

**IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS  
R. Knox McMahon, Circuit Court Judge

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Trial Court Case No. 2008-CR-32-2361

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William T. Jervey, Jr., Employee .....Respondent/Petitioners,

v.

Martint Environmental, Inc., Employer,  
and General Casualty Insurance Company, Carrier,..... Petitioners/Respondent.

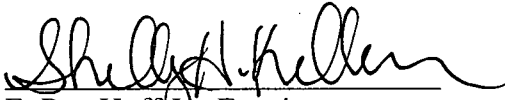
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**PETITION FOR WRIT OF CERTIORARI**

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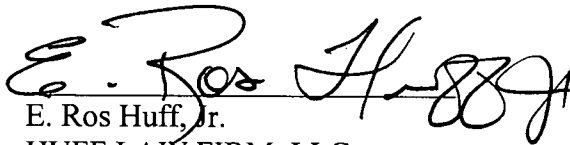
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**CERTIFICATE OF COUNSEL**

Counsel for the Appellant hereby certifies, pursuant to SCACR Rule 226(d)(1), that the Petition for Rehearing was initially made to the Court of Appeals on February 9, 2012, and finally ruled on by the Court of Appeals on March 30, 2012.



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April 26, 2012

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that Respondent Jervey's defenses of waiver and laches were properly before the Single Commissioner, the error being that Respondent abandoned said defenses?
2. Did the Court of Appeals err in finding the Appellant's argument that Respondent Jervey did not amend his Form 50 to raise the defenses of waiver and laches or raise it as an issue during the hearing before the single Commissioner is not preserved for review because it did not raise the argument to the single Commissioner or the Appellate Panel; the error being that Respondent abandoned said defenses?
3. Did the Court of Appeals err in finding that the Appellant's defense to the compensability of the claim was barred by the doctrine of waiver and laches based upon the substantial evidence, the error being the single Commissioner prohibited the Appellants to present their side of the evidence to defeat said defenses?
4. Did the Court of Appeals err in determining that the waiver of laches exception was untimely raised by Appellants, the error being that the determination is not supported by the evidence and is an error of law when Respondent abandoned those arguments?
5. Did the Court of Appeals err in determining that the doctrines of waiver and laches apply when that determination is not supported by the evidence and is an error of law?

- 6. The Due Process rights of the appellants were violated when the Circuit Court ruled and the Court of Appeals affirmed that the Respondent's injury was compensable when the South Carolina Workers Compensation Commission denied Appellants a full evidentiary hearing before the South Carolina Workers Compensation Commission?**
- 7. Did the Court commit an error of law when determining that the substantial evidence standard applies to mixed questions of equity and law before the Court?**

## STATEMENT OF THE CASE

This case arises from an accident that took place on January 23, 2006. Claimant was working for Martint Environmental, Inc. ("Employer") on a work site at Camp LeJune in Onslow County, North Carolina. Claimant and another employee were discarding a piece of pipe when sulfuric acid spilled out of the pipe onto Claimant's neck, face, and back. (R. p. 12). He subsequently developed post traumatic stress disorder and began having cervical problems.

Defendants provided temporary total disability payments beginning on January 31, 2006, and also paid Claimant's medical bills. Claimant sought additional treatment for cervical problems which Defendant's denied. A Form 50 was then filed on June 29, 2007 seeking treatment for cervical symptoms and designation of Dr. Donald R. Johnson, II as his authorized treating physician for the cervical symptoms. (R. p. 54). Defendants filed a Form 51 denying Claimant's entitlement to this treatment and denying Claimant had sustained any compensable injuries. (R. p. 56).

