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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

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

Case No. 2012-CP-14-00024

Andreal Holland Appellant

v.

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

RECORD ON APPEAL
Volume 2

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF)
THIRD JUDICIAL CIRCUIT)
(FRONT DESK)
S.C. Workers Comp Comm

Andreal Holland, by his Guardian Ad Litem)
Peggy Knox,)
Claimant/Appellant,)

DOCKET NO.: 2011 CP 14-__

VS.)

NOTICE AND)
PETITION FOR APPEAL FROM)
DECISION OF THE S.C.)
WORKER'S COMPENSATION)
COMMISSION)

J.C. Witherspoon, Jr., Inc.,)
And)
A& K Mulch, LLC,)
And)

Capital City Insurance Company,)
Carrier,)

WCC FILE # 0607813

Defendants/Appellees,)
_____)

TO: THE S.C. WORKER'S COMPENSATION COMMISSION and the
DEFENDANTS/APPELLEES:

Notice is hereby given that the Employee/Appellant hereby appeals the Order of the Full
Commission of the S.C. Worker's Compensation Commission Appellate Panel dated December
14, 2011, in this action, and:

1. The facts of this case are essentially stipulated by all parties. The
Claimant/Appellant, 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 by A& K Mulch,
LLC, in Clarendon County, South Carolina where he suffered a severe and permanent head
injury while operating a wood chipper machine.

2. Peggy Holland is the mother of Andreal Holland and on May 13th, 2009, was
appointed his Guardian *Ad Litem* by the Commission in this action and was duly appointed as
his guardian by the Clarendon County Probate Court for the purpose of prosecuting the legal
claims, including the worker's compensation claim here involved, on behalf of Andreal Holland.

3. 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, is solely owned by J.C. Witherspoon, Jr., the individual owner of various businesses including J.C. Witherspoon, Jr., Inc.

4. Upon information and belief, at all times mentioned hereafter, Capital City Insurance Company, hereafter "Carrier", was a qualified insurance company authorized to write and provide insurance coverage and benefits in accord with the requirements of the applicable South Carolina law and statutes and on June 1, 2006, the date that Andreal Holland was injured, was the workers' compensation insurance carrier of J. C. Witherspoon, Jr., Inc., and apparently A&K Mulch, LLC.

5. That on March 30, 2011, the Single Commissioner issued an order pursuant to S.C. Code Ann. § 42-17-40, (1976), finding that the Employer and Carrier were entitled to stop all benefits to Appellant/Claimant upon the basis of election of remedies by Claimant/Appellant's not having timely filed and served an S-2, when pursuing a third party claim, copy attached as "Exhibit A".

6. On April 13, 2011, the Claimant, Appellant appealed the single commissioner's order to the SCWCC Appellate Panel pursuant to S.C. Code Ann. § 42-17-50, (1976), copy of Form 30 attached as "Exhibit B".

7. On December 14, 2011, The SCWCC Appellate Panel issued its final order, copy attached and incorporated by reference as "Exhibit C", upholding the single commissioners decision.

8. Claimant appeals from the findings, conclusions and order of the Appellate Panel of the SC Workers Compensation Commission on those grounds hereafter stated. A copy of the relevant orders and the Record below will be forwarded by the Judicial Administrator of the S.C. Workers' Compensation Commission as provided by law and are made a part of the record in support of this appeal.

9. Further, Claimant/Appellant alleges that the decision of the Appellate Panel is a final agency decision from which judicial review is appropriate and this appeal is made pursuant to Rules of Procedure and §1-23-380, *Code of Laws of South Carolina, 1976*, on the grounds that the Decision and Order appealed from is affected by errors of law, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and is arbitrary and capricious and characterized by abuse and unwarranted exercise of discretion.

10. The Court has jurisdiction of this appeal pursuant to S.C. Code Ann. § 42-17-60, (1976), as such statute was in force at the time of the employee's injury.¹

11. The venue for this appeal is properly placed in Clarendon County, South Carolina.

ISSUES FOR APPEAL

Specifically regarding the uncontested factual issues, Full Commission erroneously failed to determine who the Appellant's employer was in this case but rather found and concluded:

The findings of an accidental injury while allegedly employed at-J.C. Witherspoon, Jr., Inc.-The single Commissioner and Full Commission found:

¹ § 42-17-60. Conclusiveness of award; appeal; payment of compensation during appeal

The award of the commission, as provided in Section 42-17-40, if not reviewed in due time, or an award of the commission upon such review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not thereafter, may appeal from the decision of the commission to the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. Notice of appeal must state the grounds of the appeal or the alleged errors of law. In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and thereafter the employer is required to make payment of the award involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title.

and *Pee Dee Regional Transportation, Employer, and State Accident Fund, Appellants v. S.C. Second Injury Fund, Respondent, In re: Clinton Gaskins, Jr., Employee/Claimant v. Pee Dee Regional Transportation, Employer, and State Accident Fund, Carrier*, 375 SC 60, 650 SE2d 464, (SC 2007).

"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."

The findings of an accidental injury while employed at A&K Mulch, LLC-The single Commissioner and the Full Commission concluded as set forth above.

The findings of notice following amendment of the case to correctly name the employer A&K Mulch, LLC:

In essence the Single Commissioner and Full Commission glossed over this crucial fact by merely stating that since the Carrier for both company was the same and under one policy, that was all that was needed. No specific finding or conclusion aside from those cited above was made as to this issue though there was discussion of it. The finding and conclusion was that one or the other was the employer which is no finding or conclusion at all.

The Appellate Panel of the South Carolina Workers' Compensation Commission, committed errors of law and/or acted in an arbitrary and capricious manner characterized by abuse and unwarranted exercise of discretion the following particulars, to wit:

1) in failing to rule that s §42-1-560 is unconstitutional as being vague, unambiguous;

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 Claimant was under disability until a GAL was appointed;

- 7) in failing to find 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 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.

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 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. Specifically, § 42-1-560 (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 Heath 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 Heath 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 Commission 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:

Date of Injury	50 filed	3 rd Party filed	S-2
----------------	----------	-----------------------------	-----

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 Commission 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 Commission 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 Commission 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 Commission 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 waived any claim if 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, <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=7111&FindType=Y&ReferencePositionType=S&SerialNum=2012991051&ReferencePosition=470>

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 pled. 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 Commission 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 Commission 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 Commission 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.

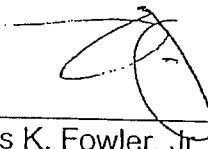
"When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct.App.2005). "The doctrine of unclean hands 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 inequitableness 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)

Claimant is informed and believes he is entitled to this Court's Order reversing and/or remanding the Appellate Panel's findings and conclusions determining that the Claimant's injury on June 1, 2006, that he made and election of remedies and that as a result his workers compensation benefits should be stopped. When the employer /carrier finally identified themselves and made a proper appearance, the employee's representative provided proper notice of the third party action.

WHEREFORE, having fully stated its Petition for Judicial Review of the Agency's Decision filed December 14, 2011, Claimant/Appellant prays the case be reversed and/or remanded as requested; for such other and further relief as may be just and proper.

January 12, 2012



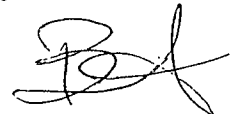
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	CIVIL ACTION NO: 2012-CP-14-24
	)	
Andreal Holland,	)	On Appeal from the S.C. Workers'
	)	Compensation Commission File No.:
	)	0607813
Claimant/Appellant,	)	
	)	
vs.	)	BRIEF OF THE RESPONDENTS
	)	JC WITHERSPOON, Jr., INC.,
JC Witherspoon, Jr., Inc., and A&K Mulch,	)	A&K MULCH, AND CAPITAL
	)	CITY INSURANCE
Employer,	)	
	)	
And	)	
	)	
Capital City Insurance,	)	
	)	
Carrier.	)	
	)	
<u>Defendants/Respondents.</u>	)	

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.

JUN 25 2012



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); see also *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117, (Ct. App. 2011). This issue was originally scheduled to be determined - in addition to issues raised by the Claimant - in a Form 50 hearing scheduled in May, 2009. 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 cited twelve (12) separate points of error for appellate review by the Appellate Panel.

Pursuant to S.C. Code Ann. 42-17-50 (1985) the Appellant Panel reviewed the decision of the Single Commissioner, weighed the evidence as presented in the initial hearing, and considered all issues raised by Claimant's Form 30 and in the briefs of the parties. After careful review of the instant case, the Appellant Panel determined that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law were correct as stated. On December 14, 2011, the Appellate Panel issued an order unanimously affirming the Single Commissioner's Decision and Order and adopting the same as the Decision and Order of the Appellate Panel. This appeal by the Claimant/Appellant to Circuit Court of Clarendon County followed.

STANDARD OF REVIEW

The date of injury for this accident is prior to July 1, 2007. Therefore, pursuant to S.C. Code Ann. §42-17-50 (Supp. 2000), the Claimant/Appellant properly appealed the full Commission Order to the Circuit Court of Clarendon County. The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

ELECTION OF REMEDIES IN GENERAL

This accident which gives rise to this claim for benefits took place on or about June 1, 2006. The claim also took place under circumstances that gave rise to third party civil action. The Claimant 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.

ARGUMENT

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

Neither of the above two issues should have been considered by the full Commission Panel on appeal, nor should they be considered now by the Circuit Court, 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.

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)

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

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

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

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

Notice is required even where the carrier is not prejudiced by the lack of notice. [*Kimmer v. Murata of 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 and on page 12 of the Claimant’s/Appellant’s brief to the Circuit Court, 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. 1 i, 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 concede that the Claimant is *per se* mentally incompetent or incapacitated due to his injuries arising from this accident, nor from another unrelated cause. Moreover, no evidence of the Claimant's alleged mental incapacity was ever submitted by Appellant.

However, assuming *arguendo* that the Claimant is incapacitated in a way as to preclude him from legally participating, such a claim for tolling or excusing compliance with the statute (§42-1-560) would still be unfounded and unsupportable under the facts of this. 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/Appellant cannot use the sword and the shield, and should be judicially estopped from making inconsistent arguments as to his capacity to comply with the Workers' Compensation Act. Generally speaking, the doctrine of judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. (Adopted by South Carolina in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997)).

It would appear quite logically inconsistent that the Claimant 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; (c) the Claimant chose not to go forward on the Form 50 hearing on May 20, 2009, which the Claimant himself had requested; and (d) The Defendants/Respondents had no authority or ability to force the Claimant to proceed on a Form 50 hearing request in Order to assert their own defenses to that Form 50 or the claim in general.

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) SCRCR.

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 Courts have acknowledged that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391 (quoting *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388).

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

For the same reasons outlined above under the argument sections of waiver and *laches* the Respondents/Defendants assert there is no basis for estopping them from raising the defense of election of remedies in this claim. There were no actions, or omission made by the Defendants in this case which created the circumstances that gave rise to the election of remedies defense. Furthermore, the Claimant 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 became 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 their unclean hands?
(Claimant's/Appellant's Appeal Issue No. 10)

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

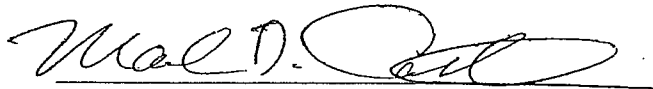
'unclean hands' bars parties that are seeking equitable relief from the court from doing so when they have acted inequitably. The Defendant Employer/Carrier has asserted election of remedies which is a statutory defense under S.C. Code Ann. §§42-1-540, -550, -560. Therefore, 'unclean hands' would not 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.

CONCLUSION

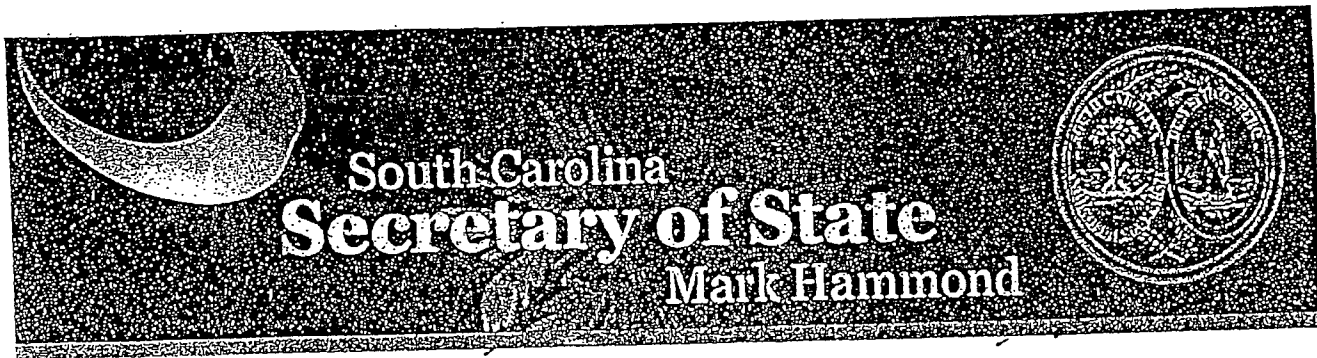
In conclusion, the Defendant/Respondent asserts the numerous arguments raised by the Claimant/Appellant are either inapplicable, not preserved for review, not factually supportable under the evidence of this case, or not legally tenable to bar the defense of election of remedies in this case. Moreover, the findings of the Hearing Commissioner unanimously affirmed by the Appellate Panel are supported by the substantial evidence in this case. Therefore, the Decision and Order of the Appellate Panel should be affirmed in full.

Respectfully submitted,



Mark D. Cauthen, Esq.
Peter P. Leventis, IV, Esq.
McKay, Cauthen, Settana & Stublely, PA
1303 Blanding Street
Post Office Box 7212
Columbia, South Carolina 29202-7217
(803) 256-4645
Attorney for Employer/Carrier

Columbia, SC
June 21, 2012.



A & K MULCH, LLC

Note: This online database was last updated on 4/20/2009 6:03:51 PM.
See our Disclaimer.

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION / ORGANIZATION:	SOUTH CAROLINA Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	J C WITHERSPOON JR INC
ADDRESS:	2374 ALDERMAN CAMP RD
CITY:	ALCOLU
STATE:	SC
ZIP:	29001

SECOND ADDRESS:

FILE DATE:	11/17/2003
EFFECTIVE DATE:	11/17/2003
DISOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
LLC Annual Report	01/26/2004	LLC ANNUAL REPORT-2004 TYE: 12/31	Image
Domestic LLC	11/17/2003	DOMESTIC LIMITED LIABILITY CO(AT WILL)	

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

#18

FILED

NOV 17 2003

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES

NOV 17 2003

Mark Hammond
SECRETARY OF STATE

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY

The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to § 33-44-202 and § 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with § 33-44-105 of the South Carolina Code of 1976, as amended is A & K Mulch, LLC

2. The office of the initial designated office of the limited liability company in South Carolina is:

2374 Alderman Camp Road (P.O. Box 289) Alcolu SC 29001
Street Address City State Zip Code

3. The initial agent for service of the process of the limited liability company in South Carolina is:

J. C. Witherspoon, Jr., Inc.

BY: J. C. Witherspoon

[Signature]
Signature

and the street address in South Carolina for this initial agent for service of process is:

Alcolu SC 29001

4. The name and address of each organizer is:

(a) J. C. Witherspoon, Jr., Inc. P. O. Box 289, Alcolu, SC 29001
Name Address

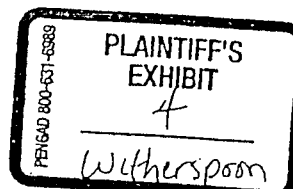
5. ☐ Check this box only if the company is to be term company. If so, provide the term specified:

6. ☒ Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager:

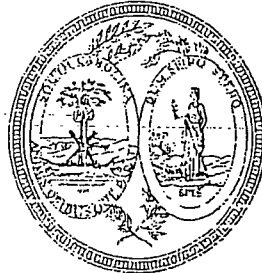
J. C. Witherspoon, Jr., Inc. P. O. Box 289 Alcolu SC 29001

7. ☐ Check this box only if one or more of the members of the company are to be liable for its debts and obligations under Section § 33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members.

W:\FPFILES\CORPORATE\A & K MULCH, LLC-JC WITHERSPOON
FILE #030861BB



The State of South Carolina



Office of Secretary of State Mark Hammond **Certificate of Existence**

I, Mark Hammond, Secretary of State of South Carolina Hereby certify that:

A & K MULCH, LLC, A Limited Liability Company duly organized under the laws of the State of South Carolina on November 17th, 2003, with a duration that is at will, has as of this date filed all reports due this office, including its most recent annual report as required by section 33-44-211, paid all fees, taxes and penalties owed to the Secretary of State, that the Secretary of State has not mailed notice to the company that it is subject to being dissolved by administrative action pursuant to section 33-44-809 of the South Carolina Code, and that the company has not filed articles of termination as of the date hereof.

Given under my Hand and the Great Seal of
the State of South Carolina this 21st day of
November, 2003.

Mark Hammond

Mark Hammond, Secretary of State

OPERATING AGREEMENT
OF
A & K MULCH, LLC

WHEREAS, J. C. Witherspoon, Inc., by J. C. Witherspoon, Jr., has formed a Limited Liability Company for the purpose of a wood mulching and saw mill operation thereon in the State of South Carolina and any other location as they may from time to time determine. It is hereby agreed:

Article I. Organization of Limited Liability Company -

A. Formation - That J. C. Witherspoon, Jr. is the member of the Limited Liability Company which has been formed by the filing of Articles of Organization with the South Carolina Secretary of State.

B. Name - The name of the L.L.C. is: *A & K Mulch, LLC*

C. Registered Office and Agent - The initial registered agent is J. C. Witherspoon, Jr. of 2374 Alderman Camp Road (P. O. Box 289), Alcolu, SC 29001, as specified in the Articles of Organization. If the members elect to change the office or agent or if the agent resigns, the members agree that they will promptly file the name of a new agent or office with the Secretary of State of South Carolina. In the event of a change of the location of the principal office of the L.L.C., notice shall be sent in writing to each of the members.

D. Doing Business in Other States - A & K Mulch, L.L.C. may elect to do business in states other than South Carolina and if so, the L.L.C. shall make all the required filings in that state before conducting any business there.

E. Term - The Articles of Organization provide that A & K Mulch, L.L.C. shall continue in perpetual existence. PROVIDED, HOWEVER, that at any time any member ~~of the L.L.C. dies or resigns, the remaining members of the L.L.C. shall have ninety (90)~~ days after the "disassociation" in which to decide to either end the L.L.C. or vote to continue it. In the event that they do not affirmatively vote to continue, the L.L.C. shall automatically dissolve and be liquidated and totally terminated and the proceeds distributed to the members.

F. Not a Partnership - The member intends that A & K Mulch, L.L.C. shall not be a partnership (including both limited partnership and joint venture) and no member shall be deemed to be either a partner or a joint venturer other than for federal and state tax purposes. All the provisions in this Operating Agreement shall be interpreted and construed in accordance with this provision.

Article II. Members -

A. Initial Members - The initial members of A & K Mulch, L.L.C. is:

J. C. Witherspoon, Jr.

B. Rights of Members - Each member of A & K Mulch, L.L.C. has all of the rights which are defined in the South Carolina Limited Liability Company Act which include:

1. Share in profits and losses.
2. Share in distributions.
3. To vote and manage the L.L.C.
4. To inspect L.L.C. records and receive information.

5. Receive a certificate specifying the extend of each of the rights specified in 1, 2, 3 and 4.

~~C. Admission of New Members - Additional members may be admitted into~~

A & K Mulch, L.L.C. only upon the vote of One hundred (100%) percent of the members which admission vote shall also specify:

1. The share of profits and losses which shall be allocated to the new member.
2. The capital being contributed by the new member.
3. Its value.
4. The amount in which the profits and loss shares of the existing members shall be reduced.

D. Meetings of Members - The members shall meet at least annually on the date to be fixed by the membership at the principal office of the L.L.C. at which time the managing member shall present a financial statement of the L.L.C.'s activities for the past year and the members shall review the same and make decisions regarding the operation of business for the ensuing year.

E. Special Meetings - Special meetings may be held at any time upon call of the manager or One Hundred percent (100%) of the ownership of the members. The members calling the meeting shall state the purpose and the matter proposed to be acted upon.

F. Place of Meeting - All meetings of the membership shall be held at the principal office of A & K Mulch, L.L.C. which is 2374 Alderman Camp Road, Alcolu, SC

29001. Members may participate in such meetings by means of telephone conference or similar communication equipment in which all persons participating in the meeting can ~~hear each other and participation in a meeting as provided here shall constitute presence~~ of persons at such meeting.

G. Notice of Meeting - No notice of the annual meeting shall be required. Notice of special meetings shall be given orally or written not less than three (3) days prior to the meeting.

H. Quorum - A quorum for all meetings shall require the presence, in person, of an officer of each of the members.

~~I.~~ Required Votes - For any extraordinary action to be taken, members holding One-Hundred percent (100%) of the votes must affirmatively vote "yes" at a duly called meeting or by written consent. Extraordinary actions include:

1. A vote to amend the Operating Agreement.
2. A vote to admit an additional person as a member of the L.L.C.

J. Withdrawal - No member shall be allowed to withdraw funds from the L.L.C. in anticipation of profits nor shall any member pledge or hypothecate his membership interest for the benefit of any creditor.

K. Substitution - If a member desires to substitute another person for itself as a member, one hundred (100%) percent affirmative votes shall be required. First, all members must unanimously and in writing approve the substitution. Second, a majority in interest of the members (other than the member requesting the permission to substitute) must vote to continue the L.L.C. Upon both affirmative votes, the substituted member

shall become a member when the person's admission is reflected upon the records of the L.L.C. If a member attempts to transfer all of their right in the L.L.C. to another person ~~without the one hundred (100%) percent affirmative votes, such act is void and the member~~ attempting to transfer shall remain the member and the purported substitute obtains no rights whatsoever.

L. Assignability - Members may desire to transfer their financial rights to:

1. Share in the profits and losses.
2. Receive distributions.

A transfer of these two (2) rights to a third party will not make the third party a member. The original assigning member retains all voting rights and as such is still deemed to be the member. Before any member may transfer his financial rights, he shall obtain the written consent of unanimous vote of the members. Any attempt to transfer without such vote is void and of no effect.

Article III. Managers -

A. Appointment and Removal of Managers -

1. There shall, at all times, be a manager who shall be a member of the company unless all of the members unanimously consent in writing to the selection of a non-member manager. The name and mailing address of the initial manager is as follows:

J. C. Witherspoon, Jr. 2374 Alderman Camp Road, Alcolu, SC 29001

The initial manager shall discharge or cause the discharge of his duties as manager unless and until replaced pursuant to the provisions of this Agreement.

2. The manager may be removed at any time and for any reason upon One-Hundred percent (100%) vote of the members. In the event of the removal, ~~death, incapacity or inability of the manager to act or in the event of the manager's~~ notification to the company of his election to resign as manager, another manager shall be designated as a successor manager by majority vote of the members and the members shall execute such documents and do such other acts as may be required to permit such person to act as a successor manager in accordance with the provisions of this Agreement.

3. The manager shall not be required to manage the company as his sole and exclusive function but shall devote whatever time, effort and skill as may be reasonably necessary to the conduct of the company's business.

B. Authority and Duties of Manager - Subject to the limitations set forth in this Agreement, the manager shall have the exclusive right, authority and responsibility to manage the day to day operations and affairs of the company and to make all decisions with respect thereto and except as specifically provided in this Agreement, no member shall participate in his, her or its capacity as a member hereof in the control or management of the company's business. Without, in any way, limiting the general powers and authority of the manager and subject to the provisions of this Agreement, the other rights expressly granted to the members under the provisions of this Agreement, the manager is specifically authorized to:

1. Execute and deliver any and all agreements, contracts, documents, certifications and instruments necessary or convenient in connection with the carrying on in the usual way of the business and affairs of the company.

2. Execute and deliver, in furtherance of any or all of the purposes of the company, any deed, lease, mortgage, mortgage note, bill of sale, contract or ~~other instrument purporting to employ, labor, execute any other contracts for the~~ purpose of carrying on in the usual way the business and affairs of the company.

3. Prepay in whole or in part, refinance, recast, increase, modify or extend any mortgage or other indebtedness relating to the company or the business property.

4. Deal with or otherwise engage in business with or provide services to and receive compensation therefor from any person who provides any services to, lends money to, sells property to or purchases property from the company.

5. Deposit or invest company funds in such interest-bearing or non-interest-bearing investments or bank accounts as they deem advisable to the extent such funds are not then required for company operations and are not required to be distributed to be distributed pursuant to this Agreement.

6. Retain or employ and coordinate the services of employees, supervisors, accountants, attorneys and other persons necessary or appropriate to carry out the business and purposes of the company.

7. Engage in any kind of activity and to perform and carry out such contracts of any kind necessary to or in connection with or incidental to in the furtherance of the carrying on in the usual way of the business and purposes of the company in accordance with this Agreement.

8. Pay all debts and other obligations of the company to the extent that funds of the company are available therefor, including amounts due under permanent and other loans to the company.

9. Supervise the operation, maintenance, management and repair of any property owned by the company, including supervision of the performance of such functions as hiring and termination of employees, leasing or selling of the property, collection of rents and receivables, provision of utilities, cleaning, repairs and maintenance services for the purpose of carrying on in the usual way of the business and affairs of the company.

10. Perform other duties provided elsewhere in this Agreement to be performed by the managers.

C. Restrictions on Authority of the Manager - Anything in this Agreement to the contrary notwithstanding, the manager shall not, without the prior unanimous consent of the members:

1. Do any act in contravention of this Agreement or cause the company to engage in any business not authorized by the terms of this Agreement.

