APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 0912295



Nikolay Gul.....CLAIMANT/APPELLANT

v.

Kohler Company .....DEFENDANT/RESPONDENT

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on January 12, 2016, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order
filed, March 23rd, 2016

APPEARANCES: CLAIMANT/APPELLANT represented by David Williford, Esquire, of Greenville, South Carolina; and

DEFENDANTS/RESPONDENTS represented by Grady Beard, Esquire, and Robert Horner, Esquire, of Columbia, South Carolina.

## STATEMENT OF THE CASE

This is an appeal by the Claimant, Nikolay Gul, of the Decision and Order of Commissioner T. Scott Beck filed August 7, 2015, wherein the Claimant alleged he contracted the occupational disease of occupational asthma while in the employ of the Defendant Kohler. Commissioner Beck heard the matter and issued an Order finding that the claim was not compensable.[1] The Claimant subsequently appealed. The Claimant filed his Form 30 *pro se*, as he was no longer represented by counsel at the time his Form 30 was due, as his prior counsel had been relieved. After the Form 30 was filed, the Claimant retained David Williford, Esquire, who represented the Claimant with respect to both briefing and oral argument of this Full Commission appeal.

The Claimant contends that the Hearing Commissioner: (1) erred in finding the Claimant did not suffer from asthma at the time alleged; and (2) assuming the Claimant was suffering from asthma, erred in finding that his asthma was not an occupational disease caused by his employment at Kohler. The Claimant sought benefits for his alleged occupational disease, including temporary total disability benefits and past and future medical care. As the Claimant alleged he was permanently and totally disabled, permanency was not an issue before the Hearing Commissioner. The Claimant contended that the Hearing Commissioner's Decision and Order should be reversed or vacated for a new hearing.

The Defendant contends that the Hearing Commissioner's determination that the Claimant failed to establish he suffered from asthma was supported by the greater weight of the evidence in the record. Additionally, the Defendant contends that, even if the Claimant did suffer from asthma, the greater weight of the evidence supports the Hearing Commissioner's decision that the Claimant failed to meet his burden of proof that any alleged asthma was causally related to his employment. The Defendant contends the Hearing Commissioner's Decision and Order should be affirmed in its entirety.

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[1] Commissioner Beck heard the matter after a Full Commission remand for a *de novo* hearing.

By way of background, this claim is a denied occupational disease claim. The Claimant began working for Kohler in 2004. His job at Kohler required him to use acetic acid as part of the casting process. By August 20, 2009, the claimant had stopped working at Kohler, and in September 2009, he began seeing Dr. Gregory Feldman, a pulmonologist. The Claimant subsequently filed a workers' compensation claim alleging that he had contracted occupational asthma due to his use of acetic acid at the plant based upon the opinions of Dr. Feldman and the medical records and/or exhibits subsequently submitted by the Claimant as part of his APA submissions.

As noted, the Defendant Kohler denied the claim. In response to the allegations of the Claimant, Kohler had the Claimant examined by Dr. Charles Fogarty, a pulmonologist. Additionally, the Claimant was seen by Dr. Sahn at MUSC, per a Consent Order of the Parties issued by Commissioner Derrick Williams. The Defendant also conducted an industrial hygiene assessment to measure the levels of acetic acid in the plant. Based upon the opinions of Dr. Fogarty and Dr. Sahn, the industrial hygiene assessment, and medical records and/or exhibits subsequently submitted by the Defendant as part of its APA submissions, Kohler asserted that the Claimant did not suffer from asthma at all, and if he did, it was not caused by his employment.

Per Decision and Order dated August 7, 2015, Commissioner Beck issued the following Findings of Fact and Conclusions of Law:

***FINDINGS OF FACT***

1. *The Claimant began working for Kohler in 2004.*

2. *His job at Kohler from 2004 until early 2009 involved operating machines that involved the application of acetic acid. This Finding is based upon the testimony of the Claimant.*

3. In early 2009, the Claimant was trained on the kitchen sink machine, a machine that did not use acetic acid. This Finding is based upon the testimony of the Claimant.

