioner and counsel for both parties on December 16th, it was agreed that in lieu of a hearing, both parties would submit briefs. Each party's brief was due by 5 p.m. on Thursday, 23rd, per direction of the Commissioner. Further, Employer/Carrier were to submit a proposed Order confirming the agreements of counsel *which has not be done as of this submission.* As part of that conference, counsel for Employer/Carrier stated its brief was all but ready for submission and would be provided Claimant's counsel within the next several days thereafter. *That was not done.*

In fact, the brief of Employer/Carrier was not submitted until *after the deadline set in the conference call*. Thus, Claimant objects to consideration of the Employer/Carrier's brief or any subsequent submission by them.

2) Further, Employer/Carrier of its own accord and without permission of the Commissioner has submitted a reply brief to that of Claimant. Claimant objects to this as well upon the grounds stated above and because the same has not been solicited nor approved by the Commissioner.

b) RESPONSE OF CLAIMANT:

Subject to the above objections, Claimant would respond to the positions of Employer/Carrier as follows:

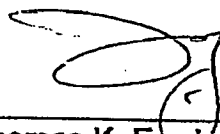
- 1) Defendants fail to deny or contest that there was agreement of the parties to pursue the third party action jointly. Nor do they contest they have breached this agreement for which Claimant, through counsel, paid consideration.
- 2) Defendants fail to address that the legal authority upon which they rely herein, addresses the election of remedies in a case where the *lawsuit was filed within the first year*. That is not the case here.
- 3) Defendants fail to address their own failure to follow the law and provide required notices and an S-1;
- 4) Defendants fail to refute that the adjuster testified that she gave the "complaint" to Defendants' counsel. Instead they try to draw the focus to when the amended complaint was filed and served later. Clearly, Defendants had notice of the law suit and knew they had not been served with an S-1, especially since they had agreed to pursue the third party

action jointly with Claimant. *None of this of course is relevant as the suit was not filed within the first year.*

- 5) Defendants fail to acknowledge that the parties appeared in Sumter for the first hearing date and they failed to pursue any defense of election of remedies. Due process clearly provides that Defendants have as much right as Claimants to proceed on issue properly raised at any hearing date is they choose to do so. In this case, Defendants failed to insist on being heard on the issue.
- 6) Further, the rule of the Commission dictate the proper method of raising the defense and Defendants did not do so.
- 7) Defendants fail to refute the majority of the arguments of Claimant.

For these reasons and those cited in Claimant's initial brief, Mr. Holland requests that the relief requested be denied.

Respectfully submitted,



Thomas K. Fowler, Jr.
Attorney for Claimant
Peake and Fowler Law Firm, P.A.
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P.O. Box 23601
Columbia, SC 29224
(803) 788-4370

Thursday, January 20, 2011

to Reg. 67-609 'Computation of Time,' "Sundays...are included unless the designated time period ends on a...Sunday...in which case the next day that is not a Saturday, Sunday, State, or Federal holiday is included as the last day [for filing]." (emphasis added). Defendants also assert this line of argument is extraneous in light of the fact that: (a) The current issues are before the Commission on the Defendant's Form 21, not a Form 50; (b) At the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; and (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had requested.

In addition, the Claimant notes that the Carrier, "did not pursue its request to be allowed to allege the election [of remedies]" at the May 20, 2009 Form 50 hearing, and thereby has waived this defense even if it was properly raised, back in May of 2009. (Claimant's brief at p. 4; para. "K-L"). Again, this argument is also without merit. It is the Claimant who chose not to go forward with his own requested Form 50 hearing on May 20, 2009. The Employer/Carrier does not procedurally have the ability to force a Form 50 hearing to go forward if the Claimant withdraws the hearing request or otherwise chooses not to go forward.

Clearly, this creates a quandary for the Employer/Carrier when there is: (1) an accepted claim; (2) giving rise to an election of remedies defense; and (3) benefits have been paid in excess of 150 days; yet (4) no Form 50 hearing is pending – or, as here – the Claimant chooses not to go forward with a requested Form 50 hearing. Regardless, this procedural conundrum does not stand for the premise that an Employer/Carrier has waived an election of remedies defense because the Workers' Compensation Act, and accompanying regulations, do not provide another vehicle for bringing the issue in front of the Commission.

The Defendants could not have raised the election of remedies issue in their February 19, 2009 Form 51 without some knowledge of the filing and non-service of the S-2. The Carrier was never served with an S-2 notice of the original Complaint in the third party action, filed on October 10, 2008. As indicated in the Claimant's own brief, the amended third party complaint (filed March 3, 2009) was not received by the Carrier until March 10, 2009. (Claimant's brief p. 3; para. "D")(Claimant's APA 23). Furthermore, at that time, and as noted by the Claimant in his own legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; then timely serving the S-2. Furthermore, it should be noted that a claimant must comply with the, "notice requirements of § 2-1-560, even though the carrier had actual knowledge of the third-party suit," in order to maintain the workers' compensation action simultaneously. *Callahan v. Beaufort County Sch. Dist.*, 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007)(at Footnote 2)(internal citations omitted).

As the hearing drew closer, no such action to cure this defect was ever taken by the Claimant. Accordingly, the Defendants did raise the election of remedies defense on their Form 58, filed May 11, 2009, for the corresponding Form 50 hearing on May 20, 2009. (Note: The three year Statute of Limitations for the third party civil action expired on June 1, 2009). However, since no curative action was ever taken by the Claimant, election of remedies would have been a viable defense for the Employer/Carrier on the date of the May 20, 2009 Form 50 hearing.

The Claimant also asserts that the Form 58 Pre-Hearing Brief filed by Defendants on May 11, 2009 was untimely for the May 20, 2009 Form 50 hearing. This is not accurate. Judicial notice should be taken that May 10, 2009 (the actual due date of the Defendants Form 58, PHB) was a Sunday. Meaning, a filing on the following Monday would be timely. Pursuant

CONCLUSION

The Defendants have already addressed the majority of the other issues raised in the prior legal memorandum filed in support of their position, and rely on the arguments therein and above.

Respectfully Submitted,



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January 7, 2011

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January 7, 2011

VIA EMAIL & US MAIL

The Honorable T. Scott Beck
Commissioner
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: Andreal Holland v. J. C. Witherspoon, Jr., Inc. & A&K Mulch
WCC File No: 0607813
DOI: 06/01/06
Claim No.: WC071306
Our File No.: 2301-0017

Dear Commissioner Beck:

Enclosed please find Defendants' Legal Memorandum in Reply in regard to the above matter. We have no objection to any supplemental or reply brief that claimant's counsel may wish to file in response to this or our original memorandum in support of our position.

By copy of this letter to Thomas K. Fowler, Jr., counsel for the claimant, I am serving him with a copy of the same.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Mark D. Cauthen

MDC/msb

Enclosure

cc: Thomas K. Fowler, Jr., Esquire (Via Email & US Mail)
Ms. Paula Dyches

RECEIVED

JAN 12 2011



Claimant's Name: ANDREAL HOLLAND SSN: _____
Address: IRANCHVIEW DRIVE
City: MANNING State: SC Zip: 29102
Home Phone: () - Work Phone: () -
Employer's Name: A&K MULCH, LLC / J.C. WITHERSPOON, INC.
Address: P.O. BOX 289
City: ALCOLU State: SC Zip: 29001
Insurance Carrier: CAPITAL CITY
Preparer's Name: THOMAS K. FOWLER, JR. Law Firm: PEAKE AND FOWLER LAW FIRM, P.A.
Preparer's Phone #: (803) 788 - 4370

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 6/1/2006 (m/d/yyyy)

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

Is §42-1-560 unconstitutional as being vague, unambiguous?

Is §42-1-560 unconstitutional as failing to provide equal protection of the law?

Did the Single Commissioner err in the application of *Callahan v. Beaufort* and/or §42-1-560?

Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills?

Did the Single Commissioner err by failing to deny relief to the Carrier/employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration?

Did the Single Commissioner err in failing to rule that Claimant was under disability until a GAL was appointed?

Did the Single Commissioner err in failing to find Carrier/Employer(s) waived the election of remedies defense?

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to laches?