A hearing was held on October 15, 2007 in Columbia, SC before the Single Commissioner. The hearing was to determine issues as set on the Form 50 and Form 51. A pre-hearing conference was held and then the Commissioner went on the record and took testimony on the issue of compensability. In the middle of testimony, the Claimant's attorney made a Motion. (R. p. 91 lines 18-25) Claimant's attorney moved Defendant's could not raise any defenses as to the compensability of the claim due to Claimant's having previously accepted the claim and continued payment of temporary total disability payments beyond the 150 day time limit established in § 42-9-260. Claimant took the position the only issue that could be litigated by Defendant's was the additional medical

treatment for the cervical symptoms. The Single Commissioner ruled in favor of Claimant's motion, finding Defendants could not present evidence or raise a defense on compensability after 150 days. (R. p. 94 lines 19-20). At that time, Defendant's stipulated the medical records to date indicated a cervical problem that the doctors found to be causally related. The hearing concluded at that point. (R. p. 5).

Thereafter, Defendants filed a Form 30 Request for Commission Review, appealing thirty-four grounds to include the following issues: Did the Single Commissioner err in ruling in favor of Claimant's motion that Defendants waived all good faith defenses to compensability by raising them for the first time after 150 days, the error being such a ruling is an error of law? Did the Single Commissioner err in concluding that the Defendants have met the criteria for both waiver and laches, when this is in violation of statutory provision, affected by an error of law? Did the Single Commissioner err in finding and concluding as a matter of law Claimant suffered a compensable injury, the error being the preponderance of the evidence does not support the finding of a compensable injury? (R. p. 57).

In an Order dated May 5, 2008, the Commission Appeal Panel ordered that the Defendants shall continue to pay the Claimant temporary total disability benefits until further Order of the Commission or agreement of the parties, shall accept financial responsibility for all causally related medical modalities including those provided by Dr. Johnson, and authorize additional medical treatment by Dr. Johnson. (R. p. 26).

It is from this Order that the Defendants appealed to the Circuit Court based on multiple grounds, to include the following: the appellate panel committed an error of law in that pursuant § 42-1-160 the Claimant did not sustain an injury by accident, the

appellate panel erred in finding that the carrier engaged in various activities reflecting an informed and voluntary acknowledgement of liability for the Claimant's claim based upon various activities as listed in sub-paragraphs (a) through (f), the appellate panel erred in Finding of Fact No. 11 (e) that during the 150 day period commencing January 23, 2006 both employer and carrier engaged in activities which were reflective of the knowing, informed, voluntary acceptance of liability for claimant's injuries, the appellate panel erred in Finding of Fact No. 11 (f) that the course and conduct of the employer/carrier after the expiration of the 150 day period is consistent with their continued acceptance of liability of the claim, the appellate panel erred in Finding of Fact No. 13 whereby it states that the case is still compensable because the doctrines of waiver and laches apply and further that the Defendants waived these defenses by their behavior in that they knew the facts surrounding the defense from the beginning, by paying benefits and providing medical treatment the Defendants have waived the defenses in SC Code Section 42-9-260, the appellate panel committed an error of law in finding and concluding that 42-9-260 is applicable in this claim, the appellate panel erred in Conclusion of Law No. 5 that based upon the doctrine of waiver as set forth in Johnson vs. Life & Casualty Insurance Company of Tennessee applies, the error being that waiver was not plead and was not proper before the Commission, the appellate panel erred in Conclusion of Law No. 6 that the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, the error being that this is a proper citing of the law however, set forth above, waiver was not properly plead and notice was not properly given to the Defendants that they had to be prepared to address waiver or estoppel, thereby depriving them of their due process, the

appellate panel erred in Conclusion of Law No. 7 that laches would apply thereby citing Byars v. Cherokee County, the error being that the doctrine of laches was not raised properly by the pleadings and proper notice was not given to the Defendants to defend this legal defense thereby depriving them of their due process and was an error for the Commission to sui sponte address the issue of laches, and the appellate panel erred in Conclusion of Law No.8 that the equitable doctrine of laches is equivalent to the legal doctrine of waiver, is a proper distinction of the issue of laches and waiver was not properly raised before the Commission and therefore it was an error of law for it to be considered by the Single and Full Commission. (R. p. 78).

A hearing was held before the Circuit Court and Judge McMahon issued his order on March 24, 2009 indicating that the Commission's May 5, 2008 Order is affirmed in all respects with the exception of the portion vacating the single commissioner's legal conclusions/determinations relative to the impact of the statute of limitations contained in § 42-9-260(A), the award of compensation and medical benefits is reinstated and the Defendants' appeal is dismissed. (R. p. 35). It is from this Order that Defendants have now filed their appeal to this Court.