2. Do any act which would make it impossible to carry on in the normal business of the company in the usual way.

3. Change or reorganize the company into any other legal form.

4. Take any of the following actions.

a. Amendment of the Articles of Organization.

b. Merger or consolidation of the company.

c. Sale, lease or exchange of a major portion of the property or assets of the company. PROVIDED, HOWEVER, the manager shall have full authority to execute deeds conveying lots as well as mortgages encumbering the property of the company.

d. Dissolve the company except as otherwise provided in this agreement.

e. Any other action which the members may add to this list by unanimous vote.

D. Reliance by Third Parties - Any person dealing with the company or the manager may rely upon a certificate signed by the manager, thereunto duly authorized, as to:

1. The identity of any manager or member.
2. The existence or nonexistence of any fact which may constitute a condition precedent to acts by the manager or in any other manner be germane to the affairs of the company.
3. The persons who are authorized to execute and deliver any instrument or document of the company.
4. Any act or failure to act by the company.

E. Compensation of Manager -

1. Manager shall be compensated on such terms and conditions as may be mutually agreed upon and approved by unanimous vote of the members.

2. Each manager shall be reimbursed by the company for all reasonable out-of-pocket expenses properly incurred by him in connection with the discharge of his obligations under this Agreement or otherwise properly incurred on behalf of the company.

Article IV. Self Dealing by Members - Before the L.L.C. enters into any agreement to purchase property from, sell property to or otherwise deal with any member acting in its' own behalf or any corporation, partnership or other entity which the member (or spouse or child of the member) is a shareholder or, a majority of the disinterested members shall approve the transaction.

Article V. Capital Contributions

A. Initial Contribution - Each member shall make the capital contribution described for the membership on Exhibit A. No interest shall accrue on any capital contribution and no member shall have the right to withdraw or be repaid a capital contribution except as may be provided in this Operating Agreement.

B. Additional Contributions - Upon vote or consent of the membership that additional capital contributions are required to enable A & K Mulch, L.L.C. to properly operate or to meet its obligations, each member agrees that he shall contribute prorata to his ownership of the company.

C. Capital Accounts - The L.L.C. shall establish and maintain capital accounts for each member as follows:

1. Each member's capital account shall be increased by:

a. The amount of any money actually contributed by the member to the L.L.C.

b. The fair market value of the property contributed by the member to the L.L.C.

c. Allocation to the members of the net profits and net losses of the L.L.C.

d. Allocation to the members of income described in IRC § 705(a)(1)(B).

2. Each member's capital account will be decreased by:

a. The amount of money distributed to the member of the L.L.C. (except the managing members shall receive a salary as established by the membership which shall not result in a decrease of their capital account).

b. The fair market value of property distributed to the member by the company.

c. Allocations to the member of expenditures described in IRC § 705(a)(2)(B).

d. Allocation to the account of any member of L.L.C. loss and deduction as set forth in the relevant Treasury Regulations, taking into account adjustments to reflect book value.

Article VI. Sharing Profits, Distributions and Taxable Income -

A. Allocation of profits and losses and taxable income, gain, loss, deductions and credit - The profits and losses of the L.L.C. shall be allocated among the members as follows: J. C. Witherspoon, Jr..

B. Distribution to Members - The L.L.C. may make distribution of cash to members as it shall determine from time to time but not less often than annually. The manager shall determine the total amount of each distribution which shall be made to the members and each member shall share in such total distribution in the ratio by which it shares in the profits and losses of the L.L.C.

Article VII. Assignment of Member's Interest -

A. Restrictions - No other sale, assignment, transfer, encumbrance, or hypothecation except for those outlined in the aforesaid Contract of Sale shall be made by any member of the whole or any part of their interest in the company without prior unanimous written consent of all of the members or as otherwise provided in this Agreement.

1. No person or entity to whom an interest in the company is transferred shall be admitted as an additional member without the prior unanimous written consent of all of the members.

2. Transfer in violation of the provisions hereof shall be null and void and of no effect.

B. Assignment - All interests in the company transferred, assigned or bequeathed pursuant to the provisions of this Article shall be subject to the restrictions and obligations set forth in this Agreement. As a condition to any sale, transfer, assignment or admission permitted hereunder, the assignee (regardless of whether he, she or it is to be admitted as a substituted or additional member) must execute an instrument in form satisfactory to the manager to the effect that he or she agrees to be bound by all of the

terms and provision of this Agreement, including, without limitation, the provisions applicable to the members under this Agreement.

C. Death of Member - In the case of death of any of the members during the continuance of the L.L.C., the surviving members shall, from the date of death, have the right to continue the business of the L.L.C. as herein provided in the case of a withdrawing partner. PROVIDED, HOWEVER, the continuing members shall pay to the Estate of the deceased member a sum as agreed upon by the members in advance. Any life insurance maintained by the L.L.C. on the life of a deceased member shall be applied in full upon receipt against the amount due for the deceased member's interest. The balance of the purchase price of the deceased member's interest shall be paid within six (6) months of the date of his or her death.

Article VIII. Withdrawing or Deceased Member -

A. In the event of a proper withdrawal (disassociation or death) of any member of the L.L.C., the same shall automatically end and the business shall be wound up and terminated. PROVIDED, HOWEVER, that if, within ninety (90) days of such event or dissolutionment, the remaining members agree by majority vote to continue the L.L.C., the L.L.C. shall continue.

B. Without limiting the other provisions hereof, neither the assignment of all or any part of a member's interest hereunder nor the admission of a new member shall work the dissolutionment and termination of the company. Except as may be otherwise provided in this Agreement, each member agrees that it resigns or withdraws or causes a voluntary dissolutionment of the company without the written consent of the other members, it shall

be liable to the other members and the company for any damages, including attorney's fees, resulting therefrom.

Article IX. Dissolution, Winding Up and Termination -

A. Dissolution - A & K Mulch, L.L.C. shall dissolve its affairs and be wound up and the L.L.C. shall thereupon terminate upon the first occurrence as follows:

1. The written consent of the all members upon any member ceasing to be a member of the L.L.C. as provided herein but only if a majority in interest of the remaining members fail within ninety (90) days of such event of disassociation or withdrawal to vote to continue the L.L.C.

2. Entry of a decree of judicial dissolutionment of the L.L.C. under § 33-43-902 of the Code of Laws of South Carolina.

3. Administrative dissolutionment pursuant to § 33-43-901.1 of the Code of Laws of South Carolina.

B. Winding Up of the L.L.C. - Upon occurrence of any event above stated, the managing member of the L.L.C. shall serve as liquidator. The manager shall proceed diligently to wind up the affairs of the L.L.C. and make final distribution as provided herein and in the South Carolina Limited Liability Company Act. The cost of liquidation shall be borne as an L.L.C. expense. Until final distribution of the remaining assets to the members, the manager/liquidator shall continue to operate the L.L.C. with all the powers and authority of the members.

C. Distribution of Proceeds of Liquidation - The proceeds from liquidation shall be applied and distributed in the following order of priority:

1. First, to the payment of the debts and liabilities of the L.L.C. except loans or advances that may have been made by any of the members.

2. To set up any reserves the liquidator may deem necessary for any contingent or unforeseen liabilities or obligations of the L.L.C., which reserves may be paid over by the liquidator to a bank or trust company acceptable to the liquidator as escrow to be held by it for the purpose of distributing such reserves and payment of such liabilities or obligations and at the expiration of such period as the liquidator shall deem advisable, distribute the balance, if any remaining, in the manner herein provided.

3. To the repayment of any loans that may have been made by any of the members to the L.L.C.

4. The balance remaining shall be distributed to the members, including any withdrawing members, in accordance with their respective positive capital account balances.

Article X. Miscellaneous Provisions -

A. Members Rights to Inspect Books and Receive Information - Upon reasonable request, an officer of a member corporation, at the member's own expense, may inspect and copy during ordinary business hours any limited liability company record, wherever the records are located.

B. Accounting Method and Tax Year - The L.L.C. shall maintain its books on a cash method of accounting. The L.L.C. has adopted the calendar year as its accounting year.

The **Warren** Group
Forensic Engineers & Consultants

PO BOX 1000
Columbia, SC 29063

803.732.6600
803.732.7576 (Fax)
888.827.7823 (Toll Free)
www.warren-group.com

DATE: August 3, 2006

REPORT TO: Southeastern Claims Service, Inc.
Attn: Ms. Paula Dyches
Post Office Box 212128
Columbia, South Carolina 29221

Chipper Access Door Injury

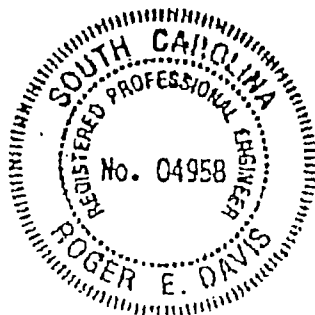
Insured: J.C. Witherspoon

D.o.L.: 6/1/2006

L.o.L.: Alcolu, SC

Claim No.: WC071306

The Warren Group File Number: 60236



PREPARED BY: Roger E. Davis
Roger E. Davis, P.E.

August 3, 2006
Date

Engineering Analysis of Claims and Accidents

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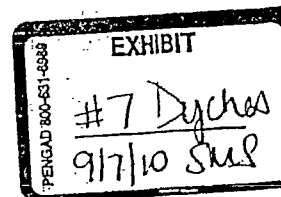
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Laura Roberts

From: Darryl Starkey
Sent: Monday, August 28, 2006 10:15 AM
To: Laura Roberts
Subject: FW: WC071306

if you could put this in the file.....thanks! what a horrible claim.

From: Paula Dyches [mailto:PDyches@southeasternclaims.com]
Sent: Monday, August 28, 2006 9:25 AM
To: Darryl Starkey
Subject: WC071306



Darryl,

I had an engineer go out from the Warren Group to inspect the chipper here is his exact conclusion:

- 1) The incident chipper contains a hazard created by a heavy rotating member that continues to rotate long after the electrical power has been shut off.
- 2) The manufacturer of the chipper warned of the hazard, but the warning does not convey the serious nature of the injury or death that could result from the hazard.
- 3) The manufacturer did not provide a safeguard to protect the operator from a foreseeable misuse of the equipment.
- 4) It is economically and technologically feasible to provide a safeguard that would have prevented the injury.
- 5) A machine that contains an uncontrolled hazard when it is economically and technologically feasible to reduce the risk of the hazard to a tolerable level is defective.
- 6) The defect in the incident chipper was a cause of the injury to Mr. Holland.

I have put the claimant's attorney on notice for a potential 3rd party claim. The claimant's attorney agreed to split the cost of the engineer.

The claimant is 31 years old. The claimant had an ICP monitor catheter on 6-1-06 so the neurosurgeon could monitor and measure his intracranial pressure. The claimant had surgery on 6-2-06 for a tracheostomy for respiratory failure. Also on 6-2-06 he had surgery to debride and repair his facial and orbital lacerations and fractures. He had a closed reduction with maxillomandibular fixation of the symphysis and left ramus angle mandible fracture. On 6-7-06 the doctor had to extract the claimant's teeth and repair the multiple cranial facial and lower jaw fractures. The CT scan showed the claimant had a subacromion hemorrhage. The claimant had a feeding tube placed on 6-6-06. On 6-12-06 the claimant's tracheostomy was removed and he was sitting in a charge. The claimant was transferred to Charlotte Institute of Rehab on 6-14-06. The claimant got an infection around the peg tube and needs care 24 hours a day, occupational therapy, physical therapy, and speech therapy 3 times a week for one hour. The claimant then had post traumatic amnesia. Charlotte Institute of Rehab wanted to discharge the claimant because the claimant's mother wanted him to go to Healthsouth in Columbia. Then the mother wanted the claimant to be transferred to Tuomey Hospital and we could not do that because their speech therapist does not have the level of expertise that is needed in order for the claimant to be at maximum medical improvement in cognitive rehab. Holke Hoadwonic, rehab nurse, informed this nurse that the claimant could not travel 3 hours a day and she suggested that the claimant go to a transitional living place. It was then decided to have the claimant evaluated by Walton Rehab in order to see what exactly the claimant needs will require. The claimant's mother was against him being evaluated by Walton Rehab. The claimant's mother then stated that she would like for the claimant to stay with his sister in Rock Hill, SC and they could take care of him. The claimant's mother is aware, that we will not pay her for taking care of the claimant. The claimant was discharge on 6-27-06 and his discharges needs to nursing for peg tube injections, 24 hour supervision and a shower chair for safety, home health infusion to peg for tube feedings. The claimant is receiving outpatient care for the brain injury at Charlotte Institute of Rehab. The claimant had an appointment with Dr. Well on 7-17-06 and had a CT scan which was fine, there was no active bleeds, and he was being discharged from Dr. Will. The claimant had an

appointment with Dr. Bynoe on 7-20-06 and a portion of the feeding tube was removed; the remaining feeding tube had to remain in place because it had not been in for the proper duration of time; there was some drainage around this area and Dr. Bynoe told the claimant's mother just to use bacitracin ointment. The claimant has a follow up appointment with Dr. Bynoe on 8-31-06. The claimant had completed occupational therapy and physical therapy and a driving evaluation was requested, which was authorized. The claimant is unable to complete his homework from the speech therapist unless his mother helps him. The mother was told not to help the claimant so it can be determine what he is having problems with so he can be helped. The claimant is going to OP Brain Injury Program 3 times a week and he will be involved in: Functional Independence Group; Cognitive Skills Group; Adjustment Group. The claimant is scheduled for a four week time and at the end, the team will meet and identify and discuss if the claimant needs additional time in the program and in what areas. After he has completed this program, he then will be transferred to South Carolina Vocational Rehab for services if it deems appropriate.

Due to this being a brain injury, file needs to be reserved for lifetime. I am currently having our rehab nurse get a life care plan and once I receive it, reserves will be re-address.

I hope this answers any questions you may have.

PEAKE, FOWLER & ASSOCIATES, P.A.
Attorneys at Law

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October 18, 2007

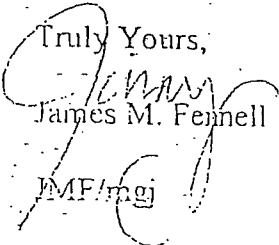
Paula Dyches
S.E. Claims
Post Office Box 212128
Columbia, SC 29223

RE: Andreall Holland
Claim # WC071306

Dear Paula:

Enclosed please find a few questions that I have regarding our client, Andreall Holland. I would greatly appreciate you returning this completed questionnaire to me in the envelope provided. If you should have any question, please don't hesitate to contact me. With kind regards, I am

Truly Yours,


James M. Fennell

JMF/mgj

RECEIVED

OCT 22 2007

SCS-SC

Andreal Holland v. J.C Whitterspoon

1. Who installed the wood chipper at the plant?

J.C. Witherspoon

2. Who maintained the wood chipper?

J.C. Witherspoon

3. Where was the wood chipper purchased?

Precision Husky Corporation
Leeds, Alabama

RECEIVED

OCT 22 2007

SCS-SC

PAULA DYCHES
OCT 29 RECD

South Carolina
Secretary of State
Mark Hammond

J. C. WITHERSPOON, JR., INC.

*Note: This online database was last updated on 4/20/2009 6:03:51 PM.
See our Disclaimer.*

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION	SOUTH CAROLINA
/ ORGANIZATION:	Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	J C WITHERSPOON JR
ADDRESS:	RT 4 BOX 1126
CITY:	MANNING
STATE:	
ZIP:	
SECOND ADDRESS:	

FILE DATE:	05/31/1982
EFFECTIVE DATE:	05/31/1982
DISOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Merger Survivor	09/24/2004	SURVIVED MERGER WITH: JIMMY'S TRUCKING, INC. (EFFECTIVE 9-30-2004)	
Merger Survivor	09/24/2004	SURVIVED MERGER WITH: WITHERSPOON FOREST PRODUCTS, INC. (EFFECTIVE 9-30-2004)	
Amendment	09/08/1995	AMEND PURPOSE	Image
Incorporation	05/31/1982	ART	Film

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COFFEY, CHANDLER, KENT & McKENZIE, P.A.
Attorneys at Law
8 South Brooks Street
Manning, South Carolina 29102
803-435-8847 Fax 803-435-8915
email for William C. Coffey, Jr.: bill@coffeychandlerkent.com

October 28, 2010

Mr. Thomas K. Fowler, Jr.
Peake & Fowler Law Firm, P.A.
P9357 Two Notch Road
Columbia, SC 29223

VIA EMAIL: tfowler@peakefowler.com

Re: Andreal Holland vs. J. C. Witherspoon, Jr., Inc., et al.
WCC File Number 0607813

Dear Tommy:

In response to your subpoena in the above captioned matter, the Employer Identification Numbers you requested are as follows:

J. C. Witherspoon, Jr., Inc.
A & K Mulch, LLC

57-0734562
26-3898658

Sincerely,

Billy Coffey

William C. Coffey, Jr.

WCC\cp

ANDREAL HOLLAND
250-33-6394
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transportation however, and so sometimes he was not able to. He spends time with his fiancée and the children.

BEHAVIORAL OBSERVATIONS: Mr. Holland is a 33-year-old African American male who was dressed in blue jeans, shirt, and hat. He was responsive to the examiner's questions throughout the entire evaluation session. The left hand is used for written work. He was able to maintain his concentration and effort throughout the entire evaluation session. It was felt that this was accurate estimate about the cognitive and academic functioning.

EVALUATION RESULTS: In terms of mental status, Mr. Holland states that he gets up feeling happy, but becomes easily irritated, by minor stresses. However, there is no evidence for any type of anger outburst. He denied ever being physically abusive to anyone. He states that he was a joyful person, but now worries a bit more since the accident. He has no suicidal ideation or intent. He has no flash backs about the accident. Sometimes, he is able to enjoy himself and laugh. He states that it does not bother him to talk about the accident. He was alert, responsive, and in no distress. His thoughts are logical, coherent, and he has the goal of getting back his health.

The WAIS-III was given as a way to assess Mr. Holland's cognitive abilities. Full Scale, Verbal IQ all fell within Borderline and as well as Performance IQ. He was in the Low Average range. The Corresponding IQ scores are Full Scale equals 76, Verbal equals 76, and Performance equals 80. The percentile scores are Full Scale equal 6, Verbal equal 5, and Performance equal 9. The Full Scale 95% competence interval is 72 to 81. The WAIS-III scaled scores are:

Verbal Subtest Scaled Scores

Vocabulary	4
Similarities	5
Arithmetic	9
Digit Span	8
Information	5
Comprehension	5

Performance Subtest Scaled Scores

Picture Completion	8
Coding	5
Block Design	8
Matrix Reasoning	7
Picture Arrangement	7

In terms of specific abilities, these generally clustered in the Borderline and Low Average limits. There were few exceptions. He had strength relative to his other skills and a Average level of arithmetic reasoning while the most difficulty was in Mentally kept efficient level of active vocabulary. The remaining scales clustered in the Borderline and Low Average limits and include judgment and decision

DOUGLAS R. RITZ, PH.D.
LICENSED CLINICAL PSYCHOLOGIST
635 SOUTH HAZARD STREET
GEORGETOWN, SOUTH CAROLINA 29440-

CLAIMANT: Andreall Holland
SSN: 250-33-6394
DISABILITY EXAMINER: Margaret A. Knott
DATE OF EXAMINATION: September 2, 2008

PSYCHOLOGICAL EVALUATION

INSTRUMENTS USED: Diagnostic interview; Wechsler Adult Intelligence Scale, Third Edition (WAIS-III); Bender-Gestalt; Wide Range Achievement Test - Third Edition (WRAT-3).

REFERRAL PROBLEM: This individual was evaluated due to allegations of anxiety.

BACKGROUND INFORMATION: Currently, Andreall was with his fiancée and two sons. He was raised by his mother and stepfather. He has four sisters and one brother. In school, he completed the twelfth grade, but did not graduate, as he could not pass the exit exam. He said that he had reading problems and took the exam second time and again failed the reading portion. In terms of work history, he worked at a Ware House and then at Federal-Mogul and then a Gold Kiss. His last job was at a wood mill and he did this three years up until the time of his injury, which occurred in June 2006. He sustained a head injury as a result of problems with the wood chipper. The mother who accompanied and drove to the interview portion of the evaluation said that he had brain swelling and the left side of his face was crushed and he had reconstructive surgery. He completed PT and OT. The mother notes him to be impatient with problems around anxiety and impulsiveness. He also attended vocational rehabilitation in January 2008. He takes no medications because they made him sleep. There was a note from Carolina Rehab in terms of discharge in 2006. They noted, facial fractures and traumatic brain injury. In terms of daily activities, he has a driver's license, but his mother drove him to the evaluation session. He has four children two of whom live with him. He has never been married. He gets up at 6:30 and gets his daughter ready for the bus. He did not go back to bed until about 8 o'clock. He watches his sons. He does chores around the house including washing the dishes, the picking out the trash, and helping with some laundry. He takes care of his personal grooming consistently. He attends church. He has no

TDN:

ANDREAL HOLLAND
250-33-6394
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making, abstraction, and memory. The Bender-Gestalt was administered as an additional assessment of visual-motor skills, and there were no errors.

The WRAT-III was given as a way to assess academic skills. On the Reading Section, standard score was 64 and grade score of third. He could read words like "stretch" and "bulk" and missed others like "contagious" and "horizon." On the Arithmetic section, standard score was 79 and grade score of 6. He was able to do all arithmetic operations including a few with fractions.

SUMMARY AND RECOMMENDATIONS: This individual was evaluated with allegations of anxiety. According to his and the mothers' account, he becomes easily irritated, although, he has never been aggressive or acted out. He was well motivated and fairly calm throughout the entire evaluation session. Intellectually, skills fell within the Borderline range while academic abilities are at the third grade level in reading and sixth grade level in arithmetic.

In terms of recommendations, it was felt that Mr. Holland has the capabilities of performing in work-related setting. On his description, he has always had difficulty with reading and this does not appear to be an affect of any kind of brain injury. He has the capabilities of caring for his personal needs, understands spoken word. He is able to avoid physical ^{danger} venture. He is able to handle funds appropriately. He might work best in a capacity that is not highly stressful, given some evidence for personality change based on the brain injury. He initiates activities independently and cares for his children while the fiancée works. He maintain some social functioning. He is able to concentrate and complete tasks in a manner that is commensurate with his cognitive functioning level.

Listed below are functioning levels:

Axis I: Personality change due to traumatic brain injury, unspecified, anxiety characteristics, and reading disorder.

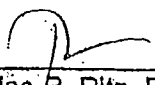
Axis II: V62.89 borderline-intellectual functioning.

ANDREAL HOLLAND
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Axis III: Traumatic brain injury, multiple facial fractures.

Axis IV: Unemployed.

Axis V: GAF 65.

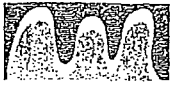


Douglas R. Ritz, Ph.D.
Licensed Clinical Psychologist

DRR/PVR

This is to certify that the above was transcribed from the recorded voice of
Douglas R. Ritz, Ph.D., on September 5, 2008.

LS SERVICES/190RITZ522327/6899



May 13, 2009

Thomas K. Fowler
Peake & Fowler
P.O. 23601
Columbia, SC 29224

VOCATIONAL ASSESSMENT

Claimant: Andreal Holland
DOI: 6-1-06
DOB: 2/10/75
Employer: J.C Witherspoon, Jr., Inc.

Background information

Mr. Holland was referred to Adams & Wilkinson by his attorney, Thomas Fowler. I met with Mr. Holland at his mother's home in Manning, SC on April 30, 2009. He appeared to be somewhat restless and I observed him to be irritable with family members at times. He was not a good historian. Family members were in and out of the living room and volunteered information as needed. Mr. Holland. Mr. Holland did not make good eye contact and did not attend to the conversation at all times. I had to repeat questions in order to get answers.

Before beginning the interview, I explained my role and who had hired me. I explained how my report might be used and who might receive copies of it. I established the limits of confidentiality.

Medical Information

History of injury

On 6/1/06, Mr. Holland reports that he was working at A&K Mulch when he was asked to check on a chipper that might be running and shouldn't be. He proceeded to the chipper to check it when he was hit in the face with something. He lost consciousness and remembers little of what happened next. The left side of his head was injured, including multiple facial fractures around the orbit. He was diagnosed with a traumatic brain injury. He was initially taken to Clarendon Hospital and later transferred to Palmetto Richland Memorial

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Hospital in Columbia. His mother reported that he died twice and was revived and placed upon life support. Records indicate that he had to be incubated and placed on a vent. He underwent open reduction and internal fixation for the facial fractures. He lost teeth and also had a broken jaw that had to be wired. He had to have a stomach tube for feeding. He had left sided-weakness on the left side of his body. He remained at Richland for two weeks and was then transferred to Carolinas Rehabilitation Hospital in Florence. He reports that had to learn to do everything all over again, including walking, dressing and feeding himself. He continued to have problems with anxiety and agitation for which he had to be medicated. He had problems with balance and coordination and strength and endurance which were addressed in both inpatient and later outpatient therapy.

Mr. Holland underwent carpal tunnel release on the left wrist on 5/21/07.

Records from Devin Troyer, MD, indicate that Mr. Holland attended an inpatient alcohol and drug rehabilitation program in October-December of 2007. Notes from the program are not available for review, but Dr. Troyer seemed pleased with his progress in this area.

A neuropsychological evaluation by Robert Deysach, Ph.D. on 4/9/09 revealed that Mr. Holland demonstrated "marked difficulty on tasks that measured attention and immediate and delayed memory."

Secondary medical issues

Mr. Holland denied any health problems prior to his injury. He reported that both his right hand and right foot have been smaller than the limbs on the left. He indicated that he has had this abnormality since birth. He indicated that the right foot is two sizes smaller than the left foot.