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

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Mark Cauthen, Esquire
McKay, Cauthen, Settana & Stubley, P.A., P.O. Box 7217, Columbia, SC 29202-7217

Name

on the 13 day of April, 2011 by ☒ first class mail ☒ personal service ☒ certified mail.
Preparer's Signature _____ Title Attorney for Claimant Date 4-13-11

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

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

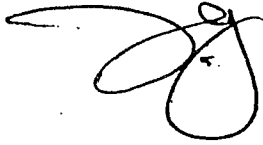
GROUND OF APPEAL CONTINUED

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to equitable estoppel?

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to waiver?

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their unclean hands?

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their failure to comply
With §42-1-560?

A handwritten signature in black ink, consisting of a stylized, cursive 'J' or 'G' shape with a horizontal line extending to the left.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS COMPENSATION
COMMISSION

ANDREAL HOLLAND, by and through)
His Guardian Ad Litem, PEGGY KNOX,)
Claimant,)

WCC FILE NO. 0607813

APPELLANT'S BRIEF

J.C. WITHERSPOON, INC.)
And)
A.K. MULCH, LLC,)
Employer,)
And)
CAPITAL CITY INSURANCE,)
Carrier.)

The Single Commissioner's Order in this case finds Claimant elected his remedy by commencing a Third Party action and failing to file and serve an S-2 within 30 days. It is Claimant's position that, upon the facts of this case, the Single Commissioner's reliance upon *Callahan v. Beaufort Co. School Dist.*¹, is misplaced and the Order should be reversed upon this and other grounds.

ARGUMENTS:

- 1) Is § 42-1-560 unconstitutional as being vague,
ambiguous?

An ambiguity exists within § 42-1-560, so this court's inquiry must continue. In its provisions the statute provides for who has the right to sue the

¹ 375 S.C. 92, 651 SE2d 311, (2007).

third party tortfeasor. The ambiguity exists in the procedure that arises between the provisions of sub-sections b, c and d.

Sub-section (b) clearly provides for procedure within the first (1st) year after an on the job injury. However, the procedure, at least as far as the Order in this case is concerned, becomes murky at best. It would appear that the Carrier is required to give notice of the right of action and that only the Carrier has the right to bring the third party action.

Question: What if they Employer/Carrier do not bring the third party action?

Question: Are Employer/Carrier required to give the subsection C notices whether they bring suit or not?

Question: Who has the right to sue if Carrier and Employer do nothing in the second and third years after an accident and prior to the right to do so being returned to the injured Employee?

Question: Who has the duty to file an S-1, 2 or 3 during the second and third years after an accidental injury, but before the right of action magically reverts to the injured Employee?

"Procedure . . . should not be written or interpreted to create a trap for the unwary lawyer or party," and "should not be construed in manner which operates as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition." *Elam v. SC Department of Transportation*, 361 S.C. 9, 25, 602 S.E. 2d 772, 780 (2004). Clearly § 42-1-560 has created traps and has been so interpreted where in one instance an Employee is required to dismiss an action so that she can re-file just to serve an administrative form S-1.

1-560 (c) is vague in its meaning such that "a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598. It is vague regarding the dates when the injured Employee and the Employer/Carrier have the right to file suit against a third party responsible for an accident.

"The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." *In re Amir X.S.*, 371 S.C. 380, 391-92, 639 S.E.2d 144, 150 (2006). "The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

Claimant would also point out that the ambiguities of the provisions of Section 42-1-560, have previously been recognized by the Supreme Court in *Callahan*, when it observed it would then:

".....leave it to the Legislature to amend and define its ambiguities."

Unfortunately, the Legislature has not cured the ambiguous defects of the statute and the same should therefore be held unconstitutional.

2) Is § 42-1-560 unconstitutional as failing to provide equal protection of the law?

Disparate treatment of members of the same class in same or similar circumstances, should be found to violate of the equal protection clause of the 14th Amendment. In *Hanvey v. Oconee Memorial Hospital*, the South Carolina Supreme Court held that a statute disparately treating charitable hospitals and other charitable organizations violated equal protection. *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 416 S.E.2d 623 (1992). In *Hanvey*, the South Carolina Supreme Court ruled that charitable hospitals were in the same class as other charitable organizations and it was violative of the equal protection clause to limit a charitable hospitals liability to \$100,000 while all other charitable organizations were subject to a liability limit of \$200,000.

The disparate treatment workers receive with regard to the length of the statute of limitations workers have to file suit after being injured by a third party while on the job, compared with the length of the statute of limitation of private individual for a similar accident is violative of the workers' 14th Amendment right to equal protection. Section 42-1-560 provides that workers are limited to "one year after the carrier accepts liability for the payment of compensation" to file suit against a third party for injuries caused by the third party to the worker while on the job. S.C. Code Ann. § 42-1-560 (1976). While anyone injured in an identical accident, but not on the job, would have three years to file suit per § 15-3-530. S.C. Code Ann. § 15-3-530 (1988). As a result this court should hold that § 15-1-560 is unconstitutional.

In South Carolina, provided no fundamental right has been violated, "the Equal Protection Clause is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the

class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." *Boiter v. SC Dept. of Transp.*, 2001 WL 2183582, at *4 (June 6, 2011). The disparity between the length of time given to a worker injured in an accident by § 42-1-560 and another individual injured in an identical accident by § 15-3-530 causes § 42-1-560 to fail prong two of the three-prong test used by the Supreme Court of this state in *Boiter*. Under the current laws, the worker would have only one year (and potentially thirty (30) additional days just prior to the statute of limitations expiration) to file suit, while the individual injured while not on the job would have three years to file suit if involved in the exact same accident. Both the worker and the individual not on the job make up a class of victims, and "under similar circumstances and conditions" the worker is denied equal protection of the law by the application of § 42-1-560. *Boiter v. SC Dept. of Transp.*, 2001 WL 2183582, at *4 (June 6, 2011) (citing *Samson v. Greenville Hosp. System*, 295 S.C. 359, 368 S.E.2d 665 (1998)).

Additionally, § 42-1-560 should be held to have been repealed by implication by § 15-3-530. In *S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control*, the South Carolina Court of Appeals stated that "the most recent legislation will take precedence over earlier enactments." *S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control*, 380 S.C. 349, 368, 669 S.E.2d 899, 909 (S.C.App., 2008) (citing *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000); *Lloyd v. Lloyd*, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988); *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985)). The South

Carolina Supreme Court has ruled when statutes are "incapable of any reasonable reconciliation, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy." The Court ruled that an earlier statute was in "direct conflict" with a later statute and the earlier was thus repealed by implication. *Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988).

Section 42-1-560, amended in 1978, is in "direct conflict" with § 15-3-530, which was amended ten (10) years later, in 1988, to provide a three (3) year tort statute of limitations. The earlier, upon the authority of *Yahnis*, should be repealed by implication. Section 42-1-560 provides a worker injured on the job will have only one year (and maybe thirty (30) days) to file suit against a party that injured him. These sections, 42-1-560 and 15-3-530, are at irreconcilable odds with regard to the length of time an injured victim has to file his suit against the party at fault and as a result the earlier of the two, § 42-1-560, should be repealed by implication.

1) Did the Single Commissioner err in the application of
Callahan v. Beaufort and/or § 42-1-560?

Erroneously the Order provides in essence that failure to file an S-2 within thirty (30) days of Claimant's commencement of a third party action acts as an election of remedies so as to bar the Claimant from receiving further Workers Compensation benefits. This ignores the specific facts of this case that, unlike in *Callahan*, suit was **not filed within one (1) year after the accident** thus.

FACTS:

- A) If the Third Party suit had been commenced within one (1) year of the accident, Carrier's contention might be viable but that is not what happened in this case. The Third Party action was not commenced (filed and served) until well into the third year after the date of accident.
- B) Carrier never filed or served an S-1, as required by 42-1-560 (c); (see APA 30, deposition of Fennell)
- C) At the time of the Third Party action, the duty was actually upon the Carrier to serve and file notices which it has failed to do.

This was a case of the Carrier asking for relief without itself complying with the mandatory provisions of § 42-1-560. Our Supreme Court said:

"Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of §42-1-560 and leave it to the Legislature to amend and define its ambiguities."

Callahan v. Beaufort County School District
375 SC 92, 651 SE2d 311, (2007) at page 3

The Carrier failed to comply with the notice and filing requirements of the statute, and doing so in this case meant the Carrier should have been denied the relief requested.