4. The Claimant continued to help other employees on machines that involved acetic acid, but these machines were not his primary responsibility. This testimony is based upon the testimony of the Claimant.

5. In 2008, the Claimant began seeking treatment for issues with chest pain and elevated blood pressure. This Finding is based upon the Claimant's medical records from Mary Black Memorial Hospital.

6. Despite his testimony that he believed that acetic acid was the cause of his problems, the Claimant never mentioned this belief, or even the phrase acetic acid, to any of his medical care providers before September 2009. This Finding is based upon all of the Claimant's medical records prior to September 2009.

7. Despite his testimony that he reported breathing problems to his medical care providers in 2008, the records do not reflect that the Claimant complained of respiratory problems in 2008. This Finding is based upon all of the Claimant's medical records.

8. Despite his testimony that he suffered from breathing problems in 2008, the Claimant's medical records during 2008 establish that the Claimant's lungs were repeatedly clear and that he was never suffering from any respiratory distress upon exam. This Finding is based upon all of the Claimant's medical records up to September 2009.

9. Despite the Claimant's denying that he had been on any medications from Russia, the records of Mary Black Hospital establish that the Claimant had been on a Russian medication for some period of time and establish that the Claimant reported to his

*medical care providers that this was the only medication that alleviated his symptoms. This medication was identified as Inderal in the Mary Black Memorial records. This Finding is based upon the medical records of Mary Black Memorial Hospital.*

*10. I find the Claimant's allegations that this medication was not Inderal but Advil/Ibuprofen to be dubious, as the Claimant could have simply purchased ibuprofen over the counter rather than asking a doctor at Mary Black Memorial Black Hospital for a refill of this medication. Moreover, the medication was identified by Mary Black Memorial Hospital as Inderal. This Finding is based upon the records of Mary Black Memorial Hospital.*

*11. On cross-examination, the Claimant refuted the accuracy of virtually every single medical record he was questioned about and repeatedly testified that he reported symptoms that were not reflected within those medical records; the Claimant's repeated disputing of every medical record not favorable to his case is extremely troubling to the undersigned, and for this reason, I am suspect of the Claimant's testimony.*

*12. The medical records show that the Claimant did not seek any treatment between June 2008 and June 2009, which is the period of time when the Claimant reported that his symptoms were worsening every day. This Finding is based upon the Claimant's testimony and the medical records.*

*13. The Claimant further stated that he was having difficulty even attending work during this time frame; despite this, the Claimant did not go see a single medical provider for his alleged worsening symptoms between June 2008 and June 2009. This Finding is based upon the Claimant's testimony and the medical records.*

*14. The Claimant began seeing Dr. Nowatka in June 2009. This Finding is based upon the Claimant's medical records and the Claimant's testimony.*

*15. A review of Dr. Nowatka's records reflect that the Claimant did not have any respiratory difficulties during this time and that each time on examination the Claimant had no findings relative to his lungs that would indicate he was suffering from asthma, despite the fact the Claimant reported that these symptoms had been ongoing for over a year at this point in time. This Finding is based upon the medical records of Dr. Nowatka.*

*16. The Claimant specifically and personally requested a pulmonary consultation from Dr. Nowatka, and in response, Dr. Nowatka opined that he did not think the Claimant's medical problems were pulmonary related. This finding is based upon the medical records of Dr. Nowatka.*

*17. There is a medical record from Dr. Feldman dated September 23, 2009, that appears to show at best a minimal examination of the Claimant; the record from this date only reflects basic information about the Claimant despite reciting a diagnosis of asthma, possibly occupational. This Finding is based upon the medical records of Dr. Feldman.*

