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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Common Pleas Case No. 2012-CP-32-02093
Common Pleas Case No. 2012-CP-32-02111
Appellate Case No. 2014-001258

Ricky Kneece, Petitioner,

v.

Kneece Farms and Legion in Liquidation and South Carolina Property and Casualty Insurance Guaranty Association, Respondents.

AMENDED APPENDIX – VOLUME II

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case Nos.: 2012-CP-32-02093 & 2012-CP-32-02111

Ricky Kneece,

Respondent,

v.

Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Appellants.

AMENDED
RECORD ON APPEAL
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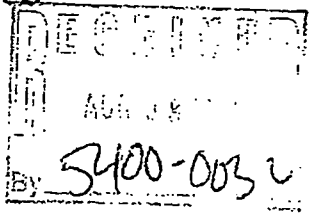
The South Carolina Court of Appeals



Ricky Kneece, Respondent,

v.

Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Appellants.

Appellate Case No. 2014-001258

The Honorable R. Knox McMahon
Lexington County
Trial Court Case No. 2012CP3202093, 2012CP3202111

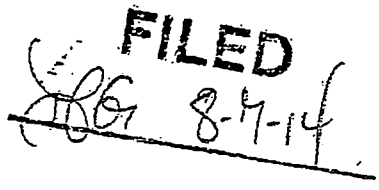
ORDER

The time for serving and filing the appellants' initial brief and designation of matter is hereby extended until September 2, 2014. No further extensions will be granted absent extraordinary circumstances.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina



cc:
Mark Davis Cauthen, Esquire
Peter P. Leventis, IV, Esquire
Scott A. Elliott, Esquire

The South Carolina Court of Appeals

JUL 31 2014
5400-0032

Ricky Kneece, Respondent,

v.

Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Appellants.

Appellate Case No. 2014-001258

The Honorable R. Knox McMahon,
Lexington County
Trial Court Case No. 2012CP3202093, 2012CP3202111

ORDER

The time for serving and filing the appellants' initial brief and designation of matter is hereby extended until August 1, 2014.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED
7-2-14 AE

cc:
Mark Davis Cauthen, Esquire

Peter P. Leventis, IV, Esquire
Scott A. Elliott, Esquire

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP3202093

PLAINTIFF(S)	DEFENDANT(S)
Ricky D Kneece	Kneece Farms South Carolina Property and Casualty Insurance Guaranty Asso Virginia Crocker (Judicial Director) Legion in Liquidation South Carolina Workers Compensation Commission
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

4/30/2014

CPFORM4Cm.
SCCA SCRCP Form 4C (Revised 3/2013)

Circuit Court Judge

Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 1st of May 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Scott A. Elliott 1508 Lady St. Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Mark Davis Cauthen PO Box 7217 Columbia, SC 29202
South Carolina Workers Compensation Commission
1333 Main Street, Ste #500 Columbia, SC 29201
Virginia Crocker (Judicial Director)
Sc Workers Compensation Commission
P.O.Box 1715 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

ORIGINAL

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	CASE No. 2012-CP-32-02093 CASE No. 2012-CP-32-02111
Ricky D. Kneece, Employee Claimant/Appellant, vs. Kneece Farms, Employer, and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Defendants/Respondents.	ORDER DENYING DEFENDANT'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

FILED
2013 APR 25 A 10:06
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

The Defendant/Respondents have moved for an order, pursuant to Rule 59(e) SCRCP, to alter or amend the Court's order, dated July 18, 2013, in this Workers' Compensation appeal. The Court, sitting in an appellate capacity, applied the standard of review and the law applicable to the issues on appeal in its order. Moreover, the Court addressed all issues raised by Defendants/Respondents in connection with this appeal. Accordingly, the Defendants/Respondents' Motion to Alter or Amend the Court's order is DENIED.

The matter before the Court involves cross-appeals from an order of the Workers' Compensation Commission, dated April 19, 2012. In its April 19, 2012 order, the full Commission reversed the Hearing Commissioner's order of April 29, 2011, which found and

concluded that the Claimant/Appellant was totally and permanently disabled under the Workers' Compensation Act and awarded Claimant/Appellant benefits to include those required by S.C. Code Ann. § 42-9-10(C) due to his physical brain damage. The Defendants/Respondents appealed the Hearing Commissioner's order to the full Workers' Compensation Commission. However, the full Commission reversed only that provision of the Hearing Commissioner's order which found that the Claimant/Appellant had suffered brain damage and ordered that Claimant/Appellant be awarded benefits under S.C. Code Ann. Reg. § 67-1101. The full Commission affirmed the Hearing Commissioner's order in all other respects. The Claimant/Appellant appealed the full Commission's order finding that the Claimant/Appellant did not suffer brain damage to the Circuit Court, seeking to overturn the finding and restore the benefits granted under S.C. Code Ann. § 42-9-10(C). The Defendants/Respondents appealed the provisions of the full Commission's order affirming the award of all other benefits under the Act.

In reversing the full Commission's April 9, 2012 order, the Court held that the full Commission erred in finding and concluding that the Claimant/Appellant did not suffer physical brain damage. The Court further concluded that on this record, the Claimant/Appellant was totally and permanently disabled with physical brain damage and entitled to benefits under S.C. Code Ann. § 42-9-10(C), and remanded the matter back to the Workers' Compensation Commission for the entry of an order awarding Claimant/Appellant benefits under S.C. Code Ann. § 42-9-10(C). The Court concluded that the Defendants/Respondents' appeal was without merit and denied relief.

In its Order dated July 18, 2013, the Court fully considered the evidence, law, and arguments and, based on the record, reversed the full Commission. Consequently, the Defendants/Respondents' Rule 59(e) Motion to Alter or Amend the Judgment is denied.

RULE 59(E) STANDARD

Rule 59(e) SCRCP provides for a Motion to Alter or Amend the Court's judgment to preserve the record for appeal. *Pelican Building Centers v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The motion provides the Circuit Court with an opportunity to rule properly after it has considered all relevant facts, law, and arguments. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). A party cannot use Rule 59(e) to present the court with an issue the party could have raised prior to the judgment but did not. *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).

DISCUSSION

The Defendants/Respondents argue that this Court misapplied the standard of review. As set out below, this Court, sitting in its appellate capacity, applied the proper standard of review to the issues on appeal.

The Administrative Procedures Act (APA) "governs appellate review of a final decision from an administrative agency." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007); *see* S.C. Code Ann. §§ 1-23-310, et seq. Under the APA, this 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(A)(5); *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 442 (2000). However, the full Commission's factual findings may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008). Moreover, the full Commission's findings must be based on the reliable, probative,

and substantial evidence on the whole record and must not be arbitrary or capricious. S.C. Code § 1-23-380(A)(5)(e)(f).

Applying the recent decisions of the Supreme Court in *Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund*, 406 S.C. 124, 126, 750 S.E.2d 61, 62 (2013), reh'g denied (Aug. 8, 2013) and *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 631, 738 S.E.2d 835, 837 (2013), the Court concludes that the Claimant/Appellant had suffered physical brain damage compensable under S.C. Code § 42-9-10(C). To be compensable under S.C. Code § 42-9-10(C), "the physical brain damage must be severe." Citing *Crisp v. SouthCo.*, the Court concludes that for physical brain damage to be severe, a worker with severe physical brain damage must be unable to return to suitable gainful employment. Further, the holding in *Crisp* is consistent with existing case law, which provides that total disability does not require complete abject helplessness but rather is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. *McCollum v. Singer Co.*, 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003); *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 473 S.E.2d 699 (1996); *Lyles v. Quantum Chemical Co.*, 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993). The Court's order on July 18, 2013, sets out and applies the law applicable to the Claimant/Applicant's claim involving physical brain damage.

The Court recognizes that the full Commission's factual findings would normally be upheld on appeal unless their findings are based upon surmise, conjecture, or speculation. The record below was devoid of any reliable, probative, and substantial evidence to support the Appellant Panel's finding that:

> [t]he Commissioners find a claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained physical brain injury. The claimant has sustained an injury pursuant to Regulation 67-1101.

The reliable, probative, and substantial evidence on the whole record supports the Court's order. The Claimant/Appellant's treating physicians found that the Claimant/Appellant's physical brain damage was severe and permanent. The Claimant/Appellant's family physician, Dr. Carl White, diagnosed the Claimant/Appellant to have suffered a "dead zone in his brain" as identified by an MRI. The authorized treating psychologists treating the Claimant found him to have suffered from a traumatic brain injury. None of the evidence from Claimant's treating physicians or psychologists provided a medical foundation for the Commission's finding. The Defendants/Respondents argue here, as they argued below, that their consulting physician, who admittedly did not perform extensive psychological testing, concluded that the Claimant/Appellant's head injury was mild to moderate. However, the Defendants/Respondents' evidence is contradicted by that of Dr. Tora Brawley, their own clinical psychologist. Dr. Brawley, the Defendants/Respondents' witness, concluded that as recently as January of 2011, the Claimant continued to suffer from several vegetative symptoms, chronic pain and stressors, and that the Claimant suffers from a residual brain dysfunction as a result of his accident. Lastly, Commissioner Michelle Childs in her 2005 order on this factual issue relied upon the evidence of Dr. Lenwood Smith, Claimant/Appellant's treating neurologist, that the Claimant/Appellant's brain injury was both permanent and severe and found that the Claimant/Appellant had suffered a brain injury which she described as a closed-head injury giving rise to neuro-cognitive deficits. She ordered the Defendants/Respondents to treat the Claimant/Appellant for his brain injuries. Commissioner Child's order constitutes the law of this case.

Moreover, there is no credible evidence of record that the Claimant/Appellant operated a complicated tractor. The undisputed evidence of record reflects that the Claimant/Appellant's

family has purchased a tractor which is equipped with GPS and computer-operated equipment which accommodates the Claimant/Appellant's limitations by automatically operating the tractor and its equipment allowing the Claimant/Appellant to plow, plant and fertilize. The Claimant/Appellant drives the tractor but cannot program or operate the equipment. As the record reflects, the Claimant/Appellant is only required to "mash" a button to start the equipment. A family member must program the equipment and accompany the Claimant/Appellant to the field to assist him in the event the equipment fails, and the Claimant/Appellant's family accommodates his mistakes.

The Court concludes that the medical evidence supports only the finding that the Claimant/Appellant suffered physical brain damage. Further, the Court concludes that the Claimant/Appellant's physical brain damage was so severe as to prohibit him from returning to work or finding suitable gainful employment. In support of its holding, the Court relies on *Wigfall v. Tideland Utilities, Inc., supra*, setting out the manner in which a claimant may prove total disability under § 42-9-10. The Court held that a Claimant may demonstrate total disability in one of three ways under § 42-9-10. First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in § 42-9-10. Second, a Claimant may establish total disability under § 42-9-20 by showing an injury, which is not a § 42-9-30 schedule injury, caused sufficient loss of earning capacity to render him totally disabled. *Coleman v. Quality Concrete Prod.'s, Inc.*, 245 SC, 625, 142 S.E.2d 43 (1965). Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 schedule injury must show an additional injury. *Singleton, supra; see also McCollum v. Singer Co.*, 300 SC. 103, 386 S.E.2d 471 (Ct. App. 1989).

The record herein reflects that in addition to physical brain damage, the Claimant/Appellant suffered extensive injuries to his left upper and lower extremities, head and face. After two surgeries to Claimant/Appellant's left arm and elbow, Dr. Michael Green assigned 17% impairment to Claimant/Appellant's upper left extremity. After two surgeries to Claimant's left knee, Dr. James O'Leary assigned a 10% impairment rating to the Claimant/Appellant's lower left extremity. The Claimant/Appellant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant/Appellant's mental and emotional deficits cause him difficulties in coping with everyday life. After his psychological testing, Dr. Randolph Waid assigned a 22% whole person impairment to the Claimant/Appellant for his injuries and Dr. Larry Bergmann assigned an 11% impairment to the Claimant for the injuries for which he and Dr. Roger Deal treated the Claimant/Appellant.

The Claimant/Appellant's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and reliably operate the family farm. The Claimant/Appellant now functions in the low average IQ range and has no formal education beyond high school. Farming is all the Claimant/Appellant knows. The Claimant/Appellant's family has purchased farming equipment which accommodates the Claimant/Appellant's disabilities. The Claimant/Appellant's family has hired farm hands to assist the Claimant/Appellant with his chores. The Claimant/Appellant's father has eliminated his income from the farm to free up funds with which to pay the Claimant/Appellant. The Claimant/Appellant's son has gone to work on the farm and performs much of the Claimant/Appellant's responsibilities. The family has managed its farming practices to maximize the farm's income while permitting the Claimant/Appellant the opportunity to work on the farm.

The Claimant/Appellant can no longer manage the farm's financial affairs and, without his wife, Claimant/Appellant would need a legal guardian to manage his affairs. Vocational expert Dr. William Stewart opined that "[i]n an open competitive labor market [the Claimant/Appellant] would find himself occasionally disabled and unable to work gainfully."

The Court holds that the Claimant/Appellant suffered a complete loss of earning capacity. Based on the authority in *Wigfall v. Tidelands Utilities, Inc., supra*, the Court holds that the Claimant/Appellant's loss of earning capacity resulting from his permanent and severe physical brain damage is totally and permanently disabling. Moreover, the Court holds that the Claimant/Appellant's schedule injuries in combination with each other and the Claimant/Appellant's non-schedule injuries are likewise totally disabling. *Wigfall v. Tidelands Utilities, Inc., supra.*

The full Commission affirmed the holding of the Hearing Commissioner that the Claimant/Appellant suffered a loss of earning capacity notwithstanding the financial support offered him by his family farm. In challenging the full Commission's finding, the Defendants/Respondents argue that South Carolina law does not recognize the doctrine of sheltered or benevolent employment. However, the Court concluded that in order to be entitled to total and permanent disability benefits, the Claimant/Appellant must be unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable and stable market for them does not exist. Total disability under the Workers' Compensation Act does not require complete abject helplessness. Our courts have held that the mere fact of employment is not necessarily evidence of earning capacity. *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003); *McCollum v. Singer Co.* and *Stephenson v. Rice Services, Inc., supra.*

The Court upheld the full Commission in holding that the sheltered or benevolent employment doctrine as articulated by the Commission is merely an extension of long-standing South Carolina law. See *Nelson v. Yellow Cab Co.*, 348 S.C. 589, 564 S.E.2d 110 (2002). Citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986); *McCollum v. Singer Co.*, *supra*.

Dr. Stewart, who concluded that the Claimant/Appellant suffered a total loss of earning capacity, recognized Claimant/Appellant's benevolent employment on his family farm. The Claimant/Appellant's wife testified that the Claimant/Appellant was unemployable and that Delano R. Kneece and Son, Inc. would not employ a stranger with the Claimant/Appellant's disabilities. The undisputed testimony of record reflects that those accounts paid to the Claimant/Appellant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant/Appellant on behalf of the family farm. In addition, the Claimant/Appellant's wife testified that the Claimant/Appellant's physical brain damage would make him unable to compete in an open job market and that the family farm would not hire a farm hand with the Claimant/Appellant's disabilities and that no farming operation would go to the cost and expense of providing work accommodations for a farm hand such as the Claimant/Appellant. Accordingly, the Court affirms the full Commission on the issue of sheltered or benevolent employment.

The Defendants/Respondents argue that the Court erred in holding that the totally and permanently disabled Claimant/Appellant was entitled to weekly disability payments for life. The Defendants/Respondents argue that the Commission could only order weekly lifetime disability payments prospectively. The Defendants/Respondents' arguments fly in the face of the plain language of the statute. S.C. Code Ann. § 42-9-10(C) reads as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive benefits for life.

Statutes must be given their plain meaning. *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005); *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009). Here, the statute means what it says. The Claimant/Appellant is not subject to any limitations but is entitled to lifetime weekly benefits from the date of his compensable injury and the Court so held.

The Defendants/Respondents argue that the Court erred in affirming the full Commission's award for Claimant/Appellant's medical treatment. The Defendants/Respondents argue that because certain of the Claimant/Appellant's medical providers which the full Commission authorized to treat the Claimant/Appellant were not selected by the Defendants/Respondents, the full Commission erred in ordering the Defendants/Respondents to pay for the Claimant/Appellant's past and future medical treatment and mileage. The Defendants/Respondents do not contend that the Claimant/Appellant did not benefit from the treatment of these providers. Rather the Defendants complain about having to pay for the treatment. The full Commission, when it deems is necessary, and in the Claimant/Appellant's interest, may override the employer's choice of medical providers and order a change in the medical or hospital services provided and order payment of those medical services. *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). The Court affirmed the full Commission in that regard.

Moreover, the Defendants/Respondents argue that the full Commission erred in failing to hold these medical costs to be barred by the equitable doctrine of laches. Throughout the life of the claim, the Claimant/Appellant sought and the Defendants/Respondents provided medical benefits under the Workers' Compensation Act. The Defendants/Respondents can claim no

prejudice arising from the length of time of the claim. The Defendants/Respondents' partial compliance with the Act disproves any such prejudice as is required by the doctrine of laches. *Muir v. C.R. Baird, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). Here, the Defendants/Respondents well knew that the Claimant/Appellant suffered permanent and severe physical brain damage and was undergoing for treatment for his injuries from Dr. Bergmann and Dr. Deal. Indeed, the Defendants/Respondents were paying for part of Claimant/Appellant's medical treatment for his injuries. There was no delay in prosecuting the claim nor were the Defendants/Respondents prejudiced. The Court held that the doctrine of laches does not apply.

Accordingly, the Court affirmed the full Commission awarded of medical benefits to the Claimant/Appellant.

CONCLUSION

Based on the foregoing, the Court holds that the Defendants/Respondents' Rule 59(e) Motion to Alter or Amend Judgment be DENIED. The Court applied the standard of review and the applicable substantive law to the issues on appeal. Having done so, the Court holds that based on the evidence of record, viewed as a whole, the Claimant/Appellant is totally and permanently disabled with physical brain damage and entitled to an award of benefits under S.C. Code Ann. § 42-9-10(C). The Court's reversal of the full Commission on this issue was in all respects consistent with the reliable, probative, and substantial evidence based on the whole record. In addition, the Court affirms the full Commission order in all respects raised by the Defendants/Respondents' appeal.

THEREFORE, IT IS ORDERED that the Defendants/Respondents' Motion to Reconsider pursuant to Rule 59(e) is **DENIED**, and the prior ruling is reaffirmed in toto.

The Honorable R. Knox McMahon
Presiding Judge,
Sixth Judicial Circuit

Lexington, South Carolina
April 24, 2014

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: AVERY B. WILKERSON, CHAIR, SUSAN S. BARDEN, T. SCOTT BECK

SCWCC FILE NO.: 9920867

Ricky D. Kneece,

Claimant

v.

Kneece Farms,

Employer, and

Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association,

Carrier, Defendants.

On Remand from the Court of Common Pleas of Lexington County
Per notice timely and properly served upon all Parties of Interest.

Appearances: Scott Elliott, Attorney for Claimant

Mark D. Cauthen, Attorney for Defendants

Filed: 11-15-13

STATEMENT OF THE CASE

On October 1st, 2013, the Appellate Panel issued a Decision and Order in this matter, carrying out the directives contained in the Order of the Court of Common Pleas for Lexington County dated July 18th, 2013. Subsequent to the issuance of this Panel's Order, the parties notified the Commission for the first time that post-trial motions had been filed with the Court of Common Pleas for Lexington County, and a ruling on those issues is still pending from the Circuit Court Judge.

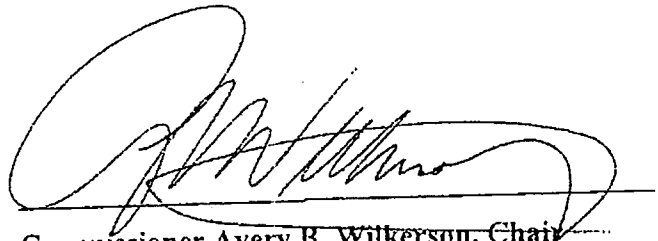
Although the Commission had no knowledge that this matter was still pending before the Circuit Court, at the time the Decision and Order of the Full Commission was issued on October 1st, 2013, jurisdiction over this matter was still before the Circuit Court and the Commission lacked subject-matter jurisdiction to issue its Decision and Order.

Therefore, the Full Commission is withdrawing the Decision and Order of October 1st, 2013 at this time, pending a final resolution of the issues currently pending before the Court of Common Pleas for Lexington County.

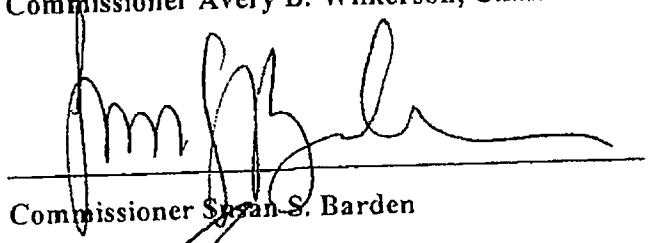
ORDER

IT IS THEREFORE ORDERED that the Decision and Order of the Full Commission filed October 1st, 2013 is hereby withdrawn.

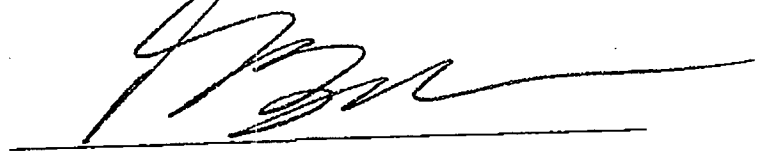
AND SO IT IS ORDERED!



Commissioner Avery B. Wilkerson, Chair



Commissioner Susan S. Barden



Commissioner T. Scott Beck

Columbia, South Carolina

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 Valerie Deller on November 15, 2013

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2013 JUL 19 P 12:08
) CASE NO. 2012-CP-32-02093 &
BETH A. CASPIGG
COUNTY OF LEXINGTON) CLERK OF COURT CASE NO. 2012-CP-32-02111
LEXINGTON, SC

Ricky D. Kneece,

Employee
Claimant/Appellant,

vs.

Kneece Farms,

Employer,
and

Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association,

Carrier,
Defendants/Respondents.

ORDER

This matter was before the Court by cross appeals from an order of the South Carolina Workers' Compensation Commission ("Commission") dated April 19, 2012, granting the Claimant Ricky Kneece benefits under the South Carolina Workers' Compensation Act. Oral argument was held on March 20, 2013 and the matter has been briefed by the parties. For the reasons set out, the order of the Commission is reversed.

PROCEDURAL HISTORY

The Claimant was injured November 22, 1999, when a tire which he was changing violently exploded while under pressure causing him injury to the head, brain and face as well as the left side of his body. The explosion was severe enough to cause the Claimant to lapse into a coma after the explosion and had to be transported by helicopter to the hospital where he was

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treated for his many injuries. (Tr. Page 46, lines 6-11; R. at page 249).

This matter was commenced by the filing and service of a Form 50 dated November 7, 2001, alleging that the Claimant, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999, while employed by Kneece Farms (the employer was insured by Legion Insurance Company which has been liquidated and the claim is now covered by the South Carolina Property and Casualty Insurance Guaranty Association).

After a hearing held January 11, 2005, the Hearing Commissioner Michelle Childs issued her order finding that the Claimant had suffered compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth. The 2005 Order sets forth the evidence of the Claimant's permanent and severe physical brain damage as follows:

> Both Dr. Lenwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30 that the Claimant's injuries, both **permanent and severe**, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2005 Order at page 8; R. at page 1280) [Emphasis added].

In reliance on the medical evidence, Commissioner Childs found in 2005 that the Claimant suffered a permanent and severe brain injury. The Commissioner found:

> 1. That the Claimant Ricky Kneece, was an employee of Kneece Farms on or about November 22, 1999, on which date he sustained injuries to his brain/head, face, nasal passage, sinus, left eye, left knee and teeth. (R. at page 1282)
>
> 9. That as a result of his injury, the Claimant was diagnosed with conditions, including a closed head injury, chronic olecranon bursitis of his left elbow, intraarticular left biceps tendon rupture, patellofemoral syndrome of symptomatic plica, anterior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femoral condyle fracture and a fracture of the nasal bridge and left nasal bone. (2005 Order at page 11; R. at page 1283).

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The Commissioner ordered as follows:

> 4. That the Defendants are responsible for treatment for the Claimant's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergmann. (2005 Order at page 13; R. at page 1285).

Commissioner Childs found and concluded that the Claimant had suffered a permanent and severe brain injury and the 2005 Order constitutes the law of the case and is binding on the parties.

The 2005 Order found that the Claimant was not at MMI (2005 Order). The 2005 Order held the Defendants/Respondents responsible for treatment rendered by Dr. L. Randolph Waid, a licensed clinical psychologist, for Claimant's brain and head injury. In addition, the 2005 Order found the Claimant was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up treatment with Dr. Waid for Claimant's closed head injury. (2005 Order).

On or about July 9, 2010, the Claimant filed a Form 50 requesting a hearing seeking an order of this Commission finding him to be permanently and totally disabled with a physical brain injury and pursuant to S.C. Code Ann. Section 42-9-10, Claimant sought all benefits to which he was entitled under the act. After a full hearing on all matters raised by the parties, the Hearing Commissioner found the Claimant totally and permanently disabled with a physical brain injury and ordered the Defendants/Respondents to provide the Claimant with the relief afforded him under the Workers' Compensation Act for life.

In particular, by Order dated April 19, 2012, the Hearing Commissioner found:

(1) That the Claimant was permanently and totally disabled with physical brain damage pursuant to § 42-9-10 (C) (2011 Order at page 28; R. at page 193);

(2) That the Claimant was permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or any

other kind of job or gainful employment on a reliable, sustained basis and that Claimant was unable to perform services other than those that are so limited in quality, dependability, and quantity as a reasonable, stable market for them does not exist (2011 Order at page 29; R. at page 194);

(3) That Claimant sustained causally related injuries to his left knee (10% impairment) (Order 2011 at page 30; R. at page 195) and his left shoulder and elbow (17% impairment) (2011 Order at page 30; R. at page 195);

(4) That the Defendants failed to pay for all medications in the amount of $14,010.77 prescribed by Claimant's physicians as required by Commission Order; (2011 Order at page 30, R. at page 195);

(5) That the Claimant had accumulated mileage to which he was entitled reimbursement. (2011 Order at page 30; R. at page 195).

Further, the Hearing Commissioner found and concluded that the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc. was sheltered employment and benevolent in nature. The Hearing Commissioner found that the Claimant's wife gave credible testimony that no such job ordinarily exists and that Claimant could not and would not be hired for farm work given his cognitive and physical limitations. Further, the Hearing Commissioner found that the paycheck which Claimant draws from the farm is because of the largesse of his family and not because he performs any substantial, beneficial work for the farm. (2011 Order at pages 27-28; R. at pages 192-193).

The Hearing Commissioner concluded that the Claimant was entitled to treatment and benefits for life as provided by §42-9-10(C) (2011 Order at page 35; R. at page 200).

The Defendants appealed the Order of April 19, 2012 to the Full Commission. The Full Commission reversed the Hearing Commissioner's finding that the Claimant had suffered a physical brain injury. In particular, the Full Commission found as follows:

> The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101.

(2012 Order at page 10; R. at page 32).

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CLERK OF COURT
LEXINGTON, SC

Based on its finding, the Full Commission reversed the findings of fact and conclusions of law of the Hearing Commissioner that the Claimant was totally disabled, accompanied by physical brain injury pursuant to §42-9-10(C). The Commission concluded that the Claimant sustained an injury pursuant to S.C. Reg. 67-1101. The Full Commission left intact all other findings of fact and conclusions of law of the Hearing Commissioner not inconsistent with the Full Commission order.

The Claimant has appealed the order of the Commission and maintains that he was totally and permanently disabled with physical brain damage and entitled to benefits under S.C. Code Ann. 42-9-10(C). The Defendants have appealed the Commission order maintaining that the Commission erred in finding and concluding that the Claimant was otherwise totally and permanently disabled and entitled to benefits under that Workers' Compensation Act.

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." Hill v. Eagle Motor Lines, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) *see* S.C. Code Ann. §§1-23-31-, et. seq. Under the APA, this 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 (A)(5); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 442 (2000). It is not within the appellate court's province to reverse the appellate panel's factual findings if they are supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. The

appellate panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Houston v. Deloach & Deloach, 378 S.C. 548, 663 S.E.2d 85 (Ct. App. 2008).

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Moreover,

> [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(a)-(f).

Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013).

THE CLAIMANT'S APPEAL

The Workers' Compensation Commission found that: "a claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain injury. The claimant sustained an injury pursuant to Regulation 67-1101." (Order page 10; R. at page 32). This Court concludes that there is no evidence in the record to support the Commission's finding. Instead, the substantial evidence of record compels the Court to conclude that the Claimant suffered severe and permanent physical brain damage and is totally and permanently disabled with physical brain damage compensable pursuant to §42-9-10 (C). For the reasons set out, the order of the Workers' Compensation Commission is reversed and the Claimant shall be found to be totally and permanently disabled with physical brain damage and

entitled to all benefits under the Act.

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Section 42-9-10 limits weekly compensation to 500 weeks with certain exceptions. However, a claimant, as here, who is totally and permanently disabled and who has suffered physical brain damage is not subject to the 500 week limit. Section 42-9-10(C) provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

The Supreme Court has held that Section 42-9-10(C) awards lifetime weekly disability payments only in cases where the physical brain damage is severe and permanent. Construing §42-9-10(C), the Supreme Court explained:

> Section 42-9-10(C) awards lifetime benefits for totally disabled claimants suffering "physical brain damage as an exception to the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I Fund, Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013).

In Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013), the Court relied in part on S.C. Code Ann. §42-9-400(d) which addresses brain damage as a permanent physical impairment. S.C. Code Ann. §42-9-400(d) defines "permanent physical impairment" as follows:

> As used in this section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a **hindrance or obstacle to obtaining employment** or to obtaining reemployment if the employee should become unemployed. S.C. Code Ann. § 42-9-400(d) [Emphasis added]

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The Court concluded that for the physical brain damage to be "severe", a worker with severe physical brain damage must be unable to return to suitable gainful employment. Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.

The statute does not require total and permanent disability to be solely the result of the physical brain damage. Pearson v. JPS Converter and Indus. Corp., 327 S.C.393, 489 S.E.2d219 (Ct. App. 1996). Thus, if the Claimant's physical brain damage combines with the Claimant's other injuries and characteristics to totally and permanently disable him under the Act, he is entitled to lifetime benefits under S.C. Code Ann Section 42-9-10(C)).

The holding in Crisp is consistent with existing case law which provides that total disability does not require complete abject helplessness; rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989); Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). In fact, the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) [recognizing that wages earned by Claimant totally and permanently disabled by virtue of paraplegia not necessarily evidence of earning capacity; see footnote (2) at 473 S.E.2d 703]. In Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993), the Court recognized that a Claimant who was totally and permanently disabled as a result of an injury to his back may continue to work notwithstanding a finding of total and permanent disability.