Further, in *Callahan, supra* the Claimant was allowed to cure the error of failing to file and serve the S-2, timely by being permitted to dismiss the Third Party Action without prejudice. Due to the actions of the Carrier herein, Claimant Holland was denied this opportunity if it was even necessary as it was too close

to the expiration of the Statute of Limitations to play with dismissal and re-filing the third party claim. As set forth above:

"Procedure . . . should not be written or interpreted to create a trap for the unwary lawyer or party," and "should not be construed in manner which operates as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition." *Elam, infra*

The majority of the cases decided on the issue of election of remedy by a Claimant involved settlements or finalized third party claims without notice to the Carrier. Such is not the case here as the Third Party claim was ongoing and being pursued by joint agreement of the Claimant and Carrier.

STATUTORY REQUIREMENTS OF §42-1-560:

Specifically, after the first year following an accident, the law requires:

*".....the carrier **shall give** the Industrial Commission, the injured employee.....notice , upon a form prescribed by the Industrial Commission, that action has been or will be commenced against the third party." [emphasis added/portion of 42-1-560 (c)]*

At the time the Third Party action was commenced, the notice duties were upon the Carrier who failed to abide them. Simply put, the Carrier in this case failed to perform and satisfy its statutorily mandated duties and was therefore not entitled to the relief requested.

There are essentially two (2) distinct time and notice requirements set forth in Section 42-1-560.

1) Sub-section B:

If the Third Party action is commenced within the first year after the injury, Claimant has the right to do so and must file and serve an S-2 within 30 days of commencement of the action; but

2) Sub-section C:

If Claimant does *not* commence the Third Party action in the first year, the right is assigned to the Carrier and it **must**.

- a) serve notice of claim within 20 days; **and**
- b) file and serve an S-1 within the following 90 days.

The Third Party action was not commenced within one (1) year so Carrier's contention as to election is without merit. At the time of suit, the duty was upon the Carrier to provide notices.

The relevant statute, section B, plainly states that *if the action is brought within one (1)-year-of the date of accident*, the S-2 must be served and filed within thirty (30) days of the commencement of the action. If not commenced within the first year, the right of action becomes assigned to the Carrier.

In this case, suit was not commenced, meaning filed and served, within the first year so the subsection upon which the Single Commissioner relies is inapplicable. This is a vast factual difference between this case and *Callahan*. In *Callahan*, following dates applied:

<u>Date of Injury</u>	<u>.50 filed</u>	<u>3rd Party filed</u>	<u>S-2</u>
November 14, 2002	Jan. 17, 2003	Jan. 24, 2003	July 16, 2003

Suit was filed *within the first year*.

In this case the action was not commenced in year one (1) but rather year three (3) and the Carrier never served or filed any notice as required. As a result, the Carrier was not entitled to the relief requested.

In the second year and thereafter, Section C places the burden for notice and action upon the Carrier. Paragraph C, Section 42-1-560, S.C. Code of Laws, 1976, transfers the right to a third party action to the Carrier and **requires** it to

- 1) notify the injured employee (or his personal representative) that Claimant's failure to file a suit will operate as an assignment to the Carrier; **and**,
- 2) file and serve an S-1,

The Carrier failed to do so. As quoted from *Callahan* we must "*strictly construe the requirements of §42-1-560*", against the Carrier as well.

- 2) Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills?

Facts:

The Carrier had failed to pay benefits due and Claimant's dental bill remains unpaid in the amount of \$24,185.00 along with a Charlotte's Carolina Healthcare bill owed of \$113.00. (see APA 27 and 28). As a result, Carrier was not entitled to stop payment or cease benefits for any reason. It's hands in this regard were unclean too.

- 3) Did the Single Commissioner err by failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration?

FACTS:

- A) There was a contract and agreement between the parties to pursue the Third Party claim jointly and for which money consideration was paid.
 - i. Claimant's attorneys and the Carrier agreed soon after the injury to investigate and pursue the Third Party action jointly (see deposition of Attorney Fennell and deposition of Paula Dyches) and,
 - ii. The adjuster handling this claim, Ms. Paula Dyches, entered into an agreement to jointly pursue the Third Party action with Claimant's attorneys. As consideration of this agreement, Claimant's attorneys paid half the costs of the expert, engineering investigation into the machine in preparation of the Third Party action. (see APA 22 and APA 30, deposition of Fennell)
- B) Ms. Dyches participated in the investigation of the Third Party Action in concert with Claimant's attorneys. (See APA 21).
- C) Ms. Dyches discussed the Third Party case with Claimant's attorneys on several occasions. "I spoke with James Fennell maybe about a couple of times in regards to the third party". (see APA 19, Deposition of Dyches, page 20, lines 21-22)
- D) The Third Party Complaint was filed on October 10, 2008, (see APA 10), and A&K Mulch, LLC, was a named Defendant. The adjuster, Paula Dyches, testified about the contents of her file

and stated she had the Third Party action documents Don Jonas, the attorney handling that case, had prepared. She explained "Mark Cauthen was sent the Complaint and to – for the file". (see APA 19, Deposition of Dyches, page 17, line 25)

She also had a copy of the Amended Complaint in her file stamped indicating receipt by her apparently on March 10, 2009. (See APA 23)

- E) Carrier had Ms. Dyches, another adjuster, Mr. Cauthen and another attorney involved with the Third Party action. (see APA 19, deposition of Dykes page 17, lines 14-17, and page 30, line 14 through page 31, line 1, and page 31, line 15 through page 32, line 6)

The findings and conclusions of the Order ignore these facts completely.

4) Did the Single Commissioner err in failing to rule that Claimant was under disability until a GAL was appointed?

This is an admitted case of brain injury and Claimant was under a disability until a Guardian *Ad Litem* was appointed on May 13, 2009. The GAL filed and served an S-2 the next day after her appointment on May 14, 2009.

On May 13th, 2009, pursuant to the provisions of R67-216, and upon motion of Claimant's attorney **upon the ground of mental incompetence and without objection of Carrier**, the Commission appointed a Guardian Ad

Litem for Claimant. The GAL served an S-2, upon Carrier's attorney the next day on May 14th, 2009. At that time, the Commission had not ruled Carrier could raise the defense of election. (see APA 9)

Due to his brain injury, Claimant was under a legal disability until May 13, 2009, when the Commission appointed a Guardian Ad Litem for him. (See exhibit 26, Order appointing GAL) It was further Ordered that the GAL should be present and participate in the deposition the Carrier wished to take of Claimant. To this the Carrier did not object and thereby recognized the disability of Claimant. (See APA, 33, Order Compelling Deposition of Claimant)

Thus, he could not be held to the requirements of the statute until the disability had been removed. It is the position of Claimant that the appointment of the GAL and her prompt action to comply with Section 42-1-560, are further grounds upon which the Order should be reversed.

5) Did the Single Commissioner err in failing to find
Carrier/Employer(s) waived the election of remedies
defense?

FACTS:

- A) The Carrier filed its Form 51, on February 19, 2009, and did not raise the defense of election of remedies *although it knew of the third party action in October, 2008, according to the testimony of the adjuster, Ms. Dyches, cited above.* The findings of the Order are erroneous in this regard as well because the Carrier

did know of the action. The Carrier waived the defense. (see APA exhibit 31). In that answer, Carrier raised seven (7) statutory and one regulation defense but omitted the defense of election, (see APA 31, Form 51).

- B) The original Form 51, served February 19, 2009, was never amended nor any other Form 51 served.
- C) The Carrier failed to raise the election claim timely and only then upon a Form 58.
- D) With unreasonable delay, the election of remedy defense was never raised until May 11, 2009, nine (9) days prior to the scheduled hearing on May 20th, 2009, and only upon Carrier's Form 58. This was untimely and should not now be considered. (See APA 32, Carrier's Form 58, undated with accompanying Certificate of Service dated May 11, 2009);
- E) Carrier never raised the defense of election by Form 51.
- F) At the May 20, 2009, hearing, the Carrier failed to go forward on its claim to add the defense of election. The parties attended a hearings and Orders issued on September 29, 2009 added the true Employer, A&K Mulch, LLC. (see APA 8, Order) and allowed the deposition of Claimant upon the condition the Guardian could attend and participate (see APA 33, Order for deposition of Claimant).

The Carrier did not pursue its request to be allowed to allege the defense of election.

- G) Carrier never requested a subsequent hearing upon its request to be allowed to allege election. Instead, Carrier has improperly attempted to raise the issue by Form 21, in complete derogation of §42-1-705.
- H) The Carrier failed to pursue the election at a hearing set for May 20, 2009. The defense was waived.