*18. This office note of September 23, 2009, reflected in Finding #17, does not reflect a physical history of the Claimant, a medical history of the Claimant, an employment history of the Claimant, or an exposure history of the Claimant, which one would expect to see in determining whether a patient was suffering from occupational asthma and the causation of same. This Finding is based upon the medical records of Dr. Feldman.*

*19. Despite the lack of a physical examination of the Claimant, as well as any history of exposure, Dr. Feldman's office note has written upon it "occupational asthma?" This Finding is based upon the medical records of Dr. Feldman.*

*20. Dr. Feldman was unable to account for a lack of a more detailed office note documenting the Claimant's past medical history, his employment history, or his exposure history. This Finding is based upon the deposition testimony of Dr. Feldman.*

*21. Dr. Feldman repeatedly disclaimed the importance of pulmonary function testing in an effort to support his diagnosis of occupational asthma using tests that the machine itself indicated were to be interpreted with care. This Finding is based upon the deposition testimony of Dr. Feldman.*

*22. Dr. Feldman defended his diagnosis of asthma made on September 25, 2009, stating that a diagnosis of asthma could be based solely upon the severity of Claimant's wheezing. This Finding is based upon the deposition testimony of Dr. Feldman.*

*23. Dr. Feldman's diagnosis of severe wheezing in the Claimant is undermined by the medical records of Dr. Chandler, a cardiologist, who examined the Claimant on the same day, September 25, 2009, and reported that the Claimant's lungs were clear and there was no wheezing. This Finding is based upon the medical records of Dr. Chandler.*

*24. Moreover, nowhere in the report of Dr. Chandler does it state that the Claimant had been examined by Dr. Feldman that same day, that the Claimant had been diagnosed with asthma the same day, or that the Claimant was now on asthma medications or an inhaler. It is unreasonable for someone who had been diagnosed with asthma the same day as he was seeing a cardiologist would not report such a diagnosis and asthma medications to him. This Finding is based upon the medical records of Dr. Chandler.*

*25. Dr. Feldman failed to adequately explain how the Claimant's June 2009 pulmonary function testing at Kohler could be normal and yet his September 2009*

*pulmonary function testing by Dr. Feldman could show a drop in lung capacity of 25-30%, given that the Claimant's use of acetic acid was not as routine and that the Claimant's last day at Kohler, but for 4 hours, was July 20, 2009. This Finding is based upon Dr. Feldman's deposition testimony and the medical records of the Claimant.*

*26. If Dr. Feldman's testimony is to be believed, in the three months that the Claimant stopped working around acetic acid on a daily and routine basis and may have been in proximity to it while helping out a co-worker sporadically at best, his lung capacity dropped between 25-30%. There is no plausible or credible explanation that can be traced to the Claimant's employment for such a massive change since the Claimant had essentially stopped working around acetic acid after June 2009. This Finding is based upon a review of all of the evidence submitted in the record.*

*27. Given the flaws with the pulmonary function testing and the complete lack of history from Dr. Feldman, I find Dr. Feldman's reports and testimony regarding same to be highly suspect, lacking in credibility, and afford them no weight in my determinations.*

*28. In contrast to Dr. Feldman, Dr. Fogarty did an extensive review of the Claimant's past medical history, including a review of the medical providers the Claimant had seen in 2008 and 2009, a review of the Claimant's work history, a review of the Claimant's exposure history, and performed a physical exam of the Claimant. This Finding is based upon the report of Dr. Fogarty.*

*29. The report of Dr. Fogarty concluded that the diagnosis by Dr. Feldman was based upon flawed testing and that the Claimant's test results in Dr. Fogarty's office were suspect due to the Claimant's lack of effort. Despite that, the testing in Dr. Fogarty's office showed test results within normal ranges. This Finding is based upon the report of Dr. Fogarty.*

*30. Dr. Fogarty opined that had the Claimant had a reaction to the acetic acid while working at Kohler, he would have expected a history of nose, throat, or eye irritation, which the Claimant failed to report to any other doctor. This Finding is based upon the report of Dr. Fogarty and the Claimant's medical records.*