The Full Commission finding that "a claimant who can drive a 'complicated' computer-

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operated tractor for fifty (50) hours per week has not sustained a physical brain injury," is wholly unsupported by the facts and evidence of record.

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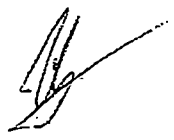
The medical evidence, when viewed from the record as a whole, compels the finding that the Claimant suffered physical brain damage resulting in severe and permanent impairment of his normal brain function. Dr. Smith, the treating neurologist, found that the impact to the Claimant from his physical brain damage **was severe and permanent.** Dr. Smith concluded that the Claimant would no longer be the "same competitive businessman" that he would have been prior to his accident. Moreover, Dr. Smith opined that the Claimant's social skills and ability to interact with others would be adversely affected by the Claimant's injuries. Dr. Carl White, the Claimant's internist, diagnosed the Claimant to have suffered from a **"dead zone" in his brain.** In particular, from an MRI taken in 2007, Dr. White found a 32 x 43 mm area in the Claimant's right frontal lobe compatible with encephalomomalacia. In addition, Dr. White opined that the Claimant's hypothyroidism was related to his head trauma resulting in lethargy, weight gain and general lack of energy and desire. Moreover, Dr. White confirmed that the Claimant's emotional changes and memory loss were related to his head trauma and frontal lobe damage.

Dr. Randolph Waid with MUSC diagnosed the Claimant as suffering from cognitive disorder, personality change and headaches resulting from traumatic brain injury. Dr. Waid, who conducted a battery of tests on the Claimant, concluded that the Claimant who functioned in the low average IQ range would have difficulties concentrating, memory impairment, and dysfunction in regard to both cognitive and emotional/psychological function. Dr. Waid assessed a 22% impairment to the whole person as a result of the Claimant's traumatic brain injury. Similarly, Dr. Larry Bergmann and Dr. Roger Deal treated the Claimant for headaches, sleep loss, dizziness, fatigue irritability, memory impairment, anger and depression from 2005 to



the date of the hearing below and recommended ongoing treatment for the Claimant. Dr. Bergmann assigned an 11% whole person impairment to the Claimant. In 2010, Dr. Shissias, a neurologist, began treating the Claimant for chronic daily headaches, memory loss and depression arising from Claimant's 1999 accident. Dr. Shissias, who is of the opinion that the Claimant is suffering Organic Brain Syndrome secondary to traumatic brain injury, finds that the Claimant is unable to make major decisions without input from his wife and that without her the Claimant would require a legal guardian to handle his financial affairs.

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The Supreme Court in Crisp recognized that there are essentially three ways to determine whether a person has sustained physical brain damage: CT or MRI scanning; cognitive behavioral level of functioning; and neuropsychological testing. Crisp v. SouthCo Inc. and Pennsylvania National Mutual Casualty Insurance Co., *supra.*

The Defendants employed Dr. Julian Adams to evaluate the Claimant. Dr. Adams, who saw the Claimant twice, found that the Claimant suffered a mild to moderate head injury in the accident with no serious problem of an organic nature. However, Dr. White's MRI reflected a dead zone in Claimant's brain. Dr. Adams admits in his report that he "did not perform extensive psychological testing" to ascertain the existence of physical brain damage whereas Dr. Deal and Dr. Brawley (the Defendants' expert) conducted such testing. Dr. Adams did not employ any of the diagnostic tools recognized in Crisp to determine whether the Claimant suffered physical brain damage and his opinions are not credible on the issue of the Claimant's physical brain damage.

Moreover, Dr. Adams' conclusions are contrary to those of the Defendants' witness Dr. Tora Brawley, a clinical psychologist who examined the Claimant in January of 2011, and concluded the Claimant "continues to suffer from several vegetative symptoms, chronic pain and

stressors" and that the Claimant has a residual brain dysfunction as a result of the accident. Dr. Brawley also found that the Claimant was not at maximum medical improvement (MMI) with respect to his fatigue, weight gain, decreased energy level, loss of interest in recreation activities, feelings of depression, feelings of anxiety, increased irritability, and decreased frustration tolerance. Instead of corroborating Dr. Adams' opinion, Dr. Brawley's findings corroborate those of Drs. Smith, White, Shissias, Waid, Bergmann and Deal. Moreover, Dr. Brawley also recommends continued treatment for his psychological symptoms as did Dr. Bergmann, Dr. White and Dr. Shissias. While the Defendants point to the testimony of Dr. Adams to support their contention that the Claimant's brain damage was mild to moderate, this Court may not view the evidence blindly from the Defendants' side of the case. Not only is Dr. Adams' opinion not supported by substantial evidence, his opinion is not supported by the Defendants' evidence.

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In her 2005 Order in this matter, Commissioner Childs, relying on the evidence of Dr. Smith that the Claimant's brain injury was both permanent and severe, found that the Claimant suffered a brain injury. In particular, the Commissioner found that the Claimant had suffered a closed head injury giving rise to neurocognitive deficits. She ordered the Defendants to treat the Claimant for his closed head injury.

In reviewing a finding of fact of the Workers' Compensation Commission, this Court is not required to suspend disbelief. The evidence of record, when viewed as a whole, compels the finding that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function.

Having concluded that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function, the Court will turn to the finding of the Workers' Compensation Commission that a Claimant who can operate a complicated computer-

operated tractor has not sustained a physical brain injury.

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First, there is no credible medical evidence to support the Commission finding that a Claimant who can operate a complicated computer-operated tractor has not sustained a physical brain injury. Second, there is no evidence that he can operate a complicated computer-operated tractor. The evidence of record reflects that the Claimant lives on the family farm and spends his day there. There is evidence of record that the Claimant performs certain work for his family farm, including driving a tractor. While the Commission was imprecise as to which tractor it was referring to in its Order, the Court infers that the Commission was referring to the fact that the Claimant's family bought a tractor equipped with GPS and computer-operated equipment which accommodates the Claimant's limitations by automatically operating the tractor and its equipment, allows him to plow, plant and fertilize. The record reflects, and is undisputed on this point, that the Claimant drives the tractor but cannot program or operate the equipment. The Claimant is only required to "mash" a button to start the equipment. A family member must program the equipment and accompany him to the field to assist the Claimant in the event the equipment fails. Moreover, the Claimant's family accommodates the Claimant's mistakes. This evidence has not been refuted by the Defendants.

The medical evidence supports the finding that the Claimant suffered physical brain damage. The record when read as a whole does not support the Commission's finding that the Claimant's ability to drive a tractor is evidence that the Claimant did not suffer physical brain damage. The Commission's finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The finding appealed from does not withstand scrutiny when viewed in context of the record as a whole. Houston v. Deloach & Deloach, *supra*.

Moreover, the Commission erred in finding and concluding that the Claimant's severe and permanent physical brain damage was compensable under Regulation 67-1101. First, the Claimant's severe and permanent physical brain damage injury is specifically compensable under §42-9-10(C). Second, Regulation 67-1101 does not address physical brain damage.

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There being no evidence of record to support the Commission's finding and conclusion, that the Claimant did not suffer physical brain damage, the only inference to be drawn from the evidence of record supports the finding that the Claimant was totally and permanently disabled with permanent and severe physical brain damage.

The Court in Wigfall v. Tideland Utilities, Inc., *supra,* set out the manner in which a claimant may prove total disability under Section 42-9-10. A Claimant may demonstrate total disability in one of three ways under §42-9-10. First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in §42-9-10. Second, a Claimant may establish total disability under §42-9-20 by showing an injury, which is not a §42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled. Coleman v. Quality Concrete Prod.'s, Inc., 245 S.C. 625, 142 S.E. 2d 43 (1965) [Claimant established that a double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment]. Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCollum v. Singer Co., 300 S.C.103, 386 S.E. 2d 471 (Ct. App. 1989) [Court found Claimant totally disabled due to combined partial impairments to the back, stomach and leg]. Wigfall v. Tideland Utilities, Inc., *supra,*

In addition to physical brain damage, the Claimant suffered extensive injuries to his left

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upper and lower extremities, head and face. After two surgeries to his left arm and elbow, Dr. Michael Green assigned a 17% impairment to the Claimant's upper left extremity. After two surgeries to Claimant's left knee, Dr. James O'Leary assigned a 10% impairment rating to the Claimant's lower left extremity. It is undisputed that the Claimant's physical brain damage was disabling. The Claimant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant's mental and emotional deficits cause him difficulties in coping with everyday life. After his psychological testing, Dr. Waid assigned a 22% whole person impairment to the Claimant for his injuries and Dr. Bergmann assigned an 11% impairment to the Claimant for the injuries for which he and Dr. Deal treated the Claimant.

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Indeed, the Claimant's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and reliably operate the family farm. The Claimant now functions in the low average IQ range and has no formal education beyond high school. Farming is all the Claimant knows. The Claimant's family has purchased farming equipment which accommodates the Claimant's disabilities. The Claimant's family has hired farm hands to assist the Claimant with his chores and to perform the Claimant's chores. The Claimant's father has eliminated his income from the farm to free up funds with which to pay the Claimant. The Claimant's son has now gone to work on the farm and performs much of the Claimant's responsibilities. The family has managed its farming practices to maximize the farm's income while permitting the Claimant the opportunity to work on the farm. The Claimant can no longer manage the farm's financial affairs and without his wife, Claimant would need a legal guardian to manage his affairs.

Dr. Stewart, a Board Certified Vocational Rehabilitation Counselor, concluded that the

Claimant has suffered a complete loss of earning capacity because of his injuries. Dr. Stewart recognized that the Claimant enjoyed a "benevolent and sheltered employment situation," and opined that, "[i]n an open, competitive labor market [the Claimant] would find himself vocationally disabled and unable to work gainfully." (R. at page 400). The impact of the Claimant's injuries is best described by Dr. Stewart who stated that the Claimant's:

> ...mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning '...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs....' (APA at page 4; R. at page 400).

The Claimant's wife who also performs chores on the farm, including that of the farm bookkeeper, testified that because of Claimant's disabilities he would be unable to compete in an open job market. In fact the family farm would not hire a farm hand with Claimant's disabilities. No farming operation would go to the cost and expense of providing work accommodations for a farm hand such as the Claimant. Her testimony is consistent with that of Dr. Stewart.

Based on the foregoing, the substantial evidence of record reflects that the Claimant suffered a complete loss of earning capacity. The Commission so held. The Claimant's permanent and severe physical brain damage is not a Section 42-9-30 schedule injury. The Claimant has demonstrated loss of earning capacity resulting from his permanent and severe physical brain damage and is totally and permanently disabled. Moreover, the Claimant's injuries to his left upper extremity and his left lower extremity are Section 42-9-30 schedule injuries. The Claimant's schedule injuries in combination with each other and the Claimant's non schedule injuries are likewise totally disabling. Wigfall v. Tideland Utilities, Inc., *supra.*

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Because the Claimant's severe and permanent physical brain damage combines with the Claimant's other injuries and characteristics to totally and permanently disable him under the Act, he is entitled to lifetime benefits under S.C. Code Ann Section 42-9-10(C) in addition to all other benefits under the Act.

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The Defendants argue that the Claimant is paid wages by his family and urge the Court to recognize these payments as evidence of earning capacity. As will be discussed more fully, infra, the Commission below concluded that the Claimant's family farm was sheltered employment and the payments by the family are not evidence of earning capacity. The evidence of record supports the Commission's conclusion in this regard. Moreover, evidence of employment after a totally disabling injury is not necessarily evidence of earning capacity Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996) [recognizing that wages earned by Claimant totally and permanently disabled by virtue of paraplegia not necessarily evidence of earning capacity]; Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993) [wages earned by Claimant totally and permanently disabled by virtue of back injury].

The Defendants appear to argue that the Claimant's injuries are not property pled. In particular, the Defendants argue that the Claimant's Form 50 alleges permanent total disability due to a general disability and not due to a specific disability. The Defendants argue that therefore the Claimant can only meet the requirements for permanent total disability through the general disability standard by showing a loss of earning capacity.

However, the Defendants failed to raise this issue in their exceptions raised in their Form 30 (notice of appeal from the Hearing Commissioner to the Full Commission) and accordingly the issue is not preserved for the purposes of appeal. Creech v. Ducane Co., 320 S.C. 559, 467

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S.E. 2d 114 (Ct. App. 1995). Assuming arguendo that the Defendants' argument is properly before the Court, as set out above, the Claimant met his burden of proof of total and permanent disability with physical brain damage under each of the theories of liability under Section 42-9-10 as set out in Wigfall v. Tideland Utilities, Inc., *supra*.

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For the foregoing reasons, it is clear that based on the evidence of record, the Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.; Wigfall v. Tideland Utilities, Inc., *supra*. The Full Commission erred in finding that the Claimant did not sustain a physical brain injury and is reversed.

THE DEFENDANTS' APPEAL

The Full Commission affirmed the holding of the Hearing Commissioner that the Claimant has suffered a loss of earning capacity, notwithstanding the financial support offered him by his family farm. In addition, the Commission order requires the Defendants to pay for the Claimant's past and future medical treatment by Drs. Bergmann, Deal, Shissias, White, Wicker and Ugino. In addition, the Commission ordered the Defendants to pay for the Claimant's mileage and prescription costs associated with his treatment by his physicians. The Defendants appeal the Commission order in this regard. For the reasons set out, the Commission order is affirmed.

Substantial evidence exists to support the Commission's finding the Claimant to have suffered a complete loss of earning capacity. The record is replete with evidence that the Claimant's injuries combine to permanently and totally disable him in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the evidence of record

supports the Commission's conclusion that the claimant is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonably stable market for them does not exist. There is no evidence that any jobs for which the Defendants claim the Claimant is qualified exist in the community where the Claimant lives. Cf. Johnson v. Rent-A-Center, Inc., 398 S.C. 595, 730 S.E. 2d 857 (2012). Last, the Commission's finding that the services that the Claimant performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exists for the services the Claimant provides for the family farm is supported by substantial evidence.

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LEXINGTON

In finding that the Claimant had suffered a complete loss of earning capacity, the Commission found and concluded that the work offered by Claimant's family farm is sheltered employment and benevolent in nature. The Defendants argue South Carolina law does not recognize the doctrine of sheltered or benevolent employment or in the alternative, that the doctrine of sheltered or benevolent employment does not apply to this case. This Court disagrees.

In order to be entitled to total and permanent disability Workers' Compensation benefits for a work injury, the Claimant must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). South Carolina courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996).

Indeed, evidence that a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. that a person who becomes a paraplegic, as a result of a work-related accident, may recover for permanent and total disability under Section 42-9-10 yet continue to work. Likewise, the Claimant who has suffered physical brain damage as a result of a work-related accident may likewise recover for permanent and total disability under Section 42-9-10 yet continue to work. Based on existing South Carolina case law precedent alone, the Commission correctly found and concluded that the Claimant suffered a complete loss of earning capacity.

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However, the Commission went further to find and conclude that the Claimant's employment on his family farm was sheltered or benevolent employment and as such did not constitute evidence of earning capacity. Because the South Carolina Workers' Compensation Act was based on the North Carolina Act, the Commission turned to North Carolina case law for guidance. See, e.g., Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). Citing Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986) the Commission held "an injured employee's earning capacity must be measured not by the largesse of a particular employer, but by the employee's own ability to compete in the labor market. The fact that an employee is capable of performing employment tendered by employer is not, as a matter of law an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E.2d 746 (1997).

As the Commission correctly pointed out, the rationale behind the benevolent employment rule is simple: Proffered employment would not accurately reflect earning capacity

if other employers would not hire the employee with the employee's limitation at a comparable wage level. The same is true if the accommodations or modification of the job to meet the employee's limitations are not ordinarily found in the competitive job market. In other words, if the Claimant does not have the ability to earn wages competitively, he will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra.* See also Baker v. Sam's Club, 589 S.E.2d 387 (N.C. App. 2003).

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Clearly, the benevolent employment doctrine as articulated by the Commission below is merely an extension of long-standing South Carolina law. See McCollum v. Singer Co., *supra;* Stephenson v. Rice Services, Inc., *supra.* See also Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc., *supra.*

The Defendants/Respondents' principal objection to the Commission's application of the benevolent employment doctrine to the facts of this case stems from the fact that the family farm makes regular payment to the Claimant. The Defendants argue that the amounts paid the Claimant meet or exceed the Claimant's wages prior to his workers' compensation injury are evidence that he has not lost earning capacity and, therefore; Defendants/Respondents argue that the benevolent employment doctrine is not applicable to the facts of this case.

Dr. Stewart concluded that the Claimant suffered a total loss of earning capacity. Claimant's wife testified that the Claimant was unemployable and that the Delano R. Kneece & Son, Inc. would not employ a stranger with the Claimant's disabilities.

The undisputed testimony of record that those amounts paid the Claimant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant on behalf of the family farm, but rather those amounts paid the Claimant are in the nature of a gift and do not constitute wages for work expended on behalf

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of the farm or wages calculated on the basis of productivity. The Claimant's wife also testified about the nature of the work the Claimant is able to perform and the fact that the family has essentially kept him working because he is family. The fact that the Claimant's family, through personal sacrifice and careful business practices, is able to afford to pay the Claimant any amount whatever is not evidence of the Claimant's earning capacity.

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Last, the Defendants/Respondents argue that in the event that the Hearing Commissioner's Order is allowed to stand, the Defendants/Respondents should be entitled to a credit for the amount the Claimant receives from his employment from the family farm. The Defendants/Respondents are entitled to no credit. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

The Defendants argue that the Commission erred in ordering them to provide and pay for the Claimant's treatment by his personal physicians, Dr. White, Dr. Wicker, and Dr. Shissias and Dr. Ugino. The Commission's findings and conclusions in this regard are clearly supported by the evidence of record and should be sustained.

Citing Section 42-15-60, the Appellants argue that Drs. White, Whicker, Shissias, and Ugino were not authorized by the Appellants prior to treatment and therefore, the Appellants were under no obligation to pay for past treatment or to provide future treatment by these physicians. The Appellants argue that Section 42-15-60, provides that the employer and only the employer may determine an authorized medical treatment. This Court disagrees.

Section 42-15-60, vests the Commission with authority to direct an employer to provide medical treatment which in the judgment of the Commission will tend to lessen the period of

disability. Here, the Commission found that the Claimant's physicians were treating him for injuries resulting from his accident and that the Claimant was benefiting from his treatment. The record is uncontroverted in this regard and is based on the expert medical evidence of record. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E. 2d 593 (Ct. App. 2012) [holding an employer liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement.].

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LEXINGTON, SC

The Commission is afforded considerable discretion under Section 42-15-60. Where it deems necessary, the Commission may override an employer's choice of medical provider or refusal to treat. Indeed, the Commission may excuse a claimant's justified refusal to seek treatment from the employer's provider. The Workers' Compensation Act should be liberally construed in furtherance of the purposes to which it was designed and any reasonable doubts as to its construction should be resolved in favor of the Claimant.

The record is replete with evidence supporting the Commission's order requiring the Defendants to pay for all past and future medical care including treatment, prescription medication, and mileage.

CONCLUSION

THEREFORE, based on the foregoing, the Workers' Compensation Commission erred in finding and concluding that the Claimant did not suffer physical brain damage. Accordingly, the Commission Order of April 19, 2012 is reversed. The Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. The Defendants' appeal is without merit and is dismissed. The order of the Hearing Commissioner dated April 28, 2011 is reinstated. The matter is remanded to the Workers'

Compensation Commission to enter its order awarding benefits under S.C. Code Section 42-9-10(C) from the date of the 1999 accident and continuing for life together with all other benefits ordered by the Hearing Commissioner in his order dated April 28, 2011.

IT IS SO ORDERED.

R. KNOX MCMAHON
PRESIDING JUDGE,
LEXINGTON COUNTY COURT OF
COMMON PLEAS

Lexington, South Carolina
Dated: 18 July, 2013

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BETTI A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP3202093 And 2012CP3202111

Ricky D Kneece	Kneece Farms South Carolina Property and Casualty Insurance Guaranty Asso Virginia Crocker (Judicial Director) Legion in Liquidation South Carolina Workers Compensation Commission
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

CPFORM4M
SCRCP Form 4C (Revised 12/2011)

INFORMATION FOR THE JUDGMENT INDEX Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	**2145** **Judge Code**	7/22/2013 **Date**

For Clerk of Court Office Use Only

This judgment was entered on n/a, and a copy mailed first class or placed in the appropriate attorney's box on **22nd day of July 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Scott A. Elliott 1508 Lady St. Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Mark Davis Cauthen PO Box 7217 Columbia, SC 29202
South Carolina Workers Compensation Commission 1333 Main Street, Ste #500 Columbia, SC 29201
Virginia Crocker (Judicial Director) Sc Workers Compensation Commission P.O.Box 1715 Columbia, SC 292021715

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

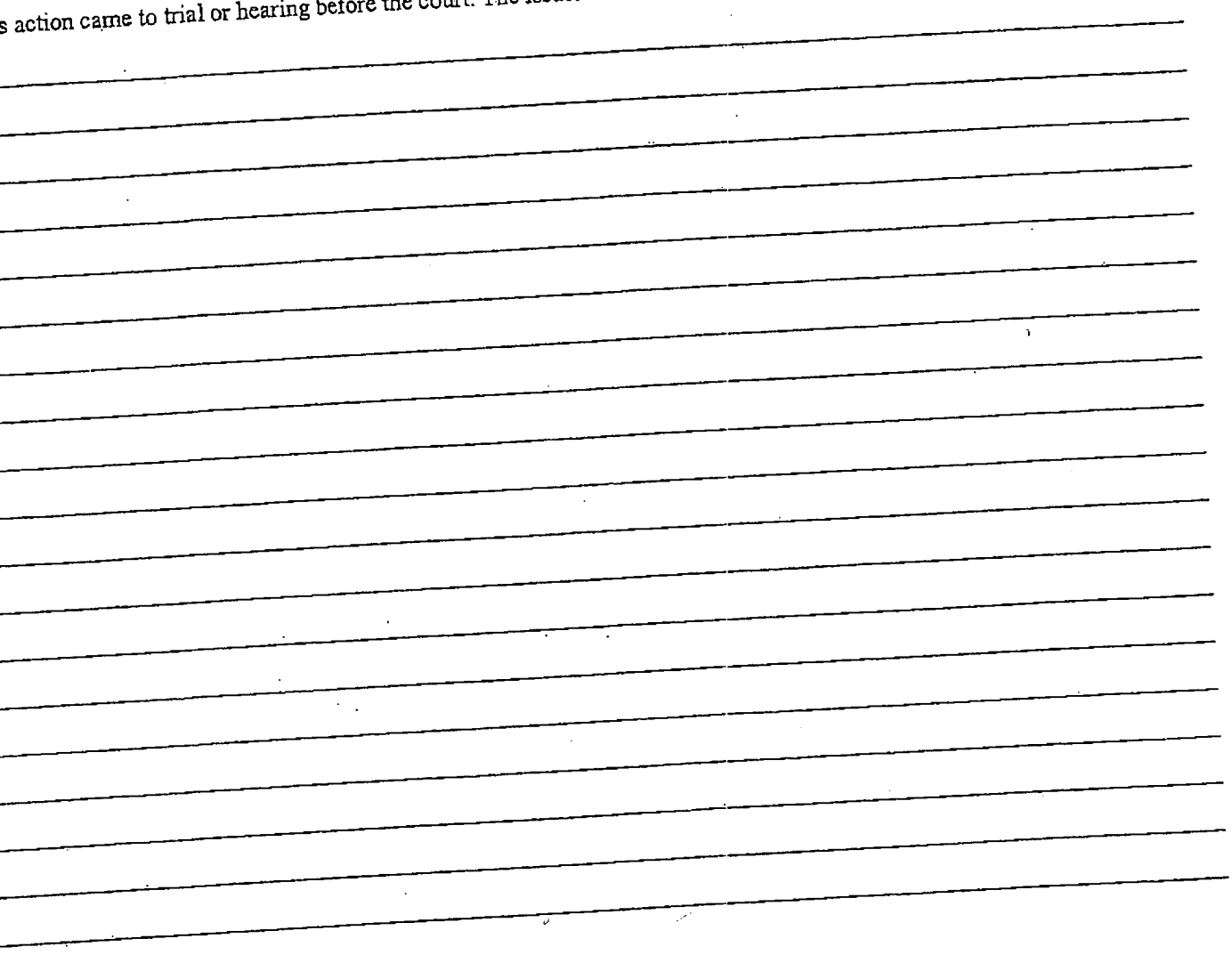
Beth A. Carrigg - Clerk of Court

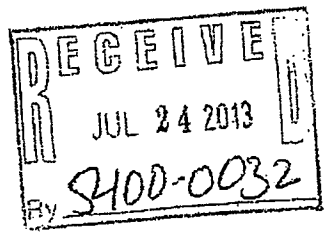
Court Reporter

CPFORM4M
SCRCP Form 4C (Revised 12/2011)

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.





CPFORM4M
SCRCP Form 4C (Revised 12/2011)

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NUMBER: 9920867

RICKY D. KNEECE, EMPLOYEE, CLAIMANT/APPELLANT,

- V -

KNEECE FARMS, EMPLOYER,

AND

LEGION IN LIQUIDATION AND THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, CARRIER, DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina on September 20, 2011 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed ~~October 15, 2011~~ April 19, 2012

APPEARANCES:

Claimant/Appellant represented by
Scott Elliott, Esquire of Columbia, South Carolina.

Defendants/Respondent represented by
Mark D. Cauthen, Esquire, of Columbia, South Carolina.

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STATEMENT OF THE CASE

The parties were heard by Commissioner Derrick L. Williams on February 14, 2011, in St. Matthews, South Carolina. On April 28, 2011, he issued the following Order:

ORDER

IT IS THEREFORE ORDERED, based on the foregoing findings of fact and conclusions of law:

1. The Defendants are responsible for the payment to Claimant pursuant to §42-9-10(C) of all weekly compensation in the amount from the period beginning November 22, 1999, for life with credit given for 157 1/7 weeks of weekly compensation heretofore paid to Claimant.

2. The Defendants are responsible for Claimant's causally related medical treatment for his compensable injuries pursuant to §42-9-10(C) as set out herein.

3. The Defendants are responsible for the Claimant's future medical treatment for his compensable injuries for his lifetime pursuant to §42-9-10(C) as set out herein.

4. The Defendants are responsible for reimbursing the Claimant all mileage and prescriptions as herein set out.

Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on September 20, 2011. All testimony and documentary evidence has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

In the appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, 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 in the instant case,

the Commission, by unanimous vote, has determined to affirm in part and reverse in part.

FINDINGS OF FACT

Based on the evidence of record, it is found as a fact:

1. That the Claimant Ricky Kneece, was an employee of Kneece Farms on or about November 22, 1999, on which date he sustained injuries to his brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth and psychological.

2. That proper notice was given to his employer.

3. That the Claimant's average weekly wage at the time of the accident was $769.23 with a corresponding compensation rate of $461.67.

4. That the Claimant's education is limited to the 12th grade, and that the Claimant's only work experience has been that of a farmer on farms owned and operated by his family members;

5. That Claimant's wife was a very credible witness. This finding is based on my observation of her and her testimony at the hearing. Mrs. Kneece testified truthfully and accurately (compared to the medical evidence) to her husband's limitations, both physically and psychologically. She also testified very honestly about the nature of the work Claimant is able to perform, and the fact that his family has essentially kept him working because he is family. Mrs. Kneece was often emotional when honestly describing the fact that her husband is now only a "shell" of his former self.

5. That as a result of his injuries, the Claimant is no longer able to operate as a farmer/owner/operator of a farm supply and farming operation; his cognitive and emotional/psychological impairments and memory loss do not permit him to make calculations or calibrations of irrigation equipment, sprayers, chemical mixes, medications, or operate sprayers or combines or to manage the farm purchases, expenses, accounts or farm business; his physical limitations do not permit Claimant to climb, bend or stoop and prohibit him from the physical movement involved in climbing stairs or ladders, making repairs of equipment or the physical activity of planting, weeding and harvesting; and that only by virtue of the accommodations that the family farm has made is the Claimant able to perform very limited activities normally associated with farming.

7. That as a result of this accident, the Claimant has sustained permanent physical brain damage pursuant to the reports of Dr. Waid, Dr. Shissias, Dr. White, and Dr. Lenwood Smith.

8. That the Claimant now functions in the low to moderate IQ range with an IQ of 76 pursuant to reports of Dr. Randolph Waid; that as a result of neurocognitive impairments, the Claimant has suffered a 22% impairment as a result of his neurocognitive deficits

assigned by Dr. L. Randolph Waid; Dr. Waid made the following Assessment of the Claimant:

Axis 1
cognitive disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury

Personality change
labile-/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury

Axis 3
status post-traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and shoulder

9. That as a result of Claimant's accident, the Claimant has suffered irritability, sleep disturbance, headaches, poor concentration, memory loss, fatigue, loss of interest in his vocational and avocational pursuits; mood swings and depression for which he has been treated by Drs. Bergmann and Deal; that as a consequence of the foregoing, the Claimant has experienced a permanent impairment of 11% to the whole person for his psychological status and not for his cognitive impairments as opined by Dr. Bergmann; that the Claimant has benefited from and will continue to benefit from treatment by Dr. Bergmann and Dr. Deal for his workers compensation injuries;

10. That the Claimant has suffered hypothyroidism as a consequence of his head trauma suffered in his 1999 accident; that Claimant's lethargy, weight gain, general lack of energy and desire, that the Claimant has been treated by Dr. White and is currently being treated by Dr. Wicker for his hypothyroidism and that Claimant has benefited from this treatment and will continue to benefit from treatment from Dr. Wicker for this hypothyroidism;

11. Dr. Charles Shissias has treated Claimant for his chronic daily headaches, memory loss and depression; that the Claimant has benefited from Dr. Shissias' treatment of his causally-related injuries and Claimant will benefit from further treatment from Dr. Shissias.

12. That Claimant's dizziness which is causally related to this accident resulted in a fall and fracture of the index metacarpal of his left hand; that the Claimant has benefited from the treatment of Dr. Ugino of this injury and will continue to benefit from Dr. Ugino's treatment for this injury;

13. That the Claimant continues to suffer from certain vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, decreased frustration tolerance and decreased libido as diagnosed by Dr. Tora Brawley, Defendant's neuropsychologist; that the Claimant will benefit from treatment for these symptoms as recommended by Dr.

Brawley.

14. That the Claimant has not returned to work for the Defendant employer Kneece Farms since his November 22, 1999, accident.

15. That the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature. Claimant's wife gave credible testimony that no such job ordinarily exists, and that but for this being his family, the Claimant could not and would not be hired given his great cognitive and physical limitations; that he has been "working" and drawing a paycheck from the farm, this is only due to the largesse of his family, not because he performs any substantial, beneficial work for the farm.