In other words, despite the agreement of the parties, the Carrier attempted to ignore their contract and with unclean hands asked the Commission to award relief upon a defense it previously waived.

Likewise, it gave no notice of claim as required by statute and regulation and has thus again **waived** any claim it may have otherwise had.

The Order herein finding "Defendants were not even aware of this defense, election of remedies, until receipt of the S-2 notification several months later", (Order, page 14, last sentence, second paragraph) ignores the testimony of Ms. Dyches that she had the complaint and gave it to the Carrier's attorney.

STATUTORY REQUIREMENTS OF FORM 51 ANSWER AND
DEFENSES and PROPER METHOD TO REQUEST TO PRESENT DEFENSE

OMITTED FROM FORM 51:

The Carrier's Form 51 was to contain all known defenses and the controlling statute, § 42-1-705, entitled "*Employer's Answer to Request for Hearing (Form 51); specificity as to possible defenses*", mandates that:

(A) The commission's Employer's Answer to Request for Hearing form, hereinafter referred to as Form 51, must describe with as much specificity as possible the defenses to be relied upon by the defendants. A Form 51 shall not state that "all defenses apply" or other similar language, unless

such is actually the case. A Form 51 which does not conform to the requirements of this subsection shall not be considered at a hearing.

(B) Nothing in this section prohibits a commissioner from considering a defense not listed on a Form 51 if:

(1) it is proven to the satisfaction of the commissioner that the defendants **had no knowledge** of the facts supporting the defense on the date of the completion of the Form 51; **and**

(2) in the case of represented defendants, the defense omitted on the Form 51 is set forth on the commission's Pre-Hearing Brief form, and such **brief is timely filed with the commission and timely served upon the parties.**

(C) A Form 51 must be signed by an attorney, verifying that the contents of the form are accurate and true to the best of the attorney's knowledge. If the employer is unrepresented and completes a Form 51, the employer must sign the form, verifying that the contents are accurate and true to the best of the employer's knowledge. (emphasis added)

There is a two pronged test before a defense omitted from a Form 51, may be considered or raised later. Carrier failed to pass the test of Subsections B(1) and B(2).

1) Carrier must have no knowledge of the facts supporting the defense.

As set forth above, Carrier had knowledge of the Third Party action and that no S-2, had been served upon it and could have alleged the defense but failed to do so. All subsequent attempts to raise the issue by additional Forms 58 served by Carrier, fail upon the same basis.

2) The Form 58 must be served and filed timely. The Carrier's initial Form 58, wherein election is first raised, was undated but the certificate of service confirms it being served on May 11th, nine (9) days prior to the scheduled hearing on May 20th. Thus, Carrier failed to serve the Form 58 timely as Rules 67-611 and 67-211, require the same be served "at least ten (10) days before the hearing" required by Rule 67-611 and/or 67-211.

Due to these failures, §42-1-705 would bar the consideration of the defense of election of remedies.

Further, Rule 67-610, requires that:

"A. After a Request for Hearing and Answer are filed with the Commission, an "Amended" form must be filed to indicate a change in the nature of the claim, relief requested, or another defense." (emphasis added)

"B. A party may amend a form once as a matter of course at any time before or within thirty days after it is served. Otherwise, a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party."

The Carrier never served an Amended Form 51 nor any motion or other document asking for leave to do so. Further, Carrier waived and abandoned the defense and any rights to request leave to raise the defense by not pursuing the same at any scheduled hearing.

The Order should be reversed as it completely ignores the requirements of set forth above.

COMMON LAW AS TO WAIVER OF DEFENSE/AFFIRMATIVE DEFENSE

As it has developed, the election of remedy defense in the workers compensation arena is in the nature of an affirmative defense and a defense or affirmative defense not raised is waived. The Carrier further waived the affirmative defense of election of remedies by not pursuing it at the hearing set for May 29th, 2009, just prior to the expiration of the statute of limitations.

A waiver is an intentional relinquishment of a known right. *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981). It may be either **express** or **implied**. *Lawrimore v. American Health and Life Insurance Co.*, 276 S.C. 112, 276 S.E.2d 296 (1981). **An implied waiver results from acts and**

conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable. *Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148 S.E.2d 369 (1966). (emphasis added)

Lyles v. BMI, Inc., et al

292 S.C. 153355 S.E.2d 282 at 285 (S.C.App. 1987)

Defendant further waived the defense of election for failure to raise it timely.

"[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."

Strickland v. Strickland,

375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007)

"Statutory prohibition is in the nature of an affirmative defense precluding enforcement of a contract and should be pled." *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct.App.2008) (citing *Costa and Sons Constr. Co. v. Long*, 306 S.C. 465, 469; 412 S.E.2d 450, 453 (Ct.App.1991)); see also *Skiba*, 374 S.C. at 210, 648 S.E.2d at 606 (noting that section 40-11-370 is an affirmative defense). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it."

The statutory prohibitions provided by §42-1-540, *et seq*, should have been plead. A review of the Form 51 clearly shows Carrier plead virtually every statutory defense known to man and certainly indicates it knew how, but clearly chose not to assert election of remedies. This was a voluntary omission based upon facts actually known to Carrier at the time.

A Form 21, was not the proper manner in which to raise a defense. As stated above all defenses are to be raised by Form 51. Carrier failed to pursue the issue at *any* prior scheduled hearing.

The Order herein should be reversed upon these grounds.

6) Did the Single Commissioner err in failing to deny

Carrier/Employer(s) relief due to laches?

FACTS:

- A) Carrier unreasonably delayed raising the issue of election until less than 20 days prior to the expiration of the statute of limitations thus forcing the Claimant to pursue the Third Party action instead of being able to dismiss without prejudice as in *Callahan*.
- B) Carrier was represented and well aware of the defense but delayed raising the issue of election to the detriment of Claimant and while allowing him to pursue The Third Party at great expense of time and money for discovery.
- C) The Carrier waited until May 11, 2009, after the agreement was consummated and suit commenced to first mention the issue of the S-2 and then did so by way of a an untimely served Form 58. This was within three (3) weeks of the expiration of the statute of limitations forcing the Claimant to continue the action rather than being able to elect to dismiss without prejudice as in *Callahan*. Claimant relied upon the agreement of the parties to pursue the Third Party action jointly to its own prejudice.

When the Carrier delays unreasonably in raising an issue causing the Claimant prejudice or to incur expenses or obligations or change his position then the relief requested should be denied. The Carrier failed to raise election in its answer and only mentioned the same 20 days prior to the expiration of the statute of limitations in an untimely filed Form 58 and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations. Instead it permitted Claimant to expend considerable time and money in the prosecution of

the Third Party action when, had timely notice of the claim of election been made, Claimant could have cured the defect, if any, by voluntarily dismissing the Third Party action without prejudice as in *Callahan, supra*.

" Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Jones v. Leagan*, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct.App.2009). The equitable doctrine of laches is defined as " neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). " Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary **to incur expenses or enter into obligations or otherwise detrimentally change his position**, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Hallums*, 296 S.C. at 199, 371 S.E.2d at 528. (emphasis added)

Robinson v. The Estate of Elois Pinckney Harris,
388 SC 616, 698 S.E.2d 214 at 221, (S.C. 2010)

The Order should be reversed upon this ground.

7) Did the Single Commissioner err in failing to deny
Carrier/Employer(s) relief due to equitable estoppel?