*31. Dr. Fogarty concluded that the Claimant had no evidence of lung disease and did not find any evidence of work-related respiratory illness. This Finding is based upon the report of Dr. Fogarty.*

*32. Dr. Sahn, a pulmonary physician at MUSC, also performed an independent medical evaluation on the Claimant and produced a report detailing his findings. This Finding is based upon the report of Dr. Sahn.*

*33. The pulmonary function testing performed by Dr. Sahn on the Claimant showed that his lung volumes were inappropriately low suggesting either submaximal effort or respiratory muscle weakness. This Finding is based upon the report of Dr. Sahn.*

*34. The Claimant was unable to produce acceptable and reproducible spirometry data, stating that he was exhausted and unable to perform the testing any better. This Finding is based upon the report of Dr. Sahn.*

*35. Dr. Sahn concluded that the Claimant's pulmonary function test results were essentially normal but for one finding which was compatible with truncal obesity. This Finding is based upon the report of Dr. Sahn.*

*36. Dr. Sahn concluded that the Claimant had no evidence of lung disease and did not find any evidence of work-related respiratory illness. This Finding is based upon the report of Dr. Sahn.*

*37. The Defendant, in an effort to determine the exposure levels the Claimant would have been exposed to, performed an industrial hygiene assessment, which showed*

*levels of acetic acid to be between 1/10th and 1/100th that of the permissible levels as defined by OSHA. This Finding is based upon the Industrial Hygiene Assessment.*

*38. The Claimant reported to the South Carolina Department of Employment and Workforce that he was ready, willing, and able to work from September 2009 until September 2011, over 2 years after his termination from Kohler. This Finding is based upon the Claimant's testimony and a review of the records of SCDEW. (Defendant's Exhibit # C in its APA's).*

*39. Based upon his representation that he was ready, willing, and able to work, the Claimant received unemployment benefits for two years. This Finding is based upon the Claimant's testimony and a review of the records of SCDEW. (Defendant's Exhibit # C in its APA's).*

*40. The Claimant subsequently declared that he was unable to work at all, a declaration that coincided with the Claimant's exhausting of all benefits from SCDEW. This Finding is based upon the Claimant's testimony and a review of the records of SCDEW. (Defendant's Exhibit # C in its APA's).*

*41. The Claimant has not worked anywhere since August 20, 2009, when he worked one day for four hours; the Claimant has not worked a full day since July 20, 2009. This Finding is based upon the Claimant's testimony, and a review of the records of SCDEW. (Defendant's Exhibit # C in its APA's).*

*42. Based upon the greater weight of the evidence as recited herein and a full review of all evidence in the record, I find, as it relates to the alleged Date of Injury, that Claimant does not suffer from any asthmatic condition.*

*43. Even if Claimant suffered from asthma during the relevant period of time, I find the evidence in this record is insufficient to establish causation to his employment as*

*required by the South Carolina Workers' Compensation Act; moreover, the greater weight of the credible evidence reveals Claimant's alleged symptoms are not causally related to his former employment with Kohler.*

*44. I find Defendant was served notice of the claim via letter from Claimant's counsel on September 11, 2009, within 90 days of alleged injury; I also note a Form 12A filed on September 18, 2009.*

## ***CONCLUSIONS OF LAW***

*Based upon the foregoing Findings of Fact, it is the determination of this Commissioner that:*

*1. The South Carolina Workers' Compensation Commission file is made a part of the record with the exception of any self-serving declarations, unstipulated medical reports, and subject to the rulings made with respect to objections, as set forth herein.*

*2. Pursuant to § 42-1-130, Claimant was a covered employee at the time in question.*

*3. Pursuant to § 42-1-140, self-insured employer, Kohler, was a covered employer under the Act.*

*4. Pursuant to § 42-15-20, the Claimant gave proper and timely notice of his workers' compensation claim.*