## ARGUMENTS

**I. Appellants properly raised their exceptions to the doctrines of waiver and laches before the South Carolina Workers Compensation Commission and their exceptions are preserved for review by this Court because Respondent abandoned these affirmative defenses. (Questions presented 2, 4)**

The Court of Appeals erred in affirming the Circuit Court order when it concluded that Appellants are prevented by waiver and laches from raising the defense of compensability because Respondent abandoned these arguments. Waiver and laches were not raised in the respondents' pleadings in the SCWCC Form 50. (R. p 54). The first time

laches and waiver were presented, was in the Respondent's Form 58 Prehearing Brief, which was filed twenty days prior to a hearing, and after the hearing notices were served on the parties. (R. p. 148). A complete reading of the Single Commissioner's Hearing Transcript illustrates that the Respondent abandoned and did not pursue waiver and laches as issues at any point during the hearing, therefore, the Appellant did not need to object to the timeliness of the defenses of waiver and laches. Further, since the defenses of waiver and laches were abandoned and not pursued at the hearing, there was no need to have a ruling by the Commission regarding timeliness. (R. p. 84). The Hearing Commissioner stated for the record, the issues as follows:

The Claimant takes the position he suffered injuries to his neck, left arm, psychological injury, disfigurement and skin loss. He seeks payment of all causally related medical treatment received to date. He seeks an award of compensation for temporary total disability from January 28<sup>th</sup> 2006 forward and he seeks additional medical treatment through Dr. Johnson, Dr. Peck and Dr. Deal. He further takes the position that the denial of this case comes more than 150 days after the Defendant entered into a Form 15 Agreement

The Defense denies an injury by accident arising out of/in the Course Employment. They take the Position the Form 15 is not binding. They further take the position the Claimant committed a forbidden act. Is that Correct?

Mr. Safran: Your Honor. I think that's correct.

(R. p. 87; lines 3-20)

The Commissioner cites the issues in dispute above, and the respondent never corrected the Commissioner to raise the issues of waiver and laches. Therefore, the issues of waiver and laches were abandoned. Once the attorney for Respondent stated the

Hearing Commissioner's statement of the issues in dispute were correct, the attorney for Appellant could therefore rely that waiver and laches were abandoned and that was confirmed when no evidence was presented and waiver and laches are not even mentioned in the Record of the Hearing Commissioner.

The law in effect at the time of the accident, 23 S.C. Code Ann. Regs 67-610(A) (1976), states "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." "Must" is mandatory. Respondent was required by the SCWCC regulation, to amend the Form 50 to raise the issue of laches and waiver when Appellants Form 51 raised the defense of compensability. While it is true that the *Frederick* decision allows a Form 50 to be amended by a prehearing brief, that alone is not sufficient for issue preservation. *Frederick v. Wellman, Inc.*, 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009). An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554 (Ct. App. 2011). *See also; State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009); *see also State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating that an argument is deemed abandoned on appeal when conclusory and without supporting authority). No evidence was ever submitted by the Respondent to support waiver or laches. More importantly the hearing Commissioner would not allow the Appellant the opportunity under due process to ever presented evidence to defend against waiver or laches.

It must be noted that the parties in *Frederick* were allowed to amend their Form 21 by their Form 58 in part because their Form 58/prehearing brief was served approximately

two months before the hearing, thus giving the parties ample notice of the issues. See *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 682 S.E.2d 516, 521-522 (Ct. App. 2009). In the instant case, Claimant's Form 58 was filed on September 26, 2007. This was only twenty days before the October 15, 2007 hearing.

Numerous cases before this court have held that an issue merely being raised in a brief is not enough for issue preservation. See *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.). There is no authority raised by Respondent in the record for waiver or laches, therefore, he abandoned those issues. 24 SC Code Ann. Regs. 67-611(c) (2010) makes it clear that a form 58 cannot constitute **evidence** or become a part of the record of the hearing.