Facts:

1) Carrier and the Employer maintained a pattern of deceptive and uncooperative conduct throughout the course of this claim: (see APA 29, Deposition of Jonas)

a) The Carrier has maintained since the First Report was filed that J.C. Witherspoon, Inc, was Claimant's employer at the time of the injury. This is untrue though it took considerable time and expense in discovery between the Third Party action and this case to determine the true employer was A.K. Mulch, LLC. A&K is a distinct legal entity with its own

Federal I.D. number (see APA 16, 17 and 18, A&K filing with Sec of State and Letter of company attorney Billy Cook) The two companies perform different jobs. A.K. is a warehouse type, non-mobile mulching operation. J.C. Witherspoon is a logging operation. (See APA 24, Witherspoon deposition). He also testified, despite the representations of the Carrier in this case, that Claimant:

- 1) was always an A&K employee (not J.C. Witherspoon, Inc.)
page 7, lines 21-25, page 16, lines 21-23;
- 2) working on A&K premises when hurt, page 10, lines 13-17;
- 3) That A&K was a separate operation from Witherspoon, Inc.,
page 5, line 14 through page 7, line 3;
- b) Not until September 29, 2009, was the true employer, A&K Mulch, LLC, made a party to the workers compensation case. This was the result of Claimant's efforts through discovery in the Third Party action. (see APA 8, Order Adding Party)
- c) Once A&K was made a party, an S-2 was promptly served for the second time on October 13, 2009, within thirty (30) days. (See APA 15)
- d) In its answer to the Amended Complaint, A&K first raised its status as Employer and noticed the lien of the Carrier. (see APA 12, Answer of A&K)
- e) Finally, on August 13th, 2010, Responses to Requests to Admit in the Third Party action confirmed that at the time of injury Claimant was an employee of A&K. (see APA 13)
- f) Ultimately, A&K was dismissed from the Third Party action

on August 23, 2010, due to its status as the true Employer. (See APA 26, Order of Dismissal)

g) Even when A&K raised the defense in the Third Party action that it was the Employer, avowed itself entitled to the employer immunity and claimed the lien of the Carrier, the Carrier never admitted as much in this case but pursued the position that J. C. Witherspoon, Inc. was the employer.

h) In fact, the Carrier asserted its lien by way of the Employer's counterclaim but failed to notify Claimant by service of the S-1.

In South Carolina, a defendant may be estopped from claiming the benefit of a statute if some conduct or representation by the defendant has induced the plaintiff to delay or forego action in a timely manner *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (. Ct.App.2001). The Carrier failed to raise election until 20 days prior to the expiration of the statute of limitations and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations.

The Carrier did not disclose the name of the true employer and forced the Claimant to discover the truth through discovery.

*"An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary." Id. An intentional misrepresentation is not required for the application of equitable estoppel. Id. at 361, 559 S.E.2d at 339. "It is sufficient if the plaintiff reasonably relied upon the **words or conduct** of the defendant in allowing the limitations period to expire." Id.*

*The "elements of equitable estoppel as to the party estopped are: (1) **conduct** by the party estopped which amounts to a **false representation or concealment of material facts**; (2) the*

intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). (emphasis added)

Logan v. Cherokee Landscaping and Grading Co., et al,
389 S.C. 611, 698 S.E.2d 879 at 883 (Ct. App. 2010)

The Order herein failed to apply the law properly and should be reversed.

8) Did the Single Commissioner err in failing to deny
Carrier/Employer(s) relief due to unclean hands?

This case is replete with misrepresentation and bad faith on behalf of the Carrier. Carrier failed to perform its duties of paying benefits and giving statutorily required notices. Further, Carrier entered into a binding contract/agreement to pursue the Third Party action jointly with Claimant.

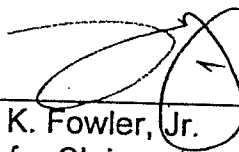
"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct.App.2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App. 1998). "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or **bad faith** relative to the matter in which he seeks relief.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). "The decision to grant equitable relief is in the discretion of the trial judge." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379. (emphasis added)

Straight v. Goss, et al,
383 SC 180, 678 S.E.2d 443 at 458, (S.C.App. 2009)

CONCLUSION

For the many reasons set forth above, Claimant requests that the Full Commission reverse the Order of the Single Commissioner and reinstate the benefits to which he is entitled.

Respectfully submitted,



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Wednesday, June 29, 2011

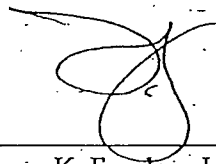
CERTIFICATE OF SERVICE

I, the undersigned, of the Law Offices of Peake & Fowler Law Firm P.A., attorneys for the claimant do hereby certify that I have personally served counsel of record, MARK CAUTHEN, ESQUIRE, in this action by having a copy of the APPELLANT'S BRIEF herein at the below specified address:

SERVED : Mark Cauthen, Esquire (personally served)
McKay Law Firm.
1303 Blanding Street
Columbia, SC 29201

DATE SERVED: June 29, 2011

PLEADINGS: Appellant's Brief



Thomas K. Fowler, Jr.

Columbia, South Carolina
June 29, 2011

BEFORE THE APPELLATE PANEL
OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 0607813

Andreal Holland,

Claimant/Appellant,

vs.

JC Witherspoon, Jr., Inc. and A&K Mulch,

Employer,

and

Capital City Insurance,

Carrier,

Defendants/Respondents.

RESPONDENTS BRIEF

STATEMENT OF THE CASE

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

It is undisputed that the Claimant did not file the requisite "S-2" notification with the Commission, and serve the S-2 on the Defendant Employer/Carrier in this case until May 14,

2009. The notice of the third party claim, and service of the S-2 was therefore made well in excess of the thirty day limitation for filing this notification as prescribed by S.C. Code Ann. §42-1-560.

Subsequently, the Defendants in this workers' compensation action raised the affirmative defense of election of remedies pursuant to §42-1-560 and as interpreted by the Supreme Court in *Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). This issue was originally scheduled to be determined - in addition to issues raised by the Claimant - in a Form 50 hearing scheduled in May, 2009. That hearing was postponed, and the Form 50 requesting the hearing was later withdrawn.

The current issues associated with the election of remedies then came before the Commission on the Defendants' Form 21 hearing request. This case had been postponed multiple times, and was most recently scheduled to be heard before Commissioner T. Scott Beck on Friday, December 17, 2010. During a teleconference on December 16, 2010, Commissioner Beck and the attorneys for the respective parties agreed to have the issue of election of remedies determined based on the APA's submitted into the record and legal memorandums to be filed by the parties.

Legal memoranda were filed by the parties, in addition to the APA's and exhibits that were submitted. The Hearing Commissioner subsequently ruled that the Claimant had elected his remedy due to failure to comply with the mandated statutory dictates of §42-1-560. The Claimant appealed the hearing Commissioner's order to the Appellate Panel of the Commission via a timely filed Form 30 appeal. In the Claimant's/Appellant's Form 30 and addendum, he cites twelve (12) separate points of error for appellate review by the Appellate Panel as follows:

ISSUES ON APPEAL:

1. Is §42-1-560 unconstitutional as being vague, unambiguous (sic)?
2. Is §41-1-560 unconstitutional as failing to provide equal protection under the law?
3. Did the Single Commissioner err in the application of *Callahan v. Beaufort* and/or §42-1-560?
4. Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills?
5. Did the Single Commissioner err in failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration?
6. Did the Single Commissioner err in failing to rule that the Claimant was under disability until a GAL was appointed?
7. Did the Single Commissioner err in failing to find the Carrier/Employer(s) waived the election of remedies defense?
8. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to *laches*?
9. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to equitable estoppel?
10. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to waiver?
11. Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their unclean hands?
12. Did the Single Commissioner err in failing to deny the Carrier/Employer's relief due to their failure to comply with §42-1-560?

ELECTION OF REMEDIES IN GENERAL

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

S.C. Code Ann. §42-1-560(b) requires that, when an injured employee chooses to assert a third party claim for benefits, in addition to a workers' compensation claim, a notification of the, "commencement of the [third party] action **shall be given** within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission." (emphasis added). The 'prescribed form' of the Commission is the 'S-2.' (See S.C. Code of Regs. § 67-203(2)). However, a Form S-2 notifying the Respondent Employer/Carrier and the S.C. Workers' Compensation Commission of this third party action was not filed until May of 2009, several months after the commencement of the third party civil action.

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

Is §42-1-560 unconstitutional as being vague, ambiguous? Is §41-1-560 unconstitutional as failing to provide equal protection under the law? (Claimant's/Appellant's Appeal Issues No's 1 and 2).

Neither of the above two issues should be considered by the full Commission Panel on appeal, as the constitutionality of S.C. Code Ann. §42-1-560 was not challenged or raised to the hearing Commissioner. Therefore, the Claimant/Appellant should be precluded from now raising these arguments for the first time on appeal. Issues not raised to the trial court are deemed abandoned on appeal, and cannot be raised for the first time to an appellate body reviewing the decision of the trial officer who originally heard the case, as the trial Judge or Commissioner would never have had the opportunity to consider and determine the issue in the first instance. This principle holds true for both factual and legal issues, including a challenge to the constitutionality of a statute. (See *State v. Nichols*, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review."). **Constitutional arguments are no exception to the rule**, and if not raised to the trial court are deemed waived on appeal. *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116 (1998) (emphasis added).