Current medical status

Mr. Holland remains at home with his girlfriend. He reports that he is currently not taking any medications and feels that he badly needs medication for his anxiety and agitation. He reports that he easily becomes frustrated and then takes off and walks for miles. He has difficulty accepting supervision. He reports that he experiences cramping on the left side. He reports headaches that occur every other day. He reports blurred vision where he was hit. He reports that he sees double sometimes and that his eyes are very watery. He has trouble chewing and has to eat soft food. He reports difficulty speaking clearly. He is hypersensitive to loud noises and vibrations.

Education and Training

Mr. Holland reports that he attended school for 12 years and obtained a certificate instead of a diploma because he could not pass the exit exam required by the state of SC to obtain a diploma. He finished school in 1995. He denies military service or post secondary training. He reports difficulty with reading and writing, memory and concentration. He reports that he is able to add, subtract, multiply and divide. He states he can measure and make change but cannot balance a checkbook. Testing completed at Carolinas Rehabilitation Hospital placed Mr. Holland at the 8th grade level in reading comprehension and at the 5th grade level in spelling. His IQ scores placed him in the borderline level of intelligence.

Work History

Mr. Holland provided the following work history:

Following high school, Mr. Holland reports that he was a meat wrapper at the local Piggly Wiggly grocery store for a year. He worked for a year as a machine operator at Federal Mogul. His job was to form seals out of rubber. He next worked for two years at the Food Lion distribution center as an order picker. He worked for 3 years at Gold Kist as a chicken marinator. This involved mixing the marinade and placing 50 lbs of chicken into the bowl, sealing it and putting it on a conveyor belt all day. He worked as a laborer, putting pipe into the ground for Maxi Hicks for 6 months. He was a material handler for Patola Packaging. He worked for AK Mulch for three years before his injury.

The Dictionary of Occupational Titles provides this information regarding Mr. Holland's past relevant work history. A detailed explanation of this information will follow.

90.685-290 MOLDED-RUBBER-GOODS CUTTER

Medium, SVP 2, GED R2M1L1

920.587-018 PACKAGER, HAND

Medium, SVP 2, GED R2M1L1

22.687-058 LABORER, STORES

Medium, SVP 2, GED R2M1L1

520.687-054 SEASONING MIXER

Medium, SVP 2; GED R2M1L2

869.687-026 Pipe layer helper

Very Heavy, SVP 2, GED R2M1L1

According to the Dictionary of Occupational Titles, the pre-injury occupations reported by Mr. Holland indicate the following GED levels:

- Reasoning Development = 2
- Mathematical Development = 1
- Language Development = 2

GED embraces those aspects of education (formal and informal) which contribute to the worker's (a) reasoning development and ability to follow instructions, and (b) acquisition of "tool" knowledge such as language and mathematical skills. Ordinarily, such education is obtained in elementary school, high school, or college. However, it may be obtained from experience and self-study (source: The Revised Handbook for Analyzing Jobs, U.S. Department of Labor, 1991). GED is reported on a scale of 1-6, with 6 being the highest.

Mr. Holland's pre-injury work history indicates a specific vocational preparation level of 2, over a short demonstration up to and including 30 days. Specific vocational preparation is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation (The Revised Handbook for Analyzing Jobs, U.S. Department of Labor, 1991). SVP is reported on a scale of 1-9 with 9 being the most skilled. Mr. Holland would be considered unskilled.

Aptitudes are the specific abilities required of an individual to perform a given work activity (The Revised Handbook for Analyzing Jobs, U.S. Department of Labor, 1991). Aptitudes and Abilities are reported on a scale of 1-5, with 5 being the lowest. Mr. Holland's aptitude profile, based upon his her past work history, looks like this:

Aptitude	Symbol/Level	Percentile	Performance
General Learning Ability	G-4	10 to 33	Below Average
Verbal	V-4	10 to 33	Below Average
Numerical	N-4	10 to 33	Below Average
Spatial Perception	S-3	34 to 65	Average
Form-Perception	P-3	34 to 65	Average
Clerical Perception	Q-5	Under 10	Minimal or none
Motor Coordination	K-3	34 to 65	Average
Finger Dexterity	F-5	Under 10	Minimal or none
Manual Dexterity	M-3	34 to 65	Average
Eye/Hand/Foot Coordination	E-3	34 to 65	Average
Color Discrimination	C-5	Under 10	Minimal or none

make him a poor candidate for return to work in a competitive job environment.
it is likely that his status is likely to be persistent over time."

He was released by Dr. Fulton without restriction for his carpal tunnel release.

Review of Records

I reviewed these records in preparing my report:

- Robert Deysach, PhD
- Carolinas Rehabilitation Hospital
- Healthsouth Rehabilitation Hospital
- Moore Orthopedic Clinic
- Clarendon Memorial Hospital

Adjusted vocational profile

Mr. Holland was born in 1975, making him 33 years old. He has suffered a traumatic brain injury leaving him with memory deficits and behavioral difficulties. He completed 12 years of schooling but did not pass the exit exam, leaving him with a certificate of attendance rather than a high school diploma.

All of Mr. Holland's work experience has been in the medium to heavy physical demand level. All of his work history has been unskilled. Academically, his work has required only the lowest levels of reasoning, mathematics and language. With his traumatic brain injury, he now suffers from memory deficits and slowed work pace, leaving him likely unable to return to his former occupations which demanded a fast work pace. He is noted to have poor judgment in making decisions and probably needs close supervision. A job coach has been recommended to accompany him to work.

Work sample testing performed at Carolinas Rehabilitation Center revealed that Mr. Holland's work speed was below average in tasks involving memory, manual dexterity, clerical tasks and eye-hand foot coordination. His intelligence scores place him in the borderline level of intelligence. His reading comprehension scores were equivalent to an 8th grade education and his vocabulary was equivalent to the fifth grade.

Labor Market Survey

Using the SC Employment Security Commission job search website, I identified a total of 21 job openings in Clarendon County. A majority of the jobs required a bachelor's degree or two years work experience in management. There was one opening as a stocker in a grocery store that may be appropriate for Mr. Holland. He may need the services of a job coach to learn the requirements of the job. It is

Transferable knowledge, skills and abilities

O*NET, a database of occupational information developed by the U.S. Department of Labor, has identified the following knowledge, skills and abilities as being important to the pre-injury occupations reported by Mr. Holland. Transferable skills are those skills that have at least 75% of importance to the overall functioning of the job. This list is not all-inclusive, but is meant to provide a sampling of the knowledge, skills and abilities acquired through Mr. Holland's reported work experience.

Knowledge

- No knowledge met the minimum 75% importance level

Skills

- No skills met the minimum 75% importance level

Abilities

- No abilities met the minimum 75% importance level

Personal Data

Mr. Holland lives with his girlfriend in Manning, SC. Manning is located in Clarendon County. According to the May 2009 unemployment figures from the SC Employment Security Commission, Clarendon County has the 14th highest unemployment rate in the state with a 15.9%. The statewide average for the same period was 11.9%.

Mr. Holland reports that he is left handed. He has a driver's license but no car to drive. Family members discourage him from driving. He reports that he can pass a criminal background check, but vocational records from Carolinas Hospital indicate that he does have a criminal record. I am unable to determine which scenario is accurate. Mr. Holland lives with his girlfriend and her two children. He reports that he is responsible for paying child support for two children who do not live with him. His girlfriend works third shift at the Waffle House. He gets the older kids ready for school and the smaller children appear to be on their mother's schedule and sleep during the day with her.

Work Restrictions

Dr. Deysach indicated that "it does appear that the combination of cognitive difficulties overlaid upon a limited developmental learning background combined with problems in the area of social emotional control very probably

unknown if Mr. Holland's memory problems, poor judgment and anxiety will negatively affect his work performance, but it is likely that he will have adjustment problems that may make a return to work impossible for him.

One job opening does not indicate that a stable labor market exists for Mr. Holland. Neither do we know how he will react to customers and supervisors. Family members indicate that he is easily frustrated and angers easily. If he is angry, he will take off walking and they never know when he will return. This behavior would be considered inappropriate on a job.

Vocational Conclusions

It is my opinion, with a reasonable degree of certainty from a vocational rehabilitation point of view, that Mr. Holland is unlikely to be able to meet the quality, quantity and dependability standards that any employer would have a right to expect of him. His memory impairment will make it difficult to remember multistep instructions. He would have a slowed speed completing tasks and his ability to interact appropriately with customers and supervisors would affect his overall performance in a negative manner. Before the injury, he qualified for only unskilled medium to heavy work and the injury has now made his chances of success in competitive employment much less likely as it has affected his work behaviors in a negative way. I would consider him to be permanently and totally disabled.

Thank you for this referral to Adams & Wilkinson. If you have any questions regarding this report, feel free to contact me at 803.932.2127.

Harriet Wilkinson

Harriet Wilkinson, M.Ed., CRC
Vocational Consultant

November 5, 2010

Account Number: 01781039

Social Security Number: ***-**-6394

#05325

.....AUTO**3-DIGIT 290
ANDREAL HOLLAND
726 BRANCHVIEW DR
MANNING SC 29102-2032

|||||

THIS DOCUMENT IS AN IMPORTANT LEGAL NOTICE WHICH YOU SHOULD READ CAREFULLY AND COMPLETELY. The cost of health care has become a matter of national concern in recent years. CHARLOTTE MEDICAL CLINIC has found it necessary to place more emphasis on collecting overdue physicians bills. While it is difficult for all involved, these collection efforts can play a role in holding down increases in health care costs for everyone.

According to our records, you owe CHARLOTTE MEDICAL CLINIC a delinquent debt in the amount of \$113.00, which represents the fees, costs and expenses of medical treatment received at CHARLOTTE MEDICAL CLINIC. This may not be your only account(s), but just the one(s) that fall into a specific delinquent status. You are hereby notified that CHARLOTTE MEDICAL CLINIC intends to submit this delinquent debt to the South Carolina Department of Revenue to be setoff against your individual income tax refunds. If you file a joint return with your spouse, this amount will be deducted from the total joint refund, without regard to which spouse incurred the debt or actually withheld the taxes. Pursuant to the Setoff Debt Collection Act, this amount, plus all costs, will be deducted from your South Carolina individual income tax refunds unless you file a written protest within thirty (30) days from the date of this notice. Failure to file a written protest, or filing one more than thirty (30) days after date of this letter, may result in a waiver of any objections to the setoff and/or loss of any right to a future challenge to, or appeal of the set off. This written protest must contain the following information:

1. Your name;
2. Your address;
3. Your Social Security Number;
4. The type of debt in dispute; and
5. A detailed statement of all the reasons you disagree or dispute the debt

The original written protest must be mailed within 30 days from the date of this letter to CHARLOTTE MEDICAL CLINIC at the following address: CHARLOTTE MEDICAL CLINIC, PO Box 70826, Charlotte, NC 28260. Upon receipt of a timely written protest, a representative will contact you and, in the event the matter cannot be resolved, a date and time for a hearing before the CHARLOTTE MEDICAL CLINIC Hearing Officer will be scheduled. Failure to attend the hearing with the Hearing Officer will result in a waiver of all rights to dispute the debt or the setoff or to challenge the debt of the setoff in any civil lawsuit. Failure to make an argument or to present evidence to the Hearing Officer will result in waiver of the right to make the argument or to present that evidence in any future proceedings.

To avoid having your state income tax refund reduced, the debt must be paid in full by December 5, 2010 by mailing payment to CHARLOTTE MEDICAL CLINIC, PO Box 70826, Charlotte, NC 28260. An additional administrative fee of \$25 each for the SC Department of Revenue and an additional \$25 administrative fee for the SC Association of Counties will be added to your debt authorized by §12-56-60 and §12-56-63 of the Setoff Debt Collection Act.

We hope you will work with us to resolve this situation.

Sincerely,
Patient Accounts
704-512-4828

Columbia Oral & Maxillofacial Surg
Darren R. Cross, DDS, MD

611 Oneil Court
 Columbia, SC 29223

Statement

Date	11/09/10
Account	4373
Patient	Andreal Holland

Page: 1

Andreal Holland
 726 Branch view Dr
 Manning, SC 29102

Date	Charges and Credits	Amount
	PREVIOUS BALANCE	0.00
05/08/07	IP cons 55 min	250.00
05/08/07	ZMC fx, open treatment T#UL	7500.00
05/08/07	Orbital blowout fx, alloplastit#UL	4500.00
05/08/07	Mand fx, open w/o IMF T#LL	4000.00
05/08/07	Mand fx, open w/o IMF T#LR	4000.00
05/08/07	Mand Fx, closed, IMF	2500.00
05/08/07	Subsequent Hosp Care 25 min	100.00
05/08/07	Panorex Xray	35.00
05/08/07	Wire rem, deep T#UR	250.00
05/08/07	Wire rem, deep T#UL	250.00
05/08/07	Wire rem, deep T#LL	250.00
05/08/07	Wire rem, deep T#LR	250.00
05/08/07	Gen Anesthesia	200.00
05/08/07	Gen anes addtl 15 min	50.00
05/08/07	Gen anes addtl 15 min	50.00

Payment due immediately upon receipt of statement.

0.00	0.00	0.00	0.00	15514.22
------	------	------	------	----------

We accept all major credit cards.

Please call 1-803-736-4343, for any billing questions

Columbia Oral & Maxillofacial Surg
 Darren R. Cross, DDS, MD
 (803) 736-4343

Thank You

Columbia Oral & Maxillofacial Surg
 Darren R. Cross, DDS, MD
 611 Neil Court
 Columbia, SC 29223

Statement

Date	12/16/10
Account	4373
Patient	Andreal Holland

Page: 2

Attorney Peake and Fowler
 PO Box 23601
 Columbia, SC 29224

Charges and Credits		Amount
ENDING BALANCE		24185.00

Action by collection agency will be taken. Unless arrangements have been made

0.00	0.00	0.00	0.00	15514.22
------	------	------	------	----------

We accept all major credit cards.

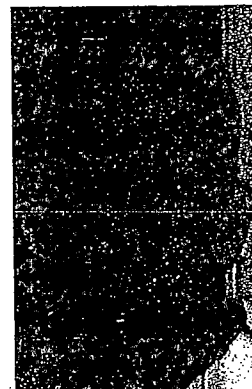
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Columbia Oral & Maxillofacial Surg
 Darren R. Cross, DDS, MD
 (803) 736-4343

Thank You

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 0607813

ANDREAL HOLLAND,	)	DEPOSITION
	)	
CLAIMANT,	)	OF
	)	
VS.	)	ANDREAL HOLLAND
	)	
J.C. WITHERSPOON, JR., INC.,	)	
	)	
EMPLOYER,	)	
	)	
CAPITAL CITY INSURANCE	)	
COMPANY,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	



Deposition of Andreal Holland, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 2:23 p.m., Monday, June 1st, 2009, at Peake, Fowler & Associates, 9357 Two Notch Road, Suite 103, Columbia, South Carolina.

COPY

Reported by

Barbara P. Scott, CVR

SCOTT REPORTING SERVICE
P.O. Box 290482, Columbia, SC 29229 ♦ (803) 736-2408
www.scottreporting.com ♦ bscott@scottreporting.com

Appearances

For the Claimant: Thomas K. Fowler, Jr., Esquire
Peake, Fowler & Associates, PA
9357 Two Notch Road, Suite 103
Columbia, SC 29224

For the Employer/
Carrier: Mark D. Cauthen, Esquire
McKay, Cauthen, Settana &
Stublely, PA
1303 Blanding Street
P.O. Box 7217
Columbia, SC 29202-7217

Reported By: Barbara P. Scott, CVR

Also Present: Peggy Knox

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Exhibits

No exhibits marked.

Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken.

Stipulations

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

Whereupon,

Peggy Knox was duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth.

Whereupon,

Andreal Holland, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

The Court Reporter: State your name for the record.

The Deponent: Andreal Holland.

Examination

By Mr. Fowler:

Q Mr. Holland, as you know, my name is Mark Cauthen, and I represent the insurance company who has your workers' compensation claim and your employer, and I just -- I appreciate the opportunity to be here to take your deposition. It's going to be -- As we talked about before we got started, it's going to be -- it's going to be limited to certain

1 aspects, certain issues, because we don't need to
2 go into a lot of -- We know how your accident
3 happened, and we know about your medical treatment.
4 We have the records and all that, so we don't have
5 to go into all -- all of those things. So,
6 hopefully, it will not be too long, but -- and it
7 will go smooth -- smoothest if you will just try to
8 give me a verbal answer to any question that I ask,
9 either a yes or a no or explain ever how you need
10 to explain. And if you don't understand any
11 question, just let me know, and I'll do my best to
12 just try to clear that up and make it clear to you.
13 Don't be afraid to -- you know, to say that you
14 don't understand a question because I ask questions
15 in a very routine manner. I've been taking
16 depositions for many, many years, so I'll just kind
17 of ask standard questions a lot of times and -- you
18 know, that may not be totally clear to you, but you
19 just let me know if it's not clear. And, of
20 course, your mom, Ms. Knox, is here, as well, and
21 is under oath and can help, and -- but, also, just
22 like your attorney just said a minute ago, if you
23 need to stop and take a break, we'll just go off
24 the record, take a break. It's no big deal. We
25 can do that as many times as we need to. You just

1 let me know.

2 A (Nods head.)

3 Q Okay. Could you state your full name for us, Mr.

4 Holland.

5 A Andreal Holland.

6 Q Do you have a middle name?

7 A No, sir.

8 Q And what is your current age?

9 A Thirty-four.

10 Q All right. And what is your -- what is your home

11 address?

12 A 105 Richburg Drive, Manning, South Carolina.

13 Q Okay. Now, is that -- is that your mom's house?

14 A No, sir.

15 Q That's your own house?

16 A Yes, sir.

17 Q Do you live alone currently?

18 A No, sir.

19 Q Who lives there with you?

20 A My fiancé.

21 Q Okay. All right. And how long have you and your

22 fiancé lived there?

23 A Six -- Lived at that address --

24 Q Mm-hmm.

25 A -- or been together?

1 Q Well, at that address.

2 A About five months, six months. Six months.

3 Q Okay. Now, is that a house?

4 A Yes, sir.

5 Q Does she rent that house? Does she rent it?

6 A Yes, sir.

7 Q She does?

8 A (Nods head.)

9 Q Okay. And how long have you and your fiancé been
10 together?

11 A Six years.

12 Q Okay. And do you all have any children together?

13 A Yes, sir.

14 Q Okay. How many children -- How many children do
15 y'all have together?

16 A Two.

17 Q Two. And could you tell me their ages?

18 A One and three.

19 Q Okay. And does she also have children from a prior
20 marriage or prior relationship?

21 A Yes, sir.

22 Q How many children from that?

23 A Five.

24 Q So, it's five plus -- plus the two that you all
25 have together?

- 1 A Yes, sir.
- 2 Q Y'all have seven children in that house?
- 3 A No, sir. Six.
- 4 Q Six. Okay.
- 5 A But she got five in all.
- 6 Q Okay. Six live there. Now, of her children, the
- 7 other four children that live there, do you know
- 8 about how their ages range?
- 9 A Seventeen, sixteen, twelve, six and five.
- 10 Q Okay. All right. And who looks after the younger
- 11 children during the day?
- 12 A School.
- 13 Q Okay. They're in school?
- 14 A Yes, sir.
- 15 Q All right. How about the one- and the three-year-
- 16 old?
- 17 A Me and my fiancé.
- 18 Q Okay. Y'all both look after them during the day?
- 19 A Yes, sir.
- 20 Q Does your fiancé work?
- 21 A Yes, sir. She work at night.
- 22 Q Oh. She works at night. Okay. And, so, at night
- 23 when she's working, do you look after the kids?
- 24 A Me and my stepkids, my older kids.
- 25 Q Okay. Okay. So, y'all, you and the older kids,

1 make sure they have their dinner and --

2 A Everything they need.

3 Q Everything they need. Okay. And are all of the --

4 All the children except for the two youngest, are
5 they all in school?

6 A Yes, sir.

7 Q Okay. Do you all have any sources of income
8 currently other than your workers' compensation
9 check and her earnings, your fiancé's earning?

10 A Her earnings from work or what the house --

11 Q Well, her earnings, whatever she earns in her job,
12 and then I know that you get the weekly workers'
13 compensation check. Do y'all have any earnings
14 besides those two?

15 A Coming from that -- I want to say DSS. Just from
16 the -- We get food stamps.

17 Q Okay. Okay. Are there any other sources of
18 income, though?

19 A No, sir.

20 Q Okay.

21 Ms. Knox: Can I clarify something here?

22 Mr. Cauthen: Mm-hmm. Sure.

23 Ms. Knox: He talks about her income, but
24 there is -- like if they need additional
25 funds, it's not necessarily coming in, but

1 there is support from families. Like if
2 they're running short, if they're needing
3 diapers or if they're needing different
4 things, he knows to come to family members to
5 get that. So, her part-time income and his
6 workman's comp just does not always meet --

7 Mr. Cauthen: Right.

8 Ms. Knox: -- but family comes in.

9 Mr. Cauthen: Okay.

10 Ms. Knox: So, if that's what you're
11 looking for, --

12 Mr. Cauthen: Okay.

13 Ms. Knox: They don't -- As for child
14 support stuff, he does not know that.

15 Mr. Cauthen: Okay. Very good. Thank
16 you. Thank you for adding that.

17 Q Now, Mr. Holland, how far did you go in school?

18 A Twelve years. High school.

19 Q Okay. Have you obtained a GED yet?

20 A No, sir.

21 Q Are you working toward that?

22 A I would like to, but I don't have no transportation
23 to get around like I want.

24 Q Okay. You went to the twelfth -- through the
25 twelfth grade but just haven't graduated yet; is

1 that correct?

2 A I failed -- Part of the exit exam is the only
3 thing I failed.

4 Ms. Knox: No. He received a certificate
5 of completion from high school. He earned his
6 credits, and the only thing he did not receive
7 was the diploma. He received a certificate of
8 completion of high school.

9 Mr. Cauthen: Okay. And do you know what
10 would need to be done to obtain a GED?

11 Ms. Knox: Yeah. He needs to go back and
12 only take remediation for the reading and the
13 -- reading part of the exit exam.

14 Mr. Cauthen: Okay.

15 Mr. Fowler: Go ahead and clarify he's
16 done that before.

17 Ms. Knox: Yeah. He has -- We've --
18 We've made numerous attempts, and we've used
19 every method for him to earn his -- his
20 diploma. He's not earned that. Therefore,
21 that's why we look at other options for him,
22 other skills that he could utilize to be
23 successful.

24 Mr. Cauthen: Okay. Are there any plans
25 to try to get that GED?

1 Ms. Knox: He could very well, but at
2 this point, with what is going on with him
3 with his injuries, I just can't see him
4 actually obtaining it, no.

5 Mr. Cauthen: Okay.

6 Ms. Knox: It would be an ideal solution,
7 but no.

8 Mr. Cauthen: Right.

9 Mr. Fowler: Let's go off the record a
10 minute, --

11 Mr. Cauthen: Okay.

12 Mr. Fowler: -- see if we can get a clear
13 picture.

14 [Off the record briefly at 2:32
15 p.m.]

16 Ms. Knox: I think his age, too, now --

17 Mr. Cauthen: I'm sorry?

18 Ms. Knox: I said I'm thinking his age
19 might be a factor when it comes to the school
20 providing him any type of accommodations or
21 assistance --

22 Mr. Cauthen: Okay.

23 Ms. Knox: -- because he's thirty-four.

24 Mr. Cauthen: Okay.

25 Examination Continues

1 By Mr. Cauthen:

2 Q Now, Mr. Holland, have you ever had any formal job
3 training, vocational school or anything like that,
4 after high school?

5 A I had it during high school, carpentry I took in
6 high school for a trade. After I got out of that,
7 went to some other plant and drive a forklift.

8 Q Okay. That's in connection with jobs you had?

9 A Yes, sir.

10 Q Okay. But no actual like going to, you know, a
11 vocational school to learn a specific trade or
12 anything like that?

13 A No, sir. I was working.

14 Q Working all the time?

15 A Yes, sir.

16 Q Okay. All right. And let me ask you a little bit
17 about your work now. Were you an employee of A&K
18 Mulch --

19 A Yes, sir.

20 Q -- as opposed to J.C. Witherspoon?

21 A Say again.

22 Q Were you an employee of A&K Mulch or J.C.
23 Witherspoon, or were you an employee of both?

24 A Employee of both.

25 Q Really of both. Okay. Now, did you -- What

1 exactly did you -- was your job -- I guess you
2 considered that you worked directly for A&K Mulch;
3 is that correct?

4 A Well, that's what my shirts and stuff said, but
5 when I get my check stubs, --

6 Q Yeah.

7 A -- they say something different.

8 Q J.C. Witherspoon. Yeah, I've seen that. That's a
9 little confusing.

10 A Yeah. I told them -- Put it like that. Leave it
11 like that.

12 Q Yeah. So, that's just the way they did things I
13 guess. What did you -- What exactly were your job
14 duties, if you can tell me a little bit about that.

15 A If I can remember. I started three years ago, and,
16 you know, he offered me a job to be a cutoff guy,
17 and the cutoff guy, he -- When the man starts the
18 day off, he got to cut that log, and when he cut
19 the log, I got to either ditch that part to
20 produce, if it produce, I put it to the trash. I
21 send it to shipping. I did all day long, and then
22 when twelve o'clock come for break, they gave me a
23 part-time job to change the chipper. Break time,
24 then time to go home. That was my duty for like
25 six days a week.

1 Q Okay. So, you would -- you would -- When you say
2 change the chipper, you're talking about like --

3 A The knives that go in the chippers.

4 Q -- taking it down after the shift and --

5 A Like lunchtime, I got to cut all the power off and
6 change the blades because it got to be changed once
7 a day, you know. In the afternoon, I just take the
8 whole blades out and put new blades in.