Under the section entitled legal issues involved, the Respondent, while listing a litany of legal issues, simply states in his Form 58/Prehearing Brief the doctrine names without any legal authority or citation to such authority:

Legal issues involved: entitlement to: (a) continued temporary total disability compensation per S.C. Code Ann. Section 42-9-10 (1976 as amended); and (b) further medical benefits, including treatment through Dr. Johnson, per S.C. Code Ann. Section 42-15-60 (1976 as amended) Additionally, we submit defendants' belated/untimely attempt to deny this claim: (a) has no credible factual basis; (b) is barred by several legal doctrines, including **waiver, estoppel and laches** and (c) appears to be a punitive response to Mr. Jervey's efforts to seek treatment of his cervical injury component, particularly in view of the circumstances surrounding the assertion of their current position. (R. 149).

Even if Respondent had raised legal authority in his Form 58, he abandoned his argument because he made no arguments for the doctrines or authority at the hearing. Before the Hearing Commissioner and agreed that the issue of waiver and laches were not before the hearing Commissioner. When the hearing commissioner set forth the issues to be heard and decided. (R. pgs. 84-98) *See also; State v. Porter*, 389 S.C. 27, 35-36, 698 S.E.2d 237, 241 (Ct. App. 2010) (holding that where a party cites only to authority that does not support the specific argument raised, and fails to cite to any authority that supports the specific argument, the argument will be deemed abandoned on appeal). Because Respondent abandoned the arguments with regard to waiver and laches, **it has been an error since the beginning of this litigation for any tribunal to rule that the doctrines were properly before the Court.**

Moreover, Appellants timely made their exceptions to the claimant's arguments concerning waiver and laches because Appellants raised the issue at the first time that it should have been raised, which was in its appeal Form 30. Appellants refer to the Form 30 Addendum and make special reference to number 16:

Did the Hearing Commissioner err in concluding as a matter of law so much of Conclusion of Law No. 7(c), that allowing the requested relief is particularly inappropriate whereas here, Defendants have engaged in a course of conduct which unquestionably satisfies the criteria for both **waiver and laches**, where such is clearly erroneous in view of the reliable, probative and substantial evidence upon the whole record; in violation of statutory provision; affected by other error of law; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?  
(R. 60)

There was no evidence in this record of what was argued at the Appellate Panel other than the Form 30 because the transcript of that hearing was not a part of the record.

However, Appellants again specifically argued before the Circuit Court that they did not receive due process because the arguments of waiver or estoppel were untimely raised by Respondent (R. pgs. 103-106).

Pursuant to 23 SC Code Ann. Reg. 67-701 (1976, as amended), the grounds for appeal must be set out in detail on the Form 30 in the form of questions presented. Appellants properly set out a violation of a statutory provision and one of the provisions is timeliness. It was error for the court to state that we specifically had to argue that the waiver and laches arguments were “untimely” or “improper” when we clearly raised the defects in those defenses. As stated above in number 16 of the Form 30, we properly raised the issues pursuant to the Administrative Procedures Act.

Because Waiver and Laches are affirmative defenses, Respondent’s attorney should have raised and argued the doctrines before the Hearing Commissioner. Because he did not raise and argue the two, his arguments are deemed abandoned and Appellants in their Form 30 timely objected to the Hearing Commissioner’s ruling and relying on those doctrines. The mere attempt to raise Laches and Waiver in a prehearing brief, and then fail to: (1) offer any evidence to support the affirmative defenses, (2) offer legal authority for support of the doctrines, or (3) even mention the words “laches and waiver” again at a hearing, is an abandonment of the defenses.