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

The equal protection argument is meritless as well. The Claimant/Respondent indicates that usually a person injured would have three years in which to file a claim against the tortfeasor, but that §42-1-560 only permits one year to do so. However, a person injured on the job by a third party tortfeasor actually has their rights expanded. If the injured worker chooses not to pursue a workers' compensation claim, his or her rights are exactly the same as any other injured party with three years to file. If the injured worker chooses, however, to file both a third party action and the workers' compensation claim, he or she is bound to follow the dictates of §42-1-560, or otherwise risk electing his or her remedy. Note, Mr. Holland, irrespective of the hearing Commissioner's ruling in this case, still has a valid third party civil action pending against the third party tortfeasor. Therefore, no equal protection violation is implicated by this statute.

Did the Single Commissioner err in the application of *Callahan v. Beaufort County School District* and/or §42-1-560? (Claimant/Appellant's Appeal Issue No. 3).

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

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:

Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C.Code Ann. § 42-1-560(b).

An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. *Fisher v. S.C. Dept. of Mental Retardation-Coastal Center*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct.App.1988) ("[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, **we strictly construe the requirements of § 42-1-560** and leave it to the legislature to amend and define its ambiguities. *Cf. Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). **Here, the statute clearly requires timely notice to be given to all three entities employer, carrier, and Commission on the Form S-2.**

Callahan at 95-6, 313 (emphasis added).

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

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

Callahan at 96-7, 314

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

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

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

Callahan at 97, 314.

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

This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*).

Additionally, prior cases interpreting this statute have found that prejudice should not be considered. See *Hudson, supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all") (citing *Stroy v. Millwood Drug Store*, 235 S.C. 52, 109 S.E.2d 706 (1959)); *Kimmer v. Murata*, 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.")

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

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

By requiring an employee to give notice of a third party action within thirty days of filing to the Commission, employer, and the carrier is allowed to participate

and take necessary steps to insure that the ensuing litigation is pursued diligently and effectively. Failure to comply with the notice requirement of the Act can act as a bar to workers' compensation benefits. In *Hudson v. Townsend Saw Chain Company* the Court of Appeals rejected the lower Court's finding that notice of third party action is required only in situations in which an employee pursues a workers' compensation claim simultaneously with a third part action, and held that:

[I]rrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b). If the employee fails to give the notice required by Section 42-1-560(b) and prosecutes the third-party action to a final determination, either before or simultaneously with filing a workers' compensation claim, the employee will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits.

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of America, Inc.*, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)]

The Law of Workers' Compensation in South Carolina, 5th ed., 2008, at p. 477.

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

In support of his appeal, the Claimant contends, in part, that an S-2 notification of a third party claim, by the injured employee to the employer, carrier and the Commission, is not required after a year of compensation has been paid (or presumably when an S-3 has not been filed by the Employer/Carrier). This position is unfounded. First, a review of §42-1-560 indicates no excusal of the Claimant's burden of notification, per subsection (b), under any generally or particularly defined circumstance. If anything, this statute portrays *exactly* the opposite instruction. The requirements of the employee for proceeding with a third party claim

(simultaneously or prior to his or her workers' compensation claim) are outlined in subsection §42-1-560 subsection (b). This section includes the mandate of statutory notice by the Claimant to the other parties and the Commission within thirty days of the commencement of a civil action. On the other hand, the requirements of the employer/carrier for *proceeding with a third party action* are similarly outlined in subsection (c). Notably, subsection (c) states in part that:

Failure [of the employer/carrier] to give this notice, or to commence the action at least thirty days prior to the expiration of the time within which such action may be brought, shall operate as a reassignment of the right of action to the injured employee,..., **and the rights and obligations of the parties shall be as provided by subsection (b) of this section.**

S.C. Code Ann. §42-1-560 (Supp. 1986)(emphasis added)

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

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

persuasive in light of a clear and definitive mandated statutory burden to notify the Commission and opposing parties in the workers' compensation claim of his third party action – as required by §42-1-560. This obligation is in effect regardless of the amount of time for which workers' compensation benefits have been paid, and regardless of when in the course of his workers' compensation claim the Claimant chooses to file the third party action.

Did the Single Commissioner err in granting relief to the Carrier/Employer(s) who had failed to pay medical bills? (Claimant's/Appellant's Appeal Issue No. 4).

In support of this appeal ground for judicial review, on page 7 of the Claimant's/Appellant's brief to the full Commission, the Claimant simply states:

The Carrier had failed to pay benefits due and the Claimant's dental bill remains unpaid [to monetary amounts listed and providers and APA cited]. As a result, Carrier was not entitled to stop payment or cease benefits for any reason. It's hands in this regard were unclean too.

The above paragraph is the entirety of the Claimant's argument on this issue. No authority is cited in support of the above argument be it public policy, case law precedent, statutory authority or otherwise. As to the ultimate responsibility of the Defendants/Respondents for the payments cited by the Claimant, such is beyond the scope of this brief and this appeal. Nonetheless, without some basis of authority for the conclusory arguments made by the Claimant on this point, the Defendants are unable to properly respond, except to note that judicial bodies sitting in their appellate capacity have found that:

South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). In *Brown v. Theos*, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct.App.1999), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001), we held that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal: "Brown states in a one sentence paragraph that he had raised an action for

'intentionally negligent and malicious conduct' We note Brown's argument is so conclusory that it may be deemed abandoned." (citation omitted).

Glasscock Inc. v. U.S. Fidelity and Guaranty Co. 348 S.C. 76, 81, 557 S.E.2d 689, __ (Ct. App. 2001).

Therefore, the Defendants/Respondents contend this particular issue has been abandoned on appeal. Furthermore, it is unclear how this allegation would countermand the express statutory dictates of S.C. Code Ann. §42-1-560, barring any compelling legal authority to the contrary.

Did the Single Commissioner err in failing to deny relief to the Carrier/Employer(s) upon the basis of breach of agreement to pursue the third party action jointly for which Claimant paid valuable consideration? (Claimant's/Appellant's Appeal Issue No. 5).

This issue has not been preserved for review, because the issue was not properly raised before the hearing Commissioner. Therefore, the Claimant is precluded from raising this issue for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)(Also See *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E. 2d 357 (1996)(arguments not raised to the Workers' Compensation Commission are not preserved for appeal)).

To the degree that such arguments can be considered to have been preserved for review, the Respondents reply as follows. First, the fact that the Defendant Carrier agreed to cooperate with Claimant's counsel in pursuing a third party claim, has no effect on the statutory mandates of §42-1-560. Moreover, the agreement alleged by Claimant's counsel does not absolve the Claimant of his notification responsibilities per §42-1-560. It is true that in her deposition the adjuster representative for the Defendant Carrier, stated she had spoken with Claimant's (prior)

counsel, "...James Fennell maybe about a couple of times in regards to the third party [claim]." (Depo. of Paula Dyches, p. 20 lines 20-22). Nonetheless, South Carolina Courts have previously indicated that failure to provide the proper statutory notice is still a bar the Claimant's ability to proceed in both workers' compensation and a third party civil action – thereby constituting an election of remedies, even when the Defendants had *actual knowledge* of the third party suit. As set forth in the second footnote of *Callahan, supra*: "This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. *Fisher, supra*; see also *Hardee v. Bruce Johnson Trucking Co.*, 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct.App.1987)(discussing the facts of *Fisher*) (emphasis added).

Of note, despite having discussed an agreement to split costs in pursuing the third party claim between the insurer, and the Claimant, the Defendant Carrier in this case did not have actual notice of the claim when it was filed in October of 2008, nor within thirty days of it being filed. The evidence in the record indicates that, at the earliest, the Carrier would have discovered that a third party action had been filed as early as March 10, 2009 (Claimant's APA No. 23). Yet again, even if 'actual knowledge' were sufficient to satisfy or extinguish the notice requirements of §42-1-560, which the Defendants/Respondents contend it is not, there is no evidence in the record to indicate that the Employer/Carrier had actual knowledge of the filing of third party suit within 30 days of its commencement in October of 2008. (Note: the complaint received by the Carrier's representative in March of 2009 was a copy of an amended complaint filed on March 3, 2009 by the Claimant in the third party action).