16. That the services that Claimant performs for the family farm, Delano R. Kneece & Son, Inc., given the accommodations his family has made so as to enable Claimant to perform certain limited services, are not evidence that a reasonably stable market exists for the services Claimant provides for the family farm.

17. That those amounts paid the Claimant by the family farm, Delano R. Kneece & Son, Inc. are not intended to represent wages earned and the amount is not calculated on the basis of services performed by Claimant on behalf of his employer; that, further, those amounts paid the Claimant by the family farm are in the nature of a gift and do not constitute wages for work expended on behalf of his employer or wages calculated on the basis of productivity.

18. That the Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable, sustained basis in accordance with the opinion of Dr. Stewart; that, therefore, the Claimant is unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist.

19. That based on the substantial weight of the medical evidence in this case, the Claimant is permanently and totally disabled, with a physical brain injury, pursuant to § 42-9-10; that there is essentially no evidence contradicting several doctors finding a physical brain injury; that due to the combination of his injuries (left knee, left shoulder, psychological), and the fact that Claimant's employment is found to be benevolent or sheltered in nature, the Claimant is permanently and totally disabled and entitled to lifetime benefits.

20. That the Claimant sustained a causally related injury to his left knee; that his injuries to his left knee were so severe as to require two surgeries; that as a result of Claimant's injuries, Dr. James O'Leary assigned a 10% impairment rating to Claimant's lower left extremity.

21. That the Claimant suffered a causally related injury to his left shoulder and elbow; that his injuries to his left shoulder were so severe as to require two surgeries; that as a result

of Claimant's injuries. Dr. Michael Green assigned a 17% impairment rating to Claimant's upper left extremity;

22. That since the date of Claimant's accident on November 22, 1999, the Defendants have paid the Claimant temporary total disability payments of 157 1/7 weeks.

23. The Defendants have failed to pay for all medications prescribed by Claimant's physicians, to include Drs. Deal, Wicker, Shissias, and Ugino. The Claimant will benefit from future treatment. The Defendants are ordered to pay for those medications for which the Defendants are responsible including medications for all causally related injuries.

24. That the Claimant has accumulated mileage of 3,658 for which he is entitled to reimbursement.

25. That the Claimant has accumulated charges of $14,010.77 in prescriptive medicines for which he is entitled to reimbursement.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. Pursuant to §42-1-160, Claimant sustained an admitted compensable injury by accident on November 22, 1999.

2. That as a result of this accident, Claimant sustained injuries to his brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth and psychological.

3. The Claimant's average weekly wage is $769.23 with a compensation rate of $461.67.

4. The Claimant is totally and permanently disabled with a physical brain injury pursuant to Section 42-9-10. Accordingly, the Claimant is entitled to payment of weekly compensation in the amount of $461.67 from November 22, 1999, to the present and continuing for Claimant's lifetime with credit given the Defendants for 157 1/7 weeks of weekly compensation heretofore paid Claimant and medical treatment for life.

5. In order to be entitled to total and permanent disability workers' compensation benefits for a work injury, claimant must be unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003).

6. "Total disability" under the Workers' Compensation Act does not require complete, abject helplessness; rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471(Ct. App. 1989).

7. While benevolent employment has not been specifically addressed by our courts, it has been addressed in North Carolina. As our Workers' Compensation Act was patterned after that of North Carolina, decisions of the North Carolina Courts in workers' compensation cases are given "great weight." See, e.g. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). "[A]n injured employee's earning capacity **must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market.**" Peoples v. Cone Mills Corp., 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) [Emphasis added]. Thus, "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hosp., 346 N.C. 760,765,487 S.E.2d 746,750 (1997). The rationale behind this is simple: proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified

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because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income or reduced income should the employee's job be terminated. Peoples. 316 N.C. at 438, 342 S.E.2d at 806. See also. Baker v. Sam's Club. 589 S.E.2d 387 (N.C. App. 2003) (requiring Commission to make factual findings about the suitability of claimant's post-injury job with employer).

8. Similarly, South Carolina Courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services. Inc. 323 S.C. 113, 473 S.E. 2d 699 (1996). Evidence that a workers' compensation claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial. McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471(Ct. App. 1989). In Stephenson v. Rice Services, Inc., the Claimant, although employed, was capable of performing work so limited in quality and dependability or quantity that no reasonably stable market existed for his skills and was held to be totally disabled. In its opinion, the Court noted that a person who becomes a paraplegic as a result of a work-related accident may recover for permanent and total disability under section 42-9-10 yet continue to work. 323 S.C. 121, fn 2. See also Lyles v. Quantum Chemical Company 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc. 354 S.C. 100, 580 S.E. 2d 100 (2003).

9. As a consequence of his total and permanent disability due to his physical brain injury, the Claimant is entitled to lifetime benefits under the South Carolina Workers Compensation Act. S.C. Code Ann. §42-9-10 (C) which provides as follows:

Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Accordingly, the Claimant is entitled to lifetime medical treatment for his compensable injuries to be directed by his authorized treating physicians. The Defendants are likewise responsible for reimbursement for all causally related medical expenses incurred to date as well as medical care in the future. In particular, the Claimant is entitled to treatment by Drs. Bergmann and Deal, Dr. Shissias, Dr. Wicker and Dr. Ugino going forward. The Defendants are also responsible for reimbursing the Claimant for his medical bills for Dr. Ugino, Dr. Shissias, Dr. Wicker and Dr. White. Moreover, to the extent that the Defendants have failed to reimburse the Claimant for medical treatment by Drs. O'Leary and Green, the Defendants shall reimburse the Claimant for all medical expenses incurred for his treatment by these orthopedists.

10. In addition, the Defendants are responsible for reimbursement for all prescription medication associated with the treatment of Claimant's injuries to date. In particular, the Defendants are responsible for reimbursement all such prescriptive drugs found Claimant's Exhibit 2.

11. The Defendants are also responsible for reimbursing Claimant for all mileage incurred to date. In particular, the Defendants are responsible for reimbursing Claimant for all mileage set out on Claimant's Exhibit 1. Further, the Defendants would be liable for reimbursing the Claimant for all future mileage costs associated with his treatment.

12. Because the Claimant is totally and permanently disabled with physical brain damage as set out in S.C. Code Ann. §42-9-10 (C) he is entitled to payment of weekly

compensation from the date of this November 22, 1999 accident. The Claimant has been paid 157 1/7 weeks of weekly compensation. The Defendants shall pay the Claimant for the remaining weeks of weekly compensation through the date of this order. The Defendants shall continue making weekly compensation to the Claimant in the amount of $461.67 per week for his lifetime.

13. The Claimant has benefited from the treatment of Dr. Lawrence H. Bergmann, Dr. Roger Deal, Dr. Charles Shissias, Dr. Christopher Wicker and Dr. Michael R. Ugino and pursuant to §42-9-10 (C) Claimant is entitled to continuing treatment by these physicians as well as all other causally related medical treatment for life. §42-9-10 (C)

ORDER

FINDINGS OF FACT

The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101.

CONCLUSIONS OF LAW

Based on the Finding of Fact above, the Commissioners conclude that the Claimant sustained an injury pursuant to Regulation 67-1101. Accordingly, the Commissioners reverse the Findings of Fact and Conclusions of Law of the Hearing Commissioner that the Claimant was totally disabled accompanied by physical brain injury pursuant to Section 42-9-10(c).

THEREFORE, IT IS ORDERED that the claim be remanded to the Jurisdictional Commissioner for a decision with regard to permanency as set out herein. All other Findings of Fact and Conclusions of Law are affirmed.

IT IS SO ORDERED.

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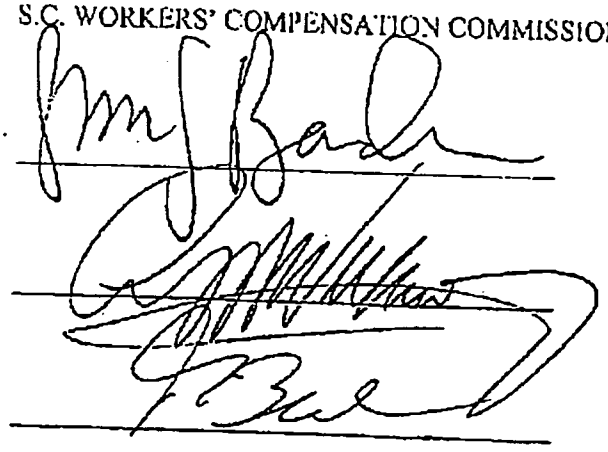
AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION



FULL AFFIRMATION

CONCUR:

CERTIFICATE OF SERVICE

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

This 19 day of April, 2012

By _____

Administrative Assistant to the Commissioner

Mark D. Cauthen

Scott A Elliott

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STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 9920867

Ricky D. Kneece, Claimant, vs. Kneece Farms, Employer, and Legion in Liquidation and The South Carolina Property and Casualty Insurance Guaranty Association Carrier/Defendant.	DECISION AND ORDER

DATE AND LOCATION OF HEARING: February 14, 2011, Calhoun County

Employee/Claimant represented by:
Elliott & Elliott, P.A., Attorneys at Law, Columbia, South Carolina with Scott Elliott, Esquire, appearing.

Carrier/Defendant represented by:
McKay, Cauthen, Settana & Stubley, P.A., Attorneys at Law, Columbia, South Carolina with Mark D. Cauthen appearing.

April 28, 2011

APA SUBMISSIONS

Claimant's APA Submissions:

TAB	NAME OF PHYSICIAN/OTHER	DATE OF REPORTS	PAGE NO.
1.	Dr. William W. Stewart	9/16/10-12/31/04	1-5(5A-H)
2.	Dr. Charles Shissias	3/25/10-4/2/10, 10/29/10	6-9, 348-350
3.	Dr. L. Randolph Waid	04/15/02-2/8/07	10-25
4.	Dr. Lawrence Bergmann	3/15/05-5/5/10, 5/5/10-1/12/11	26-63, 334, 335-341
5.	Dr. Roger Deal	6/6/06-5/5/10, 6/22/10-12/9/10	64-95, 342-347
6.	Dr. Michael S. Green	11/5/01-3/30/07	96-143
7.	Dr. James A. O'Leary	12/21/01-9/23/04	144-161
8.	Dr. Chrisopher Wicker	3/24/09-6/17/09	162-174
9.	Dr. Carl A White	3/13/01-11/16/08	175-184
10.	Dr. Devin Troyer	2/11/02-12/2/02	185-201
11.	Dr. Lenwood P. Smith	11/22/99-9/30/01	202-212
12.	Dr. Bradley P. Presnal	1/9/01	213-214
13.	Dr. Phillip E. Smith	9/22/01	215-217
14.	Dr. Frank R. Voss	12/1/99-7/26/00	218-224
15.	Dr. Linda S. Moore	7/3/00-8/21/00	225-230
16.	Dr. H. L. Rick Milne	12/3/99-2/1/00	231-233
17.	Lexington Medical Center	1/5/00-2/1/00, 11/19/10	234-237, 351-352
18.	Dr. Jean-Francois Lefaivre	11/22/99-12/22/99	238-240
19.	Karen Shelton, RN	7/11/10	241
20.	Dr. Michael R. Ugino	11/22/10	353-354

EXHIBITS:

1. Mileage records
2. Medical and pharmacy bill records
3. Correspondence to Cauthen of
   September 27, 2005
   December 22, 2005
   June 15, 2006
   September 24, 2008
4. Employee Records

Defendant's APA Submissions:

TAB	NAME OF PHYSICIAN/OTHER	DATE OF REPORTS	PAGE NO.
1	Palmetto Richland Memorial Hospital	11/22/99-11/27/99	242-285
2	The Eye Center - Dr. Rick Milne	02/29/00	286-287
3	Moore Orthopaedic Clinic-Dr. Bradley Presnal	01/09/01	288-292
4	Midlands Orthopaedics-Dr. Michael Ugino	11/05/01-11/21/01	293-296
5	Midlands Orthopaedics-Dr. Michael Green	10/04/04-03/20/06	297-300
6	Post Trauma Resources-Dr. Lawrence Bergmann	07/08/05-08/11/10	301-306
7	Lexington Medical Center	02/21/06	307
8	Post Trauma Resources-Dr. Roger Deal	02/28/06-08/11/10	308-319
9	Internal Medicine Associates-Dr. Carl White	09/20/07-07/23/08	320-324
10	SC Neurological Clinic-Dr. Julian Adams	05/14/08-05/28/08	325-329
11	Internal Medicine Associates-Dr. Christopher Wicker	12/04/09-04/23/10	330-333
12	Cynthia P. Grimley, MS, CRC, CCM, DABVE	02/11/11	334-355
13	USC Department of Neuropsychiatry & Behavioral Science-Dr. Tora Brawley	02/11/11	356-358

EXHIBITS:

TAB	
1	Deposition transcripts of Claimant dated 12/17/04 and 9/23/10
2	Deposition transcript of Dr. Lawrence Bergmann
3	Hearing transcript from 11/11/05
4	Form 17 signed 6/16/06
5	Surveillance videos
6	Claimant's tax records from 1999 to 2006
7	Deposition transcript of Roxanne Kneece
8	Letter to Scott Elliott dated 12/7/10
9	Email from Scott Elliott dated 12/30/10
10	Letter to Janice Treisch/Dr. Tora Brawley dated 12/30/10
11	Letter from Dr. Tora Brawley dated 1/20/11
12	Letter to Scott Elliott dated 12/14/10
13	Letter from Cynthia Grimley dated 12/27/10
14	Form 27 5o Scott Elliott dated 12/10/10
15	Letter to Scott Elliott dated 1/13/11
16	Letter to Scott Elliott dated 1/21/11
17	Letter from Scott Elliott dated 1/24/11
18	Letter from Cynthia Grimley dated 1/26/11
19	Claimant's tax records from 2007 to 2009
20	Letter to Scott Elliott dated 12/10/10
21	Cynthia P. Grimley CV
22	Letter to Big S Discount Pharmacy dated 2/11/11

STATEMENT OF THE CASE

This matter was commenced with the filing and service of the Form 50 dated November 7, 2001, alleging that the Claimant, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999. Subsequent to his accident, the Defendants provided certain treatment to the Claimant for his injuries and paid Claimant certain temporary total disability payments.

On or about July 28, 2003, the Carrier, Legion Insurance Company (Legion) went into liquidation and the claim was turned over to the South Carolina Property and Casualty Guarantee Association (Guarantee Association). In November of 2004, the Defendants filed and served a Form 21 to stop payment of compensation. A hearing on the Form 21 was heard January 11, 2005.

As a result of the January 11, 2005, hearing, the Commission issued its Order April 18, 2005 (2005 Order). The 2005 Order found that, *inter alia*, in addition to the injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth, the Claimant also sustained compensable injuries to his left shoulder, left elbow and for depression. The 2005 Order also found that as a result of his injury, the Claimant was diagnosed with conditions which include a closed head injury, chronic olecranon bursitis of his left elbow, intra articular left biceps tendon rupture, patello femoral syndrome of symptomatic plica, interior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femor condyle fracture and a fracture of the nasal bridge and left nasal bone. The 2005 Order found that the Claimant was not at MMI.

The 2005 Order found the Defendants responsible for Claimant's past causally-related medical treatment to include past treatment by Dr. Michael Green for the left upper extremity

and by Dr. Green and Dr. James O'Leary for the left lower extremity and for treatment rendered by Dr. Randolph Waid. Moreover, the 2005 Order found the Claimant was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up with Dr. Waid. Last, the Order found that Defendants were responsible for Claimant's additional medical treatment from Dr. Green including medications and surgery for Claimant's left shoulder and elbow.

At the January 11, 2005, hearing, the Defendants authorized the services of Dr. Green and Dr. O'Leary for treatment to and surgery on Claimant's left knee. However, the 2005 Order required the Defendants to provide continuing temporary total disability payments and to provide for a second surgery for Claimant's left shoulder and to provide for treatment of his depression.

The Defendants appealed the 2005 Order. However, the parties reached an agreement settling all issues arising out of the 2005 Order wherein the Claimant agreed to permit the Defendants to stop making temporary total disability payments in exchange for the Defendants dismissing their appeal of the 2005 Order and providing the medical treatment required in that order. The unappealed 2005 order, however, constitutes the law of the case.

Subsequently, the Defendants provided certain treatment for Claimant's injuries. The Defendants provided treatment for the Claimant by Dr. Green and Dr. O'Leary as required by the 2005 Order. In addition, the Defendants provided treatment by Dr. Lawrence Bergmann and his associate, psychiatrist Dr. Roger Deal.

On or about July 9, 2010, the Claimant filed a Form 50 requesting a hearing seeking an Order of this Commission finding him to be permanently and totally disabled with a physical brain injury and pursuant to S.C. Code Ann. Section 42-9-10, Claimant sought all benefits to

which he was entitled under the act. A hearing was held on Claimant's Form 50 February 14, 2011.

At the outset of the hearing, the Defendants raised an objection to one of the Claimant's exhibits, certain payroll records found at Exhibit 4 to Claimant's September 29,2010 APA submissions. The Defendants' objection to these submissions was overruled. Subsequently, the Defendants renewed their motion previously denied February 10, 2011, to compel Claimant to submit to an examination of a neurologist and to postpone to the hearing. After argument of counsel, the Defendants' motion to compel and to postpone the hearing was denied.

At the hearing in this matter held February 14, 2011, the parties submitted the APA submissions as identified above: The Claimant alleges that he has reached maximum medical improvement (MMI) and is permanently and totally disabled with a physical brain injury pursuant to Section 42-9-10. Claimant seeks lifetime compensation benefits; both past and future, lifetime causally related medical treatment and reimbursement for any causally related medicals. The Employer/Carrier acknowledges that the Claimant is at MMI and that even though he has some diagnosed physical brain injury, Claimant is has not sustained a complete loss of earning capacity and is not permanently and totally disabled. The Employer/Carrier stipulate to any causally related medicals that the doctors have set forth.

CLAIMANT'S BIOGRAPHICAL

The Claimant is a fifty-one (51) year old, married male. He has a high school education and has worked as a farmer his entire working life. The Claimant has had no additional schooling or training since high school except for instruction from farm equipment salesmen in the use of new farm equipment (2005 Order at page 3). He currently works for Delano R. Kneece & Son, Inc., a family farm owned by the Claimant, his father and his family (Tr. page 14, line 19

-page 15, line 3). However, at the time of his accident in November of 1999, the Claimant was in the employ of Kneece Farms. The Claimant has not returned to work for the Defendant Kneece Farms (Roxanne Kneece Dep. Page 8, line 13 - Page 9, line 25) The Claimant also has a history of sharecropping other farm land.

EVIDENCE OF THE CASE

Testifying at the hearing were Claimant Ricky Kneece and his wife, Roxanne Kneece.

Ricky Kneece, the Claimant, does not remember his accident (Tr. page 15, lines 4-6). Prior to his accident, the Claimant was able to perform all of the duties and responsibilities of a farmer, to include ordering chemicals, pesticides, fuel, seed, fertilizers, and seed varieties. He was a general decision maker for the farm. He was able to perform farm chores which required climbing, stooping, and bending. Such chores would include climbing grain legs, performing irrigation duties, and doing roof work. The Claimant was able to operate all farm equipment and had no limitations in this regard (Tr. page 15, line 7 through page 16, line 9).

The Claimant testified that as a result of his accident, he injured his head, and his left side to include his shoulder, leg and knee (Tr. page 16, lines 10-14). The Claimant testified that he is neither physically nor mentally capable of farming since his accident. For instance, the Claimant testified that he is unable of climbing elevator legs. Moreover, the Claimant testified that he is unable to make decisions such as calibrating sprayers, working on equipment, or making decisions on ordering seed and supplies (Tr. page 16, lines 19-25).

The Claimant testified that the injury to his head and brain affected his memory. The Claimant is no longer able to stay focused. He gets dizzy a lot and is unstable. He described his dizziness and instability as "the staggers". The Claimant testified that since the accident he

has developed what he calls "staggers". The Claimant frequently loses his balance and testified that the previous fall he had an episode of the "staggers" while climbing stairs at the farm and fell requiring treatment by a physician (Tr. Page 23 line 12 – Page 24, line 6).

The Claimant gets headaches frequently "...[j]ust every day." Being unable to focus, he repeats himself and has to do things over. The Claimant admits making a lot of mistakes in what he does (Tr. page 17, lines 1-8). Having a good memory and being able to focus is important on a farm. For instance, irrigation equipment requires the ability of the farmer to focus his attention on controlling water flow and an even application of water (Tr. page 17, lines 9-13). The Claimant is able to help turn irrigation on and off but is unable to program the irrigation equipment (Tr. Page 31, line 12-18).

A farmer must have good memory and remain focused when planting seed so as to know how to set the seed, its distance and depth; mistakes can prove costly (Tr. page 17, line 24-page 18, line 4). Memory loss affects the Claimant's ability to spray crops. The Claimant must have full control of his memory so that he can calculate the amount to be mixed and sprayed. The improper mixture of pesticides and other chemicals or fertilizer to be sprayed can stunt crop growth which can be a costly mistake (Tr. page 18, lines 5-16).

The Claimant drives a tractor. However, he is not permitted to drive all farm equipment (Tr. page 19, lines 4-6). The Claimant is no longer permitted to operate a combine (Tr. Page 27, lines 11-13).

The Claimant is permitted to drive a tractor with GPS, seed monitors and a field find. The Claimant testified that once other farm hands get the Claimant started on the tractor, he can run it. Because the tractor has a field finder using the GPS operating off of satellites, the tractor steers itself (Tr. Page 19, lines 2 - page 20 line 1). The Claimant testified that once he gets the

tractor to the field, "you mash a button and it starts you at the edge. And you turn around at the end and you have got one button you mash. You turn around and you mash it. It steers." The tractor is air conditioned and has automatic transmission (Tr. page 32, line 8 – page 33, line 3). If the Claimant encounters a problem or cannot finish the field, someone else must finish the field for him. He has encountered difficulties driving tractors on many occasions (Tr. Page 19, lines 2 - page 20 line 1). The Claimant testified that before the accident he was able to keep up with the business accounts on the farm but no longer can (Tr. Page 20, lines 2-7). The Claimant is not able to sleep well since the accident (Tr. Page 20, lines 8-14). The Claimant testified that his work on the farm is "mainly sitting and watch stuff while they are running machinery." The Claimant is able to watch certain of the farm processes and perform simple task such as turning the machinery on and off (Tr. Page 30, line 3 – page 31, line 11).

The Claimant testified that since the accident he has developed a temper, has memory loss, and repeats himself. His temper has caused him difficulty with not only his family members but also with the sheriff's department (Tr. Page 20, lines 15-25). Claimant's headaches contribute to his irritability and loss of patience. Claimant's headaches dull his senses and focus. Claimant testified that his treatment by Drs. Bergman, Deal and Shissias have helped him manage his headaches, temper, moods and ability to cope (Tr. Page 21, lines 11-25). The Claimant's family doctor, Dr. Wicker, is treating the Claimant for a thyroid condition related to his accident (Tr. Page 22, lines 3-21).

Claimant acknowledges that he receives a check from the family farm but has no idea how much the checks are for or how the check amounts are calculated. In fact he does not even see the checks. The Claimant's finances and the farm finances are managed by Claimant's wife Roxanne Kneece (Tr. Page 24, lines 9-25).

The Claimant testified that after his accident in 1999, he went back to work and "done what I could" (Tr. Page 26, lines 4-19). The Claimant testified that his physical and mental abilities no longer permit him to farm as he did prior to his accident (Tr. Page 25, lines 1-15). The Claimant testified that if he were to look for other work, no one would hire him. Because of his limitations, Claimant's father, Delano Kneece, wants to see the Claimant taken care of and his family have made accommodations for the Claimant that permit him to "do kind of what I am able to do" on the farm. (Tr. page 43, lines 3 – 22).

Roxanne Kneece. The Claimant's wife, Roxanne Kneece, testified and was a very credible witness. Mrs. Kneece testified that she was employed at the Delano R. Kneece and Son, Inc. farm ("the farm" or "the family farm"). Her duties include bookkeeping, serving as treasurer, decision maker, inventory, order and other general duties. Mrs. Kneece has worked on the family farm since her husband's injury (Tr. Page 44, lines 18-25). The family farm was started by Mr. Delano Kneece, the Claimant's father. The farm consists of approximately 2,000 acres. The family farm grows corn, cotton, peanuts and cattle (Tr. 45, lines 1-14). Prior to Claimant's accident, his father, Delano Kneece actively worked the farm.

Farming is very strenuous. It requires considerable climbing. Farming on the Delano R. Kneece and Son, Inc. farm requires climbing up the side of grain bins, climbing elevator legs, and climbing sheds in need of repair. The elevator legs are 200 feet tall. Since the Claimant's accident, he is no longer permitted to climb grain bins, elevator legs or even stairs (Tr. Page 47, lines 3-15). In November of 2010, the Claimant was attempting to climb a piece of equipment operated by pulling two small levers (approximately 10 steps). The Claimant got the "staggers" and fell breaking his hand. Mrs. Kneece testified that given her experience in farming, the

Claimant's attempt to pull these two small levers would not constitute farming. (Tr. Page 47, line 16 – page 48, line 10).

Mrs. Kneece testified that stooping and bending are important on the farm. A farmer or farm hand must be able to get under farm implements, behind the tractor and repair or adjust them. One must be able to stoop to get around grain facilities and unloading facilities. However, the Claimant's knee injury will not permit him to stoop and so the family farm pays a farm hand to do those duties that the Claimant was once able to do (Tr. Page 48, lines 14-25).

When asked how the Claimant's brain injury affected him, Mrs. Kneece testified, "I was married to one man for 17 years. I'm married to a totally different man now. Same body. There's a shell there but there's not a person. And it's hard. Excuse me. And it really hurts to have to talk about him in front of him. His dignity is worth something." (Tr. Page 49, lines 9-11).

Mrs. Kneece testified that his brain injury had affected his temper. Before the accident, the Claimant was mild mannered. Since the accident, the Claimant has developed a "very short fuse." The Claimant's anger has alienated his family members. The Claimant's anger has not only been directed at his family but also to strangers. Mrs. Kneece testified that on one occasion, the Claimant became threatening with a Fire Marshal attempting to put out a fire in a nearby field. The Claimant escaped criminal charges in this particular incident. (Tr. Page 49, line 19 – page 50, line 15).

Mrs. Kneece testified that the treatment by Doctors Bergmann and Deal have been helpful in helping the Claimant control his anger (Tr. Page 50, line 21). Mrs. Kneece testified that since the accident, the Claimant has been unable to get a good night's sleep. She testified that the Claimant "yells out in his sleep. He jumps. He jerks with nervous twitches like he's

falling off the bed. He frails. There is just never a restful night, never." Doctors Bergmann, Deal and Shissias are trying to treat the Claimant for those causes of his fitful sleep. Their treatment has been somewhat helpful. However, the Claimant still sleeps fitfully most nights, wakes up tired and yet does not remember what has caused his sleeplessness. Drs. Deal and Shissias have prescribed medication to eliminate the Claimant's nightmares (Tr. Page 50, line 25 – Page 51, line 17).

Mrs. Kneece testified that the Claimant's memory has been affected by his accident. First and foremost, the Claimant is forgetfulness interferes with the Claimant's ability to seek and obtain treatment. The Claimant is unable to remember the nature of the treatment and instructions given him by his physicians. The Claimant's memory is not consistent; he may recall a fact one day and forget it the next day. Moreover, if one attempts to remind the Claimant of a forgotten fact, his temper will flare (Tr. Page 52, lines 1-18).

The Claimant's memory loss affected his ability to be an effective farmer at the family farm. Mrs. Kneece testified that a farmer must be able to determine what the farm's needs are for pesticides and fertilizer. There are many different kinds of each and a farmer must be able to determine which product is best for his particular farm. Having determined the kind and nature of chemicals to purchase, the farmer must then know the quantities he must purchase. Once purchased and delivered to the family farm, these chemicals must be mixed and loaded into sprayers. The sprayers must be calibrated and the pesticide or fertilizer dispensed in the appropriate amounts. Certain chemicals are very expensive and may cost as much as $375 an ounce. Prior to his accident the Claimant was able to make these determination and calibrations independently. He no longer can, and these responsibilities have been turned over to the Kneeces' son, Kain (Tr. Page 52, line 19 – page 54, line 8).

Mrs. Kneece testified that prior to his accident, the Claimant very familiar with the family farm's revenue and expenses, deliveries and inventory and the family farm's financial position. However, since the accident he unable to manage the farm finances. In fact, his faulty memory puts the farm at risk of financial losses. Mrs. Kneece testified that because of its size, the family farm is able to purchase chemicals and other supplies on credit. At the request of neighboring farmers, the family farm will purchase chemicals and other supplies on behalf of their neighbors who will reimburse the family farm for these supplies. On more than one occasion the Claimant has ordered supplies for a neighbor and forgotten inform Mrs. Kneece or anyone else in authority at the farm of his purchase. On one such occasion, the Claimant purchased $8,900 in supplies for his neighbor without making any record of the debt. The family farm was reimbursed by its neighbors only after the neighbors came forth to repay the family farm for these supplies. Had the neighbors not been so honest, Delano R. Kneece and Son Inc. would have suffered a financial loss as a result of the Claimants poor memory. (Tr. Page 54, line 14 – page 56, line 2).

Explaining the Claimant's attendance at the family farm, Mrs. Kneece testified that she and the Claimant live on the farm. Their home is on farm property and steps away from the fields and shops (Tr. Page 56, lines 3-15). Mrs. Kneece explained that the Claimant is easily distracted by telephone calls, visits from neighbors and otherwise has become unfocused. As a consequence, the vast majority his time spent on the family farm is not productive for farm purposes (Tr. Page 56, lines 16 – Page 57, line 9). The Claimant had been very energetic and active prior to his accident. However, he has become lifeless since his accident. The Claimant has become depressed. Doctors Deal, Bergmann and Shissias are working with the Claimant to address his depression (Tr. Page 57, line 10 – Page 58, line 2).

Mrs. Kneece testified that the Claimant could no longer operate farm equipment as he could before the accident. Mrs. Kneece described a huge harvester which the Claimant was able to drive prior to his accident but he was prohibited from driving since. The Claimant is unable to operate the peanut combines which harvest the peanuts. Prior to the accident Claiment was able to operate the more traditional equipment employed by the farm to spray the fields. After the accident Claimant was unable to operate a sprayer. To accommodate this loss of manpower, the farm purchased a more sophisticated sprayer operated by multiple computer boards which the Claimant's son and others operate. Because the Claimant is no longer mentally capable of making the necessary calculations in mixing the chemicals, he is a risky field hand. If Claimant were to incorrectly mix chemicals which were then sprayed on the crops in the field, he could damage or kill the crop at great cost to the farm (Tr. page 58, line 6 – page 60, line 24).