**II. Even if waiver and laches were properly before the court, the Court erred in finding that waiver and laches applies when there was no evidence to support the findings. (Questions presented 1, 3, 5, 7)**

It is axiomatic that the doctrines of waiver and laches must be proven by evidence introduced by the party asserting the affirmative defenses. *See Hoffman v. Greenville,*

242 S.C. 34, 129 S.E.2d 757 (1963) (One who pleads an affirmative defense has the burden of proving it). Not only are the rulings concerning waiver and laches without a preponderance of the evidence, they are without ANY evidence. The respondent/employee never testified regarding waiver and laches and further offered no evidence in support. The appellants were denied by the hearing commissioner from offering any defense evidence regarding waiver and laches when he ruled that the 150 day language in SC Code Ann. Section 42-9-260 (2010), was a statute of limitations that barred any defense.

#### Waiver

Because “waiver is a voluntary and intentional abandonment or relinquishment of a known right, generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E. 2d 384 (1992). It may be expressed or implied by a party's conduct. *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). It was error for the Court to find that waiver applied because there was no evidence of an intentional abandonment or relinquishment of a known right. Respondent, as the party asserting the defenses, had to prove that Martint, the employer, or General Casualty Insurance Company: (1) possessed actual or constructive knowledge of their rights of (2) all of the material facts upon which the employer or carrier depended. The order of the court of appeal must be revised because the appellant was denied their right to present evidence before the South Carolina Workers Compensation Commission regarding the facts that would support a defense against waiver or laches.

The Court relies on the Form 12A as evidence Appellants alleged “knowledge of waiver of this right (to assert the defense under *Wright v. Bilo* for compensability). There is no evidence that the unknown party who filled out the 12A even knew or should have known of the compensability defense. There is no evidence presented as to the identity of the party who filled out the 12A and that party is unknown. How can you infer knowledge to an unknown person? To do so would be speculation, conjecture and surmise. Again, Appellants were not allowed to present a witness to testify as to what they did or did not know. Knowledge that an employee was “asked” not to do something is not knowledge that the employee was specifically instructed regarding a prohibited act that would take the employee out of the “sphere of employment” and thereby the injury is not compensable under the Workers Compensation Act.

Workers Compensation is a no fault statute. Just asking an employee not to do something does not take an employee out of his sphere of employment under *Wright v. Bilo*. Basing a decision upon the 12A that appellants had knowledge of all there material facts upon which to deny the claim based upon violation of specific instructions by the employer.

The court states that “Martint’s denial stems from the same allegation that was listed on its January 24, 2006 Form 12A.” Further, there is no evidence that Martint was the entity that has the authority to make the decision regarding compensability, which is generally a decision that the insurance carrier makes. However, there is no evidence of what basis the claim was denied upon because no witnesses for the appellant were allowed to testify and Appellants were not allowed to introduce any evidence. Just because an allegation made in Form 12A may or may not support a defense, is not

evidence of knowledge of the defense. The Form 12A simply states in the section for a description of the accident that “the employee was **asked not** touch or dismantle the sulfuric acid system” and that “employee dismantled system and did not use provided safety gear.” (R. 142). This document does not identify WHO gave this instruction. It is clear under the *Wright v. Bilo* decision that this person has to have the authority to make that instruction. That instruction could have related to the job duties, but we will never know because the Hearing Commissioner never allowed Appellants to present any evidence. The mere instruction of being asked not to do something does not take the employee out of their sphere of employment. Furthermore, the statements are not enough to show knowledge of all material facts by the employer, Martint or the insurance carrier, for the legal defense under *Wright v. Bilo*.

Even if the unknown person who filled out the Form 12A was an agent of the insurance carrier, there is no evidence that Martint, as a separate and distinct entity, had knowledge of the legal defense. There is no evidence that Martint makes compensability decisions.

In order to assert the defense of *Wright v. Bilo*, one has to have facts available to them after conducting an extensive investigation of the incident. As the court in *Wright v.*

*Bilo* states:

**Not every violation of an order** given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act. . . . Certain rules concern the conduct of the workman within the sphere of his employment, while others limit the sphere itself. A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied.

*See Wright v. Bi-Lo*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994).

Certain rules concern the conduct of how the worker performs his duties while in the course and scope of his employment. Certain rules limit the sphere of employment itself and a violation of that rule carries the worker outside of his employment and therefore, pursuant to SC Code Ann. Section 42-1-160 (1976, as amended), even though the injury arises out of the employment i.e. dismantling the equipment, it does not occur in the course of his employment. BOTH conditions have to be met to be a compensable accident under SC Code Ann. Section 42-1-160 (1976, as amended). The Appellants were not afforded the opportunity to introduce any witness or evidence to prove that both were not met.