Finally, the Claimant's appellate argument discusses a "breach of an agreement" to pursue the third party claim, after "consideration" was paid by the Claimant. The resonance of the argument seems to implicate something in the form of a breach of contract. The legal nomenclature of 'consideration paid' is normally peculiar to contracts, and that provision of 'valuable' consideration from one party to another is binding upon the other party to perform the second operation (other half) of the contract in remuneration for the 'consideration' received. While having no bearing on the legal doctrine of election of remedies, such an argument by the Claimant is further misplaced as to the fact that the 'consideration' noted was not something provided by the Claimant, to the Defendants, in anticipation of the Defendant's performing some service or duty for the Claimant. To the contrary, the 'consideration' indicated was actually in reference to monies paid by the Claimant to expert consultants for the furtherance of his own third party claim. (See Claimant's/Appellant's brief at p. 11, para. (A)(ii)).

Such an argument by the Claimant does little to explain how the Claimant's payment of litigation costs, for a third party suit on his own behalf, would act to excuse his own non-compliance with the statutory requirements of §42-1-560.

Did the Single Commissioner err in failing to rule that the Claimant was under disability until a GAL was appointed? (Claimant's/Appellant's Appeal Issue No. 6).

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

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

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

Furthermore, incapacity of the Claimant cannot, and should not be imputed to Claimant's counsel for the purpose of tolling or excusing proper compliance with the Worker's Compensation Act. During his purported time of legal disability, the Claimant, through counsel, had filed a Form 50 hearing request and pre-hearing briefs/APA evidentiary submissions. The Claimant/Respondent cannot use the sword and the shield, and should be judicially estopped from making inconsistent arguments as to his capacity to comply with the workers' compensation Act. Generally speaking, the doctrine of judicial estoppel precludes a party from

adopting a position in conflict with one earlier taken in the same or related litigation. (Adopted by South Carolina in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997)).

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

Did the Single Commissioner err in failing to find the Carrier/Employer(s) waived the election of remedies defense? (Claimant's/Appellant's Appeal Issue No. 7).

Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.App.2004). The equitable doctrine of *laches* is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right," *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both *laches* and waiver require a party to have known of a right, and that the party knowingly fails to assert (*laches*) or knowingly abandons that right (waiver).

The Defendants assert that the argument of waiver of the election of remedies defense is also without merit. The Defendants have raised this defense, election of remedies, at every contested hearing in this case since the defense became viable, and was known by the

Defendants. There is no legal or factual evidence in the record indicating the Defendants have waived or abandoned their right to assert election of remedies as a defense in this claim.

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

The Claimant/Appellant argues that the Defendants/Respondents failed to raise the election of remedies defense in their Form 51 response filed on February 19, 2009. First and foremost, the arguments pertaining to this issue are superfluous as the current election of remedies issue has been raised via the Defendants' own Form 21. Secondly, the arguments made by the Claimant seem to indicate the only proper way to raise election of remedies is by a Form 51. If this were the case, it would mean that a Claimant could thwart the dictates of §42-1-560 by simply never filing a Form 50 (on an already accepted claim) thereby never giving a defendant the opportunity to raise the election of remedies on a Form 51.

The Defendants could not have raised the election of remedies issue in their February 19, 2009 Form 51 without some knowledge of the filing and non-service of the S-2. The Carrier was never served with an S-2 notice of the original Complaint in the third party action, filed on October 10, 2008. As indicated in the Appellants own brief, the amended third party complaint (filed in 2009) was not even received by the Carrier until March 10, 2009. (Claimant's APA 23). Furthermore, at that time, and as noted by the Claimant in his own legal memorandum, he could have still, ostensibly, "cured" his S-2 service/filing defect by voluntarily dismissing the third party action and re-filing it; then timely serving the S-2. It should also be noted that a claimant must comply with the, "notice requirements of §42-1-560, even though the carrier had actual

knowledge of the third-party suit,” in order to maintain both the workers’ compensation action the third party suit simultaneously. *Callahan v. Beaufort County Sch. Dist.*, 375 S.C. 92, 96, 651 S.E.2d 311, 313 (2007)(at Footnote 2)(internal citations omitted).

As the hearing drew closer, no such action to cure this defect was ever taken by the Claimant. Accordingly, the Defendants did raise the election of remedies defense on their Form 58, filed May 11, 2009, for the corresponding Form 50 hearing on May 20, 2009. (Note: The three year Statute of Limitations for the third party civil action expired on June 1, 2009). However, since no curative action was ever taken by the Claimant, election of remedies would have been a viable defense for the Employer/Carrier on the date of the May 20, 2009 Form 50 hearing. The Appellant also indicates that the Form 58 Pre-Hearing Brief filed by Defendants on May 11, 2009 was untimely for the May 20, 2009 Form 50 hearing. This is not accurate. Judicial notice should be taken that May 10, 2009 (the actual due date of the Defendants Form 58, PHB) was a Sunday. Meaning, a filing on the following Monday would be timely. Pursuant to Reg. 67-609 ‘Computation of Time,’ “Sundays...are included unless the designated time period ends on a...Sunday...in which case the next day that is not a Saturday, Sunday, State, or Federal holiday is included as the last day [for filing].” (emphasis added).

Defendants also assert this line of argument is purely extraneous in light of the fact that:

- (a) The current issues are before the Commission on the Defendant’s Form 21, not a Form 50;
- (b) At the time of the May 20, 2009 hearing the Claimant did not object to the Form 58 filing based on timeliness; and (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had requested; (d) The Defendants/Respondents had no authority or ability to force the Claimant to proceed on a Form 50 hearing request in Order to assert their own defenses to that Form 50 or the claim in general.

In addition, the Claimant indicates that Carrier did not pursue its request to be allowed to allege the election of remedies at the May 20, 2009 Form 50 hearing, and thereby has waived this defense, even if it was properly raised, back in May of 2009. Again, this argument is also without merit. It is the Claimant who chose not to go forward with his own requested Form 50 hearing on May 20, 2009. No Form 21 had been filed at that time. The Employer/Carrier does not procedurally have the ability to force a Form 50 hearing to go forward if the Claimant withdraws the hearing request or otherwise chooses not to go forward. Additionally, if the Claimant had gone forward with his Form 50 hearing, Defendants would have had an opportunity to amend the Form 51 to conform to the evidence at trial pursuant to Rule 15(b) SCRPC.

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

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to laches? (Claimant's/Appellant's Appeal Issue No. 8).

Laches is an affirmative defense available in workers' compensation claims. See *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004). In *Richey* a Claimant had alleged injuries in October of 1987 and subsequently filed a F50, and a hearing was set for March of 1989. The hearing was cancelled for some unknown reason, but the claim apparently remained

open. The Claimant did not file another Form 50 or otherwise requesting a hearing before the Commission until approximately 11 years later in March of 2000. No evidence existed to show that Richey had tried to pursue his rights against the Carrier/Employer during the intervening 11 years, and Richey was unable to show good excuse for failure to do so. Furthermore the *Richey* court found that material prejudice to the Defendants due to the intervening delay.

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

Laches is inapplicable to the case at bar to block the defense of election of remedies. First, the burden of proving *laches* is on the Claimant/Appellant. The issue is election of remedies, premised upon Claimant Holland's failure to comply with the express notification requirement dictated by S.C. Code Ann. §42-1-560 (for simultaneously pursuing a workers' compensation claim and a third party civil action for the same accident). It is undisputed that the Claimant filed a third party civil action in October of 2008, but did not file and serve his S-2 notification, per §42-1-560, until several months later (May of 2009).

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

Laches is an affirmative equitable defense. Even to the degree that it could be appropriate in this instance, the Claimant would have to show his failure to file the S-2 notification within 30 days of his civil action was based on some inexcusable neglect of the Defendants, upon which the Claimant relied – to his detriment – in failing to act sooner. That is, more timely filing the S-2. Again, under the facts of this case, this cannot be demonstrated, as the Defendants did not even become aware of the third party actions' filing until several months after it took place. Furthermore, South Carolina Courts have held "previously [] that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had **actual knowledge** of the third-party suit." (*Callahan v. Beaufort Co. School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007) at Footnote 2) (internal citations omitted) (emphasis added).