Mrs. Kneece further explained that the Claimant has to have assistance in operating the tractor equipped with the GPS system. While Claimant is driving this sophisticated tractor to the field, a farm hand must accompany him in a truck. The chemical spray and seed have been pre-measured and loaded onto the tractor by others. The tractor has a seed monitor and chemical monitor to measure the planting functions. Claimant's son, Kain, pre-programs the computer boards. While the tractor is operating in the field, bells or alarms sound if the tractor's planting system fails to drop the seeds as required. If for some reason the GPS is unable to pick up the satellite, the Claimant is helpless to restore contact with the satellite and must stop until his son Kain can meet him in the field to reestablish contact with the orbiting satellites. Even with the GPS system , the Claimant will sometimes fail to completely plow the field. Moreover, this tractor is completely mechanized and requires no physical exertion to drive. Other than to turn

the tractor at the end of each row, the Claimant operates the tractor by simply mashing a button (Tr. Page 58, line 3 – Page 62, line 18).

Mrs. Kneece testified as to additional measures to which the family farm had gone to accommodate the Claimant's inability to farm since his accident. After the accident, the Claimant could no longer competently operate the corn dryer. The farm purchased an automatic corn dryer which is operated by the push of a button which the Claimant is capable of operating. The new corn dryer is equipped with an alarm which shuts off the dryer and notifies others on the farm if the corn dryer or the Claimant has experienced a problem (Tr. Page 63, line 5 - Page 64, line 15).

The family farm purchased a new peanut dryer, but because it was operated by a computer, the Claimant could not learn how to operate it. Accordingly, Mrs. Kneece and the Claimant's father determined that the existing peanut dryer was simple enough for the Claimant to assist the farm in operating. Basically the Claimant's only responsibility while the peanuts are drying is to stand and watch (Tr. Page 64, line 15 - Page 65, line 6).

In addition to the equipment purchases made to accommodate Claimant's mental and physical infirmities, the family farm added staff to perform the duties that the Claimant was capable of performing prior to his accident. After his accident, the Claimant's son, Kain was employed to work the farm full time. Mrs. Kneece testified that their son, Kain, was as skillful in farming, if not more so, than the Claimant prior to his accident. Kain Kneece performs 95 percent of the duties that the Claimant had performed prior to his accident. Kain Kneece is underpaid but is accepting of his circumstances because he knows he is accommodating his father (Tr. Page 65, lines 7-22 - Page 66, line 15).

The Claimant's father, Delano Kneece, continues to work on the family farm (Tr. Page 54, lines 3-11). Since the Claimant's accident, the family farm has been forced to employ additional farm hands on a temporary part time and full time basis to make up for the Claimant's inability to perform as a farmer. Mrs. Kneece testified that the persons or firms identified on Exhibit E-4 reflected those individuals that were retained to perform such farm chores such as fencing, electrical work, weeding, transportation, all of which the Claimant could do prior to his injury (Tr. Page 71, line 21 - Page 73, line 22).

For instance, Mrs. Kneece explained that Mr. Willie Dobbs was a full time employee hired to take over many of the Claimant's responsibilities on the family farm. Mrs. Kneece testified that Mr. Dobbs drives tractors, spreads chicken manure, spreads fertilizer, sprays, feeds cows, helps dry corn, helps harvest and dry peanuts, and helps harvest cotton. In this regard, Mr. Dobbs performs all the farm chores that the Claimant could do with no help prior to his accident (Tr. Page 98, lines 8-19).

Mrs. Kneece testified that the Claimant does help with the cattle. He watches over them and where he could give them their shots and vaccinations by himself before his accident, now he requires the help of other farm hands to perform these chores. The Claimant cannot remember how much medicine that is required for the shots and vaccinations; he cannot remember which cows he has vaccinated and which he has not. At times, four or five farm hands might help the Claimant give the shots to the cattle (Tr. Page 73, line 8 - Page 74, line 20). In fact, there are occasions when the farm hires farm hands to simply watch the Claimant in the field (Tr. Page 75, lines2-9).

Mrs. Kneece testified that the farm has hired the extra farm hands "[s]o, that Ricky's dignity can be saved. The work has to get done. He can't do it. So, we hire people to help us get it done. And he sort of hangs out with them." (Tr. page 79, lines 13-17)

Further, after the Claimant's accident to accommodate the loss of production caused by the Claimant's injuries, the family farm determined to stop planting less productive crops such as soybeans and wheat and to grow peanuts which are more productive. Whereas prior to his accident the Claimant was able to make all such production decisions, after the accident and because of the Claimant's incapacity, The family farm hired a grain broker to assist in making marketing decisions (Tr. Page 68, line 8 - Page 69, line 5).

Prior to the Claimant's accident, his father, Delano Kneece was employed full time at the farm. However, after the Claimant's accident, Delano Kneece took early retirement. Delano Kneece reduced his pay by approximately half so that the Claimant might be paid that amount notwithstanding his inability to farm. In addition, the Claimant's mother, Mrs. Shirley Kneece, retired from her employment on the family farm and her salary was put back in the farm budget (Tr. Page 66, line 18 - Page 68, line 7).

Mrs. Kneece, The family farm bookkeeper and treasurer, explained that the Claimant was paid $4,175.00 a month. Mrs. Kneece explained that the Claimant's father, Mr. Delano Kneece, instructed her make payment to Claimant in this amount on a monthly basis. The check is not calculated based on performance. The Claimant's father instructed Mrs. Kneece to pay the Claimant because"[w]e love him that much" (Tr. page 79, lines 13-24). Mrs. Kneece writes the check and deposits it; the Claimant never sees this check. In addition, Mr. Delano Kneece has made the decision to purchase additional land for the farm in the Claimant's and Mrs. Kneece's name. Mr. Delano Kneece has instructed that the Claimant will receive a $25,000.00 year bonus

for the purpose of making payment for these land purchases. These payments are made out of love and affection for the Claimant by his family (Tr. Page 69, line 6 - Page 71, line 18).

Asked whether the Claimant was capable of performing the functions of a farmer, field crop; farm worker general, liquid-fertilizer Servicer, or tractor operator as described in the report of Cynthia P. Grimley and Associates, LLC, Mrs. Kneece explained that Claimant was no longer capable of performing any of those farm positions. First, Claimant requires supervision in the performance of his farm chores. Second, the risk of harm or loss from a miscalculation in calculating or spreading fertilizer is too great to be entrusted to the Claimant. Third, the Claimant cannot operate farm tractor or equipment without expensive equipment to accommodate his physical and mental disability. Mrs. Kneece testified that the job market in farming was very competitive. Mrs. Kneece testified that with the availability of migrant farm workers, the Claimant could not compete for these farm jobs or any farm jobs in today's market. Nor would an employer tolerate the lack productivity, errors, costs, and disruption such as those caused the farm by the Claimant (Tr. Page 76, line 25 - Page 79, line 4). Mrs. Kneece testified that the Claimant could never compete in the market place for farm positions and that the family farm would not hire a stranger with the Claimant's disabilities (Tr. page 79, line 25 - page 80, line 21).

Mrs. Kneece explained that the Claimant was in need of additional medical treatment by Drs. Deal and Bergmann (Tr. Page 81, lines 14-18). Mrs. Kneece explained that the Claimant sought to be reimbursed for all prescriptions purchased in treating the Claimant's injuries. In particular, Mrs. Kneece testified that the Carrier has not reimbursed the Claimant for prescriptions purchased since 2005. The prescriptions are found on Claimant's Exhibit E-2 (Tr. Page 81, lines 19 - Page 83, line 5). Mrs. Kneece explained that the Claimant had not been

reimbursed for mileage. She testified she calculated the mileage that the Claimant is seeking reimbursement of the mileage found on Claimant's Exhibit 1. Mrs. Kneece testified that she had calculated the amount of mileage due to date and requested reimbursement for any mileage from the date of the hearing forward (Tr. Page 83, lines 6-16).

In addition to treatment by Drs. Bergmann and Deal, Mrs. Kneece testified that Dr. Shissias' treatment for the Claimant's headaches and depression was beneficial and that the Claimant was asking the Commission to require the Carrier to accept treatment by Dr. Shissias and continue his treatment (Tr. Page 83, line 17 - Page 84, line 14).

Mrs. Kneece testified that Dr. White and Wicker were Kneece family physicians. Dr. White diagnosed the Claimant's thyroid problem as being connected to the accident, and both Dr. White and Dr. Wicker have been treating the Claimant for his thyroid condition. Mrs. Kneece testified that the Claimant was requesting the Commission to order the Carrier to accept treatment by Dr. Wicker for the thyroid condition and provide treatment going forward (Tr. Page 84, lines 15-24).

Mrs. Kneece testified that Dr. Ugino treated the Claimant for his left hand injury in November of 2010 and that the Claimant was requesting that the Commission order Carrier to pay for any future treatment for Dr. Ugino and reimburse Claimant for his out-of-pocket expenses related to this treatment (Tr. Page 84, line 25 - Page 85, line 9).

When asked why the Claimant was not simply replaced at the farm with a farm hand who was productive, Mrs. Kneece testified that the Claimant was retained on the farm because "I love him and that's his world. And his dignity and his pride is worth much more." (Tr. Page 102, lines 10-13)

The Commission's Order of April 2005 sets forth the evidence of the Claimant's early treatment for his admitted injury.

> Both Dr. Linwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30 that the Claimant's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2005 Order at Page 8).

In particular, Dr. Smith diagnosed that the Claimant had had injuries to the right frontal pole and observed diffuse cerebral edema. In addition, the Claimant suffered a subarachnoid hemorrhage across the tentorium and a left tentorial subdural hematoma. In addition, Claimant had a high right posterior frontal epidural and very thin bilateral convexity subdural hematomas. In addition, Claimant had a left posterior frontal parasagittal contusion (APA at Page 202).

As summarized by the 2005 Order, Dr. Michael S. Green performed his first surgery on Claimant's left shoulder on November 15, 2001, after Claimant reported suffering pain and discomfort in his left knee which impaired his ability to bend, stoop and walk, Dr. Green performed surgery on Claimant's left knee on January 9, 2003. The Claimant continued to suffer from pain, discomfort and immobility from his left knee and Dr. James A. O'Leary performed surgery for the second time on Claimant' left knee on January 26, 2004. Subsequently, Dr. O'Leary gave the Claimant a 10% impairment rating to the left lower extremity on April 16, 2004 (2005 Order at Pages 6-7).

The Commission noted in its 2005 Order that, although aware of Claimant's treatment and surgeries by Dr. Green and Dr. O'Leary in 2003 and through 2004, the Defendants failed to authorize or accept responsibility for Claimant's treatment. The Commission found the Defendant to be responsible for Claimant's treatment by Dr. Green for the left upper extremity

and by Dr. Green and Dr. O'Leary to the left lower extremity as well as for services rendered by Dr. Waid (2005 Order, Pages 10-11).

Dr. William W. Stewart, CRC, CVE, LPC. In his report dated September 16, 2010, Dr. Stewart, a Board-certified rehabilitation counselor, opined as follows:

> Based on Mr. Kneece's original and update (sic) vocational and rehabilitation evaluations it is concluded that to a reasonable degree of vocational and rehabilitation certainty he is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. (APA at Page 4)

Dr. Stewart recognized that the Claimant enjoyed "a benevolent and sheltered employment situation" but that "in an open, competitive labor market [the Claimant] would find himself vocationally disabled and unable to work gainfully." (APA , Page 4)

Dr. Stewart, who was able to evaluate the Claimant on two occasions, further opined:

> This vocational opinion is consistent with the mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning "...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs..." (APA at Page 4)

Dr. Stewart recommended that the Claimant continue with "medical care, medical pain management care, neurological care, psychiatric care and professional/trauma counseling care, continue prescribed medications, and medical case management services to coordinate his care/needs." (APA at Page 4)

Dr. Charles Shissias. Dr. Shissias, a neurologist practicing in Beaufort, South Carolina, is treating the Claimant for chronic daily headaches, memory loss and depression arising from

Claimant's 1999 accident. Dr. Shissias concluded that the Claimant was suffering from Organic Brain Syndrome secondary to traumatic brain injury Claimant suffered when he was hit with the locking ring tire and experienced right frontal lobe injury/R supra orbital fracture. Dr. Shissias found that "[patient] has fragmented sleep, chronic daily headaches, and chronic disturbance of mood. He is unable to make major decisions without input from wife, his primary care giver. Believe that without her, he would require legal guardian or payee to manage his affairs." (APA at Page 6) Dr. Shissias reports in his note of the Claimant's October 29, 2010, appointment that the Claimant had reported improvement with respect to his headaches and in sustainment of attention given his treatment by Dr. Shissias (APA at Page 348).

Dr. L. Randolph Waid. Dr. Waid, a licensed clinical psychologist, evaluated the Claimant for his 1999 injuries. Dr. Waid evaluated the Claimant most recently on February 8, 2007; Dr. Waid opined that the Claimant suffered a traumatic brain injury in his accident of November 19, 1999. Dr. Waid found that radiographic studies conducted at the time of the Claimant's injury revealed disruptive physical injury to the brain including diffuse cerebral edema, subarachnoid hemorrhages, left tentoril subdural hematoma, right posterior frontal epidural, and contusions (APA, page 15).

With respect to the Claimant's emotional and psychological functioning, /Dr. Waid's assessment revealed:

> The current neuropsychological evaluation was generally consistent with that obtained in previous evaluation. Mr. Kneece's intellectual functioning is in the low average range. Neurocognitive evaluation revealed Mr. Kneece to continue to experience difficulties with the effective sustainment of attention/concentration and slowed mental processing speed. Assessment of anterograde memory continued to reveal a lateralized pattern of impairment as Mr. Kneece continues with difficulties with immediate visual learning/memory capacities. There is also continuing impairment of visual spatial skills compared to estimates of his premorbid level of functioning. Mr. Kneece continues to demonstrate mild

executive dysfunction both with regard to cognitive and emotional/psychological functioning.

Assessment of emotional/psychological functioning revealed Claimant to continue with social executive changes to his personality that are common after a traumatic brain injury, particularly when there is injury to the anterior portion of the brain. He is assessed as experiencing disruptive difficulties associated with apathy, executive dysfunction, and disinhibition/emotional dysregulation. Overall, he is more irritable, with lower frustration tolerance and remains quite withdrawn with regard to social and recreational pursuits. (APA at Page 15)

Dr. Waid made the following assessment of the Claimant:

> Axis 1
> cognitive disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury
>
> Personality change
> labile-/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury
>
> Axis 3
> status post-traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and shoulder

Dr. Waid opined that "[a]s a result of his neurocognitive impairments, Mr. Kneece was assessed as having a Class II impairment to the whole person with provision of a 22% impairment as a result of his neurocognitive deficits" (APA at Page 16).

Dr. Lawrence H. Bergmann, PhD and Dr. Roger W. Deal, MD of Post Trauma Resources. Both Dr. Bergmann and Dr. Deal have treated the Claimant since March of 2005, and continue to treat the Claimant. Dr. Bergmann, a psychotherapist, has treated the Claimant for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment, anger and depression. During his treatment of the Claimant, Dr. Deal has treated the Claimant for sleep disturbance, headaches poor concentration, memory loss, loss of interest, irritability, fatigue, and depression. Dr. Deal, a psychiatrist has treated the Claimant with various medications for his symptoms and illness. Dr. Bergmann opined that the Claimant reached maximum medical improvement for psychological

symptoms resulting from his 1999 brain injury. In his correspondence of January 11, 2007, Dr. Bergmann found that the Claimant continued to report symptoms of dysphoria, difficulties adjusting to his cognitive disability, irritability and withdrawal and symptoms consistent with a head injury. Dr. Bergmann opined that "[based] on the AMA Guidelines and using the Epstein , et al (1998) method for determining psychiatric impairment, Dr. Roger Deal, psychiatrist, and I are of the opinion that Claimant has experienced an 11-percent whole person, permanent impairment. This is our opinion only concerning his psychological status, not his cognitive impairments. In order to maintain his current status, Claimant will require the use of psychotropic medication and medication management as long as he is experiencing chronic pain and cognitive difficulties." (APA at Page 334). Subsequently, in September of 2010, Dr. Bergmann opined: "[i]t is Dr. Deal and my opinion that Claimant will require the use of psychotropic medication indefinitely with up to four medication management appointments per year. In addition, Claimant will require up to 24 psychotherapy sessions during the first two years and six for the next year. After that, Claimant may require further care if he experiences periods of increased symptoms." (APA at Page 26).

Dr. Michael S. Green. Dr. Green, an orthopedist, treated the Claimant over a long period of time for his work-related injury to his left shoulder. Dr. Green released the Claimant from his care in May of 2006 after the Claimant reached maximum medical improvement with respect to his shoulder. After two surgeries, Dr. Green opined that "according [a] to the AMA Guidelines for the Evaluation of Permanent Impairment, 5th Edition, the patient has 8% impairment due to labral pathology and 10% impairment due to degenerative joint disease, which is equivalent on the combined values table to 17% to the left upper extremity." (APA at Page 96).

Dr. James A. O'Leary. Dr. O'Leary, an orthopedist, treated the Claimant for injuries to his left elbow and left knee arising from his accident. Dr. O'Leary performed surgery on the Claimant January 26, 2004, to repair a tear of the interior horn of the medial meniscus. The Claimant was released from Dr. O'Leary's care of his left knee in April of 2004. Dr. O'Leary gave the Claimant a 10% impairment rating of the left lower extremity at that time (Claimant's APA p. 146). Subsequent to Claimant's surgery, Dr. O'Leary referred the Claimant back to Dr. Green for left shoulder surgery.

Dr. Carl A. White. Dr. White, Claimant's internist, found a 32 x 43 mm area in Claimant's right frontal lobe which Dr. White found compatible with an area of encephalomalacia related to Claimant's 1999 head injury and skull fracture. Dr. White opined that Claimant's hypothyroidism was related to Claimant's head trauma. Dr. White states that untreated, hypothyroidism results in lethargy, weight gain, and general lack of energy and desire. Moreover, Dr. White opined that Claimant's emotional changes and memory loss were related to his head trauma and frontal lobe damage. Dr. White also corroborated the fact that the Claimant suffered from headaches since his head injury which were at times incapacitating. Dr. White began treatment for Claimant's hypothyroidism (APA at Pages 175-176). Dr. Christopher Wicker has now succeeded Dr. White as Claimant's family physician after the retirement of Dr. White. Dr. Wicker continues to treat the Claimant for his hypothyroidism (APA at Pages 162-163).

Dr. Michael R. Ugino. Dr. Ugino reported that he treated the Claimant for a fracture of the index metacarpal left hand. Dr. Ugino's history reflects that the Claimant's injury occurred on November 19, 2010. The Claimant reported becoming dizzy while working on one of the

machines, lost his footing and fell, injuring his left hand. Dr. Ugino treated Claimant with a cast and splint on November 22, 2010 (APA at Pages 253-254).

Tora Brawley, PhD. The Defendants submitted a report by Dr. Tora Brawley, a PhD. with University Specialty Clinics. Dr. Brawley, having conducted a clinical interview and neuropsychological evaluation of Claimant on January 28, 2011, concluded that the Claimant suffered from several vegetated symptoms, chronic pain and stressors. Dr. Brawley felt as though the Claimant was not a maximum medical improvement with regard to his vegetative symptoms such as his fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability and decreased frustration tolerance and decreased libido. Dr. Brawley relied upon the formal IQ testing of Dr. Waid and accepted Dr. Waid's 2002 evaluation wherein the Claimant had a full scale IQ of 76. Dr. Brawley concluded that the Claimant would benefit from additional treatment for his personality/psychological residual symptoms (APA Pages 356-358).

Cynthia P. Grimley. Ms. Grimley submitted a vocational evaluation dated February 11, 2011 (seven days prior to the rescheduled hearing date), on behalf of the Defendants. Ms. Grimley identified skilled or semi-skilled farm positions requiring medium to heavy exertion. However, Ms. Grimley never met with or evaluated the Claimant prior to issuing her report. Moreover, Mrs. Kneece, who was very familiar with the routine at the family farm, testified that the Claimant was not capable of performing any of the positions identified by Ms. Grimley. For these reasons, I give no weight to this evidence.

Notwithstanding the Defendant's agreement to provide treatment by Drs. Bergmann and Deal as required in the 2005 Order, the Defendants have failed to pay for the medication

prescribed by Dr. Deal, an authorized treating physician. The Claimant submitted an accounting of the unpaid medications for which he is seeking reimbursement **(Exhibit 2)**.

The Defendants have failed to reimburse Claimant for mileage due. The Claimant submitted an accounting for the unreimbursed mileage for which he is seeking reimbursement **(Exhibit 1)**.

Further, since his accident, the Claimant has been paid temporary total disability benefits for only 157 1/7 weeks.

FINDINGS OF FACT

Based on the evidence of record, it is found as a fact:

1. That the Claimant Ricky Kneece, was an employee of Kneece Farms on or about November 22, 1999, on which date he sustained injuries to his brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth and psychological.

2. That proper notice was given to his employer.

3. That the Claimant's average weekly wage at the time of the accident was $769.23 with a corresponding compensation rate of $461.67.

4. That the Claimant's education is limited to the 12th grade, and that the Claimant's only work experience has been that of a farmer on farms owned and operated by his family members;

5. That Claimant's wife was a very credible witness. This finding is based on my observation of her and her testimony at the hearing. Mrs. Kneece testified truthfully and accurately (compared to the medical evidence) to her husband's limitations, both physically and psychologically. She also testified very honestly about the nature of the work Claimant is able to perform, and the fact that his family has essentially kept him working because he is family. Mrs. Kneece was often emotional when honestly describing the fact that her husband is now only a "shell" of his former self;

5. That as a result of his injuries, the Claimant is no longer able to operate as a farmer/owner/operator of a farm supply and farming operation; his cognitive and emotional/psychological impairments and memory loss do not permit him to make calculations or calibrations of irrigation equipment, sprayers, chemical mixes, medications, or operate sprayers or combines or to manage the farm purchases, expenses, accounts or farm business; his physical limitations do not permit Claimant to climb, bend

or stoop and prohibit him from the physical movement involved in climbing stairs or ladders, making repairs of equipment or the physical activity of planting, weeding and harvesting; and that only by virtue of the accommodations that the family farm has made is the Claimant able to perform very limited activities normally associated with farming.

7. That as a result of this accident, the Claimant has sustained permanent physical brain damage pursuant to the reports of Dr. Waid, Dr. Shissias, Dr. White, and Dr. Lenwood Smith.

8. That the Claimant now functions in the low to moderate IQ range with an IQ of 76 pursuant to reports of Dr. Randolph Waid; that as a result of neurocognitive impairments, the Claimant has suffered a 22% impairment as a result of his neurocognitive deficits assigned by Dr. L. Randolph Waid; Dr. Waid made the following Assessment of the Claimant:

> Axis 1
> cognitive disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury
>
> Personality change
> labile-/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury
>
> Axis 3
> status post-traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and shoulder

9. That as a result of Claimant's accident, the Claimant has suffered irritability, sleep disturbance, headaches, poor concentration, memory loss, fatigue, loss of interest in his vocational and avocational pursuits; mood swings and depression for which he has been treated by Drs. Bergmann and Deal; that as a consequence of the foregoing, the Claimant has experienced a permanent impairment of 11% to the whole person for his psychological status and not for his cognitive impairments as opined by Dr. Bergmann; that the Claimant has benefited from and will continue to benefit from treatment by Dr. Bergmann and Dr. Deal for his workers compensation injuries;

10. That the Claimant has suffered hypothyroidism as a consequence of his head trauma suffered in his 1999 accident; that Claimant's lethargy, weight gain, general lack of energy and desire, that the Claimant has been treated by Dr. White and is currently being treated by Dr. Wicker for his hypothyroidism and that Claimant has benefited from this treatment and will continue to benefit from treatment from Dr. Wicker for this hypothyroidism;

11. Dr. Charles Shissias has treated Claimant for his chronic daily headaches, memory loss and depression; that the Claimant has benefited from Dr. Shissias' treatment of his causally-related injuries and Claimant will benefit from further treatment from Dr. Shissias.

12. That Claimant's dizziness which is causally related to this accident resulted in a fall and fracture of the index metacarpal of his left hand; that the Claimant has benefited from the treatment of Dr. Ugino of this injury and will continue to benefit from Dr. Ugino's treatment for this injury;

13. That the Claimant continues to suffer from certain vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, decreased frustration tolerance and decreased libido as diagnosed by Dr. Tora Brawley, Defendant's neuropsychologist; that the Claimant will benefit from treatment for these symptoms as recommended by Dr. Brawley.

14. That the Claimant has not returned to work for the Defendant employer Kneece Farms since his November 22, 1999, accident.

15. That the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature. Claimant's wife gave credible testimony that no such job ordinarily exists, and that but for this being his family, the Claimant could not and would not be hired given his great cognitive and physical limitations; that he has been "working" and drawing a paycheck from the farm, this is only due to the largesse of his family, not because he performs any substantial, beneficial work for the farm.

16. That the services that Claimant performs for the family farm, Delano R. Kneece & Son, Inc., given the accommodations his family has made so as to enable Claimant to perform certain limited services, are not evidence that a reasonably stable market exists for the services Claimant provides for the family farm.

17. That those amounts paid the Claimant by the family farm, Delano R. Kneece & Son, Inc. are not intended to represent wages earned and the amount is not calculated on the basis of services performed by Claimant on behalf of his employer; that, further, those amounts paid the Claimant by the family farm are in the nature of a gift and do not constitute wages for work expended on behalf of his employer or wages calculated on the basis of productivity.

18. That the Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable, sustained basis in accordance with the opinion of Dr. Stewart; that, therefore, the Claimant is unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist.

19. That based on the substantial weight of the medical evidence in this case, the Claimant is permanently and totally disabled, with a physical brain injury, pursuant to § 42-9-10; that there is essentially no evidence contradicting several doctors finding a physical brain

injury; that due to the combination of his injuries (left knee, left shoulder, psychological), and the fact that Claimant's employment is found to be benevolent or sheltered in nature, the Claimant is permanently and totally disabled and entitled to lifetime benefits.

20. That the Claimant sustained a causally related injury to his left knee; that his injuries to his left knee were so severe as to require two surgeries; that as a result of Claimant's injuries, Dr. James O'Leary assigned a 10% impairment rating to Claimant's lower left extremity.

21. That the Claimant suffered a causally related injury to his left shoulder and elbow; that his injuries to his left shoulder were so severe as to require two surgeries; that as a result of Claimant's injuries, Dr. Michael Green assigned a 17% impairment rating to Claimant's upper left extremity;

22. That since the date of Claimant's accident on November 22, 1999, the Defendants have paid the Claimant temporary total disability payments of 157 1/7 weeks.

23. The Defendants have failed to pay for all medications prescribed by Claimant's physicians, to include Drs. Deal, Wicker, Shissias, and Ugino. The Claimant will benefit from future treatment. The Defendants are ordered to pay for those medications for which the Defendants are responsible including medications for all causally related injuries.

24. That the Claimant has accumulated mileage of 3,658 for which he is entitled to reimbursement.

25. That the Claimant has accumulated charges of $14,010.77 in prescriptive medicines for which he is entitled to reimbursement.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. Pursuant to §42-1-160, Claimant sustained an admitted compensable injury by accident on November 22, 1999.
2. That as a result of this accident, Claimant sustained injuries to his brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth and psychological.
3. The Claimant's average weekly wage is $769.23 with a compensation rate of $461.67.

4. The Claimant is totally and permanently disabled with a physical brain injury pursuant to Section 42-9-10. Accordingly, the Claimant is entitled to payment of weekly compensation in the amount of $461.67 from November 22, 1999, to the present and continuing for Claimant's lifetime with credit given the Defendants for 157 1/7 weeks of weekly compensation heretofore paid Claimant and medical treatment for life.

5. In order to be entitled to total and permanent disability workers' compensation benefits for a work injury, claimant must be unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003).

6. "Total disability" under the Workers' Compensation Act does not require complete, abject helplessness; rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471(Ct. App. 1989).

7. While benevolent employment has not been specifically addressed by our courts, it has been addressed in North Carolina. As our Workers' Compensation Act was patterned after that of North Carolina, decisions of the North Carolina Courts in workers' compensation cases are given "great weight." See, e.g. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). "[A]n injured employee's earning capacity **must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market.**" Peoples v. Cone Mills Corp., 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) [Emphasis added]. Thus, "the fact that an employee is capable of performing employment tendered by the employer is not, as a

matter of law, an indication of plaintiff s ability to earn wages." Saums v. Raleigh Community Hosp.. 346 N.C. 760,765,487 S.E.2d 746,750 (1997). The rationale behind this is simple: proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income or reduced income should the employee's job be terminated. Peoples. 316 N.C. at 438, 342 S.E.2d at 806. See also. Baker v. Sam's Club. 589 S.E.2d 387 (N.C. App. 2003) (requiring Commission to make factual findings about the suitability of claimant's post-injury job with employer).

8. Similarly, South Carolina Courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc. 323 S.C. 113, 473 S.E. 2d 699 (1996). Evidence that a workers' compensation claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial. McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471(Ct. App. 1989). In Stephenson v. Rice Services, Inc., the Claimant, although employed, was capable of performing work so limited in quality and dependability or quantity that no reasonably stable market existed for his skills and was held to be totally disabled. In its opinion, the Court noted that a person who becomes a paraplegic as a result of a work-related accident may recover for permanent and total disability under section 42-9-10 yet continue to work. 323 S.C. 121,

fn 2. See also Lyles v. Quantum Chemical Company 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc. 354 S.C. 100, 580 S.E. 2d 100 (2003).

9. As a consequence of his total and permanent disability due to his physical brain injury, the Claimant is entitled to lifetime benefits under the South Carolina Workers Compensation Act. S.C. Code Ann. §42-9-10 (C) which provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Accordingly, the Claimant is entitled to lifetime medical treatment for his compensable injuries to be directed by his authorized treating physicians. The Defendants are likewise responsible for reimbursement for all causally related medical expenses incurred to date as well as medical care in the future. In particular, the Claimant is entitled to treatment by Drs. Bergmann and Deal, Dr. Shissias, Dr. Wicker and Dr. Ugino going forward. The Defendants are also responsible for reimbursing the Claimant for his medical bills for Dr. Ugino, Dr. Shissias, Dr. Wicker and Dr. White. Moreover, to the extent that the Defendants have failed to reimburse the Claimant for medical treatment by Drs. O'Leary and Green, the Defendants shall reimburse the Claimant for all medical expenses incurred for his treatment by these orthopedists.

10. In addition, the Defendants are responsible for reimbursement for all prescription medication associated with the treatment of Claimant's injuries to date. In particular, the Defendants are responsible for reimbursement all such prescriptive drugs found Claimant's Exhibit 2.