*5. The Defendant raised the defense of laches. "Under the doctrine of laches, if a party, knowing its rights, does not seasonably assert them, but by unreasonable delay suffers its adversary to detrimentally change its position, then the courts will ordinarily refuse to enforce these rights." Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). "Delay alone in the assertion of a right does not constitute laches." Id. "[L]aches arises upon the failure to*

*assert a known right under circumstances indicating that the laches party has abandoned or surrendered the right." Id., at 479, 451 S.E.2d at 929. Based upon the law of laches, I find such a defense is inapplicable in this case.*

*6. This claim involves an allegation that the Claimant has suffered from an occupational disease. "Occupational disease" means a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease is considered an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of continuous exposure to the normal working conditions of that particular trade, process, occupation, or employment. In a claim for an occupational disease, the employee shall establish that the occupational disease arose directly and naturally from exposure in this State to the hazards peculiar to the particular employment by a preponderance of the evidence. S.C. Code Ann. § 42-11-10. See also Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986).*

*7. Pursuant to § 42-11-10 and case law interpreting the same, a Claimant must prove the following six elements in order to receive Workers' Compensation benefits for having contracted an occupational disease: (1) a disease; (2) the disease must arise out of and in the course of the Claimant's employment; (3) the disease must be due to hazards in excess of those hazards that are ordinarily incident to employment; (4) the disease must be peculiar to the occupation in which the Claimant was engaged; (5) the hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment; and (6) the disease must directly result from the Claimant's continuous exposure to the normal working conditions of the particular trade,*

*process, occupation, or employment. See Fox v. Newberry County Memorial Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995).*

*8. Pursuant to § 42-11-10 and Fox v. Newberry County Memorial Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995), I find and conclude that the Claimant has failed to establish that he suffers from asthma relative to his alleged Date of Injury.*

*9. Pursuant to § 42-11-10 and Fox v. Newberry County Memorial Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995), even if I were to find that the Claimant suffered from asthma on the Date of Injury, I find and conclude that the Claimant failed establish that his asthma arose out of the and in the course of his employment with Kohler.*

*10. Because the Claimant cannot meet the first two elements for establishing an occupational disease, i.e., a disease and that the disease arose out of and in the course of his employment, I find that I do not need to address the remaining four factors under § 42-11-10 and Fox v. Newberry County Memorial Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995).*

*11. As a result of the preceding Findings of Fact and Conclusions of Law, I conclude that the Claimant's request for benefits under the South Carolina Workers' Compensation Act must be DENIED!*

The Claimant, *pro se* at the time, appealed the Decision and Order to the Full Commission via Form 30, raising the following grounds for appeal:

1. "No Dr. Feldman records were never [sic] sent to MUSC – Dr. Sahn."

2. "Recently found that Dr. Fogarty is in ongoing litigation with my treating physician Dr. Feldman and has big bias – not disclosed in accurate medical conclusions."

3. "Ineffective assistance of my attorney."

Prior to the start of the Appellate Panel Hearing, the Defendant raised several issues related to both the timeliness of the Claimant's appeal and the scope of the appeal as briefed by the Claimant. As to the timeliness, the Defendant argued that the Claimant's Form 30 was not timely, as the Claimant failed to attach the filing fee or ask that it be waived at the time of filing. As to the scope of the appeal, the Defendant argued that the Claimant attached an exhibit to his brief that was not presented to the Hearing Commissioner, and it should, therefore be excluded. The Defendant also argued that the Claimant's brief addressed issues that were not properly raised by the Claimant's Form 30, and that the Appellate Panel should only consider on appeal those issues expressly raised on the Form 30.