It is clear that an insurance agent or adjuster is not allowed to practice law, so imputing knowledge that should only be obtained from legal counsel to the employer, Martint, or the insurance carrier, General Casualty Insurance Company, is improper. *See Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002) (noting that public adjusting does not include any activities which may constitute the unauthorized practice of law).

In addition to the Form 12A, the court also relies on the passage of time—fifteen months—to prove that waiver and laches apply (court of appeals order p. 40). However, evidence has to be introduced to prove that the passage of time was “unreasonable” and unexplained. *See Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007) (holding that in order to establish laches as a defense, a defendant must show that the complaining party **unreasonably** delayed its assertion of a right, resulting in prejudice to the defendant). There is no evidence to support the finding that the delay was unreasonable

or that the Respondent, who received benefits the entire time during the investigation, was prejudiced. As explained above, the *Wright v. Bilo* test is fact intensive and would require substantial investigation and legal counsel in order to determine if the defense is applicable. Moreover, the investigation could only commence after this so called agent would have consulted an attorney to know of whether this violation of employer instruction is a defense to the claim. Courts have held that “usually, the question of waiver or estoppel is a matter for the jury but when the facts are undisputed and warrant only one reasonable inference, waiver or estoppel becomes a matter of law.” See *American Mut. Fire Ins. Co. v. Green*, 233 S.C. 588, 106 S.E. 2d 265(1958). Because there are no facts to support the ruling that waiver applies in this instance, the Court committed an error of fact and law.

#### Laches

The record is also devoid of evidence of Laches. 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**. *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007). Both laches and waiver require a party to have known of a right, and know that the party was abandoning that right. *Id.* Judge Huff , Judge Anderson, and Jude Thomas, in the *Skipper* decision state the following: The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. *Skipper v. Perrone*, 382 S.C. 53, 674 S.E.2d 510 (Ct. App. 2009). All three must be proven by the party raising laches as a defense.

Respondents attorney as well as the courts continuously cite to the fifteen month time frame prior to denying the claim as delay. There is no evidence of unreasonable

delay as discussed above. Moreover, Respondent cannot show and there is no evidence to show that Respondent suffered material prejudice due to Appellants seeking to defend the claim on the issue of compensability. During that time, Claimant has received and continues to receive benefits from the Appellants, including the receipt of weekly temporary total disability checks and medical benefits. Claimant has not suffered any material change in circumstances due to Appellant's assertion the claim is not compensable. Therefore, Claimant has not suffered material prejudice, and cannot prevail on a defense of laches. Moreover, there has been no finding of fact by either the Hearing Commissioner or the Commission's Appellate Panel concerning any alleged prejudice. There has just been a ruling that laches applies and no finding of evidently support for that finding.

The Court's determination that laches and waiver applies is conjectural on what an unknown person may or may not have known about a legal defense when it filled out its Form 12A. The court also speculates that the extended period of time by itself taken to deny the claim was "unreasonable." Because the court's order as to these two doctrines were based upon speculation, conjecture and surmise, it must be reversed.

**III. The Due Process rights of Appellants were violated when the Court ruled that the respondents injury was compensable when there was never a full evidentiary hearing before the South Carolina Workers Compensation Commission. (Questions presented 6)**

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. *See Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 374 (1981). The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann § 1-23-380(5) (1976, as amended). Further, the court may only reverse the decision of the Commission if that decision is affected by an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole

record. S.C. Ann § 1-23-380(5)(d)&(e) (1976, as amended). Substantial evidence “is not a mere scintilla of evidence, but evidence, which considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 513 S.E. 2d 843 (1999).

South Carolina courts have frequently stated that the burden is on a claimant to prove the injury is compensable. *Pilgrim v. Eaton*, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). Because this matter was determined by the Hearing Commissioner by Motion with regard to the Statute of Limitations issue, appellants were barred from participating in a full evidentiary hearing with regard to compensability or any issue.