9 Q Okay. Now, when you were doing that, did you have
10 other job duties during that time besides just
11 taking the chipper down and changing out the blades
12 and all that?

13 A Well, it's just certain time of the day I done
14 that, like lunchtime and time to go home. I'm the
15 cutoff guy, and that's my station all day long.

16 Q Now, what does cutoff guy mean?

17 A When the driver of the man who cuts that log, --

18 Q Mm-hmm.

19 A I got a line like I'd say about half a mile to a
20 mile long, and I'm the first guy that catch stuff
21 comes out on that line. Like I say, I either send
22 it to shipping, I send it to produce, or I send it
23 to the trash. It's a buildup that runs --

24 Q Right.

25 A -- constantly.

1 Q Right.. Okay. Okay. Did you have a specific
2 supervisor there at A&K?

3 A You talking about the foreman?

4 Q Foreman or whoever your boss man was.

5 A Foreman. Yes, sir.

6 Q What was your foreman's name?

7 A Woodrow Woods.

8 Q Woodrow Woods. Okay. And he would give you -- I
9 mean, he's the guy that you answer to directly? He
10 was your direct boss, I guess, --

11 A Mm-hmm.

12 Q -- Mr. Woods? Was that the whole time that you
13 were there?

14 A He came -- Okay. My first year I was there was --
15 The Deponent: (to Ms. Knox) I got hurt
16 in 2006?

17 Ms. Knox: Uh-huh.

18 A I started in 2003. He came there like the end of
19 2003 sometime, either like a couple months before
20 the year end out.

21 Q Mm-hmm.

22 A If I'm not mistaken, I started -- I want to say
23 April Fool's Day, and he wasn't there yet. After I
24 got hired and worked for like three or four months,
25 that's when he came in as a foreman.

1 Q Okay. And he was there until the time of your
2 accident?

3 A Yes, sir.

4 Q Okay. And do you know about how many hours you
5 were working per week on average?

6 A Probably about 60, 60 at the most, 60, 65.

7 Q Sixty to 65 every week?

8 A Yes, sir.

9 Q Wow. You worked that many every week?

10 A Ten hours a day. Then on Saturday, I do -- I go
11 for cleanup.

12 Q Okay. So, you were working six days a week?

13 A Yes, sir. Sometimes seven.

14 Q And did you always get a paycheck from J.C.
15 Witherspoon?

16 A Yes, sir.

17 Q Were you always paid by check, or --

18 A Yes, sir.

19 Q You were never paid in cash, were you?

20 A No, sir.

21 Q Okay.

22 A No, sir.

23 The Deponent: (to Ms. Knox) Getting a
24 little hot.

25 Ms. Knox: Huh?

1 The Deponent: Getting a little hot.

2 Mr. Fowler: Let me go turn that air on.

3 Mr. Cauthen: Okay.

4 [Off the record briefly at 2:39
5 p.m.]

6 Examination Continues

7 By Mr. Cauthen:

8 Q Okay. Now, your last day of work there with A&K
9 Mulch I guess was the date of the accident?

10 A (Nods head.)

11 Q You haven't worked since then, have you?

12 A (Shakes head.)

13 (Ms. Knox prods the deponent to give a verbal
14 response.)

15 A No. I'm sorry. Yes, sir, my last day was June the
16 1st, 2006, and I never worked since then.

17 Q Okay. Have you been in contact with any of the --
18 of your former --

19 A Employees?

20 Q Yeah, your coworkers or your supervisor at A&K
21 Mulch or J.C. Witherspoon since then.

22 A Well, I have some family members out there, and I
23 don't constantly see them, but if I'm in the
24 street, they'll wave, you know. That's the only
25 time I see them.

1 Q Okay. All right. Now, have you -- have you had
2 any type of employment since this injury, any type
3 of job since this accident?

4 A No, sir.

5 Q No job. Have you earned any kind of income from
6 any source? When I say earned income, I mean like
7 doing some work to get -- to get a paycheck.

8 A No, sir.

9 Q Okay. Now, did you actually work with the
10 Department of Vocational Rehabilitation about
11 possibly, you know, retraining or --

12 A Yes, sir.

13 Q -- getting some job skills and stuff?

14 A Yes, sir.

15 Q You did?

16 A (Nods head.)

17 Q Tell me a little bit about that. What did you do
18 with the Department?

19 A Well, they sent me to Columbia, and I started off
20 in classes and stuff, and they put us off in groups
21 to work. They had me doing housework at first, and
22 then from housework they sent me to yard work, and
23 my experience doing housework was -- it wasn't bad;
24 it wasn't good. It's just that I was skipping here
25 and there, you know, stuff in room, skipping this,

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1 forgot to wash the mirror down, forgot to wash the
2 sink out, or -- It just -- Basically, I was just
3 rushing doing the work. And then outside they had
4 me working with the inmates, and working with the
5 inmates, I talked more than I worked, so they
6 couldn't -- You know, I'd work, but I was doing
7 more talking than I worked.

8 Q Right.

9 A And, you know, told me, you know, I can work but I
10 talk more than I work, so they told me -- they
11 tried me by myself. Then when I got myself, I was
12 too slow.

13 Q Okay.

14 A I took my time, just, you know, finish one building
15 where I could've did like two or three buildings.
16 It took me a long time.

17 Q Okay. Okay.

18 Ms. Knox: Plus -- Can I also add
19 something there?

20 Mr. Cauthen: Mm-hmm.

21 Ms. Knox: They tried him outside, and we
22 had different meetings, but the heat tends to
23 have impact on his implants, the heat and the
24 cold. So, he would not tell them when
25 something was actually going on medically with

1 him.

2 Mr. Cauthen: Okay. Do you know what
3 type of an impact it would have on the
4 implants? I mean, do you know -- Any way you
5 can further elaborate on that?

6 Ms. Knox: Well, yes. When he's in the
7 heat, his face swells, it aches. When it's
8 cold, it swells and it aches, and he complains
9 of having pain near that eye and near that
10 side of his face, as well as the side of his
11 face.

12 Mr. Cauthen: Okay.

13 Ms. Knox: He's also indicated that that
14 side hurts when he's outside a lot, too, that
15 left side.

16 Mr. Cauthen: Okay. All right.

17 Q Now, do you know -- About how long, Mr. Holland,
18 did you work with the -- Do you remember about how
19 long you worked with the Department of Vocational
20 Rehabilitation?

21 A I went in February, and they started me working
22 like the -- I went there like the 9th or 10th, I
23 got there. Let's say the -- Let's say the 5th.
24 And I started like the 10th as in working, you
25 know, with voc rehab.

1 Q Okay. Was it about a month?

2 A It'd be a month.

3 Q About a month.

4 Ms. Knox: Correction. He was -- On
5 April -- Let's see. On January --

6 The Deponent: The 28th.

7 Ms. Knox: -- the 20th was when he was
8 admitted to the ER.

9 The Deponent: Oh. Yeah.

10 Mr. Cauthen: Okay. January 20th of?

11 Ms. Knox: 2008.

12 Mr. Cauthen: Okay. And do you have an
13 exit date?

14 Ms. Knox: It had to have been February
15 the 22nd.

16 Mr. Cauthen: Okay.

17 Ms. Knox: Uh-huh. Yeah.

18 Mr. Cauthen: All right.

19 Q Well, since that time, February of 2008, after you
20 ended the voc rehab program, have you done any --
21 attempted any other kind of job training since
22 then?

23 A No, sir. Job training. Looking for a job or --

24 Q Well, -- Right. Either looking for a job or doing
25 any kind of preparation for some other type of work

1 or job.

2 A She can tell you better than I can.

3 Q Okay. Okay.

4 Ms. Knox: Yes. March the 4th, we had an
5 appointment set up for -- to start job
6 training at Sumter VR, but then they realized
7 that workman's comp case was open and that
8 they could not actually pay him for on-the-job
9 training with -- while he's receiving benefits
10 from workman's comp. So, we had to -- They
11 terminated that service. They kept the case
12 open for a period of time. It is closed,
13 pending. They said that he can't get job
14 training right now, so --

15 Mr. Cauthen: Until the workers' comp
16 case is over with?

17 Ms. Knox: Yes.

18 Mr. Cauthen: All right. And that's the
19 Sumter Vocational Rehabilitation?

20 Ms. Knox: Yes, it is. Mm-hmm.

21 Mr. Cauthen: Now, the voc rehab program
22 that we talked about earlier, was that in
23 Columbia?

24 Ms. Knox: That one was in Columbia.

25 This one was in Sumter. We had everything set

1 up, and then they realized that, and we had to
2 just stop.

3 Mr. Cauthen: Okay.

4 Q Once the workers' comp case is settled or resolved,
5 do you -- do you plan to try to go back to the
6 Sumter Vocational Rehabilitation program?

7 A Yes, sir.

8 Q Okay. Now, is there any particular area of
9 interest that you have as far as any kind of future
10 job or future job training?

11 A No, sir.

12 Q Is there any type of work that interests you, like
13 --

14 A All types of work interest me, you know. It's just
15 that am I capable of doing the work. It could be
16 easy work. Am I capable of doing it.

17 Q Yeah. So, any kind of gainful employment is okay
18 as long as you're capable of doing it?

19 A (Nods head.)

20 Q That's a yes?

21 A Yes, sir.

22 Q Okay.

23 Ms. Knox: We had talked about his skills
24 and his abilities based on the past with the
25 Career Center in Sumter, and they were looking

1 at his strengths and trying to see where his
2 people skills -- and they also would offer
3 what's called a coach or a shadow to monitor
4 his abilities to see just what he could do,
5 but at this point --

6 Mr. Cauthen: Okay.

7 Mr. Fowler: You can go ahead and finish,
8 if you weren't finished. If you were, that's
9 fine.

10 Ms. Knox: Yeah. At this point, we've
11 tried and -- you know, to see what he can do,
12 and right now it's very, very limited.

13 Mr. Cauthen: Was there any study that
14 you're aware of that was made that -- where
15 they recommended maybe pursuing vocational
16 training in certain types of areas?

17 Ms. Knox: Well, right now, what we've
18 done is we've used -- we did some volunteer
19 work with Harvest Hope, and that, being
20 shadowed, he could not do that. So, based on
21 their assessment, -- and that was one of the
22 reasons why they wanted him to come to their
23 training site, just to assess his skills to
24 see what specific jobs he could actually do, -
25 -

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1 Mr. Cauthen: Right.

2 Ms. Knox: -- whether it was greeting
3 people at Wal-Mart, which was a no because of
4 his people skills, -- So, there's no
5 assessment or study that I'm aware of at this
6 point.

7 Mr. Cauthen: Okay.

8 Q So, other than the vocational program that you went
9 -- that you went through with Columbia for about
10 that month, I understand you haven't tried any
11 other type of employment since the accident?

12 A No, sir.

13 Q Okay. Do you -- In the future, do you see
14 yourself going back to work in some capacity?

15 A I don't know. I don't know.

16 Q Would you like to go back to work in some capacity?

17 A Say it again.

18 Q Would you like to go back to work in some capacity,
19 in some type of job?

20 A If I can, you know. I mean, these jobs these days,
21 every job you get is diploma here, some kind of
22 degree you got to have, and --

23 Ms. Knox: Yes, but then find the exact
24 job, that's going to be the key --

25 Mr. Cauthen: Right.

1 Ms. Knox: -- because he has worked all
2 of his life, --

3 Mr. Cauthen: Right.

4 Ms. Knox: -- so he do want to work, but
5 then whether he's capable of working is the
6 key here.

7 Mr. Cauthen: Yeah. Right.

8 Ms. Knox: Or even if hired, whether or
9 not he would stay on the job a week, --

10 Mr. Cauthen: Right. Right.

11 Ms. Knox: -- you know.

12 Mr. Cauthen: So, there's no area of --
13 particular area of employment that you're
14 aware of that's been recommended as something
15 that, you know, could be fruitful in the
16 future?

17 Ms. Knox: And be successful? No. If
18 you would look at a track record of if he's at
19 this job and stay a week because of some type
20 of behavior or him not doing something and
21 being terminated and moving from job to job
22 independently, no.

23 Mr. Cauthen: Okay.

24 Ms. Knox: With assistance, possibility.

25 Mr. Cauthen: Okay. With the proper

1 accommodations.

2 Ms. Knox: Right.

3 Mr. Cauthen: Okay.

4 Q Now, just one other question along those lines. As
5 far as employment, could you tell me just a little
6 bit, Mr. Holland, about the type of work that you
7 did before you went to work for A&K Mulch, just
8 different types --

9 A How far you want to go back?

10 Q Let's see. You were thirty, roughly thirty years
11 old when this happened; is that right?

12 A Thirty-one.

13 Q Thirty-one. And have you been working, I guess,
14 full-time since high school?

15 A Yes, sir.

16 Q So, what I'm looking for is just the types. You
17 don't have to give me dates of employment --

18 A Okay.

19 Q -- or anything like that but just the types of work
20 you did before.

21 A Well, like I started off -- Well, you know, when
22 you're at a young age, -- I worked on a farm since
23 high school. You know, I worked on a farm. You
24 don't have to have no -- Well, I worked on a farm
25 in high school. Coming out of high school, I

1 started off at Piggly-Wiggly in the meat
2 department. I finished high school. I left there
3 and went to Federal-Mogul in Summerton, South
4 Carolina. Stayed there about -- I forgot how
5 long. I left there and went to Food Lion
6 warehouse, and I stayed there for how long. Left
7 there, went to Gold Kist. Left there, went to
8 Maxcy Hicks Incorporation, and I left there and
9 went to Six Ls, and that's a summer job. Left
10 there, went to Total Packaging in Sumter, South
11 Carolina. I left Total Packaging. I went to A&K
12 Mulch.

13 Q Okay. Now, what type work did you do at Gold Kist?

14 A That's processing meat.

15 Q Okay. How about -- You said Maxcy --

16 A Maxcy Hicks.

17 Q Maxcy Hiss?

18 A Maxcy Hicks.

19 Q Hicks. What type work was that?

20 A Water line, sewage line.

21 Q Okay. And how about Six Ls?

22 A That was like a produce farm at a little warehouse
23 where you load trucks and unload trucks.

24 Q Okay. And at Total Packaging, what kind of work
25 was that?

1 A I forgot what they used to make out there. I think
2 for milk jugs.

3 Ms. Knox: They made caps for milk jugs.

4 Q Okay. Now, were you always employed full-time? In
5 all those jobs that you talked about before, they
6 were all full-time work?

7 A Yes, sir. Yes, sir. Yes, sir.

8 Q Okay. And were you ever out of work, like laid off
9 or just out of a job for, you know, any significant
10 period, like more than a month or something like
11 that, between jobs?

12 A Not that I know of, no, sir. No, sir.

13 Q Okay. Had you ever made any kind of claim for --
14 or filed any kind of claim for disability benefits
15 before this injury happened, like --

16 A Did I apply for it?

17 Q Yeah. Any kind of disability claim, any kind of --

18 A No, sir.

19 Q Okay. Had you ever had any on-the-job injuries
20 before this accident happened?

21 A No, sir.

22 Q Okay. Had you ever had any injury at all that was
23 bad enough to go seek medical attention, like from
24 a -- say for a car wreck or a slip-and-fall,
25 something like that?

1 A No, sir.

2 Q Nothing like that?

3 A (Shakes head.)

4 Q Do you feel like you were completely healthy before
5 this accident?

6 A Healthy? Healthy? Yes, sir. Yes, sir.

7 Q You didn't have any -- You didn't have any health
8 problems before this accident?

9 A Well, I don't have no health problems, but one of
10 my sides bigger than the other one, and it confuse
11 me sometimes.

12 Ms. Knox: That's not a health problem.

13 The Deponent: Oh. Okay.

14 Ms. Knox: That's something with that.

15 The Deponent: Okay. Okay.

16 Q One of the -- Are you talking about your hand?

17 Ms. Knox: Mm-hmm.

18 A (Displays hands.)

19 Q Okay. Okay. And I take it you never had any
20 workers' compensation claim before this one?

21 A (Shakes head.)

22 Q That's a no?

23 A No, sir.

24 Q Okay. All right. The last main thing that I need
25 to ask you about is, how is your -- how is your

1 health today as a result of these injuries? It's
2 been over three years now, so what I'm wondering
3 is, after this long period of recuperation from the
4 injuries there with the wood chipper, how you're
5 doing today as a result of these accidents. What
6 kind of problems are you still having, physical or
7 mental problems that you're still having today as a
8 result of these injuries. You know, just answer
9 that as best you can, --

10 A Since the accident?

11 Q -- and your mom is here to help with that, as well.
12 Yeah. I'm just looking for -- You know, I'm just
13 wondering -- You know, what I'm really trying to
14 find out is what kind of improvements you've made
15 and how you're doing health-wise today versus over
16 the past three years, because I know it's been a
17 long period of recovery.

18 A Very long. How do I feel now?

19 Q Yeah. Yeah.

20 A I feel okay. It's just that -- It just hurts me
21 in my left hand, like carpal tunnel. I had surgery
22 done to it, but it still give me problems a lot
23 when I want to, say, work or do something around
24 the house. My whole left hand just get tight on
25 me.

1 Q Now, did you have the -- You had the carpal tunnel
2 surgery --

3 A Yes, sir.

4 Q -- on your left hand?

5 A Yes, sir.

6 Q What problems is it still giving you?

7 A When I bend my hand and grab something, --

8 Q Mm-hmm.

9 A -- these two fingers right here just get cramped,
10 and I can't bend them at all. Can't bend them at
11 all.

12 Q Okay.

13 A I've got to rub them for a while.

14 Ms. Knox: That's the side he fell on.

15 Mr. Cauthen: Mm-hmm.

16 Ms. Knox: He's giving you grief, and I
17 think he understands some of what you said,
18 but -- and he's able to but having
19 difficulties to actually explain the medical.
20 When it comes to the medical, he still
21 complains of headaches, he still complains of
22 that side, his side hurts. What else goes on
23 with that side? That side aches. That side
24 hurts. The headaches.

25 The Deponent: The fingers.

1 Ms. Knox: Vision becomes blurred
2 sometimes. When we talk about the anxiety,
3 the mental, --

4 Mr. Cauthen: Mm-hmm.

5 Ms. Knox: -- he has a lot of anxiety. I
6 think sometimes he even has panics. He's very
7 oppositional. He just can't -- He won't
8 follow rules all the time, simple rules. He -
9 - You give him instructions. Very limited
10 following those. He gets very -- He gets --
11 Sometimes I think he experience some
12 depression because of just different things.
13 He can't verbally express himself. He was one
14 way prior to the accident. Now he's a total
15 different child. I wonder who he is
16 sometimes. He lacks people skills, person --
17 He's not -- When I say that, -- He says --
18 What comes to his mind comes out of his mouth.
19 He don't sugarcoat anything. It's how he
20 defines it. But his thought process when he's
21 expressing himself is very limited, I mean,
22 when it comes to -- If he disagrees, if you
23 try to tell him to do something and he
24 disagrees with it, that's a-whole-nother
25 person. He becomes another person. I mean,

1 you know, discussing and trying to get him to
2 understand is very hard when you're talking
3 about his cognitive and his mental
4 capabilities. We also talk about setting down
5 his time, being able to maintain a setting
6 without some anxiety or anything coming. Very
7 difficult. An example is when we go to
8 church. He can't sit in church. He just gets
9 up and pace. He constantly pace. He said
10 that's one of his coping -- how he copes.

11 Mr. Cauthen: Okay.

12 The Deponent: And nerves.

13 Ms. Knox: His nerves. He do talk about
14 -- He say his nerves is very -- He defines
15 it as his nerve's not well.

16 Mr. Cauthen: Okay. Thank you very much.
17 That's a good overview.

18 Q Now, Mr. Holland, everything that your mom just
19 said there, do you agree with all that?

20 A Yes, sir.

21 Q Okay. Do you still have a lot of headaches?

22 A I'll say about three times a week. And one day
23 it'll probably be like a half of a whole day, and I
24 might take some medicine. I don't like pill
25 popping. I don't like taking pills at all, so I

1 use the liquid Tylenol, you know, for the -- trying
2 to keep me straight and stuff.

3 Q Okay. Liquid Tylenol. Do you have any other
4 prescription medications that you're currently
5 taking?

6 Ms. Knox: Yeah, he's got prescription
7 medications. They gave him something for
8 anxiety, Dr. -- Is he taking it? It makes
9 him sleepy, so he refuses to take it. That's
10 another thing, his refusal to take medication,
11 knowing that he need it, but he is not able to
12 weigh the options here, if I took the
13 medications, I might be able to -- but he
14 looks at it it makes me sleepy. When we try
15 to look at altering the medications to make
16 sure he stays awake at certain times, he can't
17 process that.

18 Mr. Cauthen: Okay.

19 Ms. Knox: You know, he might look at
20 taking it at a different time and sleeping
21 when he's supposed to, but it works the
22 opposite for him, so --

23 Q Are you able to sleep okay?

24 A Yes, sir.

25 Q You don't have to take anything to help you sleep

1 or anything like that?

2 A One I used to. I think the doctor has prescribed
3 me something.

4 Ms. Knox: He was on prescription meds to
5 help him sleep. He was having, I guess, PTSD.
6 You know, he's been experiencing a lot. He
7 would walk -- He would get up at night. He
8 would not -- He just -- Not as much, but a
9 little bit there because when you try to
10 corner him to sit him down, he's just -- He
11 wouldn't take the medicine. I mean, you know,
12 it would be ideal to give him an injection
13 that'll last for a period of time, and -- but
14 there's no such meds for that.

15 Mr. Cauthen: Right. Right.

16 Q Before this accident happened in 2006, -- 2006, yes
17 -- did you have any of these problems that your mom
18 just told me about, that whole long list of
19 problems?

20 A Mm-mm. No. I was the kindest, sweetest guy you
21 could ever meet. I mean, kind and sweet. If I had
22 a million dollars, you said you're short a few
23 thousands in bills, and I know you like that and
24 you said you need it, I'd give it to you without no
25 problems. That how kind and nice I were.

1 Ms. Knox: He would hear you out. He
2 would help whenever possible. He was a
3 churchgoer. He was very involved. Now it's
4 like I can't get him to church at all. I
5 mean, he grew up in a Christian home. It's
6 like getting him to agree to do anything that
7 he just feel he don't want to do is a problem.
8 So, it is a change there. Pretty much healthy
9 all of his life. Healthy, yeah, other than,
10 you know, childhood colds, --

11 Mr. Cauthen: Mm-hmm. Yeah.

12 Ms. Knox: -- that stuff. No medical
13 stuff.

14 Q Did you ever have any problems with depression or
15 anxiety before this accident?

16 A Mm-mm. No, sir. No, sir.

17 Q Do you have any hobbies that you like to
18 participate in?

19 A Fishing, hunting, and I like to ride four-wheelers
20 when I get a chance.

21 Q Are you able to go fishing and hunting now?

22 A No, sir.

23 Q So, this was before the accident?

24 A Yes, sir.

25 Q But you can't -- you haven't tried to fish or hunt

1 Q Do you attempt to drive at all now?

2 A I drive every blue moon. What I mean by every blue
3 moon, I might ask, you know, one of my friends can
4 I go to the store when they come over. Other than
5 that, I don't drive.

6 Q Do you have access to a car?

7 A No, sir.

8 Q Do you ever drive your fiancé's car?

9 A She don't have one.

10 Q Oh. She doesn't have a car?

11 A (Shakes head.)

12 Q If you do drive, whose car would it be?

13 A How you pronounce that word? If somebody in the
14 car with me.

15 Q Okay. Only if somebody's in the car with you? You
16 don't try to drive by yourself?

17 A I don't have no vehicle.

18 Q Okay. Okay. Are there any other health problems
19 that you have besides the injuries from this
20 accident that we're already talked about here
21 today? Any other health issues?

22 A No, sir.

23 Mr. Cauthen: (to Ms. Knox) Any that
24 you're aware of?

25 Ms. Knox: I'm thinking. No. None that

1 since?

2 A I don't have no vehicle. Everything I own got
3 stolen when I was in the hospital.

4 Ms. Knox: I honestly think with his
5 patience at his level, if the fish just sat
6 there, -- You know, you need patience to
7 fish, and I just don't know whether -- No.

8 Mr. Cauthen: Yeah.

9 Ms. Knox: Plus, he's stumbles sometimes,
10 too, and -- He stumbles, and I -- you know,
11 that would be -- and give him a gun, I mean, -

12 -

13 Mr. Cauthen: Yeah. Issues there.

14 Q How about sports? Are you able to participate in
15 any sports? Have any interest --

16 A No, sir. It's bad for my face. I try to play with
17 my kid, and you know how you play with a kid.
18 They're going to reach every place. I get taps on
19 the face all the time, and I'm afraid -- I'll get
20 banged hard on the left side, and I'm basically out
21 for the day. So, sports, I don't play that much
22 sports like that unless it's kickball or something.

23 Q Okay. All right. Do you have a current South
24 Carolina driver's license.

25 A Yes, sir.

1 result of that?

2 Ms. Knox: PTI.

3 Mr. Cauthen: Okay. All right. Let me
4 just look over my notes real quick. That may
5 be all that I have.

6 Mr. Fowler: You all right?

7 The Deponent: (Nods head.)

8 Mr. Fowler: Okay.

9 Q And as I understand it, you have not applied for
10 Social Security disability?

11 Ms. Knox: Incorrect. We've applied, and
12 he's been denied.

13 Mr. Cauthen: Okay. Do you know the
14 status of that? Is it being appealed?

15 Ms. Knox: We appealed it, and we -- and
16 it was denied again.

17 Mr. Cauthen: So, it's been denied twice?

18 Ms. Knox: Yes. Intent is to re-apply --

19 Mr. Cauthen: Okay.

20 Ms. Knox: -- once we obtain the
21 evaluations and --

22 Mr. Cauthen: Do you have a lawyer for
23 that?

24 Ms. Knox: No.

25 Mr. Cauthen: Okay. That's all the

1 I'm aware of.

2 Mr. Cauthen: Okay.

3 Q And this is just a standard question I always ask
4 in a deposition. No offense meant, but do you have
5 any criminal record?