## ORDER OF THE APPELLATE PANEL

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the award, weigh the evidence as presented before the Hearing Commissioner, and, if good grounds be shown, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review and consideration of all the evidence presented to the Hearing Commissioner including the live testimony, the APA submissions, any exhibits, the Commission file, any proffered evidence, the Parties' appellate briefs, and oral argument before us, the Appellate Panel rules as follows:

1. The Claimant's appeal to the Appellate Panel was timely. The Hearing Commissioner's Decision and Order was served on August 7, 2015. The Claimant timely served his Form 30, Request for Commission Review, on August 20, 2015, or at the latest, August 21, 2015, as the Form 30 has two dates upon it. The Commission notified the Claimant that a filing fee or a Form 32 seeking a waiver of the filing fee, was needed, and that if the Commission did not receive either from him within ten (10) business days from the date of the letter, his appeal would be dismissed. The Commission's letter to the Claimant notifying him of this requirement was sent on August 25, 2015. On September 3, 2015, the Claimant filed a Form 32 seeking a waiver of the filing fee, which was granted by the Commission.

2. The article submitted by the Claimant with his brief was not before the Hearing Commissioner and therefore not properly before the Appellate Panel. The Claimant withdrew the article at the Appellate Panel Hearing, and it was not considered by the Appellate Panel in reaching this decision.

3. We agree with the Defendant's contention that the Appellate Panel is restricted to the issues raised per the Form 30. See S.C. Reg. 67-701 (A)(3). This Regulation states that "[t]he grounds for appeal must be set out in detail on the Form 30 in the form of questions presented." Subsection (a) further requires that "[e]ach question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error." Moreover, it is the general rule that an appellant "ought to assign clearly and distinctly all the errors relied on for a reversal of the case so that the opposite party may know what questions are to be raised in the appellate court and may not be subjected to the danger of having new questions sprung at or just before the hearing." Jones v. Anderson Cotton Mills, 205 S.C. 247, 31 S.E.2d 447 (1944); see also Wall v. C. Y. Thomason Co., 232 S.C. 153, 156, 101 S.E.2d 286, 288 (1957) (holding that appeal to the court of common pleas from the Commission's award is governed by the same principles that apply in ordinary civil actions and that court can consider only matters that were before the Commission and as to which error has been specifically assigned); Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 453, 154 S.E.2d 845, 853 (1967) (addressing prior, similar rules regarding grounds for appeal and stating that while the rule does not require any precise or formal pleadings, or require the appellant to anticipate all questions that might possibly, or incidentally, arise under the law in the course of the hearing, there is no sound reason as to why the substantive grounds should not be set forth in the notice for appeal).

4. Notwithstanding the above-cited authorities, the Appellate Panel finds that the Claimant sufficiently raised issues in his Form 30 related to the credibility of the witnesses and physician testimony, records, or reports, including any issues of bias, to the extent such bias could impact the credibility of the witnesses before the Hearing Commissioner. The Defendant was aware from the Form 30 that credibility

of the witnesses in the Hearing before the Single Commissioner would be an issue on appeal. Therefore, the Appellate Panel fully considered all of the evidence in light of the issues raised by the Claimant that the Hearing Commissioner erred in his credibility determinations.

5. The Appellate Panel, however, did not consider the issue raised on appeal by the Claimant that the Hearing Commissioner's decision should be reversed or vacated based upon the Claimant's allegation of ineffective assistance of counsel, as the Appellate Panel has no jurisdiction over such an issue and it is not within the Commission's province.

6. Turning to the merits of the Claimant's appeal, it is the decision of the Appellate Panel, by unanimous vote, that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. In accordance with the Supreme Court's opinion in Fox v. Newberry Cnty Memorial Hosp., 319 S.C. 278 (1995), 461 S.E.2d 392, the Hearing Commissioner's Decision and Order, including his Findings of Fact and Conclusions of Law are hereby adopted by the Appellate Panel as if repeated verbatim herein.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED** that the Decision and Order of the Hearing Commissioner is UNANIMOUSLY AFFIRMED!

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
for the Appellate Panel

**CONCURRING:**

Melody James, Commissioner

R. Michael Campbell, II, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

*By Kim Falls on March 23, 2016*