The appellant’s rights of due process have been denied by a ruling on the compensability issue without allowing Appellants to present evidence that the Claimant did not suffer from a compensable injury pursuant to SC Code Ann. § 42-1-160 (1976, as amended), or present any evidence regarding the defenses of waiver and laches.

A reviewing court can reverse or modify the decisions below “**if an appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous** in view of the reliable, probative, and substantial evidence on the whole record.” *Id. See also*; S.C. Code Ann. § 1-23-380(A)(6) (2005) (*emphasis added*). How more can a party’s right be substantially prejudiced if not by being barred from submitting any evidence at the evidentiary hearing.

The Appellants’ due process rights were violated by the ruling that the claim was compensable due to the fact that the Appellants never had an opportunity to have the issue heard on the merits and will never have the opportunity to be heard on this issue. Under South Carolina's Constitution, due process in the administrative context is established by S.C. Const. Art. I, § 22. *S.C. S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146, (S.C. 2010). Procedural due

process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146, (S.C. 2010). The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, **an opportunity to be heard** in a meaningful way, and judicial review. *Id.* (emphasis added).

Because the Appellants were never given the opportunity to be heard on the issue of compensability and the courts determined that the claim was compensable without an evidentiary hearing, they committed an error of fact and law.

**IV. The Court committed an error of law when determining that the substantial evidence standard applies to mixed questions of equity and law before the Court. (Questions presented 7)**

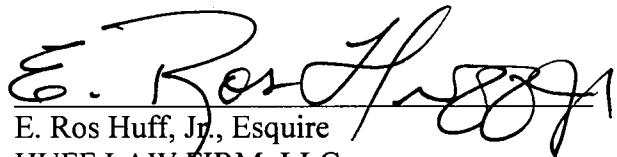
A case with both legal and equitable issues presents a divided scope of review. Thus, a legal question in an equity case receives review as in law. Questions of law may be decided with no particular deference to the trial court. The Court of Appeals of South Carolina may correct errors of law in both legal and equity actions. S.C. Code Ann. § 14-8-200 (1998). *See S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008). Because this matter involved issues rooted in both questions of law and equity, (waiver and laches) the determination with regard to equitable questions should have been based upon the preponderance of the evidence. When reviewing an action in equity, an appellate court may review the evidence to determine facts in accordancd with the appellate court's own view of the preponderance of the evidence.

*Skipper v. Perrone*, 382 S.C. 53, 674 S.E.2d 510 (Ct. App. 2009). Because the review of the evidence with regard to the equitable doctrines of waiver and laches were based upon the substantial evidence standard, this decision must be reversed.

### CONCLUSION

Accordingly, the appellants respectfully request that this Court grant Petition for Writ of Certiorari, permit oral arguments on these issues and issue a decision: (1) reversing the lower rulings; (2) ruling that the affirmative defenses of waiver and laches raised by respondent were abandoned before the hearing commissioner for failure to follow through at the time of the hearing on the record and failure to carry the burden of proof as to each element of the legal defenses; and (3) remanding the case back to the South Carolina Workers Compensation Commission directing that the evidentiary hearing be reconvened and that the appellants be allowed to defend the claim by presentation of the evidence as to their defense of the Respondent's claim for and entitlement to Workers Compensation benefits.

Respectfully submitted,



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April 30, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
R. Knox McMahon, Circuit Court Judge

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Case No. 2008-CP-32-2361

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William T. Jervey, Jr., Employee .....Respondent/Petitioners,  
v.  
Martint Environmental, Inc., Employer,  
and General Casualty Insurance Company, Carrier,..... Petitioners/Respondent.

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PROOF OF SERVICE

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I certify that I have served the Petitioners/Respondents' Petition for Writ of Certiorari on William T. Jervey, by depositing a copy of the same in the United States Mail, postage prepaid, on April 30, 2012, addressed to his attorney of record Andrew N. Safran, Post Office Box 12089, Columbia, SC 29211.



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