6 A I have one from 1994. We got caught with bats in
7 the car, and --

8 Ms. Knox: He was in high school, yes,
9 and he and some friends -- There's always
10 been a rival between two areas, Summerton and
11 Manning, and after a football game they had
12 gone down to Summerton as friends, and there
13 was some fighting going on, and law
14 enforcement was checking everything that went
15 in and out of that town, and when they
16 searched the car he was riding in, they had --
17 they found one of the small bats -- bats
18 wrapped, and they considered a wrapped bat a
19 weapon, so they arrested -- The sheriff
20 wanted to prove a point, so they arrested all
21 the boys on that, and he stayed in jail that
22 weekend --

23 Mr. Cauthen: Okay.

24 Ms. Knox: -- and -- Yeah.

25 Mr. Cauthen: Were there charges as a

1 questions I have. Thank you very much. Mr.
2 Holland, thank you very much for giving the
3 deposition, and, Ms. Knox, thank you for
4 helping. Very big help. Very big help.
5 (Whereupon the deposition was concluded at
6 3:11 p.m.)
7 (Deponent has waived reading and signing.)

State of South Carolina)
)
County of Richland) Certificate

Be it known that the foregoing deposition of
Andreal Holland was taken before me;

That I was then and there a Notary Public in
and for the State of South Carolina-At-Large;

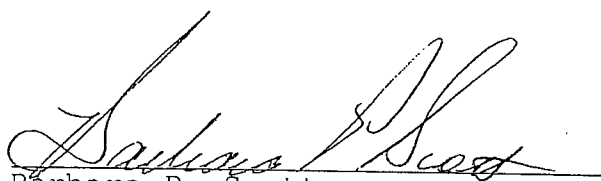
That by virtue thereof I was duly authorized
to administer an oath;

That the witness was by me first duly sworn to
testify the truth, the whole truth, and nothing but the
truth concerning the matter in controversy aforesaid;

That the foregoing transcript of 42
typewritten pages represents a true, accurate and
complete transcription of the testimony so given at the
time and place aforesaid to the best of my skill and
ability;

That I am not related to nor an employee of
any of the parties hereto, nor a relative or employee of
any attorney or counsel employed by the parties hereto,
nor interested in the outcome of this action.

Witness my hand and seal this 2nd day of June,
2009.


Barbara P. Scott

Notary Public for South Carolina
My commission expires April 9, 2017.

Note: Recordings are retained for twelve (12) months
from date of certification.

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 0607813

ANDREAL HOLLAND	)	
	)	
CLAIMANT,	)	
	)	DEPOSITION
VS.	)	
	)	OF
J.C. WITHERSPOON, JR.,	)	
INC.,	)	PAULA DYCHES
	)	
EMPLOYER,	)	
	)	
CAPITAL CITY INSURANCE	)	
COMPANY,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

Deposition of Paula Dyches, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 3:10 p.m., Tuesday, September 7th, 2010, at the law offices of Peake, Fowler & Associates, 9357 Two Notch Road, Suite 103, Columbia, South Carolina.

COPY

Reported by
Sandra M. Snead

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Exhibits

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Marked as Claimant's Exhibit Number Two; Deposition of Paula Dyches; copy of subpoena; two pages 33

Marked as Claimant's Exhibit Number Three; Deposition of Paula Dyches; copy of First Report of Injury; one page 33

Marked as Claimant's Exhibit Number Four; Deposition of Paula Dyches; copy of First Report of Injury without hand corrections, and attachments; six pages 33

Marked as Claimant's Exhibit Number Five; Deposition of Paula Dyches; copy of First Report of Injury, A&K Mulch; one page 33

Marked as Claimant's Exhibit Number Six; Deposition of Paula Dyches; copies of Form 21, Form 18, Physical Medicine & Rehabilitation Outpatient Consultation, Dr. Fulton's notes and Report of Medical Examination; six pages 33

Marked as Claimant's Exhibit Number Seven; Deposition of Paula Dyches; copy of email from Paula Dyches to Darryl Starkey; two pages 33

(All exhibits were retained by Attorney Fowler.)

Certified Questions

Question One: The doctor's report I see, which is actually page three of this exhibit, down here in recommendations, -- It's Dr. -- Is this Troyer? It's not signed, but it's typed Troyer. It says, "I still believe he has significant -- significant deficits from his injury." Is it your position he's not entitled to lifetime benefits? 24

Question Two: And you state as grounds that "The claimant elected his remedy by failure to timely file a Form S-2 after commencement of a third-party lawsuit and barred from workers' comp"; is that correct? 26

Question Three: What overpayment are you requesting in the Form 21? 27

Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken. Social Security numbers have been redacted or blacked out.

1 Stipulations

2 The reading and signing of this deposition is
3 waived by the deponent and counsel for the
4 respective parties.

5 Whereupon,

6 Paula Dyches, being duly sworn and cautioned
7 to speak the truth, the whole truth, and
8 nothing but the truth, testified and deposed
9 as follows:

10 The Court Reporter: State your name for
11 the record.

12 The Deponent: Paula Dyches, D-y-c-h-e-s.

13 Mr. Cauthen: Tommy, let me, just real

14 quick, before we get going here -- I just
15 want to state just a general objection to the
16 deposition just on grounds of relevance. As
17 the hearing will be set on our Form 21 on the
18 electoral remedies issue, it's our position
19 that her testimony would not be relevant to
20 that issue. So, I just want to put that on
21 the record up front.

22 Mr. Fowler: We'd also note that, upon
23 arrival at the deposition, Mark presented to
24 us a copy of the claim file except for in-
25 depth medical reports and bills that have been

1 paid for Mr. Holland's treatment, and we will
2 -- we are copying and will make a copy of that
3 file an exhibit to this deposition, as well.
4 I don't have any problem if we just mark it
5 and I keep that copy and save her the copying
6 costs if that's all right with you.

7 Mr. Cauthen: Sure. Sure.

8 Direct Examination

9 By Mr. Fowler:

10 Q Ms. Dyches, we've never met before today, but my
11 name is Tommy Fowler, and, as you know, I represent
12 Andreal Holland in a workers' comp claim. And I
13 think we have spoken in the past over the phone but
14 never formally met. The documents that were
15 presented today, is that a complete copy of your
16 claims file except for the extensive medical
17 records and bills that Andreal has incurred for his
18 treatment, to the best of your knowledge?

19 A To the best of my knowledge, yes.

20 Mr. Cauthen: Let me clarify that now. I
21 object to -- As you will see in the response,
22 I objected to producing certain things --
23 which, you know, of course, this is what I
24 have reviewed and produced to you. We raised
25 an objection to claim notes, as they're filled

1 with attorney-client privileged
2 communications, work product -- We've raised
3 both the work product and attorney-client
4 privileged objections to producing claim
5 notes, adjuster's notes, any prepared in
6 anticipation of litigation or documenting --
7 or actual communications between -- between
8 Ms. Dyches or other people at Southeastern and
9 myself. Those, obviously, are not included,
10 and that would be --

11 Mr. Fowler: So, you will provide us a
12 list of items that you've deleted from the
13 file?

14 Mr. Cauthen: Well, they're all --
15 They're claim notes where the adjuster will
16 document correspondence that comes -- For
17 instance, if I send a status report or an
18 opinion letter or something like that to her,
19 that report will actually be copied verbatim
20 as a claim note, and it's recorded in her
21 claim notes, you know, and those are probably
22 --

23 Mr. Fowler: What about notes from
24 conversations with potential witnesses or that
25 sort of thing? Did you take those out, too?

1 Mr. Cauthen: Don't know of any, to tell
2 you the truth.

3 Mr. Fowler: All right. Would you
4 provide me a list of what you took out and the
5 pages so that we can, if we need to, let a
6 commissioner decide whether they're attorney-
7 client or work product?

8 Mr. Cauthen: All right. Yeah. That
9 will take a little time, but, you know, if you
10 want to -- if you want something more itemized
11 and --

12 Mr. Fowler: Yeah.

13 Mr. Cauthen: All right.

14 Q Ms. Dyches, aside from those comments, to the best
15 of your knowledge, you provided your entire claims
16 file to Mark?

17 A Yes, I did.

18 Q Okay. And you're not totally aware of what he may
19 have left in or taken out?

20 A That's correct.

21 Q All right. Who -- Who do you actually represent
22 in this case?

23 A Southeastern Claims. Well, Capital City Insurance
24 is the carrier, and we handle the claims for
25 Capital City. Southeastern Claims handles the

1 claims for Capital City Insurance.

2 Q And is Southeastern Claims owned by Capital City?

3 A Yes, it is, but, now, they have been bought out by
4 QBE Specialty Insurance about two or three years
5 ago.

6 Q Is that out of Australia or --

7 A Yes. That's correct.

8 Q So, at the time that this claim arose in 2006,
9 Capital City owned Southeastern Claims?

10 A That's correct.

11 Q And --

12 A It was owned by Hinton Davis.

13 Q Of Davis-Garvin?

14 A Yes.

15 Q Okay. And was it more or less a subsidiary of
16 Davis-Garvin?

17 A That's correct.

18 Q All right. And did Sharon Mack also work for
19 Southeastern Claims at that time?

20 A Yes, she did.

21 Q And she was the original adjuster?

22 A Yes, for about -- I might -- To my knowledge, or
23 to my memory, probably about a couple of months, if
24 that.

25 Q Okay. Did she do the original investigation of the

1 claim?

2 A Yes, she did.

3 Q Were any witness statements or such taken that
4 you're aware of?

5 A I don't recall. You know, that was back in 2006,
6 so I don't recall.

7 Q You haven't reviewed the file lately?

8 A I don't go back to witness statements, no, not so
9 far back. No.

10 Q Let me ask you -- a few documents I have.

11 Mr. Fowler: I want to make this subpoena
12 -- This is the one originally served in
13 October, and I think it's identical to the one
14 served for this deposition.

15 Mr. Cauthen: Mm-hmm.

16 Mr. Fowler: If not, we'll add the other
17 one as an exhibit, too. And then we'll have
18 Mark's response to that.

19 Q I'll ask you if you recognize this document, the
20 First Report.

21 A Yes. That's our First Report of Injury.

22 Q All right. Does that appear to be the one in this
23 claim file, in your file?

24 A Yes.

25 Q All right. And, as I understand, that was

1 originally submitted by one of the ladies at J.C.

2 Witherspoon, Ms. Elmore?

3 A Yes. That's correct.

4 Q All right. And up under the employer name, it has
5 J.C. Witherspoon. Do you know why it was reported
6 as a J.C. Witherspoon employee?

7 A I don't recall.

8 Q Did you ever know why?

9 A No, because I did not do the initial investigation.

10 Q Okay. Is any of that on there your handwriting?

11 A No, sir.

12 Q Do you know whose it is?

13 A No, except for the ISO and the EDI on the bottom.

14 Q Mm-hmm.

15 A That would be from Nancy in our -- Nancy -- I
16 can't remember her last name now because she no
17 longer works with us, but she did the index and the
18 EDI to the commission, and that's how we knew it
19 was done.

20 Q Okay.

21 Mr. Fowler: I'm just going to -- These
22 exhibits, I'll just turn them face down in the
23 order that we look at them.

24 Q I'm going to ask you if you've seen this document
25 before and if this is the original before the

1 handwriting was made on it.

2 A Okay.

3 Mr. Fowler: (to the court reporter)

4 What would this one be? I'm just going to --
5 We've got their file. We've got the subpoena.
6 This would be Three?

7 The Court Reporter: Right.

8 Mr. Fowler: Okay. So, we'll call this
9 Claimant's Number Three. I'll put Number
10 Three on the back, and you can sticker it.

11 The Court Reporter: (Nods head.)

12 Mr. Fowler: Is that all right, Mark?

13 Mr. Cauthen: Sure.

14 Q All right. So, Number Three is your file version
15 of the initial report; is that correct?

16 A Yes, that's -- Yeah.

17 Q And this -- This I've just handed you, does that
18 appear to be what was faxed in --

19 A I --

20 Q -- from the employer?

21 A I don't know because, like I said, I'm -- I'm the
22 adjuster, and we don't get the First Reports of
23 Injury at all until they are actually put into a
24 claim file.

25 Q Okay. Well, look at all the documents, and tell me

1 what it appears to be to you.

2 A The other documents, now, are from Davis-Garvin
3 Agency, which would be from the underwriter.
4 Darryl Starkey was the underwriter on the file. He
5 wrote that account.

6 Q Well, let me ask you to compare Number Three and
7 this first report that I've handed you. Do they
8 appear to be the same except for the transmission
9 information at that top of what's going to be
10 Number Four?

11 A Yes. Mm-hmm.

12 Q And exclusive of the handwriting?

13 A Yeah. It looks like the handwriting was because we
14 -- they could not make it out clearly, --

15 Q Mm-hmm.

16 A -- and, so, they went back after speaking with the
17 employer and -- to do the correct spelling of his
18 name, the correct address and -- etcetera --

19 Q Okay.

20 A -- in order to get it into the system.

21 Q And when we look at Number Three, that was
22 apparently prepared by Cindy --

23 A It's -- Oh, yeah, Cindy, mm-hmm, at the employer.
24 Yes.

25 Q Okay.

1 Mr. Fowler: So, make Number Four the
2 copy without the hand corrections on it.

3 Q And these were just attached to it, right?

4 A Yes. Mm-hmm. I thought you were asking about
5 those.

6 Mr. Fowler: Mark, if you would, hand me
7 that stapler right there. The original is on
8 top. So, we have the file that Mark produced
9 as Number One. I'm just writing Number One on
10 Mark's letter here. Is that all right?

11 Mr. Cauthen: Mm-hmm.

12 Mr. Fowler: Number Two is a subpoena.

13 Q As the adjuster, tell me who you represent in this
14 case.

15 A I represent J.C. Witherspoon.

16 Q Okay. Who represents A&K Mulch?

17 A Capital City Insurance used to write the policy.
18 That's all I know.

19 Q Who is the adjuster representing A&K Mulch?

20 A I don't know. We've had various adjusters handling
21 the account.

22 Q Has any one adjuster been assigned to A&K Mulch?

23 A As for workers' comp or --

24 Q Right. For this claim.

25 A No.

1 Q Okay. And who does Mark represent?

2 A Mark represents Capital City Insurance, now QBE
3 Specialty Insurance.

4 Q All right. Is there any lawyer representing, to
5 your knowledge, in the workers' comp claim for
6 Andreal Holland, A&K Mulch?

7 A Not that I can recall, no.

8 Q Okay. Has there ever been a lawyer in the workers'
9 comp claim representing A&K Mulch?

10 A Not that I'm aware of, no.

11 Mr. Cauthen: Well, Tommy, let me just
12 say for the record I'll stipulate that I
13 represent them both. As you know, we've --

14 Mr. Fowler: I won't stipulate to that.

15 Mr. Cauthen: We've -- Well, there's an
16 Order. The commission --

17 Mr. Fowler: They were made a party, --

18 Mr. Cauthen: Right.

19 Mr. Fowler: -- but I do not stipulate
20 you represent them.

21 Mr. Cauthen: There's an Order of the
22 commission making both of them -- finding that
23 both are essentially --

24 Mr. Fowler: That's not what the Order
25 said.

1 Mr. Cauthen: -- the claimant's employer

2 --

3 Mr. Fowler: No. I disagree. You are
4 not the lawyer for A&K Mulch from my
5 perspective, never have been, and I agree with
6 what she's testified to.

7 Mr. Cauthen: Well, just -- I -- You
8 know, just to clarify -- just to clarify, --

9 Mr. Fowler: You've never appeared as --

10 Mr. Cauthen: -- there's an Order of the
11 commission making them both the employers.

12 Mr. Fowler: No. It makes them parties.
13 It doesn't make them employers.

14 Mr. Cauthen: I think it says both are
15 employers.

16 Mr. Fowler: Well, the Order says what it
17 says. We can disagree on it at this point,
18 but I think it says what it says.

19 Mr. Cauthen: Okay.

20 Q Ms. Dyches, at the time that -- From your
21 investigation and familiarity with this case, at
22 the time that Mr. Holland was injured, who was his
23 employer?

24 A J.C. Witherspoon.

25 Q And you base that upon what?

1 A Upon the prior adjuster's investigation.

2 Q All right. Have you been involved to any degree
3 with the third-party action?

4 A To what extent? I mean, --

5 Q To any extent.

6 A I put -- I put Warren Group on the file to do --
7 to go out and investigate the chipper machine.

8 Q All right. And that's what our firm and your --
9 your company split the cost of?

10 A That's correct.

11 Q Were you involved with any of the attorneys
12 involved in the third-party action?

13 A Not that I can recall, no.

14 Q Did you employ any of the attorneys in the third-
15 party action?

16 A Mark Cauthen is to look at our interest on the
17 third-party aspect of the claim.

18 Q All right. And let me ask you -- I believe in
19 your claims file you had some documents from the
20 third-party action that Don Jonas brought on behalf
21 of Andreal originally. We've got a copy here of
22 the amended complaint from February 29 of '09. Did
23 you, on behalf of -- behalf of J.C. Witherspoon,
24 employ any counsel to represent A&K Mulch?

25 A Mark Cauthen was sent that complaint and to -- for

1 the file.

2 Q Okay.

3 Mr. Cauthen: (to Mr. Fowler) I mean,
4 you're talking about the workers' comp case or
5 --

6 Mr. Fowler: Third-party case.

7 Mr. Cauthen: -- the third party?

8 Q Did you consult with or employ Roger Davis in
9 regard -- in connection with this case?

10 A I believe Roger Davis worked for the Warren Group,
11 if I'm not mistaken.

12 Q Have you used him prior to this case?

13 A Yes.

14 Q Did Mr. Jonas attempt to talk to Mr. Davis and you
15 objected to that?

16 A I have no recollection of that.

17 Q Okay. As to who the employer was, did you ever
18 discover that the employer might be other than J.C.
19 Witherspoon, Inc.?

20 A I don't remember. I just always handled it under
21 J.C. Witherspoon.

22 Q All right. Did you ever notify the commission that
23 the employer was other than J.C. Witherspoon, Inc.?

24 A No.

25 Q All right.

1 A To our knowledge, we did get a letter from the
2 commission requesting a First Report of Injury for
3 an A&K Mulch, and a person in our office did do a
4 First Report so we would not be fined from the
5 commission.

6 Q All right. Who did that?

7 A I have no idea.

8 Q All right. I'm going to ask you --

9 Mr. Fowler: This will be Number Five.

10 Q The First Report appears -- Can you tell me if
11 that's the report that was filed with the
12 commission?

13 A Yes, that is.

14 Q And does it indicate that you filed that report?

15 A It does, down at the bottom. Yes, it does.

16 Q And the date of that was October of 2009?

17 A Yes. That's correct.

18 Q So, does that help you remember who filed the
19 report, --

20 A Yes, it does.

21 Q -- okay -- that it was --

22 A Thank you.

23 Q -- you? And you say that was filed as a result of
24 the commission contacting you to file it?

25 A That's correct.

1 Q So, when did you discover -- Would that be the
2 same date that you discovered that A&K may be the
3 employer?

4 A No, because we just denied it versus -- because it
5 was a duplicate claim because of J.C. Witherspoon.

6 Q All right. Have you ever discussed it with Mr.
7 Witherspoon?

8 A Mr. Witherspoon told -- informed me, to my
9 knowledge, that he was receiving his paychecks from
10 J.C. Witherspoon.

11 Q Right, but did you ask him who he was employed by
12 at the time of his accident?

13 A They -- To my knowledge, at the point when I was
14 reviewing the initial investigation when I was
15 reassigned the file, it was J.C. Witherspoon.

16 Q Have you not had any contact with any of the
17 lawyers representing A&K Mulch or Morbark or any of
18 the parties to the third-party action?

19 A Not that I can remember, no.

20 Q You would --

21 A I spoke with James Fennell maybe about a couple of
22 times in regards to the third party.

23 Q Have you reviewed or anybody mention to you Mr.
24 Witherspoon's deposition in the case?

25 A Not that I can remember.

1 Q If Mr. -- Mr. Witherspoon states that the employer
2 at the time of the accident for Andreal was A&K
3 Mulch, LLC, would you dispute that?

4 A I would have to consult with legal --

5 Q After the initial report, were there investigation
6 -- was any investigation made by Southeastern
7 Claims?

8 A As to what? I mean, --

9 Q As to the claim.

10 A Well, we always do make contacts with the employer,
11 the claimant and the medical providers right --
12 within 24 hours.

13 Q And those records of that would be called what?

14 A What we call it is our 24-hour contact, own point
15 of contact.

16 Q Well, that would be in your claims file typically?

17 A That's correct.

18 Q And that would be part of the notes that may not be
19 included in this file we've got here?

20 A Yes.

21 Q All right. Why would you withhold those notes?

22 A I -- When I received the subpoena and -- we sent
23 it to legal.

24 Mr. Cauthen: Object to the form of the
25 question. It's -- That's the decision of

1 counsel. It's not a decision of the witness.
2 That calls for a legal conclusion and --

3 Mr. Fowler: I don't think it calls --

4 Mr. Cauthen: -- basically calls --

5 Mr. Fowler: -- for a legal conclusion.

6 I just asked why she did that.

7 Mr. Cauthen: Well, it's not her
8 decision. That's my decision.

9 Mr. Fowler: Okay.

10 Q Have you -- Did you direct Mark to file the Form
11 21 in this case?

12 A Yes, I did.

13 Q All right. And one of the first things it says --

14 Mr. Fowler: And we'll mark the Form 21
15 as Number --

16 The Court Reporter: Six.

17 Mr. Fowler: Number Five was the First
18 Report dated October 15th, '09. So, the 21
19 will be Number Six. And I've got all the
20 attachments with it that you sent, the 18, --

21 Mr. Cauthen: Mm-hmm.

22 Mr. Fowler: -- Physical Medicine and
23 Rehab Outpatient Consultant, Dr. Fulton, and a
24 Report of Medical Examination, it looks like
25 from June of '07, from somebody -- Dr. Fulton,

1 6/20 -- And, so, it's -- one, two, three,
2 four, five -- six pages all together. And
3 this is Number Six.

4 Q The first thing on here -- It says, "The
5 authorized health care provider states the claimant
6 has reached MMI." What injuries did Andreal have,
7 and what were you alleging he reached MMI for?

8 A To my knowledge, he had a brain injury and that he
9 -- he's reached MMI, he's as good as he's going to
10 get.

11 Q All right. With a brain injury, is he not entitled
12 to lifetime benefits?

13 Mr. Cauthen: Object to the form of the
14 question. It's calling for a legal conclusion
15 again.

16 Mr. Fowler: I'm not asking her --

17 Mr. Cauthen: But you can -- You can
18 answer it if --

19 A I'm not qualified to say.

20 Q All right. But you requested that -- Do you
21 believe he's reached MMI for his brain injury?

22 A Yes.

23 Q Based on what?

24 A Based on the fact that he has not -- well, he -- he
25 has not sought medical treatment for over two,

1 three years now.

2 Q What medical treatment can be rendered for his
3 brain injury?

4 A I'm not qualified to say. I'm not a MD.

5 Q Have you referred him back to a doctor to determine
6 that?

7 A Had he -- No, not at this point because he has not
8 requested further medical treatment.

9 Q Well, if he's got a brain injury, how does he know
10 to request it?

11 A You're asking me questions that I can't answer.

12 Q Well, you're the one that asked that he --

13 A Well, you're asking --

14 Q -- be terminated.

15 A -- me questions I can't answer. I can't answer
16 these questions.

17 Q The doctor's report I see, which is actually page
18 three of this exhibit, down here in
19 recommendations, -- It's Dr. -- Is this Troyer?
20 It's not signed, but it's typed Troyer. It says,
21 "I still believe he has significant -- significant
22 deficits from his injury." Is it your position
23 he's not entitled to lifetime benefits?

24 Mr. Cauthen: Object to the form of the
25 question. Do not answer that question.

1 Tommy, our position is, as stated in the Form
2 51, we admit a physical brain injury; we admit
3 that he's entitled to --

4 Mr. Fowler: That's -- But it doesn't
5 state anything that says he's reached MMI --

6 Mr. Cauthen: -- ongoing medical
7 treatment and temporary total -- Hold on.
8 Let me state my objection for the record. The
9 determination of whether or not he is totally
10 disabled is denied, or disputed, as far as our
11 legal position in this case. That is a
12 decision arrived at by communication between
13 counsel and the witness and my client. That
14 is attorney-client privileged, and she can't
15 answer that question. She can't tell you --

16 Mr. Fowler: (to the court reporter)
17 Certify that question for me, please.

18 Mr. Cauthen: -- whether or not he's
19 totally -- totally disabled or not. We deny
20 that. That's our position.

21 Mr. Fowler: Certify the question. I'm
22 asking the carrier's position, and I think
23 I've got every right to --

24 Mr. Cauthen: No.

25 Mr. Fowler: -- ask it.

1 Mr. Cauthen: No, sir. No, sir. You --
2 She can't admit something that's --

3 Mr. Fowler: You're telling --

4 Mr. Cauthen: -- inconsistent with --

5 Mr. Fowler: You're telling her to not --

6 Mr. Cauthen: -- our legal position.

7 Mr. Fowler: -- answer the question?

8 Mr. Cauthen: Absolutely. It's attorney-
9 client --

10 Mr. Fowler: (to the court reporter)
11 Certify it.

12 Mr. Cauthen: -- privileged. Can't
13 answer it. Do not answer it.

14 Q The other MMI you're claiming is for his carpal
15 tunnel release; is that correct?

16 A That's correct.

17 Q And you state as grounds that, "The claimant
18 elected his remedy by failure to timely file a Form
19 S-2 after commencement of a third-party lawsuit and
20 barred from workers' comp;" is that correct?