11. The Defendants are also responsible for reimbursing Claimant for all mileage incurred to date. In particular, the Defendants are responsible for reimbursing Claimant for all mileage set out on Claimant's Exhibit 1. Further, the Defendants would be liable for reimbursing the Claimant for all future mileage costs associated with his treatment.

12. Because the Claimant is totally and permanently disabled with physical brain damage as set out in S.C. Code Ann. §42-9-10 (C) he is entitled to payment of weekly compensation from the date of this November 22, 1999 accident. The Claimant has been paid 157 1/7 weeks of weekly compensation. The Defendants shall pay the Claimant for the remaining weeks of weekly compensation through the date of this order. The Defendants shall continue making weekly compensation to the Claimant in the amount of $461.67 per week for his lifetime.

13. The Claimant has benefited from the treatment of Dr. Lawrence H. Bergmann, Dr. Roger Deal, Dr. Charles Shissias, Dr. Christopher Wicker and Dr. Michael R. Ugino and pursuant to §42-9-10 (C) Claimant is entitled to continuing treatment by these physicians as well as all other causally related medical treatment for life. §42-9-10 (C)

ORDER

IT IS THEREFORE ORDERED, based on the foregoing findings of fact and conclusions of law;

1. The Defendants are responsible for the payment to Claimant pursuant to §42-9-10(C) of all weekly compensation in the amount from the period beginning November 22, 1999, for life with credit given for 157 1/7 weeks of weekly compensation heretofore paid to Claimant.

2. The Defendants are responsible for Claimant's causally related medical treatment for his compensable injuries pursuant to §42-9-10(C) as set out herein.

3. The Defendants are responsible for the Claimant's future medical treatment for his compensable injuries for his lifetime pursuant to §42-9-10(C) as set out herein.

4. The Defendants are responsible for reimbursing the Claimant all mileage and prescriptions as herein set out.

AND IT IS SO ORDERED.

Commissioner Derrick L. Williams

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
April 28, 2011

By: Renee Smith, Administrative Assistant to Commissioner Williams

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. 9920867

Ricky Kneece, EMPLOYEE, CLAIMANT, VS. Kneece Farms EMPLOYER, AND Legion Insurance Co./SC Property & Casualty Ins CARRIER, DEFENDANTS,	)	**ADMINISTRATIVE ORDER**

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

X Motion to Compel Medical Examination and Vocational Evaluation and to Postpone Hearing.

The following dispositions have been made:

Denied.

Commissioner Derrick L. Williams

Columbia, SC
February 10, 2011

CERTIFICATE OF SERVICE

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

February 10, 2011

By: Renee Smith, Administrative Assistant to Commissioner Williams

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STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 9920867

Ricky D. Kneece, Claimant, vs. Kneece Farms, Employer, and Legion in Liquidation and The South Carolina Property and Casualty Insurance Guaranty Association Carrier Defendant.	DECISION AND ORDER

DATE AND LOCATION OF HEARING: January 11, 2005, Richland County

STIPULATIONS

1. Notice of the hearing was timely and properly served on all parties of interest.

2. Jurisdiction and Venue are proper.

3. The average weekly wage is $769.23 with a corresponding compensation rate of $461.67.

4. Claimant sustained a compensable injury by accident to his brain/head, face, nasal passage, sinus, left eye and left knee on November 22, 1999.

5. More than 150 days have elapsed since temporary total disability payments were last commenced.

APA SUBMISSIONS

CLAIMANTS APA SUBMISSIONS:

APA1	Dr. Michael S. Green	Midlands Orthopaedics	11/05/01-12/06/04	Pages 1-39
APA 2	Dr. James A. O'Leary	Midlands Orthopaedics	12/21/01-09/23/04	Pages 40-57
APA 3	Dr. L. Randolph Waid		04/15/02-10/21/02	Pages 58-65
APA 4	Dr. Lenwood P. Smith	Palmetto Neurosurgery	12/29/99-09/30/01	Pages 66-76
APA 5	Dr. Bradley P. Presnal	Moore Orthopaedic	01/09/01	Pages 77-78
APA 6	Dr. H. L. "Rick" Milne	The Eye Center	12/03/99	Pages 79
APA 7	Dr. Frank R. Voss		12/01/99-07/26/00	Pages 80-86
APA 8	Palmetto Richland Memorial Hosp		11/22/99-11/27/99	Pages 87-105
APA 9	Lexington Medical Center		01/05/00-02/01/00	Pages 106-109
APA 10	Dr. William W. Stewart		12/31/04	Pages 110-117
APA 11	Dr. L Randolph Waid		1/03/05	Page 118

EMPLOYERS APA SUBMISSIONS:

APA 12	Lexington Medical Ctr.		1-26-99	Pages 1-2
APA 13	Richland Memorial Ctr.		11-22-99 – 11-27-99	Pages 3-9
APA 14	Dr. Frank Voss	Univ. of South Carolina School of Medicine	11-1-99 – 7-26-00	Pages 10-18
APA 15	Dr. Rick Milne	The Eye Center	2-29-00	Pages 19-20
APA 16	Dr. Bradley Presnal		1-9-01	Pages 21-27
APA 17	Dr. Michael Green	Midlands Orthopaedic	6-9-03 – 10-04-04	Pages 28-31
APA 18	Dr. James O'Leary	Midlands Orthopaedic	10-10-03 – 4-16-04	Pages 32-38

CLAIMANT'S BIOGRAPHICAL

Claimant is a forty-four (44) year old, married male. He has a high school education and has worked as a farmer his entire working life. He has had no additional schooling or training except for instruction from farm equipment salesmen in the use of new farm equipment. The parties agree that the Claimant sustained an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999, while in the employ of Kneece Farms. Also in November of 1999, the Claimant held separate employment with Delano Kneece & Son, Inc. (a family owned farm) and rented and sharecropped other farm land.

STATEMENT OF THE CASE

This matter is before me by way of the Defendant's Form 21 dated November 5, 2004, asserting that the Claimant's authorized health care provider states that the Claimant has reached maximum medical improvement. The Defendants rely upon the report of Dr. James O'Leary dated April 16. 2004, wherein Dr. O'Leary releases the Claimant from left knee surgery to return as needed, whose treatment was not authorized by the Defendants until the day of the hearing.

The Claimant contends he has not reached MMI and is in need of surgery to his left shoulder by Dr. Michael S. Green and seeks treatment for his head injury and depression from Dr. L. Randolph Waid and Dr. Lawrence Bergmann, all of which the Defendants deny.

This claim has been complicated by the fact that the carrier Legion Insurance Company (Legion) is in liquidation as of July 28, 2003, and the claim was turned over to

the South Carolina Property & Casualty Guaranty Association (Guaranty Association), at which time action on the claim was stayed. The Guaranty Association has refused to authorize any treatment for the Claimant.

In November of 2004, the Defendants filed and served a Form 21 to stop payment of compensation. A hearing in the matter was scheduled and heard January 11, 2005.

The Claimant is represented by Scott Elliott of Columbia and the Defendants are represented by Edwin P. Martin, Jr. of Columbia.

EVIDENCE OF THE CASE

Testifying for the Defendants was Mitch Dean, a private investigator. Dean testified that he observed the Claimant drive a tractor and lift bags of unknown nature while at the farm owned by Delano Kneece & Son, Inc. The witness performed surveillance on Claimant on October 14, 2004, and again on October 27, 2004. His surveillance tape was admitted into evidence over Claimant's objection. Dean also testified that he observed a number of farm hands working on this farm. The tape and testimony of the private investigator only serve to corroborate Claimant's testimony.

Claimant testified that he sustained an injury by accident on November 22, 1999, when a tire to a motor grader which he was changing exploded. The Claimant lost consciousness and remembers very little of the events immediately following his accident. Claimant testified that his memory has been impaired by virtue of the accident.

At the time of his accident, the Claimant was working for Kneece Farms which was owned by his uncle, Everett Kneece. Claimant's physical condition has not permitted him to return to work for Kneece Farms since. Separate and apart from his employment by Kneece Farms, the Claimant was self-employed at the time of the

accident by Delano Kneece & Son, Inc., a family owned farm owned by him and his father. In addition to his employment with Kneece Farms and Delano Kneece & Son, Inc., the Claimant has farmed as a sharecropper.

The Claimant testified that he has continued to own and operate Delano Kneece & Son, Inc. since the accident. Claimant testified that his injuries have left him unable to perform the farming duties required of him. Claimant has sustained physical limitations due to injuries to his left upper extremity and left lower extremity. He has also sustained loss of memory and personality changes which significantly limit his ability to meet the rigors of farming. While he can perform limited duties such as driving a tractor, his ability to lift, carry, bend, stoop and climb is now limited due to the admitted knee injury. Claimant forgets important aspects of his chores; and consequently, his memory loss requires him to write down the details of his daily routine. Because Claimant's abilities are so limited, Delano Kneece and Son, Inc. has been forced to hire additional farm employees to perform Claimant's work. Claimant's wife and sons must now also perform work on the family farm which the Claimant is no longer able to do by virtue of his physical and mental limitations. The Claimant has been paid no income by Kneece Farms since the accident. Delano Kneece & Son, Inc. has continued to pay Claimant as owner of the family farm where he is paid when the farm's income permits.

Immediately after the accident, the Claimant was hospitalized for approximately a week and was allowed to return home to convalesce. The testimony and medical evidence of record demonstrate that the Claimant sustained injuries to the brain/head, left knee, left shoulder, teeth, nasal passage, sinus, zygomatic arch, scarring, eye and left elbow. The Claimant was able to resume work approximately four months after the

accident. In accepting the claim herein, the Defendants admit compensable injuries to Claimant's brain/head, face, nasal passage, sinus, left eye and left knee. The Claimant testified that he also sustained injuries to his left shoulder and left elbow and is depressed.

The Claimant testified that, his memory suffered as a result of the accident. The Claimant, while a mild mannered, easy going person prior to the accident, has become impatient and quick tempered since the accident. The Claimant testified that his physical limitations resulting from the accident seemed to make him depressed. The Claimant testified that he believes that he will benefit from counseling.

Claimant testified that while his left shoulder "occasionally popped out" several times a year prior to the accident, now it pops out ten or more times a year due to the accident. In addition, the left shoulder is more painful. Accordingly, on November 15, 2001, Dr. Green performed surgery on Claimant's left shoulder. Claimant testified that subsequent to his accident he suffered pain and discomfort in his knee and complained that he was unable to bend, stoop and walk as well as he was prior to the accident; accordingly, Dr. Green performed surgery on Claimant's left knee on January 9, 2003. Claimant continued to suffer pain, discomfort and immobility from his left knee and Dr. O'Leary performed surgery for the second time on Claimant's left knee on January 26, 2004. The Defendants maintain that Dr. O'Leary permitted the Claimant to return to work April 16, 2004. Claimant testified that he continues to suffer pain and discomfort in his left shoulder and elbow resulting from his accident; accordingly, Dr. Green has recommended and scheduled a second surgery for Claimant's left shoulder and left elbow for a date subsequent to the hearing herein.

In addition to being out of work for approximately four months initially after this accident, the Claimant missed additional work after his surgeries, during the time relevant to Defendants' motion. In particular, Claimant testified that he was out of work approximately eight weeks after his January 9, 2003, knee surgery. In addition, Claimant testified that he was out of work approximately three months after his January 26, 2004, knee surgery.

The Claimant has paid for all of his treatment including the surgeries to his left shoulder and left knee. The Defendants have failed and refused to pay for any treatment to Claimant's left leg, shoulder and elbow, although they agreed at the hearing herein to pay Claimant for his treatment to his left knee, as they were relying on Dr. O'Leary's report of April 16, 2004, as the basis for their Form 21.

Dr. Green treated the Claimant for his injury to his left knee and left shoulder and elbow. In addition, Dr. O'Leary treated Claimant for his injury to his left knee. Dr. O'Leary operated on Claimant's left knee on January 26, 2004. Dr. O'Leary by letter dated January 12, 2004, to the adjuster for the Guaranty Association confirmed that the Claimant's injury to his left knee was related to the accident. Dr. O'Leary found a 10% impairment rating for the left lower extremity on April 16, 2004.

Likewise, Dr. Green, who operated on Claimant's left knee on January 9, 2003, found Claimant's injury to his left knee to have resulted from his accident. The Claimant suffered from pain and a popping in the knee which made him limp; accordingly, he consulted Dr. Green on June 14, 2002, for a second opinion for treatment to his left knee. Dr. Green concluded that Claimant's left knee injury was related to the accident, and after other treatment, operated on January 9, 2003. With respect to Claimant's left shoulder

and elbow injury, Dr. Green initially operated on the Claimant on November 15, 2001. Dr. Green's initial history of November 5, 2001, notes that Claimant's suffered more episodes of left shoulder instability after his accident of November 22, 1999. Green opined on December 17, 2004, as follows:

> That to a reasonable degree of medical certainty Mr. Kneece's accident of November 22, 1999, exacerbated or aggravated an existing injury to his left shoulder, and that the left shoulder surgery scheduled for December 2004, and that of November of 2001 are treatment related to his workers compensation injury of November 22, 1999.

Both Dr. Lenwood Smith, a neurologist, and Dr. Waid, a clinical psychologist, opine that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties coping with every day life. Dr. Smith noted in his report dated September 30, 2001, that Claimant has lost interest in farming and hunting and fishing. Dr. Smith also observed that the Claimant has acknowledged an unsteadiness that gives rise to concerns about Claimant's ability to operate equipment safely. Dr. Smith opines that Claimant's injuries are permanent and severe.

Although Legion agreed to the Claimant's treatment by Dr. Waid, neither Legion nor the Guaranty Association followed through and provided for treatment by Dr. Waid. The Claimant nonetheless sought out treatment by Dr. Waid. Dr. Waid in his report of April 15, 2002, finds the Claimant's intellectual functioning to be in the borderline to low average range. Dr. Waid also finds that the Claimant suffers from difficulties with attention and concentration, executive functions and higher reasoning skills. Claimant also experiences significant impairment in psychosocial functions due to his emotion/personality changes as a result of the traumatic brain injury. In his report of

October 21, 2002, Dr. Waid recommended therapy for Claimant's depression; in particular Dr. Waid recommended Dr. Bergmann to treat Claimant. Dr. Waid opined that Claimant suffered a 29% impairment to the whole person due to the traumatic brain injury sustained on November 19, 1999.

The Claimant's wife's testimony was corroborative of the Claimant's testimony. The Claimant's wife testified that the Claimant suffered memory loss and depression as a result of the accident. She further testified that the Claimant was unable to perform the chores demanded of him as a farmer. As a consequence, family members and farm hands were now required to perform many of the chores Claimant had been able to perform prior to the accident. The Claimant's wife testified that she was also the bookkeeper for Delano Kneece & Son, Inc. She testified that when sufficient revenues were available to Delano Kneece and Son, Inc., the Claimant as owner was paid from farm income, sometimes as much as $3,500 per month, in spite of the fact that Claimant was unable to perform his chores and that the farm had to pay farm hands and rely on others to perform the Claimant's duties. The Claimant's wife testified that on one occasion she advised the Defendants through its agent and adjuster that the Claimant was working for Delano Kneece and Son, Inc.

The Defendants assert that they have paid temporary total disability benefits to the Claimant for the periods December 1, 1999, through March 14, 2000, and for January 9, 2003, through the present. In November 2004, the Defendants filed their Form 21 seeking to stop payment of temporary total disability compensation payments on the basis that the authorized health care provider had stated that the Claimant had reached maximum medical improvement. The Defendants rely on the report of Dr. O'Leary in

spite of their steadfast refusal to authorize his treatment until the hearing. Although the Defendants were aware of the Claimant's treatment and surgeries by Dr. Green and Dr. O'Leary during the latter period, the Defendants nonetheless refused to authorize their treatment and declined to accept responsibility for payment of Claimant's treatment. The Defendants have also failed and refused to provide the Claimant with the therapy recommended by Dr. Waid, in spite of the Claimant's efforts to request this treatment from the Defendants. Yet in spite of all of this, the Defendants acknowledge that they continue to pay temporary total disability to the Claimant and did not file and serve a Form 21 until November of 2004.

As stated, the Claimant and Dr. Green maintain that the Claimant's left shoulder injuries related to his accident require additional surgery and treatment. The Claimant and Dr. Waid maintain that the Claimant's depression related to the accident requires treatment for depression. Neither physician opines that the Claimant has reached maximum medical improvement.

FINDINGS OF FACT

Based on the stipulation of the parties and the evidence submitted, it is found as a fact:

1. That the Claimant Ricky Kneece, was an employee of Kneece Farms on or about November 22, 1999, on which date he sustained injuries to his brain/head, face, nasal passage, sinus, left eye, left knee and teeth.

2. That Claimant also sustained compensable injuries to his left shoulder, left elbow and for depression.

3. That proper notice was given to his employer.

4. That the Claimant's average weekly wage at the time of the accident was $769.23 with a corresponding compensation rate of $461.67.

5. That Claimant had a pre-existing injury to his left shoulder in which it popped out occasionally.

6. That after the accident, Claimant's left shoulder popped out with greater frequency, sometimes as often as ten times a year, and was more painful.

7. That this accident exacerbated and aggravated the pre-existing left shoulder condition.

8. That Claimant is right hand dominant.

9. That as a result of his injury, the Claimant was diagnosed with conditions, including a closed head injury, chronic olecranon bursitis of his left elbow, intraarticular left biceps tendon rupture, patellofemoral syndrome of symptomatic plica, anterior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neruocognitive deficits, left femoral condyle fracture and a fracture of the nasal bridge and left nasal bone.

10. That Defendants are responsible for the Claimant's past causally related medical treatment for these compensable injuries. In particular the Defendants are responsible for past treatment by Dr. Green for the left upper extremity, and by Dr. Green and Dr. O'Leary for the left lower extremity and for treatment rendered by Dr. Waid.

11. That Claimant shall be entitled to future treatment for depression by Dr. Lawrence Bergmann, as recommended by Dr. Waid and follow-up with Dr. Waid for which Defendants shall be responsible as well.

12. That Defendants are responsible for the Claimant's additional medical treatment from Dr. Green, including medications and additional surgery for his left shoulder and left elbow.

13. That Claimant is not at MMI.

14. That Claimant received a salary from Delano R. Kneece & Son, Inc. during a period in which he received some TTD benefits. The Defendants are not allowed to receive a set off for this period of time since the wages were paid by a collateral source--another business in which the Claimant was a principal.

15. That Claimant returned to work at Delano Kneece & Son by April 12, 2004, as owner and operator but was unable to perform his regular duties as he was suffering from mental and physical limitations.

16. That the Defendants did not file a Form 21 until November 2004.

17. That the basis for Defendant's Form 21 was that Claimant's authorized health care provider stated that Claimant had reached MMI. The Defendants failed and refused to authorize any health care provider for treatment of Claimant's injuries prior to the hearing herein; ~~and accordingly, there existed no authorized health care provider in support of Defendants' Form 21 as required by R.67-506.~~

18. That not until the hearing held herein, did the Defendants authorize the services of Dr. Green and Dr. O'Leary for treatment to and surgery on Claimant's left knee; the Defendants however have failed and refused to authorize treatment to and surgery on left shoulder, left elbow and for depression. ~~I find that the Defendants have failed to make payments of all benefits as required by law.~~

19. That both the Claimant and his wife were credible witnesses.

CONCLUSIONS OF LAW

1. Pursuant to Section 42-1-160, Claimant sustained an admitted compensable injury.

2. Claimant has not reached MMI and is entitled to additional medical treatment, including medications, for surgery for his left shoulder by Dr. Green and for treatment for his closed head injury and resulting depression from Doctors Waid and Bergmann. Pursuant to Section 42-15-60, and as otherwise required by law.

3. The Defendants have violated Section 42-5-80 (A) of the South Carolina Workers Compensation Code and accordingly are estopped from any defense giving rise to a set off for temporary total disability payments made in connection with this claim.

4. The Defendants have failed to meet their burden of proof of those issues raised in the Form 21, because they rely upon the opinion of a health care provider which they had failed or refused to authorize prior to the date of the hearing herein. The Defendants have failed to meet their burden of proof that the Claimant is at MMI.

5. Pursuant to Section 42-9-10, Claimant is entitled to payment of such temporary total disability payments as have been paid to him and continuing into the future until such time as the Commission orders. Payment of Claimant's salary from Delano R. Kneece & Son, Inc. from the date of accident to the present is payment from a collateral source; as a consequence, the Defendants are not allowed to receive a set off for any temporary total disability benefits paid to date. McLeod vs. South Carolina Insurance Company, 272 S.C. 254,251 S.E.2nd 193 (1979).

6. The Claimant has not reached maximum medical improvement and needs surgery for his left shoulder and treatment for depression. Accordingly, the Defendants' request to terminate temporary total benefits and for credit for any amounts paid to date should be denied for this reason. Swinton vs. South Carolina Department of Mental Health, 314 S.C. 202, 422 S.E.2nd 215(Ct. App. 1994).

7. The payments made to the Claimant by Delano Kneece & Son, Inc. were not made with reference to liability under the Workers Compensation Act, nor were they made in lieu of compensation. Accordingly, for this reason Defendants are not entitled to a set off. S.C. Code Ann. Section 42-9-210; Corbin vs. Kohler Company, 351 S.C. 613, 571S.E.2nd 922(Ct. App. 2002).

ORDER

IT IS THEREFORE ORDERED, based on the foregoing Findings of Fact and Conclusions of Law:

1. That the Defendants are responsible for temporary total disability benefits continuing into the future until further order of the Commission.

2. That the Defendants are responsible for the Claimant's past causally medical treatment for his compensable injuries as set out herein including, but not limited to, treatment for the injuries to his left knee.

3. That the Defendants are responsible for treatment for the left shoulder and left elbow by Dr. Green, including all past treatment and the surgery which is pending this hearing.

4. That the Defendants are responsible for treatment for the Claimant's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergman.

AND IT IS SO ORDERED!

J. Michelle Childs, Commissioner
South Carolina Workers' Compensation Commission

Dated: 4-18-05

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

This 18 day of April, 2005.

By [signature]
Administrative Assistant to the Commissioner

SAE
EPM
MSS

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stubley
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June 2, 2014

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: WCC File No. 9920867
Kneece, D. Ricky v. Kneece Farms, Employer and Legion Insurance Co. in liquidation through the S.C. Property and Casualty Insurance Guaranty Association, Carrier
Civil Action No. 2012-CP-32-02093 & 2012-CP-32-02111

Dear Ms. Kitchings:

Enclosed for filing is the oringal and one copy of a Notice of Appeal in the above case with additional enclosures including:

(1) A copy of the Order(s) issued by the Circuit Court of Lexington County in this matter on July 18, 2013 and May 1, 2014;
(2) Proof of Serivce of the Notice of Appeal on the Respondents; the Lexington County Clerk of Court; and the South Carolina Workers' Compensation Commison;
(3) A check in the amount of $100.00 for the filing fee.

I would appreciate your returning a clocked copy of the Notice of Appeal to our courier.

I am by copy of this letter serving the Respondents, the Clerk of Court of Lexington County, and the South Carolina Workers' Compensation Commssion with the Notice of Appeal.

Very truly yours,

Mark D. Cauthen

Cc: Scott Elliott, Esquire
South Carolina Workers' Compensation Commission
Lexington County Clerk of Court
Randy Mason

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2012-CP-32-02093
2012-CP-32-02111

Ricky Kneece,.....Respondent.

v.

Kneece Farms and Legion Insurance Co. in liquidation through the S.C. Property and Casualty Insurance Guaranty Association.....Appellants.

NOTICE OF APPEAL

Kneece Farms and Legion Insurance Co. in liquidation through the S.C. Property and Casualty Insurance Guaranty Association appeal the order of the Honorable R. Knox McMahon denying their Rule 59(e) motion dated April 24, 2014. Appellants received written notice of entry of this order on May 7, 2014.

June 2, 2014

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Peter P, Leventis, IV
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Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

Other Counsel of Record:

Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2012-CP-32-02093
2012-CP-32-02111

Ricky Kneece,.....Respondent.

v.

Kneece Farms and Legion Insurance Co. in liquidation through the S.C. Property and Casualty Insurance Guaranty Association.....Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Ricky Kneece, Employee, by his attorney of record, Scott Elliott, 1508 Lady Street, Columbia, SC 29201 by depositing a copy of it in the United States Mail, on June 2, 2014.

June 2, 2014

Mark D. Cauthen
Peter P. Leventis, IV
Post Office Box 7212
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(803) 256-4645

Attorney for Appellants

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COPY

February 7, 2014

The Honorable R. Knox McMahon
Circuit Court Judge
Eleventh Judicial Circuit
Marc H. Westbrook Judicial Center
205 East Main Street
Lexington, SC 29072

3400-0032

RE: ***Ricky Kneece vs. Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association***
Civil Action No. 2012-CP-32-02093
Civil Action No. 2012-CP-32-02111

Dear Judge McMahon:

As the record will reflect, I represent the Claimant in the above captioned appeals from the South Carolina Workers Compensation Commission. I am enclosing for your consideration a copy of the Claimant's Return to the Defendant's Motion to Alter or Amend the Judgment in the above which was filed and served August 21, 2013. (I understand that counsel for the Defendants is mailing you a copy of his Motion separately). I appreciate the courtesies you have shown us in this matter. If you have questions please feel free to contact me.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott

SE/lbk
Enclosures
cc: Mark D. Cauthen, Esquire (w/Encl.)
Peter P. Leventis, IV, Esquire (w. Encl.)

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August 21, 2013

FILE COPY

Hon. Beth Carrigg
Lexington County Clerk of Court
205 East Main Street
Lexington, SC 29072

RE: ***Ricky Kneece vs. Kneece Farms and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association***
Civil Action No. 2012-CP-32-02093
Civil Action No. 2012-CP-32-02111
WWC File No.: 9920867
Date of Incident: 11/22/99

Dear Ms. Carrigg:

Enclosed please find the original and one (1) copy of the Claimant's Return to Motion to Alter or Amend Judgment, which I do hereby submit for filing in reference to the above-captioned matter. I am also enclosing a self-addressed, stamped envelope for your convenience in returning a clocked copy to my office. By copy of this letter, I am serving counsel of record with a copy of this document.

If you have questions or require any further information, please feel free to contact me.

Thank you for your time and assistance.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott

SE/cje
Enclosures
cc & enc.: Mark D. Cauthen, Esquire and
Peter P. Leventis, IV, Esquire

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	CASE NO. 2012-CP-32-02093 & CASE NO. 2012-CP-32-02111
Ricky D. Kneece, Employee Claimant/Appellant, vs. Kneece Farms, Employer, and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Defendants/Respondents.	RETURN TO MOTION TO ALTER OR AMEND JUDGMENT

The Defendants/Respondents have moved for an order, pursuant to Rule 59(e) SCRCP, to alter or amend the Court's order, dated July 18, 2013, in this Workers' Compensation appeal. The Circuit Court, sitting as an appellate court, properly applied the standard of review and the law applicable to the issues on appeal in its order. Moreover, the Court adequately addressed all issues raised by the Defendants/Respondents in connection with this appeal. Accordingly, the Defendants/Respondents' Motion to Alter or Amend the Court's Order should be denied.

1

The matter before the Circuit Court involves cross-appeals from an order of the Workers' Compensation Commission, dated April 19, 2012. In its April 19, 2012 order, the full Commission reversed the Hearing Commissioner's order of April 28, 2011, which found and concluded that the Claimant/Appellant was totally and permanently disabled under the Workers' Compensation Act and awarded the Claimant/Appellant benefits to include those required by S.C. Code Ann. § 42-9-10(C) due to his physical brain damage. The Defendants/Respondents appealed the Hearing Commissioner's order to the full Workers' Compensation Commission. However, the full Commission reversed only that provision of the Hearing Commissioner's order which found that the Claimant/Appellant had suffered physical brain damage and ordered that the Claimant/Appellant be awarded benefits under S.C. Code Ann. Reg. § 67-1101. The full Commission affirmed the Hearing Commissioner's order in all other respects. The Claimant/Appellant appealed the full Commission's order finding that the Claimant/Appellant did not suffer physical brain damage to the Circuit Court seeking to overturn the finding and restore the benefits granted under S.C. Code Ann. § 42-910(C). The Defendants/Respondents appealed the provisions of the full Commission order affirming the award of all other benefits under the Act.

In reversing the full Commission's April 19, 2012 order, the Circuit Court held that the full Commission erred in finding and concluding that the Claimant/Appellant did not suffer physical brain damage. The Circuit Court further concluded that on this record, the Claimant/Appellant was totally and permanently disabled with physical brain damage

and entitled to benefits under S.C. Code Ann. § 42-9-10(C) and remanded the matter back to the Workers' Compensation Commission for the entry of an order awarding the Claimant/Appellant benefits under S.C. Code Ann. § 42-9-10(C). The Circuit Court concluded that the Defendants/Respondents' appeal was without merit and denied relief.

Rule 59(e) SCRCP provides for a motion to alter or amend the Court's judgment to preserve the record for appeal. *Pelican Building Centers v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). The motion provides the Circuit Court with an opportunity to rule properly after it has considered all relevant facts, law and arguments. *J'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). A party cannot use Rule 59(e) SCRCP to present the court with an issue the party could have raised prior to the judgment but did not. *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). In its order of July18, 2013, the Circuit Court fully considered the evidence, law and arguments and, based on the record, was correct to reverse the full Commission. Consequently, the Defendants/Respondents' Motion to Amend or Alter the Judgment should be denied.

The Defendants/Respondents argue that the Circuit Court misapplied the standard of review. As set out below, the Circuit Court, sitting in its appellate capacity, properly applied the standard of review to the issues on appeal.

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007); *see* S.C. Code Ann. §§ 1-23-310, et seq. Under the

APA, this 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 (A)(5); *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 442 (2000). However, the full Commission's factual findings may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008). Moreover, the full Commission's findings must be based on the reliable, probative, and substantial evidence on the whole record and must not be arbitrary or capricious. S.C. Code § 1-23-380(A)(5)(e)(f).

Applying the recent decisions of the Supreme Court in *Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund*, Op. No. 27229 (S.C. Sup. Ct., filed March 6, 2013) and *Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.*, Op. No. 27229 (S.C. Sup. Ct., filed March 6, 2013), the Circuit Court concluded that the Claimant had suffered physical brain damage compensable under S.C. Code § 42-9-10(C). As the Circuit Court concluded, to be compensable under S.C. Code Ann. § 42-9-10(C), "the physical brain damage must be severe". Citing *Crisp v. SouthCo.*, the Circuit Court concluded that for physical brain damage to be severe, a worker with severe physical brain damage must be unable to return to suitable gainful employment. As the Circuit Court further concluded, the holding in *Crisp* is consistent with existing case law, which provides that total disability does not require complete abject helplessness but rather is an inability to perform services other than those that are

so limited in quality, dependability or quantity that no reasonably stable job market exists for them. *McCollum v. Singer, Co.*, 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E. 2d 100 (2003); *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 473 S.E. 2d 699 (1996); *Lyles v. Quantum Chemical Co.*, 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993). The Circuit Court, in its July 18, 2013 order, correctly set out and applied the law applicable to the Claimant/Appellant's claim involving physical brain damage.