Lastly, the Claimant/Appellant asserts that he would have been able to 'cure' the defective notification, pursuant to *Callahan*, if it had been known to him earlier. First, the Claimant knew of the election of remedies defense at least three weeks prior to the running of the

statute of limitations. Furthermore, nothing in the Act or reported opinion places an onus on the Defendants to raise defenses to a claim in the most convenient manner available to an opposing party for the purpose of circumventing such a defense. Lastly, *Callahan* does not necessarily stand for the premise that an injured worker can dismiss his third party action, then re-file and continue to seek benefits in workers' compensation and tort through §42-1-560. To the contrary, the *Callahan* court noted that the Claimant could continue to seek workers' compensation benefits based on the voluntary dismissal of the third party action – but specifically noted that, “[a]lthough it is unclear from the record whether Claimant re-filed the third-party action, the Court was made aware at oral argument that Claimant later re-filed the third-party action against Tech Clean. We offer no opinion on the efficacy of this re-filing.” (*Callahan*, at Footnote No. 1) (emphasis supplied).

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to equitable estoppel? (Claimant's/Appellant's Appeal Issue No. 9).

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

Given their derivation from the legal doctrine of waiver, the doctrines of *laches* and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that

delay to his detriment. See 7 S.C. Jur. Estoppel and Waiver § 28. Thus, it is possible to assert only one of these equitable defenses (estoppels or *laches*) - yet have successfully pled both. (See Analysis by *Strickland v. Strickland*, 375 S.C. 76, 85-86, 650 S.E.2d 465, 470 - 471 (S.C.,2007)).

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

ADDING A SECOND DEFENDANT EMPLOYER
(EQUITABLE ESTOPPEL)

From the date of accident, June 1, 2006, this has remained an accepted claim for benefits. The Defendant Employer has been J.C. Witherspoon, Jr. Inc., and its Carrier, Capital City Insurance Co., have admitted liability for this claim and been paying benefits from the date of the accident forward – it would seem peculiar indeed that the Respondents (as alleged) would have participated in bad faith deceitful behavior in order to accept liability as the employer/carrier wherein such liability did not lie. Notably, since Capital City Insurance is the carrier for both defendant employers, the benefit to the Carrier of concealing the true employer (on an admitted claim) seems negligible at best. On September 29, 2009, per the request of the parties to the workers' compensation action, A&K Mulch, LLC, which is also covered for workers

compensation by Capital City Insurance, was added as a second defendant employer to this claim. Notably, A&K Mulch was not substituted for J.C. Witherspoon, but only added as a Defendant Employer. To date, and for the past four years prior to the election of remedies hearing from which this appeal emanates, Capital City was providing workers' compensation benefits in this case.

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

As to A&K Mulch, LLC, notably, this entity was only added as a party defendant in the case. A&K Mulch was never substituted for J.C. Witherspoon, nor was A&K Mulch adjudicated or found to be the sole employer for this action. Furthermore, because A&K Mulch is owned by J.C. Witherspoon and the two are similarly intertwined companies with the same workers' compensation insurance carrier, the Defendants did not object to adding A&K Mulch as a party

Defendant. Especially so in light of the fact that J.C. Witherspoon, and its Carrier, had already admitted this accident and been providing benefits for over three years by the date of the Commission Order adding A&K Mulch as a defendant employer. Of note, by the time the Claimant moved to add A&K Mulch as a party defendant in 2009, the two year statute of limitations for filing the action against A&K Mulch would have run. (S.C. Code Ann. 42-15-40).

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

We therefore hold that, irrespective of whether an employee pursues a third-party action either before or simultaneously with filing a workers' compensation claim, the employee, to preserve his or her claim to workers' compensation, must provide the notice required by Section 42-1-560(b).

Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, __ (Ct. App. 1998).

Therefore, the Claimant's notice of the third party action would have been defective as to both A.K. Mulch, LLC and J.C. Witherspoon, Jr., Inc. as well as Capital City Insurance as the respective carrier for either of the Defendant employers despite the time frame of the second employer being added.

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to waiver? (Claimant's/Appellant's Appeal Issue No. 10).

The Defendants/Respondents address these arguments herein *supra* in response to the Claimant's/Appellant's appeal issue numbered "7" above. "Did the Single Commissioner err in failing to find the Carrier/Employer(s) waived the election of remedies defense?"

Did the Single Commissioner err in failing to deny Carrier/Employer(s) relief due to their unclean hands? (Claimant's/Appellant's Appeal Issue No. 11)

The Appellant argues the equitable doctrine of 'unclean hands' is a bar to the Respondents Employer's/Carrier's right to raise the affirmative statutory defense of election of remedies. 'Unclean hands' is solely an equitable doctrine, which serves to block a party that seeks *equitable* relief from the court from obtaining *equitable* relief when that party has, itself, acted inequitably in association with the litigated matter. (See *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct.App.1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (internal quotations and citations omitted).

This argument is not relevant, nor pertinent, to the affirmative defense of election of remedies in this case for a number of reasons. First, and foremost, the doctrine 'unclean hands' bars parties that are seeking equitable relief from the court from doing so when they have acted inequitably. The Defendant Employer/Carrier has asserted election of remedies which is a statutory defense under S.C. Code Ann. §§42-1-540, -550, -560. Therefore, 'unclean hands' would not apply. Secondly, no inequitable behavior on the part of the employer/carrier has been properly asserted nor is such substantiated by the evidence of this case.

The Appellant's statement in his brief that "[t]his case is replete with misrepresentations and bad faith on behalf of the Carrier[.]" while provocative, is not evidence of such misdeeds (Appellant's Brief at p. 23). Furthermore, it is likely more than mere coincidence that allegations of such despicable actions/inactions by the Employer/Carrier were only pointed out to the Commission by the Claimant *after* a viable election of remedies defense was raised.

Did the Single Commissioner err in failing to deny the Carrier/Employer's relief due to their failure to comply with §42-1-560? (Claimant's/Appellant's Appeal Issue No. 12).

The Defendants/Respondents address these arguments herein *supra* in response to the Claimant's/Appellant's appeal issue numbered "3" above, "Did the Single Commissioner err in the application of *Callahan v. Beaufort* and/or §42-1-560?"

CONCLUSION

In conclusion, the Defendant/Respondent asserts the numerous arguments raised by the Claimant/Appellant are either inapplicable, not preserved for review, not factually supportable, under the evidence of this case, or not legally tenable to bar the defense of election of remedies in this case. Therefore, the Order of the single Commissioner should be affirmed in full.

Respectfully Submitted,



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July 14, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Andreal Holland,

Claimant,

vs.

J.C. Witherspoon, Jr., Inc. and A&K Mulch,

Employer,

and

Capital City Insurance Company,

Carrier.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

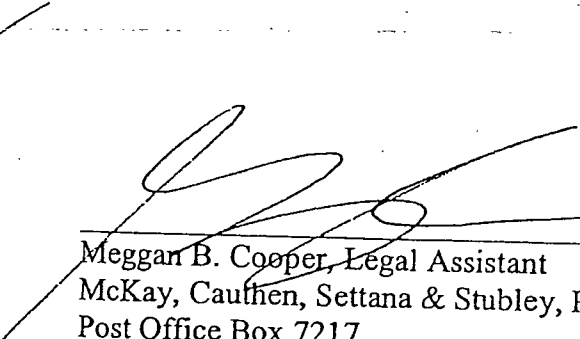
) WCC FILE NO. 0607813

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Defendants' Reply Brief to the Full Commission, has been served upon the following party(s) by placing a copy of same in the United States mail, first class, certified mail, return receipt requested, postage prepaid, addressed as shown below on this 14 day of July, 2011.

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July 14, 2011

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Handwritten: Daniel B.
7-19-11
9:30

RE: Andreal Holland v. J. C. Witherspoon, Jr., Inc. & A&K Mulch
WCC File No: 0607813
DOI: 06/01/06
Claim No.: WC071306
Our File No.: 2301-0017

Dear Ms. Crocker:

Please find enclosed the original and three (3) copies of Respondent's Reply Brief to the Full Commission in regard to the above-referenced matter.

By copy of this letter to Thomas K. Fowler, Jr., counsel for the claimant, I am serving him with a copy of our Brief.

Very truly yours,

Handwritten signature of Mark D. Cauthen

Mark D. Cauthen

Handwritten: Geo

MDC/msb

Enclosures

cc: Thomas K. Fowler, Jr., Esquire (Via Email & US Mail)
Paula Dyches

SCWCC

JUL 19 2011

JUDICIAL