21 Mr. Cauthen: I'll stipulate that is
22 correct. That is exactly what the Form 21
23 says. That's, of course, our legal position.

24 Q Who did he not file the S-2 with properly?

25 Mr. Cauthen: Okay. Object to the form

1 of the question. Again you -- you are asking
2 the witness to testify to matters that are
3 legal in nature. That is a legal defense
4 based on 42-1-5-60 in the Callahan case.
5 You're familiar with our position. These are
6 decisions made jointly, again by the client
7 and myself, and implicates the attorney-client
8 privilege. So, our position -- You're well
9 aware of our position and -- and basis for it.

10 Mr. Fowler: (to the court reporter)

11 Certify that question, too, please, ma'am.

12 Q Do you know what date A&K Mulch was served with an
13 S-2?

14 A I have no idea.

15 Q Do you know what date they were made a party to the
16 comp claim?

17 A I have no idea. I cannot recall.

18 Q What overpayment are you requesting in the Form 21?

19 Mr. Cauthen: Again, that -- Object to
20 the form of the question. It calls for a
21 legal conclusion. And I'll stipulate we're
22 requesting overpayment pursuant to law,
23 pursuant to the Workers' Compensation Act.

24 Q I'm still asking you the question. What
25 overpayment are you claiming?

1 A I'm not answering that.

2 Mr. Cauthen: Well, you can --

3 Mr. Fowler: (to the court reporter)

4 Certify that question.

5 Mr. Cauthen: -- you can answer -- You
6 can answer if you know, but, I mean, it calls
7 for --

8 The Deponent: I don't really know --

9 Mr. Cauthen: -- a legal -- It calls for
10 a legal conclusion. It's specified by the
11 Workers' Compensation Act, Tommy.

12 Mr. Fowler: It's factual. She can tell
13 me what date she's claiming it for, what
14 amounts. That's facts. That ain't legal.

15 Mr. Cauthen: That -- It's still a --
16 It's still a legal determination --

17 Mr. Fowler: I have the right to know
18 what you're asking for.

19 Mr. Cauthen: -- as to what we would be
20 entitled to. You're asking a lot of things
21 that she just can't answer, Tommy.

22 Mr. Fowler: Well, let her tell me that.
23 You don't have to testify, Mark. I didn't
24 depose you. I'm asking, deposing, a witness.

25 Mr. Cauthen: I'm just stating objections

1 for the record.

2 Q Are you answering the question?

3 Mr. Cauthen: If she -- If she knows the
4 answer, she --

5 A I cannot answer.

6 Mr. Cauthen: -- can answer. If she
7 knows the answer, she can answer.

8 Q You do not know the answer?

9 A No, sir.

10 Q All right. Did your claims file contain any
11 statements, reports, investigations or videos, to
12 your knowledge?

13 A I cannot recall.

14 Q Have you looked at your file before this
15 deposition?

16 A I did, but I reviewed like for the last couple of
17 years.

18 Q So, you don't know if you had any statements or
19 reports or investigations?

20 A No.

21 Mr. Fowler: I don't have anything else.
22 Thank you.

23 Mr. Cauthen: Just a couple -- a couple
24 of quick things to follow-up, just to clarify.

25 Cross-examination

1 By Mr. Cauthen:

2 Q Is it your understanding from your initial
3 investigation of this claim that A&K Mulch was
4 owned by J.C. Witherspoon?

5 A That's correct.

6 Q That they are essentially one company, --

7 Mr. Fowler: Object to the form of the
8 question.

9 Q -- not two separate companies?

10 Mr. Fowler: Legal conclusion she cannot
11 answer.

12 Q Is that your understanding?

13 A Yes, it is.

14 Q Was someone retained by Capital City to represent
15 A&K Mulch in the third-party litigation? Do you
16 know an attorney -- Was there an attorney that was
17 hired to represent A&K Mulch in a third-party
18 litigation?

19 A As for the comp portion?

20 Q No. No. The third-party lawsuit brought on
21 Andreal Holland's --

22 A And A&K Mulch?

23 Q -- behalf, the products liability case.

24 A Oh. That -- Yeah. John Ecton.

25 Q John Ecton represented A&K Mulch?

1 A Yes.

2 Q Who would have been the adjuster for that claim?

3 A Bruce Gardner.

4 Q With QBE?

5 A Yes.

6 Mr. Cauthen: Okay. That's all I've got.

7 Thank you.

8 Re-direct Examination

9 By Mr. Fowler:

10 Q Did you ever discuss the third-party claim with
11 John Ecton?

12 A No, not that I can recall.

13 Q Did you ever discuss it with Bruce Gardner?

14 A No, not that I can recall.

15 Q Okay. And they both -- John Ecton would have
16 represented whom you said?

17 A A&K Mulch on the product liability.

18 Q On behalf --

19 A I mean on behalf of Capital City Insurance.

20 Q All right. And you -- And does he work for
21 Southeastern Claims?

22 A He is one of the attorneys the liability people
23 use.

24 Q I'm sorry. Does Bruce Gardner work for
25 Southeastern Claims?

1 A Yes, now QBE. Yes, he does.

2 Q All right. And, so, y'all work for the same
3 company --

4 A Yes.

5 Q -- on behalf of Capital City?

6 A That's correct.

7 Q All right. And Witherspoon, J.C. Witherspoon, had
8 -- Inc. had virtually all of his coverages,
9 automobile or -- general liability, workers' comp,
10 with Capital City at one point in time?

11 A All I am aware of is the workers' comp and
12 liability. The auto I would not know unless I had
13 the policy in front of me.

14 Q Okay. All right. Fair enough.

15 Mr. Fowler: Thank you, ma'am. That's
16 all I have.

17 Mr. Cauthen: All right. That's all.

18 (Whereupon the deposition was concluded at
19 3:46 p.m.)

20 (At the conclusion of the deposition, the
21 following exhibits were marked for
22 identification.)

23 Marked as Claimant's Exhibit Number

24 One; Deposition of Paula Dyches;
25 copy of claim file.

1 copy of email from Paula Dyches to
2 Darryl Starkey; two pages.

3 (Deponent has waived reading and signing.)

1 Marked as Claimant's Exhibit Number
2 Two; Deposition of Paula Dyches;
3 copy of subpoena; two pages.
4 Marked as Claimant's Exhibit Number
5 Three; Deposition of Paula Dyches;
6 copy of First Report of Injury; one
7 page.
8 Marked as Claimant's Exhibit Number
9 Four; Deposition of Paula Dyches;
10 copy of First Report of Injury
11 without hand corrections, and
12 attachments; six pages.
13 Marked as Claimant's Exhibit Number
14 Five; Deposition of Paula Dyches;
15 copy of First Report of Injury, A&K
16 Mulch; one page.
17 Marked as Claimant's Exhibit Number
18 Six; Deposition of Paula Dyches;
19 copy of Form 21, Form 18, Physical
20 Medicine & Rehabilitation Outpatient
21 Consultation, Dr. Fulton's notes,
22 and Report of Medical Examination;
23 six pages.
24 Marked as Claimant's Exhibit Number
25 Seven; Deposition of Paula Dyches;

State of South Carolina)
)
 County of Lexington)

Certificate

Be it known that the foregoing deposition of Paula-Dyches was taken before me;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth concerning the matter in controversy aforesaid;

That the foregoing transcript of 34 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Signed this 20th day of September 2010:

Sandra M. Snead

Sandra M. Snead

Notary Public for South Carolina
 My commission expires October 17, 2013.

Note: Recordings are retained for twelve (12) months from date of certification.

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 0607813

ANDREAL HOLLAND,)
)
 CLAIMANT,)
) DEPOSITION
 VS.)
) OF
 J.C. WITHERSPOON,)
) J.C. WITHERSPOON
 EMPLOYER,)
)
 SOUTHEASTERN CLAIMS,)
)
 CARRIER,)
)
 DEFENDANTS.)
)

Deposition of J.C. Witherspoon, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 10:20 a.m., Wednesday, October 27th, 2010, at the law offices of Land, Parker & Welch, 29 South Mill Street, Manning, South Carolina.

COPY

Reported by
Barbara P. Scott, CVR Appearances
For the Claimant: Thomas K. Fowler, Jr., Esquire
Peake, Fowler & Associates, PA
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Exhibits

Marked as Exhibit Number One; Deposition of J.C. Witherspoon; copy of South Carolina Secretary of State business filing printout; one page 8

Marked as Exhibit Number Two; Deposition of J.C. Witherspoon; copy of South Carolina Secretary of State business filing printout; one page 8

Marked as Exhibit Number Three; Deposition of J.C. Witherspoon; copy of fax transmittal sheet and document entitled Policy Loss Detail; two pages 33

Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken.

Stipulations

The reading and signing of this deposition is waived by the deponent and counsel for the respective parties.

Whereupon,

J.C. Witherspoon, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

The Court Reporter: State your name for the record.

The Deponent: J.C. Witherspoon, Jr.

Direct Examination

By Mr. Fowler:

Q Mr. Witherspoon, we met briefly. My name is Tommy Fowler, and I represent Drrell Holland in a workers' comp case that I'm sure you're pretty well aware of at this point, and I'm here to ask you questions about him, about his employment with your company and some background stuff. And I know you're had your deposition before, so that'll save a little bit of time in this one because we won't have to ask you the same questions. Same ground rules, I think as Mr. Jones told you before. If you don't understand a question, say so. I'm not the best asker, and you're not going to hurt my feelings to say you don't understand what I'm saying.

A All right.

Q So, we'll keep at it till we're pretty sure we understand each other. Unless you raise a red flag and say you don't understand, we're going to operate on the basis that you understand my question and answer however you feel as a result. The other thing -- and I think they told you before -- is we all nod our head and shake our head, and that doesn't pick up on a tape recorder. And Barbara over here is transcribing this two ways. One, she's recording it with this microphone in front of us, and, also, she's repeating every word we say

into that mask there. So, it's kind of a two-way system. So, the head shakes don't work, and the head nods don't work, just like they told you before. If you need to take a break, you can. I don't think we'll be that terribly long.

A All right.

Q But when you hear a lawyer say that, that's usually the kiss of death because it's going to go a lot longer than we figure. But, in any event, how old are you, Mr.

Witherspoon?

A Fifty-five.

Q All right. And where do you live? What is your street address?

A 2374 Alderman Camp Road, Alcolu.

Q All right. And that's your private residence?

A That's correct.

Q And is there a route and box number there, or was there in the past?

A There used to be a route number, but they've changed it. I don't --

Q Does Route 4, Box 1126 sound familiar?

A I'm not sure.

Q Okay. I was looking at one of the filings with the Secretary of State for J.C.

Witherspoon, Jr., Inc., and it had the registered agent as you at that address, right here, J.C.

Witherspoon, Jr., Route 4, Box 1126, Manning. That's why I was asking if that was a prior mailing address.

A It could've been, but I don't remember.

Q Okay. And another filing from the Secretary of State for A&K Mulch, LLC shows registered agent as J.C. Witherspoon, Jr., Inc., but that appears to be your home address. Is that correct?

A Yeah. This was the -- This was for J.C. Witherspoon, Jr., and that's the address of

J.C. Witherspoon, Jr., Inc.

Q And that's your home address?

A Yes, sir.

Q Okay.

A Physical address.

Q All right. Explain to me the differences, if you would, -- I think I understand it to some degree -- between J.C. Witherspoon, Inc. and A&K Mulch, LLC.

A J.C., Inc., you know, has been in business since -- J.C. Witherspoon, Jr., Inc. has been in business since May 15th of '82, I believe is correct. A&K Mulch was formed -- I don't remember the date, but A&K was formed as an LLC which is owned by J.C. Witherspoon, Jr., Inc.

Q Okay. And the formation date of A&K Mulch shows from the Secretary of State sheet as 11/17/03. Sound right?

A That could be correct, yes.

Q All right. Did you have a lawyer help you with those?

A Yes, sir.

Q Do you know who it was?

A I think it would've been Mr. Billy Coffey, I believe.

Q Billy Coffey?

A (Nods head.)

Mr. Fowler: I want to mark these two, Mark. One's for J.C. Witherspoon, Jr., Inc. from the Secretary of State printout, and the other is A&K Mulch, LLC.

Mr. Cauthen: Okay.

Marked as Exhibit Number One; Deposition of J.C. Witherspoon; copy of South Carolina Secretary of State business filing printout; one page.

Marked as Exhibit Number Two; Deposition of J.C. Witherspoon; copy of South Carolina

Secretary of State business filing printout; one page.

Mr. Fowler: And, Mark, if you will, I need to note this deposition is taken by notice and agreement because we agreed on today's date and time after we had previously had this scheduled in Columbia.

Q As I understand, Mr. Witherspoon, -- I'm going to ask you to correct me if I'm wrong.

I'm just trying to save some questions -- save asking you some questions.

Witherspoon was created as a combination of your prior trucking company and a forestry company; is that right?

A No, sir.

Q All right. Clear me up on that.

A Clear you up in what respect? I mean, what's your question?

Q What's the business objective of Witherspoon, Inc.?

A What does J.C. Witherspoon, Jr., Inc. perform?

Q Yes, sir.

A We're into timber buying, trucking, logging, chipping.

Q All right. You previously had a trucking company, James -- Was it James C.

Witherspoon Trucking?

A No, sir. There was a Jimmy's Trucking.

Q Jimmy's Trucking?

A Yeah.

Q All right. Was that you?

A Yes.

Q All right. And is that part of J.C. Witherspoon, Jr., Inc.?

A That's correct.

Q All right. And you have a logging outfit, and, of course, I'm presuming you mean that's the ones that go into the woods and cut the trees down.

A Yes, sir.

Q The trucking hauls them out?

A Yes.

Q All right. Where do they typically take them then, the logs, trees?

A Where does J.C. Witherspoon, Jr., Inc. take the trees?

Q Right.

A We have different markets over the state.

Q And then you started A&K Mulch, as we showed, in 2003 I think it was. What does A&K Mulch do?

A It was started as a -- strictly a cypress mulching business where we would grind up cypress trees and sell it for mulch.

Q All right. And is that what it does today?

A It still does that, and, you know, it does some other businesses, but that's -- that's still the primary business.

Q All right. And you mentioned that Witherspoon does chipping. What kind of chipping does Witherspoon do, Witherspoon, Inc?

A We chip in-woods whole tree, pine, hardwood.

Q All right. When you say in-woods, you mean out in the field?

A On the job site. It's chipped on the job site.

Q So, that's dealing with mobile chippers --

A Yes, sir.

Q -- machines?

A Yeah.

Q And A&K is not a mobile chipping machine, I think, from the pictures I've seen. That was a set-in-place chipper. Is that right?

A The chipper you're referring to, yes, is a -- is a stationary chipper.

Q All right. So, A&K Mulch -- As I recollect some of what's been said before, you had originally -- A&K Mulch purchased a 48-inch chipping machine; is that correct?

A We have a 48-inch chipper, yes.

Q And that was the first one that A&K had; is that right?

A I'm not sure whether that's the first one, but we have a 48-inch today. We had one at the time of the accident.

Q All right. Is it the same one you had at the time of the accident?

A The one we have today, yes.

Q Okay. Is it the -- You don't recall if it's the first one you bought?

A No, sir.

Q All right. And then you later bought a 58-inch chipper, which was the one Andreall was working when he got hurt; is that correct?

A Yes.

Q And A&K is the only one that does that kind of mulch chipping; is that right?

A Stationary chipping.

Q Yeah. Amongst your businesses?

A Yeah.

Q For whom -- When Andreall got hurt on June 1, I believe it was, of '06, what company was he working for?

A A&K Mulch.

Q Is there any doubt in your mind about that?

A None whatsoever.

Q Now, I want to ask you -- We noticed this deposition for ten o'clock, and we got started what, about 10:15, and I was told you were meeting with Mr. Cauthen here. What did y'all discuss?

Mr. Cauthen: Objection.

Mr. Fowler: You don't represent him.

Mr. Cauthen: Objection to the form of the question. I certainly do represent him.

Mr. Fowler: That's not what your insurance agent lady said. You were hired to represent the insurance company. You've never appeared for A&K.

Mr. Cauthen: He is the -- one and the same. I mean, he is the sole owner, as I understand it, of J.C. Witherspoon which owns A&K Mulch. Therefore, he is my client. That's protected by the attorney-client privilege, and he can't answer that question. So, don't answer that question.

Mr. Fowler: All right. You're telling me that you've appeared on behalf of --

Mr. Cauthen: I'll stipulate for the record we met prior to this deposition and we prepared for the deposition, if that's what you want to know.

Mr. Fowler: You're telling me you have appeared in record -- of record as attorney for J.C. Witherspoon, Jr., Inc. and/or A&K Mulch, LLC?

Mr. Cauthen: I represent the defendant employers in this case, and, as you know, we agreed by consent to add A&K Mulch at a -- the time of prior hearing. They're both listed as employers, A&K --

Mr. Fowler: My point was --

Mr. Cauthen: -- and J.C. Witherspoon.

Mr. Fowler: -- your insurance lady told me that you represent the insurance company only, you were hired to represent the insurance company, in her deposition.

Mr. Cauthen: Tommy, in a workers' compensation case, it's my understanding that the

defendant -- counsel for the defendant represents the employer and the carrier.

Mr. Fowler: You're telling me you have made a formal appearance on behalf of the employers?

Mr. Cauthen: Certainly.

Mr. Fowler: Okay.

Mr. Cauthen: Certainly.

Mr. Fowler: All right.

Mr. Cauthen: Yeah. Is there some question in your mind as to whether or not I represent the employer?

Mr. Fowler: Yeah, there is.

Q Has your company ever hired Mr. Cauthen to represent it?

A Directly?

Q Yes, sir.

A Not to my knowledge.

Q All right. Have you ever hired him to represent you?

A No.

Q All right. Has A&K Mulch ever hired him to represent it?

A Not to my knowledge.

Mr. Cauthen: For the record, I'm hired by Capital City Insurance Company to represent the employer.

Mr. Fowler: Okay. I hear what you're saying.

Q Mr. Witherspoon, Cindy Elmore worked for you. Where is she now?

A I have no idea.

Q Is she still around Manning, do you know?

A I have no idea.

Q Do you know who she was married to?

A I have no idea.

Q How long did she work for you?

A Payroll records would substantiate that. I don't remember.

Q Approximately.

A I would not want to guess.

Q All right. What about Leroy Frierson? Does he still work for you?

A No, sir.

Q Do you know where he is?

A I assume he's at home, but I don't know. He's been sick.

Q He still lives around Manning you think?

A To my knowledge.

Q All right. At the time that Andreal Holland was working, he was on the premises of A

&K Mulch?

A He was at A&K's business --

Q Okay.

A -- working, yes.

Q I understand his job -- You may have to tell me a little more because I grew up working on bulldozers, not logging equipment, and I don't understand some of the mechanics of a chipper other than what I see. I mean, I can see pictures, obviously, but it has -- some people call them blades, it looks like; some people call them knives -- that rotate on a solid metal wheel. Is that correct?

A You could characterize it as that, yes.

Q All right, sir. In changing these knives, whose responsibility was that typically?

A His.

Q Andreal's?

A Yes.

Q Was it he did it, or did anybody help him typically, or how was that operated?

A There might've been, but it was his main job to change knives, but at times some other folks might assist him.

Q All right. Normally, it was a one-man job?

A Just depending on the circumstances. Normally, it's a one-man job, or, you know, always could ask someone there to help. It makes it easier.

Q Now, in reading through some of this stuff, -- and it was confusing a little bit, but there's discussion or talk of fan blades that are mounted apparently to the same wheel as the knives, the solid metal disk that spins the knives. Is that right?

A Yes, sir.

Q Do those ever have to be changed?

A If they wear out, yes.

Q All right. Do you recall prior to Andreal getting hurt whether those fan blades had ever been changed or worked on?

A I don't recall, no, sir.

Q If you would've had to order parts for that machine, from whom would you have ordered them?

A More than likely, if I have to order some parts, it could've been from a couple different sources, --

Q Well, who --

A -- Mobark being one of them.

Q And that was the manufacturer?

A Yes.

Q And what would be the other source?

A Well, you can buy chipper knives from Mobark or, you know, U.S. Knife & Blade. I mean, there's other people that make knives, so I would not have to buy everything from -- directly from Mobark.

Q All right. What about the fan blades? If you had to replace those, who would you buy them from?

A Could also buy them from, you know, an allied vendor or could've bought them from Mobark.

Q After the accident with Drell Holland, --

Mr. Fowler: (to the court reporter) Have you got the spelling of his name, because we're calling him Drell, D-r-e-l-l, instead of Andreal.

The Court Reporter: (Nods head.)

Mr. Fowler: I don't know that it matters.

Q Did you have to replace one of the fan blades on the spinning disk?

A I don't recall.

Q Do you remember there being damage to the hood?

A Yes.

Q Do you remember -- Have you read your deposition from before?

A No, sir.

Q All right. There was discussion in there -- I believe you said you felt like the fan blade may have struck the hood.

A Yes.

Q Was that fan blade damaged?

A I don't remember.

Q All right. If it was replaced, do you know who would have replaced it?

A You talking about the individual?

Q Yes, sir.

A If it had to be replaced, I don't know who replaced that fan blade, if it was damaged.

It would've been -- I don't know the particular individual that might've replaced it.

Q You worked on that machine somewhat, didn't you?

A Oh, yes.

Q Would that be the type work you would normally do?

A Could. Could not. Just depending on --

Q How is the fan blade attached? Is it welded on or bolted on or --

A Bolted.

Q Okay. Similar to how you have to get the blades off, you have to unbolt --

A Similar. I mean, you have a two-part fastener or either a single-part.

Q I want you to think for a minute, if you would, and try to recall whether you remember ever replacing any fan blades on that machine, the 58-inch chipper that Drell was injured using.

A As you well know, that's been, you know, a few years ago. I cannot remember specifically that we replaced a fan blade, and I can't remember whether it has three fan blades or six. I can't remember. It could be either combination. If there were a blade damaged, we would have replaced it.

Q Who do you believe most likely you would have ordered the part from?

A Probably Mobark, but I wouldn't -- you know, I'm not swearing that. I'm --

Q Do you recall any discussions with Mobark about the dimensions of that blade on that particular machine?

A You referring to the fan blades?

Q Yes, sir.

A I don't recall any conversation of that.

Q All right. If you ordered it, would you order it by machine model number or serial number?

A Yes.

Q All right. And you would depend upon Mobark to provide you the right part I presume.

A Yes.

Q All right, sir. When you bought this machine, you obviously had a particular purpose in mind, doing the cypress mulch. Would it be your position that you would have relied or depended upon the manufacturer to provide a properly or safely guarded machine?

Mr. Cauthen: Object to the form of the question, this whole line of questioning. I don't really understand. This is a workers' comp case. What does this -- How is this relevant?

Mr. Fowler: That's your position. This is cross, and I've got the right to ask him, Mark.

Mr. Cauthen: Well, how is this relevant to the workers' comp case?

Mr. Fowler: It's cross. I've got the right to ask him.

Mr. Cauthen: You can ask him, but I just don't see how it's relevant.

Q Well, go -- just go ahead and answer that.

A Ask your question again, please, sir.

Q Would you have relied upon the notion that the manufacturer would provide a properly or safely guarded machine?

A Yes.

Q Let me ask a little bit about your relationship with Mobark and/or Precision Husky.

Have you made -- or do you recall making any other purchases from either Mobark or

Precision Husky of equipment or parts?

A Oh, yes.

Q Do you recall any specific purchases?

A Well, we buy spare parts from both of them. Might've even bought -- One of the chippers we're running was purchased used from Mobark. I don't remember the purchase date, but, you know, I continue to do business with them on a, you know, as-need basis.

Q And correct me if I'm wrong, but I think you actually sold the 58-inch chipper that Drell was using and ultimately replaced it with a Precision Husky-manufactured chipper.

Does that sound familiar?

A We have a Precision Husky there today.

Q All right, sir. Have you spoken with anyone after this accident from either Mobark or Precision Husky about the accident or how it happened or anything related to it?

A Precision Husky called me and asked me what had happened, and I told them. Don't -- Have not have any discussion with Mobark.

Q All right. Have you been to the Precision Husky facility or the Mobark facility since the accident?

A Have not been to Precision Husky, and -- I could have gone to Mobark.

Q Do you recollect why you would've been up there?

A Could be on looking at a piece of equipment. Could be, you know, looking at another chipper or whatever.

Q Do you recall specifically why you were there?

A I would -- Since the accident, I'd have to go back and try to reconstruct time frame as far as any purchase, but I don't --

Q All right. Did anyone ever talk to you about the thickness of the wheel on this particular machine that Drell was using?

Mr. Cauthen: Object to the form of the question. This entire line of questioning is not relevant to the workers' compensation case.

Q You can go ahead and answer.

A No.

Q All right, sir. They ever discuss with you the dimensions of the fan blades? I think I may have asked you that.

A No.

Mr. Cauthen: I'm just going to put a running objection on the record to anything -- anything related to the -- to the makeup of the equipment, the safety of the equipment. It's not relevant to the workers' compensation case. I don't want to interrupt, though, so I'm just going to put a running objection on the record so I don't have to object to every question.

Q How long after the 58-inch chipper arrived would you say that it actually got into service where you could use it for your business?

A It wasn't long. Might've been a week or two.

Q All right. And if I noted correctly in your deposition, the quote or order was March 14th, '06, and, apparently, it was delivered on or around April 6th of '06. So, you think within a week or two of April 6th, '06 it would've gone into use?