The Circuit Court further recognized that the full Commission's factual findings would normally be upheld on appeal unless their findings are based upon surmise, conjecture, or speculation. The Circuit Court concluded that the record below was devoid of any reliable, probative, and substantial evidence to support the Appellant Panel's finding that:

> [t]he Commissioners find a claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained physical brain injury. The claimant has sustained an injury pursuant to Regulation 67-1101.

The reliable, probative and substantial evidence on the whole record supports the Circuit Court's order. The Claimant/Appellant's treating physicians found that the Claimant/Appellant's physical brain damage was severe and permanent. The Claimant/Appellant's family physical, Dr. Carl White, diagnosed the Claimant/Appellant to have suffered a "dead zone in his brain" as identified by an MRI. The authorized treating psychologists treating the Claimant found him to have suffered from a traumatic brain injury. None of the evidence from Claimant's treating physicians or psychologists provided a

medical foundation for the full Commission's finding. The Defendants/Respondents argue here, as they argued below, that their consulting physician, who admittedly did not perform extensive psychological testing, concluded that the Claimant/Appellant's head injury was mild to moderate. However, the Defendants/Respondents' evidence is contradicted by that of Dr. Tora Brawley, their own clinical psychologist. Dr. Brawley, the Defendants/Respondents' witness, concluded that as recently as January of 2011, the Claimant continued to suffer from several vegetative symptoms, chronic pain and stressors and that the Claimant suffers from a residual brain dysfunction as a result of his accident. Last, Commissioner Michelle Childs in her 2005 order on this factual issue relied upon the evidence of Dr. Lenwood Smith, Claimant's treating neurologist, that the Claimant's brain injury was both permanent and severe and found that the Claimant had suffered a brain injury which she described as a closed-head injury giving rise to neuro-cognitive deficits. She ordered the Defendants/ Respondents to treat the Claimant/Appellant for his brain injuries. Commissioner Child's order constitutes the law of this case.

Moreover, there is no credible evidence of record that the Claimant operated a complicated tractor. The undisputed evidence of record reflects that the Claimant's family has purchased a tractor which is equipped with GPS and computer-operated equipment which accommodates the Claimant's limitations by automatically operating the tractor and its equipment allowing the Claimant/Appellant to plow, plant and fertilize. The Claimant/Appellant drives the tractor but cannot program or operate the equipment. As the record reflects, the Claimant/Appellant is only required to "mash" a button to start the

equipment. A family member must program the equipment and accompany the Claimant/Appellant to the field to assist him in the event the equipment fails, and the Claimant/Appellant's family accommodates his mistakes.

The Circuit Court below correctly concluded that the medical evidence supported only the finding that the Claimant/Appellant suffered physical brain damage. Further, the Circuit Court correctly concluded that the Claimant/Appellant's physical brain damage was so severe as to prohibit him from returning to work or finding suitable gainful employment. In support of its holding, the Circuit Court, relying on *Wigfall v. Tideland Utilities, Inc., supra,* correctly set out the manner in which a claimant may prove total disability under § 42-9-10. The Circuit Court held that a Claimant may demonstrate total disability in one of three ways under §42-9-10. First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in §42-9-10. Second, a Claimant may establish total disability under §42-9-20 by showing an injury, which is not a §42-9-30 schedule injury, caused sufficient loss of earning capacity to render him totally disabled. *Coleman v. Quality Concrete Prod.'s, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965). Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 schedule injury must show an additional injury. *Singleton, supra;* see also *McCollum v. Singer Co.*, 300 S.C. 103, 386 S.E.2d 471 (Ct. App. 1989).

The record herein reflects that in addition to physical brain damage, the Claimant/Appellant suffered extensive injuries to his left upper and lower extremities, head

and face. After two surgeries to his left arm and elbow, Dr. Michael Green assigned a 17% impairment to the Claimant/Appellant's upper left extremity. After two surgeries to Claimant's left knee, Dr. James O'Leary assigned a 10% impairment rating to the Claimant/Appellant's lower left extremity. The Claimant/Appellant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant/Appellant's mental and emotional deficits cause him difficulties in coping with everyday life. After his psychological testing, Dr. Randolph Waid assigned a 22% whole person impairment to the Claimant/Appellant for his injuries and Dr. Larry Bergmann assigned an 11% impairment to the Claimant for the injuries for which he and Dr. Roger Deal treated the Claimant/Appellant.

The Claimant/Appellant's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and reliably operate the family farm. The Claimant/Appellant now functions in the low average IQ range and has no formal education beyond high school. Farming is all the Claimant/Appellant knows. The Claimant/Appellant's family has purchased farming equipment which accommodates the Claimant/Appellant's disabilities. The Claimant/Appellant's family has hired farm hands to assist the Claimant/Appellant with his chores. The Claimant/Appellant's father has eliminated his income from the farm to free up funds with which to pay the Claimant/Appellant. The Claimant/Appellant's son has gone to work on the farm and performs much of the Claimant/Appellant's responsibilities. The family has managed its farming practices to maximize the farm's income while permitting the Claimant/Appellant the opportunity to

work on the farm. The Claimant/Appellant can no longer manage the farm's financial affairs and, without his wife, Claimant/Appellant would need a legal guardian to manage his affairs. Vocational expert Dr. William Stewart opined that "[i]n an open competitive labor market [the Claimant/Appellant] would find himself occasionally disabled and unable to work gainfully."

The Circuit Court correctly held that the Claimant/Appellant suffered a complete loss of earning capacity. Based on the authority in *Wigfall v Tidelands Utilities, Inc., supra*, the Circuit Court correctly held that the Claimant/Appellant's loss of earning capacity resulting from his permanent and severe physical brain damage is totally and permanently disabling. Moreover, the Circuit Court correctly held that the Claimant/Appellant's schedule injuries in combination with each other and the Claimant/Appellant's non-schedule injuries are likewise totally disabling. *Wigfall v. Tidelands Utilities, Inc., supra.*

The full Commission affirmed the holding of the Hearing Commissioner that the Claimant/Appellant suffered a loss of earning capacity notwithstanding the financial support offered him by his family farm. In challenging the full Commission's finding, the Defendants/Respondents argue that South Carolina law does not recognize the doctrine of sheltered or benevolent employment. However, the Circuit Court correctly concluded that in order to be entitled to total and permanent disability benefits, the Claimant/Appellant must be unable to perform services other than those that are so limited in quality, dependability and quantity that a reasonable and stable market for them does not exist. Total disability under the Workers' Compensation Act does not require complete abject helplessness. Our courts

have held that the mere fact of employment is not necessarily evidence of earning capacity. *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003); *McCollum v. Singer Co.* and *Stephenson v. Rice Services, Inc., supra.*

The Circuit Court correctly upheld the full Commission in holding that the sheltered or benevolent employment doctrine as articulated by the Commission is merely an extension of long-standing South Carolina law. See *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E. 2d 110 (2002). Citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986); *McCollum v. Singer Co., supra.*

Dr. Stewart, who concluded that the Claimant/Appellant suffered a total loss of earning capacity, recognized Claimant/Appellant's benevolent employment on his family farm. The Claimant/Appellant's wife testified that the Claimant/Appellant was unemployable and that Delano R. Kneece and Son, Inc. would not employ a stranger with the Claimant/Appellant's disabilities. The undisputed testimony of record reflect that those amounts paid to the Claimant/Appellant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant/Appellant on behalf of the family farm. In addition, the Claimant/Appellant's wife testified that the Claimant/Appellant's physical brain damage would make him unable to compete in an open job market and that the family farm would not hire a farm hand with the Claimant/Appellant's disabilities and that no farming operation would go to the cost and expense of providing work accommodations for a farm hand such as the Claimant/Appellant.

Accordingly, the Circuit Court was correct in affirming the full Commission on the issue of sheltered or benevolent employment.

The Defendants/Respondents argue that the Circuit Court erred in holding that the totally and permanently disabled Claimant/Appellant was entitled to weekly disability payments for life. The Defendants/Respondents argue that the Commission could only order weekly lifetime disability payments prospectively. The Defendants/Respondents arguments fly in the face of the plain language of the statute. S.C. Code Ann. § 42-9-10(C) reads as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Statutes must be given their plain meaning. *Joseph Mark Clark, Sr. v. Aiken County Government & South Carolina Property and Casualty Insurance Guaranty Association, formerly Legion Insurance Company*, 366 S.C. 102, 620 S.E.2d 99 (S.C. App. 2005); *Larry Tucker Gay, Jr. v. Robert M. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (S.C. 2009). Here, the statute means what it says. The Claimant/Appellant is not subject to any limitations but is entitled to lifetime weekly benefits from the date of his compensable injury and the Circuit Court correctly so held.

The Defendants/Respondents argue that the Circuit Court erred in affirming the full Commission's award for Claimant/Appellant's medical treatment. The Defendants/ Respondents argue that because certain of the Claimant/Appellant's medical providers which the full Commission authorized to treat the Claimant/Appellant were not selected by the

Defendants/Respondents, the full Commission erred in ordering the Defendants/Respondents to pay for the Claimant/Appellant's past and future medical treatment and mileage. The Defendants/Respondents do not contend that the Claimant/Appellant did not benefit from the treatment of these providers. Rather the Defendants complain about having to pay for the treatment. The full Commission, when it deems it necessary and in the Claimant/Appellant's interest, may override the employer's choice of medical providers and order a change in the medical or hospital services provided and order payment of those medical services. *Clark v. Aiken County Government*, 66 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). The Circuit Court was justified in affirming the full Commission.

Moreover, the Defendants/Respondents argue that the full Commission erred in failing to hold these medical costs to be barred by the equitable doctrine of laches. Throughout the life of the claim, the Claimant/Appellant sought and the Defendants/Respondents provided medical benefits under the Workers' Compensation Act. The Defendants/Respondents can claim no prejudice arising from the length of time of the claim. The Defendants/Respondents' partial compliance with the Act disproves any such prejudice as is required by the doctrine of laches. *Muir v. C. R. Baird, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). Here, the Defendants/Respondents well knew that the Claimant/Appellant suffered permanent and severe physical brain damage and was undergoing for treatment for his injuries from Dr. Bergmann and Dr. Deal. Indeed, the Defendants/Respondents were paying for part of Claimant/Appellant's medical treatment for his injuries. There was no delay in prosecuting

the claim nor were the Defendants/Respondents prejudiced. The Circuit Court correctly held that the doctrine of laches does not apply.

Accordingly, the Circuit Court property affirmed the full Commission award of medical benefits to the Claimant/Appellant.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Defendants/Respondents' Motion to Alter or Amend Judgment be denied. The Circuit Court correctly applied the standard of review and the applicable substantive law to the issues on appeal. Having done so, the Circuit Court correctly held that based on the evidence of record, viewed as a whole, the Claimant/Appellant is totally and permanently disabled with physical brain damage and entitled to an award of benefits under S.C.Code Ann. Section 42-9-10(C). The Circuit Court's reversal of the full Commission on this issue was in all respects proper. In addition, the Circuit Court properly affirmed the full Commission order in all respects raised by the Defendants/Respondents' appeal. For these reasons, the Claimant/Appellant respectfully requests that the Defendant/Respondents' Motion to Alter or Amend Judgment be denied.

Respectfully submitted,

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Columbia, South Carolina
August 21, 2013

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON RICKY D. KNEECE, Claimant/Appellant/Respondent, v. KNEECE FARMS, Employer, and LEGION IN LIQUIDATION AND THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, Carrier, Defendants/Appellants/Respondent.	IN THE COURT OF COMMON PLEAS Civil Action Nos. 2012-CP-32-02093 & 2012-CP-32-02111 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGEMENT**

Defendants respectfully move this Honorable Court, for an order reconsidering, altering or amending the Order in this matter signed by the Honorable R. Knox McMahon on July 18, 2013, filed July 19, 2013, and received by counsel for the Defendants on July 24, 2013. A copy of this Order is attached and incorporated by reference (Exhibit 1). Defendants'/Appellants' Brief (Exhibit 2) also attached and incorporated by reference. Defendants move, pursuant to Rule 59(e), S.C.R.C.P., and the Court's inherent authority to amend its own ruling, that the Court reconsider, alter or amend the July 19, 2013 Order as outlined below.

BACKGROUND

This appeal arises from a workers' compensation claim and involves cross appeals by the parties to the Circuit Court from a prior Order of the Appellate Panel of the Workers' Compensation Commission dated April 19, 2012. The date of accident was prior to July 1, 2007, therefore, pursuant to S.C. Code Ann. §1-23-380 and §42-17-60 these appeals were properly made to the Circuit Court of Lexington County. Appellants/Respondents/Defendants ("Employer/Carrier") are represented by Mark D. Cauthen and Peter P. Leventis, IV, of McKay, Cauthen, Settana, & Stubley, P.A. of Columbia, S.C., and Appellant/Respondent/Claimant ("Claimant") is represented by Scott Elliott of Elliot & Elliot, P.A., also of Columbia, S.C.

The Claimant was involved in an admitted work related accident on November 22, 1999. The Claimant was changing a tire, when it exploded causing injuries to the Claimant's head, brain, and left side of his body. In the instant case, the single Commissioner made a finding of fact that the Claimant's ultimate degree of disability was that he was permanently totally disabled accompanied by a physical brain injury, and therefore entitled to life time indemnity benefits under S.C. Code Ann. §42-9-10(C)(See Williams Order dated April 28, 2011).

The Claimant, by his own testimony, tax filings, prior signed submissions to the SCWCC and other evidence in the record has continued work in excess of 40 to 50 hours per week for his own farm since at least 2005. He now earns a salary far in excess of that which he made at the time of the November 1999 accident. Based on this and other evidence in the record, the Appellate Panel of the Workers' Compensation Commission determined that that Claimant was not permanently totally disabled, but rather was

entitled to a permanency award for his brain under S.C. Code of Regs. §67-1101, as well of other injuries under S.C. Code Ann. §42-9-30.

The Order from the Appellate Panel is somewhat contradictory in that the Order, drafted by counsel for the Claimant, purports to adopted each and every factual finding of the single Commissioner – including the rights to indemnity, and medical benefits pursuant to a purported finding of permanent totally disability – but goes on to reverse the single Commissioner on that point, in finding that the Claimant was not permanently totally disabled, and remanding the case back to the single Commissioner for findings of the Claimant's degree of permanent disability to the brain, among other injuries, under S.C. Code of Regs. §67-1101.

THE ORDER SHOULD BE RECONSIDERED, ALTERED OR AMEDNDED FOR THE FOLLOWING REASONS

A Rule 59(e) motion is required to preserve issues that have not been ruled upon by the trial court. See Wilder Corp. v. Wilke, 330 S.C., 71, 77, 497 S.E. 2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. Elam v. S. Carolina Dept. of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review"). In Coward Hund Construction Co. v. Bell Corp., 336 S.C. 1,4, 518 S.E. 2d 56, 58 (Ct. App. 1999), the Court of Appeals explained:

> "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,], is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E. 2d 834, 842 (1992)

(quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L.Ed.2d 178 (1988)).

The Order of the Circuit Court does not address all of the issues which are the basis of the appeal, and/or determines the issues based on the incorrect standard of review. Under the appropriate standard of review, "[i]n workers' compensation cases, the Full Commission is the ultimate fact finder." *Shealy v. Aiken County*, 341 S.C. 448, 455; 535 S.E.2d 438, 442 (2000). Furthermore, in an appeal from the Commission, "[t]he 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). The question of whether there is a sufficiency of evidence is strictly a matter of fact, and the findings of the Commission thereabout are final. Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E. 646 (1938) [additional citations omitted]. It is well settled that findings of fact by the Industrial Commission are conclusive and binding upon both the court of common pleas and the Supreme Court, if there is any competent evidence reasonably tending to support them, even though there is evidence that would have supported a finding to the contrary. Willard v. Commissioners of Public Works of City of Spartanburg, 219 S.C. 477, 65 S.E.2d 874 (1951). In reviewing the finding of an administrative agency, neither the Court of Appeals nor the Circuit Court may substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

The Employer/Carrier assert that the Circuit Court, in reversing the findings of the Appellate Panel as to the Claimant's degree of permanency, by finding that the Claimant was not permanently totally disabled, has misapprehended either the appropriate standard of review for a factual finding of disability, or failed to address how the Claimant's injury

has rendered him permanently totally disabled as a matter of law. The Order of the Circuit Court overturns the findings of the Appellate Panel which had ruled, under the facts of this case, the Claimant was not permanently totally disabled.

There are only two ways in which a claimant can be ruled permanently totally disabled as a matter of law. First is by the loss of two hands, feet, eyes, shoulders, hips, arms or legs, or any combination thereof. (S.C. Code Ann. §42-9-10(B)). None of those circumstances exist in the present case as the Claimant did not suffer a loss of any body parts. Secondly, to be declared permanently totally disabled as a matter of law, a claimant may suffer a disability of over 50% to the back. (See S.C. Code Ann. §42-9-30). The Claimant in the instant case did not suffer an injury to the back, nor receive a disability rating thereto. Therefore, the Claimant is not permanently disabled as a matter of law under either theory.

Under a factual determination by the Commission, a Claimant may also be determined to be permanently totally disabled under S.C. Code Ann. §42-9-10(A) if it is determined he has suffered an injury to a "non-scheduled" body part, or to two or more scheduled member body parts (See S.C. Code Ann. §42-9-30 and S.C. Code of Regs. §67-1101), which has resulted in a total loss of earning capacity. Similarly, if a claimant has suffered a permanent physical brain injury which has rendered him or her to have lost all earning capacity, he or she can be determined permanently totally disabled and entitled to life time benefits under S.C. Code Ann. §42-9-10(C).

Nevertheless, neither of these two types of permanent total disability (wage loss under §42-9-10(A) or (C)) are findings that can be made as a matter of law. Rather, such a determination of disability under this model is adjudicated as a factual question,

therefore the ultimate determination of disability in such circumstances *must* be determined by the Workers' Compensation Commission as the trier of fact. The Supreme Court recently clarified in two opinions earlier this year, Sparks v. Palmetto Hardwood, *Inc.*, Opinion No. 27229 (2013) and Crisp v. SouthCo., Inc., Opinion No. 27230 (Ct. App. 2013) that a physical brain injury in and of itself was not enough to make a finding that a Claimant was therefore permanently totally disabled under S.C. Code Ann. §42-9-10(C).

The petitioner in Crisp, similarly to the Claimant/Appellant/Respondent Kneece in the case *sub judice*, argued that the presence of a permanent physical brain injury or damage, triggers the operation of section 42-9-10(C) – which Crisp had essentially argued required a finding as a matter of law of permanent total disability. The Sparks and Crisp courts summarily rejected this argument, finding that such an interpretation would be contrary to legislative intent, and to the manner in which our courts have awarded compensation for injuries to the brain. Further support for the proposition that §42-9-10(C) does not implicate a finding of permanent total disability for brain injuries as a matter of law, is that S.C. Code of Regs. §67-1101 provides scheduled compensation up to 250 weeks for injuries to the brain. That is, §67-1101 is for permanent *partial* disability cases where a brain injury had occurred, but where the injured worker has not been rendered permanently totally disabled by the injury.

The Order of the Circuit Court in this matter, makes a finding that that Claimant is indeed permanently totally disabled, countermanding the Appellate Panel of the Commission's findings that he is not permanently totally disabled, and instead entitled to benefits under S.C. Code of Regs. §67-1101. This finding by the Circuit Court cannot

have been as a matter of law, as both §42-9-10(B)(amputation and member loss) and §42-9-30(21)(back injuries) are not even at issue in the instant case, and as outlined by the Crisp and Sparks Courts, a finding of permanent total disability in brain injury cases is not as a matter of law. Therefore, the finding of permanent total disability by the Court must have been a determination of fact as to the degree and severity of the injury to the Claimant's brain.

Finally, on this point, the Circuit Court Order on page 11, in weighing the evidence of the record held that: "[t]he evidence of the record, when viewed as a whole, compels the finding that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function." However, this newly instituted finding by the Circuit Court, in contradiction to the Appellate Panels' findings on this point, is also contradictory to the 'substantial evidence rule.' First, a finding of the degree of severity of an injury, is question of fact for the Commission. The Commission's failure to find a "severe and permanent brain injury," is most certainly supported by the evidence in the record, even if the Circuit Court were to conclude it was not by the greater weight of the evidence. Nonetheless, the Appellate Panel's ruling should stand under the applicable standard of review.

Defendants assert there is competent and substantial evidence in the record to support the Commission's failure to find a "severe permanent brain injury," with "severely impaired" function of the Claimant's brain. For example, On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Claimant's

examination to be "absolutely normal." (R. p. 793). Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. (R. p. 796). No further treatment was recommended by Dr. Adams. See also report of Dr. Tora Brawley who was in agreement with Dr. Waid (Claimant's expert) that the Claimant had experienced a "mild residual brain dysfunction as a result of his accident." (R. p. 826).

However, if the finding was made as a factual determination, Defendants contend that such a finding by the Circuit Court is improper, in that the Appellate Panel of three Commissioners in weighing the evidence as to disability, unanimously found that the Claimant was not totally disabled. Moreover, the Appellate Panel's finding was supported by substantial evidence in that the Claimant continued to work over 50 hours per week, now making significantly higher wages than he did at the time of the accident, filing tax returns on such money as wages, and previously signing a Form 17 to be filed with the SCWCC representing that he had returned to work making the same wages he earned at the time of his injury (or more) as of 2005. Therefore, under the applicable standard of review, this finding of the Appellate Panel is binding on appeal, and should have been affirmed.

Whether the Circuit Court upon its review finds that the greater weight of the evidence may have supported a finding of permanent total disability or not, such weighing of the evidence is not permitted at this point in the appeal. The only question upon appellate review of this issue is indeed whether or not the finding of the Appellate Panel (that the Claimant has not suffered permanent total disability) was supported by substantial evidence in the record. Defendants assert that such findings were so

supported, and to find otherwise was in error. Similarly on page 12 of the Order, the Circuit Court improperly engaged in weighing the evidence by finding, "[t]here is no evidence that he can operate a complicated computer operated tractor." To the contrary, there is substantial evidence in the record, to include the Claimant's own testimony at the hearing and his sworn deposition testimony. Therefore, this finding should not have been disturbed on appeal by the Circuit Court.

In addition, the Circuit Court improperly reinstating the trial Commissioner's Order of April 28, 2011, thereby making findings of fact contrary to, and in conflict with, the Appellate Panel's April 19, 2012 determination(s) that the Claimant was capable of operating a complicated computer operated tractor up to 50 hours per week and therefore was not permanently totally disabled. Also, the Circuit Court improperly relies on the "sheltered employment" doctrine to find the Claimant was permanently totally disabled through a total loss of earning capacity, when such a finding by the single Commissioner had been inherently overturned by the Appellate Panel.

That is, the Appellate abandoned this finding of "sheltered employment" in the instant case, by making its finding that the Claimant was in fact gainfully employed by virtue of his work driving a tractor up to 50 hours per week, and contemptuously ruling that he was indeed not permanently totally disabled. For the Circuit Court to have found otherwise was an impermissible weighing of the evidence as to this factual determination made by the Appellate Panel on this point. Furthermore, and as outlined in the prior appellate briefs of the Defendants to the Circuit Court, the "sheltered employment" doctrine has not been formally adopted in South Carolina. Nevertheless, even in states where "sheltered employment" has been adopted, the facts of this case are materially

different. E.g. the Claimant is technically self-employed. He is no longer employed by the Defendant employer in this claim. He has continually received raises over the past ten years since the accident, and he actually works, in almost the same capacity – driving tractors for up to three quarters of the week, for close to 50 hours or more per week, as he did prior to the date of accident and confirmed in his deposition testimony. No authority was cited by the Circuit Court for the premise that sheltered employment may be provided by a non-party employer, as was the case here.

The Defendants further argue, as outlined in the prior briefs of the parties, that any rights flowing from such a finding of permanent total disability, are in error in that life time medical benefits under S.C. Code Ann. §42-9-10 and §42-15-60 would be improper to the degree that the Claimant was incorrectly adjudicated to be permanently totally disabled. Similarly, to the degree that the Claimant was incorrectly determined to be found permanently totally disabled, lifetime/ongoing permanent disability benefits under S.C. Code Ann. §42-9-10(C) would not be available.

The Defendants further contend that even assuming the Circuit Court accurately determined the Claimant to be permanently totally disabled accompanied by a physical brain injury as a result of his accident under S.C. Code Ann. §42-9-10(C), such permanency benefits for a life time indemnity award would only be payable from the date of maximum medical improvement as adjudicated by the Workers' Compensation Commission, and not from the date of injury. Indemnity benefits from the date of accident up through the date of maximum medical improvement are only awardable to a Claimant as temporary indemnity benefits under S.C. Code Ann. §§42-9-200 et seq. No such finding of additional temporary total disability benefits was made by the single

Commissioner, the Appellate Panel or the Circuit Court in the instant case. Therefore, no further temporary benefits should be provided in the instant case between the date of accident and the date the Claimant was adjudicated to have reached maximum medical improvement; as the Claimant previously voluntarily terminated his right to further temporary indemnity benefits back in 2006 prefaced upon his 2005 return to full time employment at the same or greater earnings. Also, see Cruiel v. Environmental Management Services 376 S.C. 23, 655 S.E.2d 482 (S.C. 2007) which states in part:

> Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

The Defendants further argue that the Court misapprehended the appropriate legal arguments raised as the entitlement of the Claimant to the unauthorized, and previously unrequested treatment he received from the 2005 hearing until the time of his most recent hearing request before the Commission in 2010, which ultimately gave rise to this appeal. Between 2006 and 2010, the Claimant, unknown to the Defendants, sought and received treatment for approximately half a decade with unauthorized treatment providers. Defendants readily concede that under §42-15-60 the provision of medical benefits is directed by the employer/carrier, by the Commission, or upon a ruling of the Commission by the Claimant. However, in the first instance, unless or until ordered otherwise, medical care is to be directed and provided by the Employer/Carrier. This statute also provides that in instances of emergent medical necessity, the Claimant's care will be

provided for by the employer/carrier despite the fact that such treatment was not authorized by the carrier nor had been directed by the Commission.

Obviously, the fact that the statute provides for and outlines instances as to emergent medical care, elucidates that it was not intended the Commission would *retroactively* be able to provide for the Claimant to direct his or her own medical care for several years prior to a request for same. Even more so, when no such request for treatment was even pending to the Defendants nor to the Commission. Otherwise, in a day and age when many persons have their own private health insurance, the provision permitting an employer/carrier to direct medical treatment in the first instance could be totally circumvented. Like in this case, an injured employee who treated on his or her own for five years – *without* even having requested such from the employer/carrier, nor from the Commission during that time period – could come back after half a decade requesting such care be reimbursed to him or her. Such a ruling by the Court or the Commission totally emasculates the dictates of §42-15-60 that medical care be provided at the direction of the employer/carrier, or even at the direction of the Commission itself.

Defendants contend that none of the treatment with the unauthorized physician's – or the related mileages, prescriptions and co-pays – were compensable by the Carrier nor reimbursable to the Claimant. However, even accepting that the Commission properly has directed care to take place with such doctors at this point in time, as requested by the Claimant in fall of 2010, Defendants still adamantly assert that the Commission improperly ordered that such treatment/reimbursement and liabilities of the carrier date back to any time prior to the fall 2010 hearing request of the Claimant. That is, the first time the Defendants or the Commission were ever even apprised of such

unauthorized treatment being requested. The Defendants were never given an opportunity to accept, reject or provide such treatment between 2005 and 2010, and the proper remedy would have been a hearing on the matter before the Commission *at that period in time* to determine the efficacy of such treatment or provision of such, and by which party, at some time in 2005, 2006, 2007, 2008, 2009 or 2010.

Also, even if the Claimant were entitled to lifetime benefits, the Circuit Court erred in failing address appellate ground No. 10 raised by the Employer/Carrier in their request for appellate review to the both to the Appellate Panel of the Commission and the Circuit Court. Namely, that the Appellate Panel and the Circuit Court erred in affirming an award for weekly compensation benefits to the Claimant while failing to address credit for wages/earnings of the Claimant from his date of return to full time employment in 2005 to present, the error being that such issue was raised by Defendants in their appeal but not ruled upon.

As a final matter, the Defendants have raised the equitable doctrine of *laches* and *res judicata* against the Claimant for many of the numerous prescription and mileages reimbursement requests which cover 10 years prior to the hearing request of the Claimant in 2010. Note, these were not previously denied requests for reimbursement, these are simply requests that were never previously made prior to 2010. This is in addition to the request lacking the necessary specificity required for the Defendants to accurately assess the validity of such requests. *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). "*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.

Claimant Kneece did not seek reimbursement for his alleged expenses for over 10 years, which Defendants assert is an unreasonable amount of time to have waited. The Claimant by his own admission worked over 40 to 50 hours a week or during that time period, and was represented by counsel, and requested and had other workers' compensation hearings apart from the one under appeal in the intervening time period. Therefore, such unreasonable delay was not excusable, and the Claimant clearly had the ability to act sooner in asserting his rights. At the very least, Claimant had an opportunity to request reimbursement for medical expenses and mileage at the 2005 hearing in this matter - but chose not to pursue them. Also note, prior to August 23, 2004, the Commission policy was not to permit mileage reimbursement to and from the pharmacy. (See www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx). Defendants assert they are prejudiced in part by their inability to accurately go back and assess these requests, many of which are over a decade in the future and with medical providers, dates of service and treatment centers that were not authorized or known about by the Defendants.

Lastly, a hearing in this same claim for benefits, for the accident dated November 22, 1999, took place by and between these same parties on January 11, 2005. The Claimant could have raised the issue of medical mileages and reimbursements owed up

until that time, but did not do so. Therefore, the Defendant Employer/Carrier would further contend that any such benefits prior to January 11, 2005 would be further barred by doctrine of *res judicata*.

CONCLUSION

Based on the Order and its failure to specifically address the issues outlined herein above, and/or apply the appropriate standard of appellate review of such disputed issues, these Defendants respectfully ask that the Court, pursuant to Rule 59(e) S.C.R.C.P., and the Court's inherent authority to amend its own order, reconsider and then alter or amend the ORDER 2012-CP-32-02093 & 2012-CP-32-02111, entered July 19, 2013, to reconsider and/or specifically address the issues provided herein.

Respectfully Submitted,

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August 5, 2013
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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
RICKY D. KNEECE, Claimant, v. KNEECE FARMS, Employer, and LEGION IN LIQUIDATION AND THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, Carrier, Defendants.	)	Civil Action Nos. 2012-CP-32-02093 & 2012-CP-32-02111 **DEFENDANTS' BRIEF**

TO: SCOTT ELLIOT, ESQUIRE, COUNSEL FOR THE CLAIMANT:

The Defendants, S.C. Property & Casualty Insurance Guaranty Association hereby submits the following brief in support of its petition for Judicial Review:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before the Court of Common Pleas on Petitions for Judicial Review submitted by both parties in response to the Order of the South Carolina Workers' Compensation Full Commission dated April 19, 2012. Previously, this matter came before the Full Commission on September 20, 2011, on appeal from the Decision and Order of Commissioner Derrick L. Williams filed on April 28, 2011, by Kneece Farms, Legion Insurance Company in

Liquidation, and The South Carolina Property and Casualty Insurance Guaranty Association (hereinafter "Defendants").

The Claimant, Ricky D. Kneece (hereinafter "Claimant"), sustained compensable injuries on November 22, 1999, while working for Kneece Farms, which is owned by the Claimant's uncle, including injuries to his head/brain, left lower extremity and left upper extremity. The Defendants provided medical as well as indemnity benefits for the Claimant's work injuries.

At the time of the accident at Kneece Farms, the Claimant was also employed with Delano R. Kneece & Son Farms, Inc. (hereinafter "Delano Kneece & Son"), which is a family farm that is owned and operated by Claimant and his father. The Claimant and his father farmed their own land while also working as sharecroppers on land owned by Kneece Farms. The Claimant never returned to employment with the Defendant Employer in this claim – Kneece Farms – but instead, returned to full time employment with a different employer, Delano Kneece & Son Farms.

The Claimant returned to limited work duties with Delano R. Kneece & Son Farms within months of his accident and admitted, per a signed Form 17, that he was able to return to full time work with Delano Kneece & Son during 2005.

The Claimant, per testimony during the hearing, has never been without his salary or wages as a result of his injuries. During the hearing, the Claimant's Wife, who is also the bookkeeper for Delano R. Kneece & Son Farms, Inc., testified that the Claimant's wages from the family farm for 2007 and 2009 were $76,600.00 and $77,600.00 respectively. She also testified that these yearly amounts were over two times the amount of the Claimant's yearly salary at the time of the accident.

On April 16, 2004, Claimant's treating physician for his left lower extremity, Dr. James O'Leary, released Claimant at MMI with a 10% impairment rating to his left lower extremity. As for the injury to Claimant's left upper extremity, Claimant treated with Dr. Michael Green who released claimant at MMI with a 17% impairment rating to his left upper extremity on September 23, 2004.

Accordingly, the Defendants filed a Form 21 Request to Stop Payment of TTD benefits. The Hearing on Defendants' Form 21 was held on January 11, 2005, before Commissioner Childs. On April 18, 2005, Commissioner Childs issued her Decision and Order finding and concluding, in pertinent part, that: (1) Claimant sustained compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, left shoulder, left elbow and depression; and (2) Claimant had not yet reached MMI for those injuries. As a result, the Hearing Commissioner ordered Defendants to provide additional medical treatment for injuries to the Claimant's left knee and shoulder, as well as treatment for Claimant's closed head injury and depression with Dr. Randy Waid and Dr. Larry Bergmann.

In addition, the Hearing Commissioner found that although the Claimant was earning wages from Kneece & Son during the same time period he was receiving TTD benefits from the Carrier, the Defendants were not allowed to receive a set-off or credit for those TTD benefits because the Claimant's wages were paid by a "collateral source." This "collateral source" was the salary Claimant earned at Kneece & Son.

The Defendants timely appealed this 2005 Decision and Order of Commissioner Childs. However, prior to the Full Commission Hearing on the matter the Claimant agreed to execute a Form 17 acknowledging that he was able to return to work at full duty as of October 4, 2005. Accordingly, TTD payments were terminated as of October 4, 2005; Defendants provided

Claimant with additional medical treatment for his closed head/brain injury, as well as the injuries to Claimant's left lower extremity (knee) and left upper extremity (shoulder) pursuant to the 2005 Order and the Agreement between the parties.

The Claimant was re-evaluated by Dr. Green on March 20, 2006. During this evaluation, the Claimant informed Dr. Green that he drove his tractor for long periods of time on his farm (Kneece & Son). The Claimant's physical examination at this appointment was normal except for a "little bit of discomfort." Dr. Green opined at that time that the claimant was able to *work full duty* as of March 20, 2006.

The Claimant was also evaluated by Dr. Randy Waid for his closed head injury. In his report of February 8, 2007, Dr. Waid indicated that the Claimant continued to "demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning." He also noted that the Claimant continued to be employed on his family farm. On February 8, 2007, Dr. Waid released the Claimant at MMI with a 22% impairment rating to the whole person for this injury. The Claimant had previously been released at MMI with regard to his left upper and left lower extremity in 2004, as stated above.

On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Claimant's examination to be "absolutely normal". Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. No further treatment was recommended by Dr. Adams.

Following the evaluation with Dr. Adams, neither Claimant nor his attorney ever made any demand or request for any additional medical treatment other than a request that Claimant be

allowed to continue his psychological treatment with Dr. Bergmann and Dr. Deal, which the Defendants authorized. However, in March of 2010, the Claimant decided to seek additional medical treatment on his own without any notice to Defendants with Dr. Charles Shissias of Low Country Medical Group in Beaufort.

Following the commencement of unauthorized treatment with Dr. Shissias, Claimant filed a Form 50 on July 9, 2010, requesting additional medical treatment, as well as an award of permanent and total disability based upon a general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10.

This Form 50 was Claimant's first request for a Hearing since the Hearing before Commissioner Childs in 2005. This was also the first notice to Defendants that: (1) Claimant was alleging he was permanently and totally disabled as a result of a loss of earning capacity under S.C. Code Ann. § 42-9-10; (2) Claimant had been receiving treatment from Dr. Shissias; and (3) Claimant intended to rely upon the opinions of the unauthorized physician, Dr. Shissias, as well as Claimant's own vocational expert, William Stewart, to establish his claim for permanent and total disability. The Defendants answered Claimant's Form 50, denying he was entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10, or any other provision of the Workers' Compensation Act.

A Hearing on Forms 50 and 51 was scheduled before Commissioner Williams on October 4, 2010; however, the parties agreed to mediate this claim. Mediation was held on November 29, 2010, but was unsuccessful. Following mediation, Defendants sought to obtain evaluations with a neuropsychologist, a neurologist, and a vocational specialist to address the new and updated opinions of Claimant's experts, specifically with regard to any ongoing neurological issues or deficits.

On December 7, 2010, counsel for the Defendants notified Claimant's counsel of a neuropsychological evaluation appointment set for January 4, 2011, with Dr. Tora Brawley of the University of South Carolina Specialty Clinics, Department of Neuropsychiatry and Behavioral Science. Subsequently, Defendants received correspondence from Claimant's attorney to Dr. Brawley indicating that he was refusing to allow Claimant to attend the scheduled appointment with Dr. Brawley. The Defendants kept the appointment scheduled; however, the Claimant failed to appear for same.

On December 14, 2010, Counsel for the Defendants requested, via written correspondence to Claimant's attorney, dates that Claimant was available to meet with Defendants' vocational expert, Cynthia P. Grimley. In addition, Ms. Grimley separately phoned and wrote to Claimant's counsel requesting available dates for the interview for the vocational evaluation. Although Claimant's counsel indicated he spoke with Ms. Grimley in December and was "checking her references," he subsequently advised that he would not agree to make the Claimant available for a vocational evaluation with the Defendants' expert.

Finally, on January 21, 2011, counsel for the Defendants notified the Claimant's counsel of a neurological examination scheduled for the Claimant with Dr. Ben Bashinski of Neurological Associates of Augusta, Georgia, for February 4, 2011. The Defendants offered to provide transportation for the Claimant to this appointment if needed. However, Claimant's counsel responded by letter dated January 24, 2011, that the Claimant would not submit to the neurological evaluation with Dr. Bashinski.

On January 26, 2011, the Defendants moved for an Order compelling the Claimant to attend and cooperate with the examinations to be conducted by the Defendants' neurologist, neuropsychologist and vocational rehabilitation expert as set forth above. The Defendants also

requested an Order suspending Claimant's right to compensation benefits and cancelling the hearing that had been scheduled for February 14, 2011, due to the Claimant's noncompliance with S.C. Code Ann. § 42-15-80. On February 2, 2011, the Defendants' Motion to Compel the medical and vocational evaluations and to postpone the hearing was denied by a Form Order of the Commission without explanation. However, prior to the hearing, the Claimant complied with the neuropsychological evaluation with Dr. Brawley and this was performed on January 29, 2011. In her report, Dr. Brawley was essentially in agreement with Dr. Waid that the Claimant had experienced a "mild residual brain dysfunction as a result of his accident."

At the Hearing on February 14, 2011, Defendants renewed their Motion to Compel and Postpone the Hearing and objected to the introduction of various records reflecting certain expenditures submitted by Claimant through his APA submissions. (See, Exhibit 4 of Claimant's APA submissions). The Defendants' objection of the introduction of this evidence as well as their Motion to Compel and Postpone the Hearing were both denied by the Hearing Commissioner. Specifically, the Hearing Commissioner stated that these evaluations could have been performed prior to the Hearing; however, no finding or disposition was made with regard to the Motion to Compel in the hearing Commissioner's Order.

At the Hearing on February 14, 2011, the Claimant asserted that he was entitled to permanent and total disability benefits as a result of a physical brain injury pursuant to S.C. Code Ann. § 42-9-10. It was the position of the Defendants that the Claimant had not sustained a loss of earning capacity and that Claimant was not permanently and totally disabled. However, both parties agreed the Claimant was at MMI for all injuries.

On April 28, 2011, Commissioner Derrick L. Williams issued his Decision and Order, finding and concluding in pertinent part, that:

1. The job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature and the accommodations made by Claimant's family that enabled Claimant to perform certain limited services for Delano R. Kneece & Son, Inc., is not evidence that a reasonably stable market exists for the services Claimant provides for the family farm.

2. The amounts paid the Claimant by Delano R. Kneece & Son, Inc. are not intended to represent wages earned and the amount is not calculated on the basis of services performed by Claimant. Instead, those amounts paid to the Claimant are in the nature of a gift and do not constitute wages. Additionally, that Claimant was entitled to weekly compensation for all previously unpaid weeks (despite earning significantly more yearly income from his employer than he received at the time of his accident).

3. The Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable, sustained basis in accordance with the opinion of Dr. Stewart and, therefore, the Claimant is unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist.

4. That the Claimant sustained injuries to the brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth, and psychological.

5. The Claimant is permanently and totally disabled, with a physical brain injury, pursuant to §42-9-10, and is entitled to lifetime benefits in terms of weekly compensation and medical treatment.

6. The Defendants have failed to pay for all medications prescribed by Claimant's physicians, to include Drs. Deal, Wicker, Shissias, and Ugino.

7. The Claimant will benefit from future treatment and Defendants are ordered to pay for those medications for all causally related injuries.

8. The Claimant has accumulated mileage of 3,658 for which he is entitled to reimbursement, (despite failing to submit any prior requests for over ten years of treatment).

9. The Claimant has accumulated charges of $14,010.77 in prescriptive medications for which he is entitled to reimbursement.

Based upon the Hearing Commissioner's Findings of Fact and Conclusions of Law, the Defendants were ordered to pay Claimant weekly compensation in the amount of $461.67 from

November 22, 1999, to the present and continuing for Claimant's lifetime, with a credit for 157 1/7 weeks of weekly compensation already paid to Claimant.

In addition, the Defendants were ordered to provide Claimant lifetime medical treatment for his compensable injuries to be directed by Drs. Bergmann, Deal, Shissias, Wicker and Ugino, as well as reimbursement for all causally related medical expenses incurred to date, including reimbursement for all prescription medication and mileage listed by Claimant in his Exhibits.

From this Decision and Order issued by Commissioner Williams, the Defendants timely filed their Form 30 Request for Review to the Appellate Panel of the South Carolina Workers' Compensation Commission, raising 39 Grounds for Review. The Defendants' appeal was heard by the Full Commission on September 20, 2011.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and weighed the evidence as presented at the initial hearing, finding good grounds to reverse and remand the prior Order on grounds that Claimant was not permanently and totally disabled with accompanying physical brain damage. Puzzlingly, the Full Commission signed a proposed Order submitted by Claimant's Counsel without removing or amending the multitude of Findings of Fact and Conclusions of Law that conflicted with their Holdings.

Subsequently, both parties timely appealed the Order of the Full Commission for the reasons outlined below and in their respective Petitions for Review.

SUBSTANTIAL EVIDENCE STANDARD

The question of whether there is a sufficiency of evidence is strictly a matter of fact, and the findings of the Commission thereabout are final. *Phillips v. Dixie Stores, Inc.*, 186 S.C. 374,

195 S.E. 646 (1938) [additional citations omitted]. It is well settled that findings of fact by the Industrial Commission are conclusive and binding upon both the court of common pleas and the Supreme Court, if there is any competent evidence reasonably tending to support them, even though there is evidence that would have supported a finding to the contrary. *Willard v. Commissioners of Public Works of City of Spartanburg*, 219 S.C. 477, 65 S.E.2d 874 (1951). In reviewing the finding of an administrative agency, neither the Court of Appeals nor the Circuit Court may substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Furthermore, a reviewing court will not disturb findings of the Workers' Compensation Commission if its findings are supported by substantial evidence on the record as a whole. *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). Where there is a conflict in evidence, either by different witnesses or in testimony of the same witness, findings of fact of the South Carolina Workers' Compensation Commission are conclusive. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999). If evidence is susceptible to more than one reasonable inference, the full Commission's finding must be sustained. *Wilson v. City of Darlington*, 229 S.C. 62, 91 S.E.2d 714 (1956). The courts may not weigh the evidence in their review of a factual finding by the Commission. *Walker v. City of Columbia*, 247 S.C. 241, 146 S.E.2d 856 (1966).

Based on the foregoing, the Circuit Court is bound by the findings of the Commission if they are supported by substantial evidence. The Full Commission's Order thoroughly explains its analysis of the issues and the reasonable evidence it relied on in reversing the lower Order. While the Claimant argues that additional weight should be placed on certain bits and pieces of evidence, the Circuit Court may not substitute its own judgment for that of the Appellate Panel

with regards to the weight of the evidence. It is not the court's duty to weigh the testimony but only to determine whether the record contains competent evidence to support the findings of the Workers' Compensation Commission. *Kay v. South Carolina Public Service Authority*, 246 S.C. 168, 143 S.E.2d 130 (1965).

"The statute empowers the full Commission to make its own findings of fact and to reach its own conclusions of law consistent with or inconsistent with those of the hearing commissioner. *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967).

If the evidence is all one way, or if the findings of the Commission are based on surmise, speculation, or conjecture, the issue becomes one of law for the court and not of fact for the Commission. *Herndon v. Morgan Mills, Inc.*, 246 SC 201, 143 SE2d 376 (1965).

Upon admitted or established facts the question of whether an accident is compensable is a question of law, and review thereof is not an invasion of the fact-finding field of the Commission on the part of the Court. *Jordan v. Dixie Chevrolet, Inc.*, 218 SC 73, 61 SE2d 654 (1950). A Court may reverse or modify the Workers' Compensation Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. *Etheredge v. Monsanto Co.*, 349 SC 451, 562 SE2d 679 (2002).

ARGUMENT

I. **THE FULL COMMISSION APPROPRIATELY REVERSED AND REMANDED THE HEARING COMMISSIONER'S ORDER WHICH HAD FOUND THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED PER TO S.C. CODE ANN. § 42-9-10(C) AND REMANDED THE CASE FOR FINDING OF PERMANENT DISABILITY UNDER Reg. 67-1101.**

The Full Commission properly determined that Claimant was not permanently and totally disabled due to the combination of the injury to the brain and other injuries. Specifically, based upon the greater weight of evidence in the record as outlined below:

1. Claimant made no allegation of permanent and total disability based upon a specific disability;

2. Claimant failed to establish any presumption of permanent and total disability under S.C. Code Ann. § 42-9-10 or 42-9-30;

3. Claimant experienced no loss of earning capacity;

4. Claimant returned to work full time with a different employer making the same or greater earnings as prior to the work accident; and

5. Claimant executed a Form 17 on April 18, 2005, affirming and attesting to his ability to return to work.

6. Without evidence that Claimant's brain injury has rendered him unable to work, the presence of a brain injury alone is not sufficient to qualify for lifetime benefits under the Act.

As stated above, the full commission based its finding that claimant was not permanently and totally disabled with a physical brain injury, (but rather was limited to benefits for injury to the brain under r. 67-1101), on reasonable and competent evidence of claimant's continuing abilities to maintain gainful employment.

Pursuant to the South Carolina Supreme Court case of *Wigfall v. Tidelands Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003), a claimant may establish his entitlement to an award of permanent and total disability under S.C. Code Ann. § 42-9-10, in one of three ways:

> First, a claimant may be presumptively totally disabled. As such, a claimant must show a physical injury enumerated in § 42-9-10. However, because the Legislature has categorized certain types of injuries as *per se* totally disabling, the claimant need not show a loss of earning capacity....
>
> Second, a claimant may establish total disability under § 42-9-10 by showing an injury, which is not a § 42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled....
>
> Third, a claimant may establish total disability through multiple physical injuries. Under this scenario a claimant who has a § 42-9-30 scheduled injury must show an additional injury....

Wigfall, 580 S.E.2d at 105.

Claimant's Form 50 expressly alleges that he is permanently and totally disability due to a general disability only. The Claimant makes no allegation of permanent and total disability based upon a specific disability pursuant to S.C. Code Ann. § 42-9-30. As enunciated in the recent case of *Hutson v. South Carolina State Ports Authority*, 390 S.C. 108, 700 S.E.2d 462 (Ct. App 2010), "[u]nder the South Carolina Workers' Compensation Act, a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability; alternatively, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute." *Hutson*, 700 S.E.2d at 465.

Therefore, because the Claimant alleges that he is permanently and totally disabled as a result of a general disability, the Claimant has the burden of proving that he is either presumptively permanently and totally disabled or that his non-scheduled injury caused a sufficient loss of earning capacity to render him permanently and totally disabled. The Claimant failed to meet his burden of proving he is entitled to an award of permanent and total disability under either theory.

A. THE CLAIMANT DID NOT SUSTAIN A LOSS OF EARNING CAPACITY AND, THEREFORE, CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED PURSUANT TO S.C. CODE ANN. § 42-9-10 OR § 42-9-20:

The evidence in the record clearly shows that since the time of the Claimant's work injury, he has earned the same and/or a *greater income* than when he was originally injured in the same capacity as an employee and part owner of Delano Kneece & Son Farms (which is a separate business entity from Kneece Farms).

Specifically, a review of Claimant's tax records introduced into evidence demonstrates that the Claimant's earnings have consistently increased since the injury in 1999, and that Claimant currently earns approximately twice as much as he did prior to the accident. There was no evidence presented at the Hearing to indicate that this trend of increasing earnings will change.

In addition, the Claimant's wife testified that the Claimant received a raise in 2007, which resulted in an increase in Claimant's compensation from $3,500.00 per month to $4,175.00 per month. (Roxanne Kneece Deposition, September 29, 2004, P. 11). Moreover, the Claimant himself testified that he had a substantial work life following his injury despite his limitations. (Ricky Kneece Deposition, December 17, 2004, P. 15-21).

As outlined below, the Claimant's testimony and other evidence in the record demonstrates that since Claimant returned to full time work with Kneece & Son over seven years ago, he has:

(1) Regularly worked approximately fifty (50) hours per week;

(2) Performed the same kind of work with similar or the same responsibilities he had when he was injured in 1999. In fact, the Claimant testified both in his deposition on September 23, 2010, and at the Hearing on November 11, 2005, that he works at Kneece & Son

approximately six (6) days a week, eight (8) to twelve (12) hours per day, and spends 75% of his working time driving a tractor.

(3) Earned the same income, or much greater income, than when he was originally injured in the same capacity as a full time employee and part owner of Delano Kneece & Son. (See, Claimant's Tax Records); and

(4) Signed a Form 17 indicating that he was able to return to work without restrictions as of October 4, 2005.

In addition, the Claimant testified that after the accident, his job duties at Kneece & Son were essentially the same job duties he was performing prior to the accident. Specifically, the Claimant testified that the majority of his work day following the accident involves driving a "complicated computer operated tractor," which is the same job duties Claimant primarily performed prior to his injury. The Claimant's wife confirmed this fact as she testified that the Claimant currently drives a tractor for five to seven hours per day, six days a week, and rarely misses a day of work. (Roxanne Kneece Deposition, September 29, 2010, pp. 17, 19).

In addition to demonstrating no loss of earning capacity, the evidence in the record further demonstrated that if the Claimant did not perform the job duties at Delano Kneece & Son that he has been performing since the work accident; then someone else would have had to perform them in order to maintain the business. Therefore, the evidence clearly shows the existence of a need for the farming functions the Claimant has been performing since his work accident.

Accordingly, the fact that the Claimant has been working for many years since his work accident operating a "complicated" computer operator tractor fifty (50) hours per week, and earning a greater income than before his injury, countermands any argument that the Claimant is

permanently totally disabled under a wage loss theory. "[A]s the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity." See *Parrott v. Barfield Used Parts, et. al.*, 206 SC 381, 34 SE 2d 802 (1945).

As a result, the Claimant failed to meet his burden of proving a sufficient loss of earning capacity necessary to render him permanently and totally disabled as required by S.C. Code Ann. § 42-9-10, nor for a partial wage loss under S.C. Code Ann. § 42-9-20.

B. THE CLAIMANT IS NOT ENTITLED TO A PRESUMPTION OF PERMANENT AND TOTAL DISABILITY:

While certain provisions contained in S.C. Code Ann. §42-9-10 and §42-9-30 provide a presumption of permanent and total disability, none of these provisions are applicable in this case.

Specifically, under S.C. Code Ann. §42-9-10, there is a presumption of permanent and total disability when the injured worker suffers "[t]he loss of both hands, arms, shoulders, feet, hips, or vision in both eyes, or any two thereof...." (Note, the loss of shoulders and hips were added after the 2007 amendments to this statute). None of the Claimant's injuries in the instants case apply to this provision and, therefore, the permanent and total disability presumption provision in S.C. Code Ann. §42-9-10 does not apply.

The second presumption of permanent and total disability arises under S.C. Code Ann. §42-9-30, when an injured worker is found to have sustained 50% or more loss of use of his back. The claimant has not alleged a back injury in this claim, and, therefore, the presumption under S.C. Code Ann. §42-9-30 does not apply either.

However, Claimant's counsel argued that pursuant to S.C. Code Ann. §42-9-10, a physical brain injury in and of itself constitutes a statutory presumption of permanent and total

disability. Yet a review of the Workers' Compensation Act and its accompanying Regulations demonstrates that such a presumption does not exist. Therefore, to the extent the Hearing Commissioner's Order may be read as finding or concluding that the Claimant is entitled to a presumption of permanent and total disability by virtue of the existence of a physical brain injury, such determination constitutes reversible error.

Specifically, S.C. Code Ann. §42-9-10(C), states that:

> "Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person *determined to be totally and permanently disabled* who as a result of a compensable injury...has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life."

S.C. Code Ann. §42-9-10(C)(Emphasis added).

In addition, Regulation 67-1101 of the South Carolina Workers' Compensation Act specifically lists the scheduled value of the brain at 25 to 250 weeks, thereby demonstrating that a physical brain injury in and of itself does not create a presumption of permanent and total disability. Instead, only when the Claimant is permanently and totally disabled and has sustained an accompanying physical brain injury may he be entitled to lifetime benefits under S.C. Code Ann. §42-9-10.

Very recent South Carolina case law supports this position. In *Crisp v. SouthCo., Inc.*, Opinion No. 27230 (Ct. App. 2013), the petitioner argued that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of section 42-9-10(C). The Court found this argument was not persuasive, as it was contrary to legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain.

In another recent decision, the South Carolina Supreme Court clarified, "we view the inclusion of 'physical brain damage,' along with quadriplegia and paraplegia, in section 42-9-

10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent brain damage." Sparks v. Palmetto Hardwood, Inc., Opinion No. 27229 (2013). Furthermore, "Thus, we conclude that 'physical brain damage' as used in § 42-9-10(C) is physical brain damage that is both permanent and severe." Id.

The Court in Crisp, relied on the Sparks decision in noting that, "permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis. Cf. James v. Anne's Inc., 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010) ("The 500 weeks limitation, however, represents the limit of the monetary amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. (emphasis in original))." Furthermore, "Inherent in the requirement that the injury to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment. See Floyd v. C.B. Askins & Co., 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009)"

The Court in Crisp interpreted "the inclusion of "physical brain damage" among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment. See Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("In construing a statute, the Court looks to its language as a whole in light of its manifest purpose." (citing Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984))); Cokeley v. Robert Lee, Inc., 197 S.C. 157, 169, 14 S.E.2d 889, 894 (1941) ("While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining

and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished." (quoting State ex rel. Walker v. Sawyer, 104 S.C. 342, 346, 88 S.E. 894, 895 (1916))). This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not render the worker unemployable. See Shealy v. Algernon Blair, Inc., 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages."). Thus, only in cases of physical brain damage that are both permanent and severe would an employee-claimant be entitled to benefits for life."

Based on the above, the Full Commission correctly determined that Claimant did not meet the accepted standard to prove entitlement to lifetime permanent and total disability for physical brain damage.

II. THE "BENEVOLENT EMPLOYMENT" DOCTRINE DOES NOT APPLY TO THIS CASE AND SHOULD NOT HAVE BEEN UTILIZED AS A BASIS FOR FINDING PERMANENT AND TOTAL DISABILITY

In addition to arguing he is permanently and totally disabled under S.C. Code Ann. § 42-9-10, the Claimant argues that he is permanently and totally disabled because his employment with Delano Kneece & Son constitutes "benevolent employment." The Hearing Commissioner agreed and found and concluded that the job offered by Delano Kneece & Son is "sheltered employment" and "benevolent in nature," and that the accommodations made by Kneece & Son that enabled Claimant to perform certain "limited services" for Kneece & Son further supports a Finding and Conclusion that the "benevolent employment" doctrine applies in this case.

However, the Hearing Commissioner went against established South Carolina law as well as the clear and unequivocal evidence in this case to find that Claimant was permanently and totally disabled because Claimant's post injury employment at his family farm, Delano Kneece & Son, was "benevolent employment."

South Carolina has not adopted the Doctrine of "Benevolent Employment" and, therefore, the Hearing Commissioner relied upon decisions from other jurisdictions to support his Findings and Conclusions that Claimant was permanently and totally disabled under this Doctrine.

The Claimant is a part owner of his family farm from which all of his post injury wages have been paid. He is for all purposes self employed. The Claimant's tax return lists him as "sole proprietor" of the farm operation. The Finding of the Hearing Commissioner that the Claimant's employment is benevolent belies the very meaning of the word benevolent. Specifically, the Merriam-Webster dictionary defines the adjective benevolent as: "having or marked by sympathy and consideration for *others*." (*Heilker v. Zoning Bd. Of Appeals for City of Beaufort*, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct.App.2001) (holding dictionaries can be helpful tools for the purpose of defining terms)(emphasis added).

The Hearing Commissioner relied upon the Claimant's argument that his employment with Kneece & Son is "benevolent employment" because his work there after the accident was *so limited and valueless to the farm* that the increasing wages he received from Kneece & Son were merely "a gift." In addition, the Claimant alleges that he essentially "costs" the farm money as a result of the installation of upgrades and the hiring of other full and part time employees to do work he previously did. However, the business model of the farm, profitable or otherwise, is not a basis for finding a wage loss of or loss of earning capacity *to the Claimant*

himself. In any event, the evidence in the record demonstrates that since the Claimant's work injury, Kneece and Son has continued to remain profitable.

A thorough review of all of the evidence submitted in this case does not support the Claimant's arguments nor the Hearing Commissioner's Findings and Conclusions on this issue. Specifically:

1. Claimant is part owner and the majority shareholder of Kneece & Son;

2. Since the accident in 1999, Claimant has regularly worked in excess of 40 hours per week performing the same or similar job duties he performed prior to the accident; namely, operating the complicated computer operator tractors for the majority of every work day;

3. Claimant testified that he has had a *substantial work life* following his injury despite his limitations. (Claimant Deposition, December 17, 2004, at pp. 15-21);

4. Following the accident in 1999, Claimant continued to earn the same wages / income at Delano Kneece & Son and since 1999, his income has consistently increased. In fact, Claimant and his wife both testified that Claimant currently earns a much greater income than when he was originally injured;

5. Claimant's wife testified via deposition that the Claimant received a raise in 2007, which resulted in an increase in Claimant's compensation from $3,500.00 per month to $4,175.00 per month. (Roxanne Kneece Deposition, September 29, 2004, at p. 11);

6. Despite the fact that the Claimant characterizes the payments made to him on a monthly basis as a "gift," he clearly treats it differently by virtue of the fact that he reports these payments to the IRS and the South Carolina Department of Revenue as taxable income. Therefore, as a result of the earnings Claimant has made since his accident, Claimant is eligible to file for social security disability insurance benefits, unemployment benefits or other benefits based on the fact that he and Delano Kneece & Son pay/file/withhold and otherwise treat this money as taxable earnings;

7. Claimant testified both in his deposition on September 23, 2010, and at the Hearing on November 11, 2005, that he works at Delano Kneece & Son approximately six (6) days a week, eight (8) to twelve (12) hours per day; and spends 75% of his working time driving a "complicated" tractor;

8. Claimant voluntarily executed a Form 17 indicating that he was able to return to work without restrictions as of *October 4, 2005*;

9. A review of the Federal and State Income taxes filed by Claimant individually as well as the taxes filed by Kneece & Son, clearly demonstrate that since the work accident in 1999, the Claimant is listed as the "sole proprietor" of Kneece Farms on "Schedule F – Profit or Loss from Farming" of the IRS tax returns;

10. "Section E" of Claimant's applicable 1040 tax returns from 2000-2006, specifically asks: "*Did you 'materially participate' in the operation of this business during" the year of the filing.*" (Emphasis added) On every tax return filed following the work accident, the Claimant answered this question posed by the IRS *in the affirmative*;

11. While the parties concede that the Claimant's work duties were modified to some extent as a result of Claimant's injuries, the greater weight of evidence in the record demonstrates that these modifications have not and do not render the Claimant's employment at Delano Kneece & Son "benevolent" nor do they render his increasing wages from Delano Kneece & Son a "gift."