A Probably so. I don't recollect the exact installation date, but normally whenever I do something, I do it fairly quick. So, it would --

Q As far as you or your businesses were concerned, was Andreal always employed by A&K Mulch, LLC?

A Yes, sir.

Q Do you recollect what warnings were on the original hood?

A It's been some time since I've looked at the physical hood. I don't want to

speculate, you know, what is or not on there. I don't --

Q Do you still have the original hood?

A Yes, I do.

Q Where is it?

A At 2374 Alderman Camp Road.

Q At your house?

A Well, it's at the shop.

Q Okay. And you have a farm there, too?

A Yes, sir.

Q Do you recall there being any labels on the machine as to how many people needed to change the blades or knives?

A I do not recall that.

Q Do you remember anybody putting any labels on the machine, the 58-inch chipper particularly that Drell was using, after it arrived?

A No.

Q You were asked before about having discussed with Drell the issue of the hood being open with the wheel turning, and you said you really didn't recall how far before this incident happened, that it could've been a month or -- Well, it was a guess I think you said. Was that when he was using the 58-inch chipper or the 48-inch chipper?

A I don't recall. I don't recall the date that --

Q You don't recall which machine it was?

A No, sir, I don't.

Q Did the machines look pretty much alike or were they somewhat different in appearance?

A Basically, the 58 is a little bit larger in physical size than the 48. The 48 is a

Mobark orange, and the 58 was painted red, but, other than that, it was just the physical size.

Q All right. As you think back on that day you think you had the conversation prior to Drell's accident about the hood being open and the wheel turning, what color was the machine?

A I don't recall which machine it was.

Q Okay. At the time of his accident, were both machines in operation or just the 58-inch chipper?

A I don't recall.

Q Do you remember much about this at all at this point?

A I was not on the -- Like I say, it's been a lot of water under the bridge since then.

Q So, the answer to my question is yeah, you do recall a lot or no, you don't?

A Well, it depends on what questions you're referring to. I mean, you know, --

Q Specifically, you know, just for example, the one about you said you had the conversation with him prior to his injury about the hood being open and the chipper wheel still turning.

A I did not document that date of my verbal warning to him, no, sir.

Q All right. And you can't tell me whether it was on the 48-inch or the 58-inch chipper?

A As you had stated earlier, the 58 had not been installed very long. Was a short period of time from installation till he got hurt.

Q Right.

A So, it's a very short window there. I do not remember.

Q All right. So, it could've been before the 58 chipper -- 58-inch chipper got there?

A It could have been. It's possible, but, like I say, I do not recall the date that --

Q And I believe you said there's no document we can go look at in the form of a written warning or anything.

A No, sir.

Q How would you describe Andreal as an employee?

A He was a good employee. Nothing special. He pretty much -- He worked -- You know, he was, for the most part, on time, did his job. You know, just an average employee.

Nothing spectacular.

Q Was he able to work on his own or by himself, or did you have to have somebody with him all the time?

A No. He was able to work on his own.

Q Did you have any problems from a supervisory nature of him being able to work on his own and complete the task that he was given?

A If it was, I was not aware of it.

Q And if it were, Mr. Woodrow -- What was his last name?

A Woods.

Q Woods. He would be the man to report to you if there were those type problems?

A Yes.

Q And you don't recall any such reports?

A No.

Mr. Fowler: I think that's all I have. Let me check one more thing. Yeah, I do have one more thing.

Q I was given this document, and it consists of really two primary pages, from

Davis-Garvin Agency. It's a fax to you on October 4th of '06 from Laura Roberts, and I guess Laura

Roberts worked for Davis-Garvin at that time. Do you recall her name or who --

A No, sir, I do not.

Q At any rate, it says, "Attached are revised workers' comp loss runs per your request showing the revised verbiage for the claim involving employee Andreal Holland on 6/1/06.

Thanks. Laura." And then attached to that is the relevant portion of it.

Mr. Cauthen: May I see that front page?

Q Here is the incident of Andreal Holland. It says, "EE was cleaning chipper." It says, "Failed to follow lockout procedures, and the door flew off machine and hit him in the head." Did you request that change to that description of the accident?

A I recall that the way they had the accident listed was not the correct -- you know, as far as what had happened.

Q All right. What do you recall that they had it listed as?

A I don't remember, but it was -- it was not factual as far as what had happened, and I wanted to make sure that what was listed on there was actual factual. I mean, you have someone sitting in an office up there. They have no -- don't even know what it looks like or nothing.

Q And you don't remember what the changes were you made?

A No, sir, I do not.

Q Now, where did you get the information or where did they get the information that he failed to follow lockout procedures?

Mr. Cauthen: May I see that?

Q The statement there that they've got on that loss report says that Andreal failed to follow the lockout procedures.

A He failed to do that.

Q All right. Who told you that?

A The supervisor.

Q Mr. Woods?

A Woodrow. Yeah.

Q All right. Because my understanding from his deposition is that he did follow the lockout procedure.

A Well, this is probably the lockout procedure as far as lockout/tagout and make sure all the inertia is dead in a piece of equipment before you proceed to open the hood.

Q All right, but the lockout --

A Because all that --

Q I'm sorry.

A All that is part of the lockout/tagout procedure. Now, you can say lockout/tagout is just strictly electrical.

Q Yes, sir. That's what my perception --

A Right. Okay.

Q -- of it was.

A All right. Well, if you want to define exactly what, I would have to get Mr. Woods' deposition as far as that's concerned, but as far as --

Q I don't mean to misquote him, if I did, because I don't have it here in front of me, but my perception --

A I don't know what he --

Q -- is that the lockout/tagout electrical was not an issue. Am I wrong?

A I don't recall that, but this was part of the lockout/tagout procedure that we set in place at the -- far as the chipper's concerned. It's not only you lockout/tagout but also make sure that the inertia, motion, of a piece of equipment is stopped. I mean, just because you go in there and lockout and tag -- cut the electricity off on something that's steady moving, that does not mean it's safe to go to -- go in it and work on it.

Q All right. But the nomenclature of -- lingo of lockout/tagout, doesn't that typically refer to the electrical portion because you actually have to go to a power box and click it off and lock it out?

A It could be. I don't know what the normal lingo for -- you know, for the electrical, but that is part of the electrical, yes.

Q All right. When you -- You help develop, I guess, the safety procedures for operating these chippers -- is that correct -- at A&K?

A Yes, sir.

Q And I think you had previously testified in your deposition that you went to some extent with Andreal the day -- whatever day it was you say you saw him with the hood open and that wheel still turning some, to go through in pretty great detail what you should and shouldn't do and what could possibly happen to you, correct?

A Yes, sir.

Q At any time did you -- did you require that two people do the lockout/tagout and -- as well as to change the knives? Did you instruct that?

A Seems like I did put that in after that to make sure there was two people there.

Q After the accident?

A Yes, sir.

Q But not before the accident?

A I don't recall before, no, sir.

Mr. Fowler: I want to mark these, Barbara, please.

Marked as Exhibit Number Three; Deposition of J.C. Witherspoon; copy of fax transmittal sheet and document entitled Policy Loss Detail; two pages.

Q Would the -- And I don't want to use a whole bunch of scientific terms because I'm not, nor am I an engineer. Do I even want to be? No. And you're probably more familiar

with it than I am. But I've heard the word inertia thrown around a good bit over my lifetime. And as this wheel turns, it's a freewheeling -- I call it freewheeling or flywheel, that mechanism that the knives are attached to. Do you agree with that?

A It is driven, but it does have a flywheel effect, yes.

Q When you cut that motor off and that solid metal wheel with the blades attached to it or knives attached to it is still spinning, that's when it's basically freewheeling; nothing is making it spin, just physics?

A That's correct.

Q All right. It spins for whatever bit of time, and it generally slows down -- I think some of the guys said they would still feed stuff in there to help slow it down. Do you have any clue how heavy that wheel is?

A You want me to guess?

Q Your best guess.

A I have never weighed it, so I do not know.

Q You think --

A Three to five thousand pounds.

Q Okay. You couldn't pick it up?

A No, sir.

Q Two men couldn't pick it up?

A No, sir.

Q It might take a tractor to pick it up?

A Yes, sir.

Q All right. Before it being -- Do you believe, from your experience of that machine, that even if it was rotating slowly, one or two RPMs per minute, it would still have enough weight and energy behind it to knock that hood open?

A At one to two RPMs, it would not have enough inertia to tear the hood off of it.

Q All right. Tear the hood off is one thing. I'm talking about knock it open.

A It could force it open, yes.

Mr. Fowler: Okay. I appreciate your time. That's all I have.

Mr. Cauthen: Just a couple of questions, J.C.

The Deponent: All right.

Cross-examination

By Mr. Cauthen:

Q Let me make sure I understand. I think your testimony earlier, at the beginning of the deposition, was A&K is organized as an LLC, a limited liability company, which is owned by J.C. Witherspoon, Jr., Inc. Is that correct?

A That's correct.

Q Was that the case at the time of this injury, June of 2006?

A Yes.

Q At the time of this accident, did J.C. Witherspoon, Jr., Inc. and A&K Mulch have separate offices or did they share the same office?

A Shared the same office.

Q How about tax returns? Did the two companies file separate tax returns?

A No.

Q They filed one tax return --

A That's correct.

Q -- for both operations?

A Yes.

Q How did Andreal Holland get his -- how was he paid? I know he was paid weekly and he was paid by a paycheck, but who paid him?

A Well, he was an employee of A&K Mulch.

Q Mm-hmm.

A J.C., Inc. wrote the checks.

Q He got paid with a J.C. Witherspoon, Jr., Inc. check?

A That's correct.

Q And do you know whether the same workers' compensation policy with Capital City covered both companies, A&K and J.C. Witherspoon, in June of 2006?

A To the best of my knowledge they did.

Q They did?

A (Nods head.)

Mr. Cauthen: Okay. That's all I have. Thank you.

Re-direct Examination

By Mr. Fowler:

Q Who set up your businesses in such a fashion that the paychecks would come from one company but the work was done for a separate company?

A That's just the way we did it.

Q All right. And do you still file one tax return? The LLC doesn't file a tax return?

A That's correct.

Q Does it have a federal ID number?

A Yes.

Q Is it the same federal ID number as J.C. Witherspoon, Jr., Inc.?

A I'd have to go back and look. I don't know.

Q All right. Could you provide that to us? Would you be able to do that today?

A The federal ID number?

Q Yes, sir.

A I possibly could, yes.

Q All right. Is any of the lawyers in this building your lawyer?

A No, sir.

Q Who is your customary lawyer?

A Billy Coffey.

Q Billy Coffey?

A Yes, sir.

Q Who does he practice with?

A Who is he?

Q Who does he practice law with?

A There's a couple other attorneys in there. It's Coffey, Cooper, Chandler. I think Mr. Cooper died.

Q Ray Chandler still there?

A Ray Chandler.

Q Okay. I was going to guess that earlier, but I -- These guys sometimes move around. So, Billy Coffey is your regular lawyer?

A Yes, sir.

Q Regular. I mean, not that there's anything wrong with Mark, but not your -- He's your customary lawyer is what I'm -- family lawyer or whatever?

A Yes.

Q All right. Could you provide those to him today, --

A I'll try to, yes.

Q -- and I'll try to catch him later. Okay. All right. Were there any employees of J.C. Witherspoon, Jr., Inc. in the -- in or around the chipper plant/mill part of A&K Mulch the day that Andreol got hurt?

A I'm not going to say there was or wasn't, but they would've had no business being there.

Q Okay. It's a totally separate operation?

A Separate -- Separate business, yes.

Mr. Fowler: All right. That's all I have. Thank you, sir.

Mr. Cauthen: That's it. Thank you.

(Whereupon the deposition was concluded at 10:59 a.m.)

(Deponent has waived reading and signing.)

State of South Carolina)

) Certificate

County of Richland)

Be it known that the foregoing deposition of J.C. Witherspoon was taken before me;

That I was then and there a Notary Public in and for the State of South
Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and
nothing but the truth concerning the matter in controversy aforesaid;

That the foregoing transcript of 39 typewritten pages represents a true, accurate and
complete transcription of the testimony so given at the time and place aforesaid to the best of
my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative
or employee of any attorney or counsel employed by the parties hereto, nor interested in
the outcome of this action.

Signed this 28th day of October 2010.

Barbara P. Scott

Notary Public for South Carolina

My commission expires April 9, 2017.

Note: Recordings are retained for twelve (12) months
from date of certification.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 0607813

ANDREAL HOLLAND,	)	
	)	
CLAIMANT,	)	
	)	DEPOSITION
VS.	)	
	)	OF
J.C. WITHERSPOON, JR.,	)	
INC.,	)	DONALD E. JONAS, ESQUIRE
	)	
EMPLOYER,	)	
	)	
CAPITAL CITY INSURANCE	)	
COMPANY,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

Deposition of Donald E. Jonas, Esquire, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 4:44 p.m., Monday, December 13th, 2010, at the law offices of McKay, Cauthen, Settana & Stublely, 1303 Blanding Street, Columbia, South Carolina.

COPY

Reported by
Sandra M. Snead

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Reported By: Sandra M. Snead

Also Present: James M. Fennell, Esquire
Sandy Jonas

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Exhibits

No exhibits marked.

Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken.

1 Stipulations

2 The reading and signing of this deposition is
3 waived by the deponent and counsel for the
4 respective parties.

5 Whereupon,

6 Donald E. Jonas, Esquire, being duly sworn and
7 cautioned to speak the truth, the whole truth,
8 and nothing but the truth, testified and
9 deposed as follows:

10 The Court Reporter: State your name for
11 the record.

12 The Deponent: Donald Jonas.

13 Examination

14 By Mr. Cauthen:

15 Q Don, of course, as you know, I have -- I've noticed
16 your deposition just because you're listed as a
17 witness in this case, and, so, you know about the
18 type questions that I'm going to ask. It shouldn't
19 take very long at all, but let me just ask you
20 first off, how long have you been licensed here in
21 South Carolina?

22 A 1976, I think May.

23 Q Okay. And you are currently employed with what
24 firm?

25 A I'm not. I'm self-employed.

- 1 Q Okay. You and Bill Cotty aren't together anymore?
- 2 A Not for a number of years.
- 3 Q How did I not know that? Are -- Is your office
- 4 still down the road?
- 5 A You know, I have -- I decided maybe a year and a
- 6 half ago to move my practice to my house, --
- 7 Q Okay.
- 8 A -- and, so, I'm pretty much semi-retired but
- 9 handling enough cases to make a difference I guess.
- 10 Q Okay. So, you're solo now, working out of home?
- 11 A I am.
- 12 Q Okay.
- 13 A I'm going to take an in-house job here shortly, but
- 14 --
- 15 Q Well, what do you -- What is your primary area of
- 16 practice?
- 17 A Presently, mostly construction law and products
- 18 liability.
- 19 Q Okay. Now, as I understand, you were associated by
- 20 Peake and Fowler to handle the third-party action,
- 21 to bring the third-party lawsuit in the Andreal
- 22 Holland matter?
- 23 A They asked me to investigate it initially, and I
- 24 did that.
- 25 Q Okay. Now, did you ever in -- Let me ask you

1 this. Do you know about when you got involved in
2 that case?

3 A I don't, but I can presume that it probably was
4 someplace in '07. I can't say that for certain,
5 but I'm sure I could figure it out. By the time
6 that I got involved, all the initial reporting had
7 been done.

8 Q Okay. All right. And after you did get involved,
9 did you ever have any direct dealings with anyone
10 at Southeastern Claims or Capital City? We'll just
11 call them the insurance carrier. Paula Dyches'
12 name has been mentioned, --

13 A Right.

14 Q -- and there's --

15 Mr. Cauthen: (to Mr. Fowler) Did you say
16 Sharon Mack?

17 Mr. Fowler: (Nods head.)

18 Q -- Sharon Mack. I don't know her, but --

19 A All right. Well, let's take them one at a time.

20 Q Okay.

21 A Well, I think initially when I was trying to get
22 access to the facility, I worked through, I think,
23 somebody at Peake and Fowler who was in direct
24 communication with Paula, requesting permission to
25 meet and to examine the machinery. I think

1 probably that went on for a while. I didn't get
2 much cooperation from it as I recall. I think at
3 some point the -- I became concerned about what was
4 going on, why we weren't getting cooperation, and
5 that became a consistent theme in this case. Ms.
6 Dyches -- On various occasions, I looked at
7 correspondence. Eventually, I came into -- had a
8 report from the Warren engineers, Roger Davis,
9 along with some billing correspondence explaining
10 what he had done for Ms. Dyches. That report was
11 the -- and Mr. Davis is the primary expert in the
12 present case. That report indicated to me that Ms.
13 Dyches had hired him in early June of '06, that he
14 had finished his work and billed for it someplace
15 about August of '06. Later on, this had turned out
16 -- Just to finish that thought about the report,
17 was that when I tried to get in touch with -- with
18 Mr. Davis about his working the case, he indicated
19 to me that he, on a regular basis, worked for Ms.
20 Dyches and that he wasn't going to cooperate with
21 me until Ms. Dyches gave him the okay. Eventually,
22 Ms. Dyches apparently gave him the okay because he
23 indicated that he'd had that conversation. With
24 regard to the insurance company, part of the issue
25 in this case, as I understand it, was that there

1 was a question from the very beginning as to who
2 the employer was. When I eventually got ahold of
3 the records in this case, I discovered that all the
4 OSHA reporting -- and at least initially found that
5 the coverage for Capital City was in the name of
6 J.C. Witherspoon, Jr., Inc. I investigated that
7 and discovered that Witherspoon, Inc. had been
8 around since the early '80s and that J.C.
9 Witherspoon, Jr., was, in fact, the sole owner of
10 the business. Later on, I discovered that Mr.
11 Witherspoon had a number of corporations, LLCs,
12 that he did business through. Well, I guess there
13 were probably four or five of them. I also
14 discovered that in -- I think it was early -- maybe
15 it was March of 2003 that Mr. Witherspoon created
16 something called A&K Mulch, LLC. He essentially
17 established that business later on, I was told, to
18 carry out the mulching business, something he
19 hadn't done in any of his other businesses. It was
20 curious to me that Mr. Holland -- When I finally
21 did receive his employment application, it was a
22 generic application with no employer listed. Mr.
23 Holland's application, actually, was made, I think,
24 a day after A&K Mulch came into existence. Mr.
25 Holland, as I recall, when he was asked the

1 question, he wasn't quite certain who he worked
2 for. When I tried to unscramble this, I went to
3 Davis-Garvin Insurance Agency and asked them for a
4 policy, a copy of the Capital City policy. They
5 refused to provide it. I asked someone to direct
6 the question to Ms. Dyches, who the insured party
7 was. So, a fellow by the name of John Ecton showed
8 up. John, later on, took over the representation
9 of A&K Mulch. John initially refused to cooperate
10 in providing the deposition that I wanted of Davis-
11 Garvin to ask these various questions about who the
12 employer was. Later on, John, of course, did
13 appear on behalf of A&K and asserted a lien on
14 behalf of the insurance company, Capital City.
15 Now, during the time that I was trying to discover
16 what was going on in this case, I also had
17 conversations, of course, with Jimmy, trying to
18 find out what he knew and meet the clients, and
19 Jimmy was pretty clear that -- you know, that he
20 couldn't understand why I was having that
21 difficulty because he'd had a good understanding
22 with Ms. Dyches and others on behalf of the company
23 and that we all had the same general purpose, that
24 is to provide an investigation and whatever suit
25 might have been appropriate. So, I wasn't really

1 that concerned about it. I thought where I was
2 getting into a sensitive area with your client was
3 that they seemed to be playing loose with their
4 corporate organization in taxing. I later
5 requested, basically, the employment security
6 records and tax forms, and I've yet to find
7 anything in the name of A&K Mulch. I, later on,
8 asked some further questions about policies or any
9 indication that -- that there was anything to
10 suggest that Mr. Holland was an A&K Mulch employee,
11 and what I got back was a series of policy
12 information, things signed by Mr. Holland early on
13 in his employment that would have indicated that he
14 was a Witherspoon employee. Now, eventually, Mr.
15 Witherspoon testified in a 30(b)(6) deposition he
16 was quite certain that Mr. Holland was an A&K
17 employee. I think that there is a lot of evidence
18 to indicate that Mr. Witherspoon ran an
19 organization that had a lot of people under an
20 umbrella that essentially was J.C. Witherspoon,
21 Jr., Inc., and he ran them out of the same
22 building, and he essentially called people whatever
23 he chose to on a -- whatever basis he had. In my
24 opinion, Mr. Witherspoon wasn't very helpful. In
25 fact, he seemed to -- to not be helpful at all in

1 answering those questions.

2 Q Okay. Now, did you -- Did you get to meet with --
3 or were you given permission to meet with or have
4 discussions with Mr. Witherspoon directly during
5 that period of time?

6 A I wasn't. I had to meet him in the deposition.

7 Q Okay. When you took that 30(b)(6)?

8 A I did.

9 Q Okay.

10 A I have a lot of regard for Mr. Witherspoon's
11 business enterprises. I mean, he seems to be a
12 very accomplished business man. But he does wear a
13 lot of hats, you know, and that seems to be part of
14 the problem in this case because when we proceeded
15 to file the first lawsuit, or at least the original
16 complaint in 2008, before I was able to serve it, I
17 discovered that Mr. Holland was having a very
18 difficult period of time. I asked for and had a
19 guardian appointed in that case because Mr.
20 Holland, when I met him, was not very helpful. He
21 seemed to have suffered severe brain damage. He's
22 improved a bit since then, but the bottom line to
23 it is that I was concerned for Mr. Holland, and I
24 was also concerned about what the real status of
25 this case was, --

1 Q Mm-hmm.

2 A -- who the employer was. I didn't want to proceed
3 against A&K Mulch if, in fact, they were an
4 employer. I had good cause to think otherwise, and
5 when I filed that complaint, the answer I got back
6 was, in fact, he was an A&K Mulch employee and that
7 the carrier was asserting their lien as -- I think
8 it's the last defense in that case. So, I really --
9 -- I sensed, throughout this case, a good bit of
10 misdirection that was -- whether it was intended or
11 not, accomplished that purpose on the part of the
12 carrier.

13 Q To confuse your client as to who's --

14 A I don't know if they were confused by Mr.
15 Witherspoon's reluctance to get hisself [sic] in
16 the middle of this situation to unscramble his
17 problems or whether the carrier was participating
18 in this, but when I ended up with two attorneys,
19 basically with different stories, it made me wonder
20 what was going on. I don't have any doubt that Ms.
21 Dyches knew what was going on, either through Mr.
22 Davis or through the process of Mr. Ecton advising
23 her. The copy of the complaint -- really, it's the
24 complaint that was actually served in 2009 -- shows
25 that she received a copy of it immediately.

1 Haven't heard a thing since then except for our
2 conversation and the conversations I've had with
3 Mr. Ecton. Mr. Ecton has had a pretty consistent
4 position throughout all this, that he thought that
5 the evidence suggested that -- that A&K was the
6 employee -- employer.

7 Q Mm-hmm.

8 A That's not been entirely worn out by the evidence,
9 but I think that at some point when you and Tommy
10 decided to add A&K as an employer to this case,
11 then it kind of resolved the problem as far as I
12 was concerned. At that point, I thought that as
13 long as I was satisfied that there was some
14 evidence of A&K being an employer, that I was
15 probably best off to dismiss them from the case. I
16 think they were entitled to their -- to their
17 position.

18 Q Mm-hmm. Do you think that -- that at that point
19 that A&K should have been substituted as the
20 employer for J.C. Witherspoon or just added as a
21 party defendant?

22 A You know, I don't know. I'm not convinced of any
23 of it because I think there's still some
24 substantial misrepresentation coming out of
25 Witherspoon. So, I don't know. I mean, I look at

1 the evidence, and it's all over the board. I
2 really think that there's something going on there
3 that is intended to present the impression that
4 J.C. Witherspoon was the employer, and I don't
5 think they ever were. I think that A&K --
6 According to the people that I have deposed in
7 addition to Mr. Witherspoon, all think that they
8 work for A&K, although they got their paychecks
9 from Witherspoon. I think there were people on the
10 same yard that -- the sawmill yard, some of which
11 were Witherspoon employees, presumably, and some of
12 which were A&K employees, presumably, and I don't
13 think that I was ever satisfied that I could tell
14 the difference.

15 Q Mm-hmm. Okay. You've talked about your -- your
16 dealings with Paula.

17 A Right.

18 Q Did you have multiple conversations with her in
19 regards to -- to this, or do you think --

20 A No. I think everything I had to do with Ms. Dyches
21 was either by correspondence or through -- through
22 someone at Tommy's firm. I mean, I think that Mr.
23 Ecton, presumably, was in regular contact, and I
24 would understand his communications with Ms.
25 Dyches. I'd ask him about some aspect of what was

1 going on with the carrier, and he would tell me
2 what Ms. Dyches said. But Mr. Ecton would be my --
3 Tommy's firm, you and Mr. Ecton are the source of
4 my knowledge --

5 Q Okay.

6 A -- about Ms. Dyches and whatever correspondence,
7 and Roger Davis.

8 Q Correspondence -- Now, correspondence between you
9 and Ms. Dyches or --

10 A I think the correspondence -- I wouldn't want to
11 answer that without looking at the file, but I'm
12 sure there's some there. You know, I don't think
13 that once Mr. Ecton was involved in that case I
14 would have presumed to contact her, but I don't
15 know whether I'm copied with her correspondence --
16 But there's some -- some paper trail there.

17 Q Mm-hmm.

18 A I'm happy to look for it.

19 Q Do you remember having conversations with Ms.
20 Dyches about anything other than the -- what you've
21 talked about already here? Do you recall any other
22 dealings with her, --

23 A I don't think I --

24 Q -- meetings or conversations?

25 A -- said I had conversations with her, but what I

1 said was that there are communications that were
2 either relayed or that I got --

3 Q Okay.

4 A -- copied with. But, you know, in terms of what I
5 would have -- I think maybe the most surprising
6 last one was when I requested that Mr. Ecton,
7 simply as a final position in the case, so that --
8 I found myself still wondering who the employer was
9 as late as August of this year -- that I asked that
10 he respond to a set of requests for admissions, one
11 of which directly asked the question who the heck
12 the employer was, and, at that time, he said he had
13 to talk with Ms. Dyches, and I said, "Well, what is
14 the question? Why do we have to talk to Ms.
15 Dyches?" Because Ms. Dyches was -- apparently had
16 to approve his answers. I don't know why Ms.
17 Dyches would have been involved in that, but that's
18 what I understood. It seemed to be a factual
19 question. I don't know why it had to be filtered
20 through an insurance adjuster.

21 Q And he -- Did he -- How did he answer that
22 question? Do you recall?

23 A I think he -- he answered it -- I think we had
24 some time issues, so it was a day or so after I
25 hand-carried the request to him, that I think Sandy

1 picked them up from his office, and it was answered
2 admitted.

3 Q All right. You mentioned that you attempted to get
4 the insurance policy previously from Davis-Garvin.
5 Do you --

6 A I did.

7 Q Do you know who you dealt with in attempting to --
8 to get it?

9 A Not at this point, but, I mean, I'm sure I could
10 find out.

11 Q Was it -- Did you go through John Ecton or --

12 A I mean, at some point John got involved in it. I
13 don't know originally who I talked to. It seems to
14 me that what -- the status of it at that point was
15 that I think I served a notice of deposition, and I
16 don't recall why John would have presumed to be
17 representing Davis-Garvin, but I think I heard from
18 him first. But at some point, someone from Davis-
19 Garvin was involved in the response.

20 Q Okay. You don't remember anybody specific that you
21 talked to over at Davis-Garvin?

22 A I don't -- I mean, that was -- I think that was
23 two thousand and -- I don't know. I -- You know,
24 I don't know, but I'll find it if you want it.

25 Q Just wondering if you recalled anybody off the top

1 of your head. How about Sharon Mack? Do you ever
2 remember speaking with a Ms. Sharon Mack?

3 A I don't think I talked directly with -- with Ms.
4 Dyches or anybody before her.

5 Q Okay.

6 A I think, like Jimmy, -- I think the thing with
7 Hollie Hoadwonic, you know, --

8 Q The nurse case --

9 A -- there was a lot of work to get through that, but
10 I don't think Hollie had any direct communication
11 with her. I mean, I -- That's the only other
12 place I would presume it would have gone.

13 Q Okay. Did you ever deal with Paula or anyone else
14 at -- well, you already said you didn't talk to
15 Paula directly -- but anyone directly at
16 Southeastern regarding the agreement that -- that
17 Jimmy was testifying about, to share the cost of
18 the engineer's initial investigation and report, or
19 was that already kind of squared away by the time
20 you got involved?

21 A Yeah, it was squared away, but I -- I mean, I saw,
22 you know, the correspondence that came with -- I
23 don't know exactly when that showed up, but Roger
24 Davis, when he finally was given permission to talk
25 to me, had a file with some of that in it. So, I

1 don't know -- You know, I knew that, you know,
2 Tommy's firm had paid some portion of that. In
3 fact, I was a little bit concerned that they were
4 reluctant to talk to me without Ms. Dyches'
5 permission, and it took probably four weeks to get
6 through that after I asked to talk to Roger, and,
7 you know, his -- his point was he wasn't -- he
8 worked for them, he wasn't going to do anything
9 without her approving it. I think I mentioned I
10 thought that this arrangement was joint, and he
11 said, well, you know, he still worked for Ms.
12 Dyches. So, that's what I know. But the
13 correspondence that came finally was -- indicated a
14 billing arrangement, you know, with -- with Warren
15 and Roger Davis. I think there was some reference
16 to the contributory payment in it.

17 Q Right. Okay. Don, do you know why you've been
18 listed as a witness to testify in the workers' comp
19 hearing?

20 A You know, if I was running the show, I would tell
21 you that I ought to be called as a witness to
22 present some information about this fiasco, about
23 A&K Mulch. I think there's been misrepresentations
24 all the way through this, and I think that, you
25 know, at some point, from what I can study of this,

1 Mr. Witherspoon was previously insured with
2 Lumbermens, and I think he switched to this group.
3 I think there's been attempts to change the
4 insurance claims information. I don't know what
5 else has been going on, but I -- I don't know why
6 it's so difficult to answer a simple question. The
7 question I have is -- I mean, I think we took off
8 in a direction that could have been avoided if we'd
9 gotten some forthright answers. I really, to this
10 -- At this moment, if -- if someone were to ask me
11 what the status of A&K Mulch is, you know, -- I
12 think Mr. Witherspoon intended to hire these people
13 in a separate capacity, and I don't think he ever
14 took the time to separate what essentially was his
15 various business forms. But I do think that Ms.
16 Dyches is well aware of it and has been from the
17 beginning. And I think that Mr. Ecton's attempt to
18 raise the issue that we -- and the answer
19 demonstrates exactly what Ms. Dyches knew. There's
20 no question these guys knew what they were doing.
21 But I -- You know, at -- at the point that you
22 reach this common agreement, -- I mean, I would
23 certainly have appreciated that clarification
24 earlier so I didn't waste all the time chasing that
25 -- that bunny down the path.

1 Q You think there's some indication of
2 misrepresentation as opposed to maybe just sloppy
3 business practice by J.C. Witherspoon?

4 A I -- I tell you, I do have respect for Mr.
5 Witherspoon, and I'd hate to go there, to be the
6 judge of that. I won't. But I will tell you
7 there's a lot of information that seems to suggest
8 that the way this was handled was at least sloppy.
9 What his intent was, I have no idea. I don't see
10 where he got any huge advantage other than this --
11 this issue about the -- trying to reduce his loss
12 experience. When I looked at that -- Of course, I
13 think we all know now that he added A&K to his
14 coverage about six weeks before this accident
15 happened. I don't know why he did it. I have seen
16 some evidence that when he tried to explain his
17 claims experience, that it seems to have changed.
18 I know that when he reported this case to OSHA and
19 they investigated, that they never heard of A&K
20 Mulch and that the report indicates no reference to
21 A&K, that this was a Witherspoon employee. I -- I
22 have, at least through this request for admission
23 and Mr. Ecton's work, -- that Mr. Holland was never
24 a Witherspoon employee, so how that stacks up -- I
25 don't know how you miss all those -- those errors.

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1 Q Well, didn't Andreal Holland actually think
2 initially his employer was J.C. Witherspoon, to
3 your knowledge?

4 A You know, I'll tell you that Mr. Holland's only
5 reference that he's capable of making to that is
6 "That's where I got my -- It was on my paycheck."
7 I don't think he's capable of knowing that. I'll
8 tell you that his uncle who worked there thinks
9 he's an A&K employee and has always been. He
10 thinks that Andreal was hired as an A&K employee
11 and always was, so has every other person that's
12 got a claim, a workers' comp claim, against that
13 entity. I've tracked them through each of their
14 claims processes. I've taken it through what
15 essentially is the -- all the internal information.
16 You know, the only thing that's finally got me
17 arguably convinced that Mr. Witherspoon is simply
18 confused is that there is an accounting at some
19 point in the middle of August of people he
20 distinguishes as A&K employees and Witherspoon
21 employees. And Andreal's uncle, a couple of the
22 other guys, got hurt. They're all on the A&K list.
23 You know, it's no official document. It's no --

24 Q Mm-hmm.

25 A I mean, it seems to show some presence of -- of his

1 mind, at least his state of mind when he wrote them
2 down or had somebody do it, and he does, in his
3 mind, distinguish who these people are. So, it
4 does appear, at least through some of this, that
5 even if his business form is incorrect, his taxes
6 haven't been properly paid and all the other
7 things, that he thinks that Andreal Holland was
8 always an A&K employee. But it's confusing.

9 Q Is there -- Other than what you've covered, -- and
10 you covered a lot, --

11 A Right.

12 Q -- and I appreciate that -- is there anything else
13 that you know of that you would be called upon to
14 testify at the hearing?

15 A Mark, the one thing I would say that -- you know,
16 anybody's that trying to claim at this point, okay,
17 -- I mean, I've practiced law for a long time, and
18 I've known you for a long time. I've known you a
19 lot longer than I've known Mr. Ecton. Okay. I
20 don't understand what the carrier was up to. I
21 don't know that you communicated with Mr. Ecton or
22 he with you. On occasions, I would try to
23 reconcile that because I just thought I was hearing
24 two different stories, but that's, you know, -- I
25 mean, I -- On the occasions that you and I have

1 talked about it, I thought we were on the same page
2 with this lien business. Okay. I thought
3 everybody was following the path of the lien, but I
4 understand you're doing your job as an attorney, so
5 that's where we're at. But no, I don't know
6 anything else.

7 Q Okay. You -- You don't expect to be called to
8 offer an expert opinion at the hearing rather than
9 be a fact witness?

10 A I think that's my role.

11 Q Yeah. Okay.

12 A I haven't been told otherwise.

13 Mr. Cauthen: Okay. That's all I've got,
14 Don. Thank you very much.

15 Mr. Jonas: All right. Thank you.

16 (Whereupon the deposition was concluded at
17 5:14 p.m.)

18 (Deponent has waived reading and signing.)

State of South Carolina)
) Certificate
County of Lexington)

Be it known that the foregoing deposition of
Donald E. Jonas, Esquire, was taken before me; ✓

That I was then and there a Notary Public in
and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized
to administer an oath;

That the witness was by me first duly sworn to
testify the truth, the whole truth, and nothing but the
truth concerning the matter in controversy aforesaid;

That the foregoing transcript of 23
typewritten pages represents a true, accurate and
complete transcription of the testimony so given at the
time and place aforesaid to the best of my skill and
ability;

That I am not related to nor an employee of
any of the parties hereto, nor a relative or employee of
any attorney or counsel employed by the parties hereto,
nor interested in the outcome of this action.

Signed this 14th day of December 2010.

Sandra M. Snead

Sandra M. Snead

Notary Public for South Carolina
My commission expires October 17, 2013.

Note: Recordings are retained for twelve (12) months
from date of certification.

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 0607813

ANDREAL HOLLAND	)	
	)	
CLAIMANT,	)	
	)	DEPOSITION
VS.	)	
	)	OF
J.C. WITHERSPOON, JR.,	)	
INC.,	)	JAMES M. FENNELL, ESQUIRE
	)	
EMPLOYER,	)	
	)	
CAPITAL CITY INSURANCE	)	
COMPANY,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

Deposition of James M. Fennell, Esquire, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 4:29 p.m., Monday, December 13th, 2010, at the law offices of McKay, Cauthen, Settana & Stublely, 1303 Blanding Street, Columbia, South Carolina.

COPY

Reported by
Sandra M. Snead

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Appearances

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For the Employer/
Carrier: Mark D. Cauthen, Esquire
McKay, Cauthen, Settana &
Stubley, PA
1303 Blanding Street
P.O. Box 7217
Columbia, SC 29202-7217

Reported By: Sandra M. Snead

Also Present: Donald E. Jonas, Esquire
Sandy Jonas

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Exhibits

No exhibits marked.

Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken.

1 Stipulations

2 The reading and signing of this deposition is
3 waived by the deponent and counsel for the
4 respective parties.

5 Whereupon,

6 James M. Fennell, Esquire, being duly sworn
7 and cautioned to speak the truth, the whole
8 truth, and nothing but the truth, testified
9 and deposed as follows:

10 The Court Reporter: State your name for
11 the record.

12 The Deponent: James Fennell, F-e-n-n-e-
13 l-l.

14 Direct Examination

15 By Mr. Cauthen:

16 Q Jimmy, as you know, I've noticed your deposition --
17 or you probably know I've noticed your deposition
18 just because you're listed as a witness in the
19 workers' comp case that we've got that's reset for
20 a hearing for Andreal Holland. And I've never
21 taken a lawyer's deposition before, so this is a
22 very new experience for me. But just tell us, if
23 you would, where -- You've been practicing in
24 South Carolina for how long?

25 A Just over six years.

- 1 Q Six years. Okay. Graduated from USC?
- 2 A Yes.
- 3 Q And you are currently employed where?
- 4 A Epting & Gillis, 125 Executive Pointe Boulevard,
5 Columbia, 29210.
- 6 Q Are you an associate there?
- 7 A Yes.
- 8 Q Okay. Now, you were previously -- You were
9 previously employed by Peake and Fowler?
- 10 A Correct.
- 11 Q Do you recall your dates or approximate dates of
12 employment there?
- 13 A December of '05 till April '09.
- 14 Q Okay. Okay. And were you an associate at Peake
15 and Fowler?
- 16 A Yes.
- 17 Q Did you handle workers' comp and -- or what was
18 your practice over there?
- 19 A Workers' comp and some car wrecks.
- 20 Q Okay. Now, you were previously involved as counsel
21 for Andreal Holland in the workers' compensation
22 case against J.C. Witherspoon; is that correct?
- 23 A That's right.
- 24 Q Did you file the -- Did you file the initial Form
25 50 in that case?

1 A I believe so.

2 Q You did. Okay. Now, were you associated to
3 bringing the comp case, or did you associate Don
4 Jonas to bring the third party? How did that work?

5 A I believe the law firm associated Don --

6 Q Okay.

7 A -- for the third-party claim.

8 Q Okay. All right. And you were never involved in
9 the third-party case yourself? Do you remember
10 representing Mr. Holland in that -- in the third-
11 party action?

12 A That was above my pay grade. Just the comp case.

13 Q Yeah, just the comp case. Okay. Okay. So, was
14 the third-party lawsuit filed before you left Peake
15 and Fowler? I guess it was, wasn't it?

16 A I -- I don't know.

17 Q Okay. Did you ever deal directly with anyone at
18 Southeastern Claims or Capital City regarding the
19 workers' comp case or the third-party case --

20 A Is that --

21 Q -- at all?

22 A Is that the carrier?

23 Q Right. Southeastern is -- is the -- basically the
24 TPA, or the adjuster, for Capital City who is the -
25 - make sure I've got that right -- is the carrier.

1 Yeah, Capital City is the actual insurance carrier.
2 A Whoever the adjuster was I was dealing with for the
3 comp side, I was dealing with.
4 Q The comp side of it. Do you -- Paula Dyches, do
5 you remember talking to her?
6 A That name rings a bell.
7 Q Okay.
8 A It does. I -- I don't -- I don't have any notes,
9 so -- I have nothing. I'm going by pure memory,
10 but I know she was an adjuster on it, but I want to
11 say there was an adjuster on there prior to her, --
12 Q Okay.
13 A -- but I don't know that for a fact.
14 Q So, you would have dealt, you think, with Ms. --
15 with Ms. Dyches and possibly someone else with
16 Southeastern --
17 A Right.
18 Q -- before they -- before they retained me actually?
19 A Correct.
20 Q Okay. Do you recall any specific discussions with
21 Paula or with anyone else at Southeastern regarding
22 these -- this case?
23 A I do.
24 Q Okay.
25 A You know, I'm fairly certain it wasn't Paula. It

1 could have been, but I thought there was an
2 adjuster, a previous adjuster, when we first got
3 involved on the case.

4 Q Mm-hmm.

5 A And because of the significance of the --
6 significance of the case, being money, the monetary
7 significance of the case and the injuries, I do
8 remember talking to the adjuster about the case.

9 Q Okay. Either Paula or someone else?

10 A Right.

11 Q Okay. Do you remember any -- the substance of any
12 conversations with whoever that was you spoke with?

13 A Other than the treatment of the client and making
14 sure he was getting what he was getting and the TTD
15 and all of that stuff.

16 Q Mm-hmm.

17 A The main thrust of the conversations occurred
18 early, and that was the third-party claim.

19 Q Okay.

20 A Okay. Because of the complexities of it, -- I do
21 not know if Peake and Fowler were already
22 associated with Don, but we knew there was a
23 potential third-party claim out there, so I spoke
24 with the first adjuster. Her and I -- We agreed
25 that we were -- we were effectively going to take

1 this, the third-party claim, and work it together.

2 Q Okay.

3 A I wasn't going to work the third-party claim, but
4 she knew that we were going to associate somebody
5 on the third-party claim, all right, and, so, I
6 talked to her -- One discussion in particular I
7 remember because we needed to hire an engineer to
8 go out there to look at the equipment, just because
9 it happened and we didn't want that piece of
10 equipment to magically disappear. So, she said,
11 "I'll hire the company, and you just reimburse us
12 half." Okay. So, she hired the engineering firm
13 to go look at the piece of equipment, and, at that
14 point, once the report was back, Peake and Fowler
15 did reimburse her for half of the -- the expert
16 fees for that -- for the third-party action against
17 the -- any potential third-party defendants out
18 there.

19 Q Okay. So, who -- who paid for the engineering
20 firm's fee up front? Was it -- Was it --

21 A The insurance company.

22 Q They paid for it --

23 A The comp carrier.

24 Q Okay. The comp carrier. And then y'all reimbursed
25 them for half of it?

1 A That's right.

2 Q Okay. So, there was an agreement that we're -- I
3 think we're all familiar with to share the costs of
4 the engineering firm's evaluation, report and all
5 that?

6 A Right.

7 Q Do you remember any -- any other -- the substance
8 of any other conversation with Paula or anyone else
9 there at Southeastern regarding that?

10 A It was -- Although the only money that changed
11 hands was the payment for that engineering --

12 Q Mm-hmm.

13 A -- expert, --

14 Q Mm-hmm.

15 A -- there was a -- there was a verbal agreement
16 between me and the carrier, the adjuster at the
17 time, that we were going to proceed with this.
18 Obviously, we couldn't represent them and they
19 couldn't represent, you know, our client in the
20 third-party action, but we were going to -- since
21 they had their lien interest and we had potentially
22 more money from a third-party defendant out there,
23 that we were going -- we were going to go about
24 this in effectively a united front. That's the
25 only -- That's the only words I can -- really kind

1 of come to mind, is it was going to be a united
2 front, we were going to proceed together with the
3 third-party action together.

4 Q Okay. Was there a -- any kind of agreement reached
5 to -- for Southeastern to pay more or to -- to be
6 either reimbursed or front further expenses as
7 discovery or, you know, further need for expert
8 analysis went on?

9 A No, not to my knowledge. The only thing I know for
10 a fact was that engineering thing. That's all.

11 Q Okay.

12 A Because after that, that was -- It took a while.
13 We got that report back, and then the case
14 proceeded, and I believe at that time Donald was
15 hired on and was taking that part of the claim
16 over, so I was -- That's -- I was handling the
17 comp claim from that point forward.

18 Q Okay. So, subsequent to the discussion and
19 agreement regarding that -- the initial evaluation,
20 I guess, and report of the engineer, was there any
21 other conversation between you and any adjuster,
22 Paula or anyone else there at Southeastern,
23 regarding the third-party case at all that you can
24 recall?

25 A That I --

1 Mr. Fowler: (to Mr. Cauthen) Can you
2 repeat that? When you say any other adjuster,
3 are you talking about the first one and Paula
4 or --

5 Q Either Paula or the other adjuster who you think
6 you talked to but can't recall the name, anyone --
7 anyone with Southeastern, you know, associated with
8 Southeastern or Capital City.

9 A Not that I recall.

10 Q Okay.

11 A That was -- That was the bingo right there, --

12 Q Right.

13 A -- just because it was purely cost-sharing for --

14 Q Right.

15 A -- for that, so I don't recall anything after that.

16 Q Okay.

17 A I know we discussed it, obviously, afterwards as --
18 You know, she said, "Hey, this is how much, you
19 know, the thing -- you know, the fee was," and
20 then, "Okay, here, we'll send you a check for
21 that." So, there was -- Yes, there was
22 discussions as far as that, but then going forward,
23 as far as we need to look at this, this and this,
24 no.

25 Q Right.

- 1 A I wasn't involved in that.
- 2 Q Okay. Do you know of any written correspondence
- 3 between you and Paula or anyone else there at
- 4 Southeastern involving any of that? Do you know if
- 5 anything was put in writing or documented?
- 6 A I think the only thing that I'm aware of is the
- 7 letter that was sent to the adjuster reimbursing
- 8 half of the engineering costs.
- 9 Q Okay.
- 10 A I've -- I've never had an issue with this.
- 11 Generally speaking, whenever I get a case,
- 12 regardless of how insignificant it is, I just tell
- 13 them look, we've got a possible third party --
- 14 example is a car wreck -- that's -- that's the
- 15 prime one we get --
- 16 Q Mm-hmm.
- 17 A -- all the time --
- 18 Q Right.
- 19 A -- possible third party to take care of your lien
- 20 for you, but just know that we're going to be --
- 21 I'm going to be looking into this, --
- 22 Q Right.
- 23 A -- and, so, -- But that's the extent of my
- 24 conversations ever until it comes time for hey, you
- 25 know, I've got the third-party case settled, this

1 is what we got, you know, can you reduce your lien
2 amounts, --

3 Q Yeah.

4 A -- and then negotiate the lien amounts down, pay it
5 off and go.

6 Q Okay. Any face-to-face meetings with Paula or any
7 other adjuster?

8 A She could walk in here right now; I wouldn't know
9 what she --

10 Q Okay.

11 A -- looked like.

12 Q Okay.

13 A I think the only -- the only person I ever dealt
14 with, actually, was probably the nurse case manager
15 when I was up at Carolinas Hospital visiting
16 Andreal.

17 Q Okay.

18 A I met her on a few occasions, --

19 Q Okay.

20 A -- not the -- not the adjusters.

21 Q Okay. The -- The initial Summons and Complaint
22 that's been placed into both parties' APAs was
23 filed in the Court of Common Pleas for Clarendon
24 County on October 10, 2008. Do you -- Do you
25 remember whether or not you could have had any --

1 any conversations with Paula or anyone else at
2 Southeastern after the commencement of that third-
3 party lawsuit in October of '08?

4 A I -- I can't.

5 Q Okay.

6 A I -- No, I don't know.

7 Q Of course, if you -- if -- if Don was already
8 involved at that point, then I think you said
9 earlier that you -- you didn't have any further
10 involvement in a third-party case after that?

11 A Right. Effectively, --

12 Q Yeah.

13 A -- it was to get the ball rolling --

14 Q Right.

15 A -- and then get back to the comp side.

16 Q Okay. Now, I assume you never had any conversation
17 with Paula or anyone else with the -- with the
18 insurance carrier regarding this election of
19 remedies defense that -- that we've raised in this
20 case?

21 A I haven't talked to her since I left there.

22 Q Okay. Do you know why you have been listed as a --
23 as a witness in this case?

24 A No, sir. Here I am.

25 Q Is there anything that you know of that you would

1 testify to at the hearing that we haven't discussed
2 here today?

3 A No.

4 Q No. And are you planning to -- to testify in any
5 fashion as an expert and offer opinions?

6 A Not to my knowledge.

7 Mr. Cauthen: Okay. Okay. That's all
8 I've got. Thank you.

9 The Deponent: Thank you.

10 Mr. Cauthen: Thank you very much.

11 Mr. Fowler: I've got one or two
12 questions.

13 The Deponent: Okay.

14 Cross-examination

15 By Mr. Fowler:

16 Q Does the first adjuster who's name is Sharon Mack
17 ring a bell with you?

18 A That's possible. I honestly don't know.

19 Q Do you recall ever -- I think you were employed
20 with Peake and Fowler until 1 April of '09. Do you
21 recall ever being served or presented with any
22 document from the carrier notifying Andreal Holland
23 or you on his behalf of any claim he might have for
24 the third-party action or any S3 form or any other
25 form from the workers' comp commission?

1 A No.

2 Mr. Fowler: I don't have anything else.

3 Mr. Cauthen: Okay. That's it.

4 (Whereupon the deposition was concluded at
5 4:43 p.m.)

6 (Deponent has waived reading and signing.)

State of South Carolina)
) Certificate
 County of Lexington)

Be it known that the foregoing deposition of James M. Fennell, Esquire, was taken before me;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth concerning the matter in controversy aforesaid;

That the foregoing transcript of 16 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Signed this 14th day of December 2010.

Sandra M. Snead
 Sandra M. Snead

Notary Public for South Carolina
 My commission expires October 17, 2013.

Note: Recordings are retained for twelve (12) months from date of certification.

CERTIFICATE OF COUNSEL IN RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. FERRELL COTHRAN, JR., Circuit Court Judge

Case No. 2012-CP-14-00024

ANDREAL HOLLAND,

Appellant,

v.

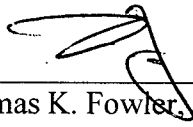
J.C. WITHERSPOON, INC.,
A.K. MULCH, LLC, and
CAPITAL CITY INSURANCE,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal is compliant with Rule 209, SCACR, and contains all material proposed to be included by any of the parties and not any other material.

September 9, 2013



Thomas K. Fowler, Jr., Esquire
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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. FERRELL COTHRAN, JR., Circuit Court Judge

Case No. 2012-CP-14-00024

ANDREAL HOLLAND,

Appellant,

v.

J.C. WITHERSPOON, INC.,
A.K. MULCH, LLC, and
CAPITAL CITY
INSURANCE,

Respondents.

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 on this the 6th day of September, 2013 served a copy of Appellant's RECORD ON APPEAL, VOLUMES I AND II, pursuant to Rule 210(a), upon attorneys of record, MARK CAUTHEN, ESQUIRE and PETER P. LEVENTIS, IV, ESQUIRE, in this action by personal delivery to the following:

Mark Cauthen, Esquire
Peter P. Leventis, IV, Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201



Chris Cunningham
Law Clerk
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