Based on the facts above, the Claimant's job duties do not fit the definition of benevolent employment where an employee continues to receive wages despite an inability to contribute to his employer. On the contrary, Claimant remained a productive and integral part of Delano Kneece & Son. In fact, if Claimant were truly unable to contribute then the Employer would have to bear the expense of paying for another employee to work the tractor up to 50 hours per week.

A. <u>CLAIMANT'S WORK INJURY OCCURRED WHILE WORKING FOR KNEECE FARMS, A SEPARATE ENTITY FROM DELANO KNEECE & SON AND, THE BENEVOLENT EMPLOYMENT DOCTRINE HAS NO APPLICATION TO THIS CLAIM</u>

The testimony and evidence presented on behalf of the Claimant and relied upon by the Hearing Commissioner to support his Findings and Conclusions that Claimant's current employment with Kneece & Son is benevolent employment, is logically inconsistent.

As outlined above, the Claimant is part owner and the largest stake holder in Kneece & Son, and he has continued working full duty and is currently earning more money now than he did prior to his 1999 accident. Following his 1999 work accident at Defendant/Employer

Kneece Farms, the Claimant never returned to perform any work for Kneece Farms and the Claimant has never alleged that Defendant/Employer Kneece Farms was the employer that provided him with Benevolent Employment.

Instead, since his work accident at Kneece Farms, Claimant has worked solely for Delano Kneece & Son Farms. Yet it was Found and Concluded by the Hearing Commissioner that the Claimant's self-employment with Delano Kneece & Son, *who is not a party to this claim*, was "benevolent employment."

This point distinguishes this claim from the North Carolina cases relied upon by the Claimant and the Hearing Commissioner in support of the adoption of the "Benevolent Employment" Doctrine. Specifically, not one of the injured workers in the cases cited by the Claimant and relied upon by the Hearing Commissioner, accepted or were able to accept the offers of benevolent employment and, as a result, they did not receive wages in addition to their compensation benefits.

A review of the cases from North Carolina cited by the Claimant and relied upon by the Hearing Commissioner in issuing his Decision and Order, indicates that the "Benevolent Employment" Doctrine only applies when *the employer with whom the injured worker was employed at the time of the accident*, provides "benevolent employment" in one of two ways: (1) An employee who is otherwise unable to work is paid a gratuitous wage by the employer who wishes to keep the claimant as his employee for the purpose of defending and defeating an allegation of PTD (based upon his continued employment with that employer); or (b) by a truly benevolent employer who, out of guilt/kindness/good will or otherwise, chooses to keep and pay a totally disabled worker who was injured in their employ, but has been rendered unable to earn wages from his work place injury. In each of the North Carolina cases cited in the Single

Commissioner's Order, the employment found to be benevolent was post injury employment with or offered by the claimants' *employer at the time of the accident*. By contrast in this case, Claimant's post injury return to work, with similar job duties, at increased earnings, for an entity that he owns, *is not the same employer as he worked for at the time of the accident*. Thus, the Benevolent Employment Doctrine has no application to the facts of the present case.

Moreover, with regard to any modifications made for Claimant, a review of case law from other States that utilize the "Benevolent Employment" Doctrine such as Florida, indicate that reasonable job modifications for the purpose of accommodating an injured or partially disabled employee will not place the job outside of the definition of gainful employment. See *Cooper v. Escambia County School Bd.*, 734 So. 2d 1072, 1073 (Fla. 1st DCA 1999)("The modifications the employer made in the claimant's job to accommodate her disability do not, as a matter of law, render it sheltered employment so as to place this job outside of 'gainful employment'...." See also, *Goodwill Indus. v. Heard*, 863 So. 2d 389, 390-391 (Fla. Dist. Ct. App. 1st Dist. 2003).

To the extent that such accommodations have been made, allowing the Claimant to work full time, above and beyond such accommodations to realize increased production and profits generally, these are indeed reasonable accommodations. Such accommodations therefore, do not render Claimant's employment sheltered or "benevolent" employment. Moreover, as noted and testified to by employees of Kneece & Son Farms, the business is and has remained profitable since the Claimant's return to full time work in 2005, and the Claimant himself has continued to receive raises in salary throughout that time period.

Therefore, this case is not analogous to the cases from other states cited by the Claimant and relied upon by the Hearing Commissioner in applying the "benevolent employment"

doctrine to this case. Furthermore, the law in South Carolina is clear that "an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury." *Wynn v. Peoples Natural Gas*, 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961).

Moreover, as demonstrated by the tax returns filed by the Claimant for the years following his 1999 work injury, it is uncontroverted that the Claimant is self-employed as the majority stakeholder in Kneece & Son and that he has earned wages performing his daily job duties since his work accident and that those wages have consistently increased since 1999. Accordingly, the "benevolent employment" doctrine does not apply to this case.

B. CLAIMANT'S ARGUMENT THAT HIS BRAIN INJURY PREVENTS HIM FROM HANDLING THE FINANCES OF KNEECE & SON IS WITHOUT MERIT AND DOES NOT DEMONSTRATE THAT HIS EMPLOYMENT WITH KNEECE & SON IS BENEVOLENT

In addition to the arguments made by Claimant as outlined above, Claimant alleged and the Hearing Commissioner agreed that as a result of Claimant's brain injury, he can no longer take care of the farm's finances. However, the greater weight of evidence demonstrates that the Claimant *never* handled the finances of the farm either before or after his 1999 injury.

Instead, the Claimant's wife handles the finances of the farm and has done so since January of 1999, when she took over this position from her mother-in-law who had handled the finances prior to 1999. (Roxanne Kneece Dep. at pp. 3-5). According to Mrs. Kneece, her job as the secretary/treasurer of Kneece & Son is a 40 hour per week job. (Roxanne Kneece Depo. at p. 6). In addition, the farm has a CPA who helps with its tax filings. (*Id.* at p. 5). This testimony of Mrs. Kneece, which the Hearing Commissioner found "very credible" does not support Claimant's assertion that his responsibilities with the farm have been curtailed due to his injury

and this Appellate Panel Finds and Concludes that Claimant's assertion that his employment is "benevolent" simply, is without merit as the Claimant himself never handled the farm finances in this his capacity neither *before* or after his injury.

III. THE FULL COMMISSION ERRED IN FINDING AND CONCLUDING THAT THE CLAIMANT IS ENTITLED TO REIMBURSEMENT OF PAST MEDICAL EXPENSES FROM UNAUTHORIZED TREATMENT AS WELL AS LIFETIME MEDICAL EXPENSES

The Full Commission erred in affirming the Single Commissioner's findings and conclusions that Defendants are responsible for: (1) payment of claimant's medical treatment with his unauthorized physicians; (2) reimbursement to claimant for mileage to and from his unauthorized treating physicians; (3) payment of prescriptions obtained from claimant's unauthorized physicians; (4) payment of future medical treatment with claimant's unauthorized physicians; and (5) payment of prescriptions submitted by Claimant as an Exhibit at the Hearing.

Specifically, pursuant to established South Carolina law, during the whole or any part of the Claimant's disability resulting from the work injury, the employer may furnish or cause to be furnished medical treatment to claimant and "the employee *shall* accept" said medical treatment unless otherwise ordered by the Commission. The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of refusal. S.C. Code Ann. § 42-15-60.

While this statute ultimately gives great deference to the Commission, the statute "does not give a unilateral right to claimants to seek their own treating physician, and such an unencumbered right undermines the authority of the Commission, as prescribed by the legislature." *Turner v. S.C. Dept of Health and Environmental Control*, 377 S.C. 540, 661 S.E.118 (Ct. App. 2008).

Following the 2005 Agreement of the parties, the Claimant requested and the Defendants authorized Claimant to undergo a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. This evaluation was performed on May 14, 2008, at which time Dr. Adams found the Claimant's examination to be "absolutely normal" and he diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe."

To further evaluate the mild/moderate head contusion, Dr. Adams ordered an electroencephalogram (EEG) test to measure Claimant's brain electrical activity which was also normal. No further treatment was recommended by Dr. Adams and Claimant was released from any further treatment with Dr. Adams.

Following his release by Dr. Adams, the Claimant never requested authorization from Defendants for another neurological evaluation or any other type of medical treatment (aside from ongoing psychological counseling). Instead, the Claimant sought unauthorized medical treatment with providers of his own choice. (H.T. at 41). The Defendants were never notified of this unauthorized treatment until Claimant filed his Form 50 in 2010.

Subsequent to Claimant's unauthorized treatment, he filed a new Form 50 on July 9, 2010, requesting additional medical treatment for multiple injuries and also alleged he was entitled to an award of permanent and total disability based upon general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. This 2010 Form 50 was the Claimant's first hearing request since the Hearing before Commissioner Childs more than five (5) years earlier and the first request for additional medical treatment since Claimant's request for treatment with Dr. Adams which the Defendants provided.

In support of his Findings and Conclusions that the Claimant is permanently and totally disabled based upon an alleged loss of earning capacity, the Hearing Commissioner relied upon

the opinions/reports of the unauthorized physicians. However, pursuant to S.C. Code Ann. § 42-15-60, the Claimant did not have the right to seek his own treating physicians with no notice to the Defendants.

The only treating physicians in this case since approximately 2005, have been Drs. Deal and Bergmann. However, the Claimant never made any request of the Defendants to authorize treatment by any other providers since 2005, with the exception Dr. Adams. Therefore, pursuant to S.C. Code Ann. § 42-15-60, Defendants would respectfully show that they have no responsibility for any past or future treatment, expense, or mileage, arising from or related to treatment provided by the unauthorized physicians; specifically, Drs. Shissias, White, Ugino, or Wicker.

Additionally, the Defendants should not be responsible for payment of certain expenses related to medications as sought by the Claimant. Specifically, Claimant's counsel submitted as an Exhibit, a list of prescriptions dating back to 1999 that he requested be reimbursed. Defendants should not be responsible for payment of these prescriptions as submitted by Claimant for several reasons.

First, it is impossible to tell from the list provided by the Claimant what these prescriptions are for, who they were prescribed by (authorized or unauthorized physician), and/or whether the prescriptions were needed as treatment for a causally related injury ordered compensable by Commissioner Childs and/or agreed to by the parties.

Secondly, the Claimant's wife testified at the Hearing in 2011, that all of these prescriptions were paid for by their personal health insurance plan. (H.T. at 100). She further testified that neither she nor the Claimant ever sought authorization for payment of these

prescriptions by the workers' compensation carrier although she obviously knew that she was entitled to do so. (*Id.*).

Finally, the Claimant did not seek reimbursement for his alleged expenses for over ten years which is highly prejudicial to the Defendants and should be barred by laches. At the very least, Claimant had an opportunity to request reimbursement for medical expenses and mileage at the 2005 Hearing but chose not to pursue them; therefore, any expenses prior to the 2005 Hearing would be barred by res judicata.

Based on the foregoing, the Full Commission erred in affirming the Single Commissioner's Order Finding the Defendants are responsible for paying for the prescriptions as listed in Claimant's exhibit.

IV. GIVEN THE FULL COMMISSION'S PROPER REVERSAL OF THE SINGLE COMMISSIONER'S FINDING OF PERMANENT AND TOTAL DISABILITY WITH LIFETIME BENEFITS FOR PHYSICAL BRAIN DAMAGE, THE FULL COMMISSION ERRED IN FINDING THAT ALL OTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE AFFIRMED WHEN A MULTITUDE OF FINDINGS AND CONCLUSIONS ARE IN DIRECT CONFLICT WITH THE REVERSAL

The Order of the Full Commission stated, "the Commissioners reverse the Findings of Fact and Conclusions of Law of the Hearing Commissioner that the Claimant was totally disabled accompanied by physical brain injury pursuant to Section 42-9-10(C)." However, the Commissioners erred by failing to remove any of the twenty-five Findings of Fact or thirteen Conclusions of Law issued by the Single Commissioner. A majority of the Hearing Commissioner's Findings and Conclusions are in direct conflict with the Reverse and Remand instructions Ordered by the Full Commission. Therefore, the Defendants request the Court to strike the prior Findings and Conclusions in whole or in part and enter an Order consistent with the Order of the Full Commission. In the alternative, this matter should be remanded to the Full

Commission to enter its own Findings and Conclusions, in whole or in part, in order to remove the contradictory instructions.

The Full Commission failed to replace contradictory Findings of Fact and Conclusions of Law regarding the following issues:

A. Findings of Fact 18, 19 and Conclusions of Law 4, 5, 6, 9, 11, 12, 13 purport to find the Claimant permanently and totally disabled, when the instructions and Order of the Full Commission very clearly find that Claimant is capable of working complicated equipment up to 50 hours per week and was not eligible for permanent and total disability with lifetime benefits secondary to physical brain damage under §42-9-10(C)

B. Finding of Fact 5 purports to show that "Claimant is no longer able to operate as a farmer/owner/operator" and that "only by virtue of the accommodations that the family farm has made is the Claimant able to perform very limited activities normally associated with farming;" which is in direct conflict with the Full Commission's holding that the Claimant "can drive a 'complicated' computer-operated tractor for fifty hours per week."

C. Findings of Fact 15, 16, 17, 19 and Conclusions of Law 7, 8 that Claimant was a benevolent employee, which is in direct conflict with the Full Commission's holding that Claimant works operating a complicated tractor up to fifty hours per week and the evidence of record that Claimant was hired by a different employer than he worked for at the time of the accident and he currently earns approximately double his prior income at the time of the initial accident

D. Conclusion of Law 12 purports to find that Claimant is entitled to approximately ten years of weekly benefits through the date of the Order, which is in direct conflict with the Full Commissions holding and evidence that Claimant continued working complicated machinery up to 50 hours per week, earning a higher income which was not treated as a "gift" for tax purposes, and voluntarily signed a Form 17 on October 4, 2005 admitting he could return to work without restrictions.

E. Findings of Fact 9, 10, 11, 12, 13, 19, 23 and Conclusions of Law 4, 9, 11, 12, 13 finding that Claimant is entitled to lifetime benefits as per §42-9-10 are in direct conflict with the Order of the Full Commission finding that Claimant was not permanently and totally disabled pursuant to §42-9-10; therefore, any entitlement to future medical treatment should be remanded for specific findings of the Commission pursuant to §42-15-60.

Each of the examples above is contrary to the fact the Full Commission found that Claimant was gainfully employed in a non-gratuitous way and that he was not permanently and totally disabled pursuant to §42-9-10.

Importantly, it cannot be implied that the Full Commission simply overturned the "lifetime benefits" portion of the original award but intended to leave an award of permanent and total disability intact. This is evidenced by the fact that the Full Commission very specifically instructed the case be remanded to the Single Commissioner to determine permanency pursuant to Regulation 67-1101. It is well settled that the maximum compensation an employee may receive is 500 weeks, therefore, if the Full Commission intended the finding of permanent and total disability to remain, there would be no reason to remand the claim to the single Commissioner to determine the compensation Claimant could receive for his injuries. To

illustrate, there would be no reason to require the Single Commissioner to determine the number of weeks Claimant is entitled to for mild brain damage under R. 67-1101, because it could not be added to an award for permanent and total disability. (See §42-9-10(A), "In no case may the period covered by compensation exceed five hundred weeks;" §42-9-30, "The weekly compensation payments [for combined specific injuries] are subject to the same limitations as to maximum and minimum as set out in Section 42-9-10;" R. 67-1101(C), "The maximum period of compensation for a combination of injuries is the legislative criterion of five hundred weeks.").

Additionally, by virtue of reversing the Hearing Commissioner's award for lifetime benefits under §42-9-10(C), the Commission necessarily reversed any and all findings awarding lifetime medical benefits. Any entitlement to such future benefits must be addressed on remand when addressing Claimant's entitlement to an award for permanency.

Furthermore, as to the weekly benefits issue, the Full Commission found that Claimant had been gainfully employed and was not totally disabled. Even if you ignored the fact that Claimant voluntarily signed a Form 17 (agreeing the Defendants were not responsible for weekly benefits because he was working full time without restriction and earning as much or more money than at the time of his injury), Regulation 67-505(C)(3) authorizes the Defendants to suspend benefits "when the Claimant returns to work for another employer... unless temporary partial compensation is due." In this case, the Full Commission found Claimant capable of working complicated machinery for 50 hours per week. Additionally, Claimant was working for a different employer and earning more money since signing the Form 17; therefore, no benefits would be due in the interim.

V. THE FULL COMMISSION ERRED IN AFFIRMING THE HEARING COMMISSIONER'S FINDING AND CONCLUSION THAT CLAIMANT SUSTAINED COMPENSABLE INJURIES BY ACCIDENT TO HIS ZYGOMATIC ARCH, THYROID, SCARRING, AND FINGER

The Full Commission erred in affirming the Hearing Commissioner's finding and conclusion that Claimant sustained compensable injuries by accident to his zygomatic arch, thyroid, scarring, and finger, and that Defendants are responsible for all medical treatment related to these injuries. As stated by the Decision and Order of Commissioner Williams dated April 28, 2011, the Findings and Conclusions from the 2005 Order from Commissioner Childs are the law of this case except as to certain provisions which the parties agreed in exchange for Defendants to withdraw their Form 30 Request for Appellate Review.

In the 2005 Order, Commissioner Childs found and concluded that the Claimant sustained the following compensable injuries: (1) brain/head/face; (2) nasal passage; (3) sinus; (4) left eye[1]; (5) left lower extremity; (6) left upper extremity; and (7) depression. Following Commissioner Childs' issuance of her Decision and Order in 2005, the parties settled several issues in Commissioner Childs' Order via a written Agreement. Specifically, the Defendants agreed to accept the injuries to Claimant's brain, left knee, and left shoulder, and to provide medical treatment for same.

In exchange for the Agreement by Defendants to accept these three (3) injuries and to provide medical treatment for same, as well as withdraw their Form 30, the Claimant executed a Form 17, acknowledging that he returned to work as of October 4, 2005. Therefore, Defendants were able to stop TTD payments as of October 4, 2005. Accordingly, in addition to the written Agreement between the parties, the 2005 Decision and Order of Commissioner Childs has been

[1] The eye is not a part of this claim as Claimant conceded on p. 47 of his 9/23/2010 deposition, that the alleged eye problems do not adversely affect his vision. (See S. C. Code of Reg. 67-1105 impairment ratings for the eye based on loss of vision).

and remains the law of the case. Moreover, the Claimant has reached MMI for all admitted injuries based upon the opinions of the authorized treating physicians.

Therefore, pursuant to the doctrines of *laches* and *res judicata*, the Hearing Commissioner erred in failing to find and conclude the Claimant is now barred from asserting he is entitled to compensation for these injuries. The doctrine of *res judicata* is based upon the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. Hayes v. Hayes, 312 S.C. 141, 439 S.E.2d 305 (Ct. App. 1993). In order for a claim to be barred pursuant to the doctrine of *res judicata*, three elements must be shown:

(1) the prior judgment/order must be final, valid and on the merits;

(2) the parties in the subsequent action must be identical to those in the first action; and

(3) the second action must involve matters properly included in the first action.

See, Owenby v. Owens Corning Fiberglass, 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993).

More specifically, a final judgment on the merits in a prior action will preclude the parties from relitigating any issues actually litigated or those that might have been litigated in the first action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993)(emphasis added). The South Carolina Supreme Court has specifically held that the doctrine of *res judicata* applies in workers' compensation action. See, Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19 (1942).

In Bennett v. South Carolina Department of Corrections, 305 S.C. 310, 408 S.E.2d 230 (1991), the Court found that when a request for benefits for an alleged injury could have been asserted by a claimant and/or awarded by the Hearing Commissioner in an original workers' compensation hearing, but is not done so, the original Order issued by the workers'

compensation tribunal normally precludes the relitigation of those issues addressed by that tribunal in a collateral action.

The defenses of *laches* and *res judicata* constitute errors of law. Upon admitted or established facts the question of whether an accident is compensable is a question of law, and review thereof is not an invasion of the fact-finding field of the Commission on the part of the Court. Jordan v. Dixie Chevrolet, Inc., 218 SC 73, 61 SE2d 654 (1950). A Court may reverse or modify the Workers' Compensation Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by other error of law. Etheredge v. Monsanto Co., 349 SC 451, 562 SE2d 679 (2002).

Pursuant to the doctrines of *res judicata* and *laches* and the Defendants assert that the Claimant is barred from asserting or receiving compensation for the following injuries:

1. Zygomatic Arch: This term refers to the part of the temporal bone of the skull that forms the prominence of the cheek (the cheekbone). Immediately following the work accident, the Claimant was seen at Palmetto Richland Health. On November 22, 1999, the date of the work accident, Claimant underwent a neurology consult which specifically found that based upon the CT scan of Claimant's head, he sustained a right frontal and *zygomatic*/orbital fracture, but that no surgery was necessary. (Defendants' APA p. 250; 253).

Accordingly, as of the date of the accident on November 22, 1999, the Claimant had been diagnosed with a zygomatic arch fracture. While Claimant may not have been informed of the diagnosis on the date of the accident, the Claimant was made aware of this diagnosis prior to the January 2005 Hearing, as Claimant submitted the records from Palmetto Richland Health from

the date of the accident as part of his APA's for the Hearing on January 11, 2005. Therefore, this claim should be barred by *res judicata*.

2. *Thyroid/Hypothyroidism*: At the Hearing before Commissioner Williams on February 6, 2011, the Claimant alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. Hypothyroidism is a condition characterized by abnormally low thyroid hormone production. Thyroid hormones are produced by the thyroid gland which is located below the Adams Apple.

As evidenced by the medical documentation in the record, there was never any mention of Claimant injuring his thyroid in the 1999 accident. Instead, when claimant started seeing family practitioners Drs. White and Wicker prior to 2005, for what Claimant described as "staggers," he was incidentally diagnosed with hypothyroidism and given medication for same beginning in at least 2005. However, on June 17, 2009, Dr. Wicker states that he wanted to test Claimant's T4 levels regarding the cause of his fatigue. It was noted that Claimant had testosterone deficiency but that his thyroid was "okay." (H.T. at 170-71). Accordingly, the greater weight of evidence in the record demonstrates that Claimant's alleged hypothyroidism is not causally related to the 1999 work injury. If the evidence is all one way, or if the findings of the Commission are based on surmise, speculation, or conjecture, the the issue becomes one of law for the court and not of fact for the Commission. *Herndon v. Morgan Mills, Inc.*, 246 SC 201, 143 SE2d 376 (1965).

Additionally, this issue is moot as claimant failed to assert that this condition was a compensable injury, even though he was treated for it prior to 2005. Moreover, based upon a thorough review of all of the evidence in the record, there is no mention of this condition being

compensable in the 2005 Order of Commissioner Childs. Therefore, this claim is barred by *res judicata*.

3. *Finger:* Not only did Claimant not allege an injury to his finger at the Hearing in 2005, he did not assert an injury to his finger on his 2010 Pre-Hearing Brief or Amended Pre-Hearing Brief. However, Claimant alleged at the Hearing that on November 19, 2010, he experienced a "stagger" while climbing the steps to a grain bin, causing him to fall and injure his left index finger. (H.T. at 47).

The Hearing Commissioner cited Defendants' APA's pp. 253-254, in support of his Finding that Claimant's left index finger injury is causally related to the 1999 work injury and that Defendants are responsible for the payment of Claimant's past and future medical treatment with Dr. Ugino. (Finding of Fact # 12).

However, based upon the evidence in the record, there are no records from Dr. Ugino referencing this left index finger in evidence, and the APA submissions cited by the Hearing Commissioner in support of his Finding are records from Palmetto Health dated November 22, 1999, which have nothing to do with any injury to Claimant's finger or treatment by Dr. Ugino for same. In fact, the only records from Dr. Ugino submitted into the record were submitted by Defendants as APA page #'s 293-296, which all reference Claimant's prior dislocations to his left shoulder.

Furthermore, with regard to the statement by Claimant and his wife at the Hearing that claimant's "stagger" (which Claimant described as a feeling of dizziness upon standing up from a seated position) caused the Claimant to fall and injure his right hand, a review of the medical reports from HealthSouth indicate that other than Claimant's headaches and knee pain, "most of his other bothersome symptoms have improved." (Claimant's APA p. 194). Finally, the

evidence in the record demonstrates that shortly before this alleged fall, Claimant's "staggers" had improved "in that when he changes posture and gets up, he feels steady and stable from the get-go." (Claimant's APA p. 194). In addition, in June of 1999, Claimant informed Dr. Wicker that he has not had any lightheadedness or dizziness since he began treatment for his unrelated hypertension. (Claimant's APA p. 162).

Accordingly, based upon the greater weight of evidence in the record, the Defendants would respectfully show that the Commission erred in finding Claimant sustained a compensable injury to his index finger.

4. *Hypothyroidism and Weight Gain:*

At the Hearing before Commissioner Williams on February 14, 2011, the Claimant alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. The Finding relating to hypothyroidism is addressed in the prior section.

However, based upon the medical evidence in the record, the record also shows there has been no significant weight gain by Claimant and even if Claimant had gained significant weight, the evidence in the record does not support a finding that such weight gain was related to the 1999 work accident.

In 1999, the Claimant weighed 205 pounds based upon the records from Palmetto Richland Health. (Defendants' APA #1). In 2004, claimant' weight was also 205. (Claimant's APA p. 5E). A review of the medical evidence shows that claimant's weight never fluctuated more than 10 to 15 pounds.

Accordingly, while the evidence in the record demonstrates that Claimant's alleged hypothyroidism and weight gain are not causally related to the 1999 work injury, the Hearing Commissioner erred in even addressing this issue as claimant failed to assert that this condition

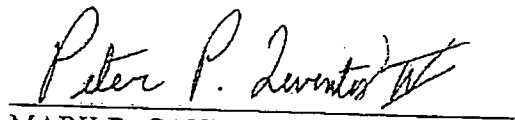
was a compensable injury (even though he was treated for it prior to 2005). Moreover, there is no mention of this condition as being compensable in the 2005 Order of Commissioner Childs.

Therefore, the Hearing Commissioner erred in failing to find the Claimant's claim for benefits for injuries as outlined above are barred by the doctrines of *res judicata* and *laches*.

CONCLUSION

BASED ON THE FOREGOING, the Defendants respectfully request the Circuit Court affirm the ruling of the Appellate Panel of the Workers' Compensation Commission as to finding that the Claimant is not permanently totaled disabled under S.C. Code Ann. §42-9-10(C), and that the claim should be remanded as Order to a single Commissioner for a determination of permanency pursuant to S.C. Code Ann. §42-9-30 and Reg. 67-1101 for the schedule member injuries to included but not limited to the Claimant's brain, and with further modifications as outlined herein above.

Respectfully Submitted,



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March 18, 2013

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Ricky D. Kneece, Employee Claimant/Appellant, vs. Kneece Farms, Employer, and Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association, Carrier Defendants/Respondents.	IN THE COURT OF COMMON PLEAS CASE NO. 2012-CP-32-02093 & CASE NO. 2012-CP-32-02111 MEMORANDUM OF LAW

For the reasons hereinafter set out, the Appellant Ricky Kneece appeals the Order of the South Carolina Workers' Compensation Commission dated April 19, 2012 finding that the Claimant has not sustained a physical brain injury.

STATEMENT OF THE CASE

This matter was commenced by the filing and service of a Form 50 dated November 7. 2001, alleging that the Claimant, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999 while employed by Kneece Farms (the employer was insured by Legion Insurance

Company which has been liquidated and the claim is now covered by the South Carolina Property and Casualty Insurance Guaranty Association).

After a hearing held January 11, 2005, the Hearing Commissioner Michelle Childs issued her order finding that the Claimant had suffered compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth. The Hearing Commissioner also found that the Claimant also sustained compensable injuries to his left shoulder, left elbow and for depression (2005 Order). The 2005 Order also found that as a result of his injury, the Claimant was diagnosed with conditions which include a closed head injury, chronic olecranon bursitis of his left elbow, intra articular left biceps tendon rupture, patello femoral syndrome of symptomatic plica, interior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femor condyle fracture, and a fracture of the nasal bridge and left nasal bone. The 2005 Order found that the Claimant was not at MMI (2005 Order).

The 2005 Order held the Defendants/Respondents responsible for treatment rendered by Dr. L. Randolph Waid, a licensed clinical psychologist for Claimant's brain and head injury. In addition, the 2005 Order found the Claimant was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up treatment with Dr. Waid for Claimant's closed head injury. (2005 Order).

The Defendants/Respondents appealed the 2005 Order. However, the Claimant was desirous of obtaining medical treatment required by the 2005 Order. In exchange for the Appellant's commitment to provide for all of the medical treatment authorized by the 2005 Order, the Claimant agreed to try to go back to work and to permit the Defendants/Respondents to stop making temporary total disability payments. The Defendants/Respondents did not fully

comply with the parties' agreement. While the Defendants/Respondents provided counseling treatment by Dr. Lawrence Bergmann and his associate psychiatrist, Dr. Roger Deal, the Defendants/Respondents failed and refused to pay for the medication prescribed by Dr. Deal, the treating physician. (Claimant's Exhibit 3)

On or about July 9, 2010, the Claimant filed a Form 50 requesting a hearing seeking an Order of this Commission finding him to be permanently and totally disabled with a physical brain injury and pursuant to S.C. Code Ann. Section 42-9-10; Claimant sought all benefits to which he was entitled under the act. The matter was scheduled for February 14, 2011. After a full hearing on all matters raised by the parties, the Hearing Commissioner found the Claimant totally and permanently disabled with a physical brain injury and ordered the Defendants/Respondents to provide the Claimant with the relief afforded him under the Workers' Compensation Act for life.

In particular, the Hearing Commissioner found:

(1) That the Claimant was permanently and totally disabled with physical brain damage pursuant to § 42-9-10 (C) (2011 Order at page 28; R. at page 193);

(2) That the Claimant was permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or any other kind of job or gainful employment on a reliable, sustained basis and that Claimant was unable to perform services other than those that are so limited in quality, dependability, and quantity as a reasonable, stable market for them does not exist (2011 Order at page 29; R. at page 194);

(3) That Claimant sustained causally related injuries to his left knee (10% impairment) (Order 2011 at page 30; R. at page 195) and his left shoulder and elbow (17% impairment) (2011 Order at page 30; R. at page 195);

(4) That the Defendants failed to pay for all medications in the amount of $14,010.77 prescribed by Claimant's physicians as required by Commission Order; (2011 Order at page 30, R. at page 195);

(5) That the Claimant had accumulated mileage to which he was entitled reimbursement. (2011 Order at page 30; R. at page 195).

Further, the Hearing Commissioner found and concluded that the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc. was sheltered employment and benevolent in nature. The Hearing Commissioner found that the Claimant's wife gave credible testimony that no such job ordinarily exists and that Claimant could not and would not be hired for farm work given his cognitive and physical limitations. And that the paycheck which Claimant draws from the farm is because of the largesse of his family and not because he performs any substantial, beneficial or work for the farm. (2011 Order at pages 27-28; R. at pages 192-193).

The Hearing Commissioner concluded that the Claimant was entitled to treatment and benefits for life as provided by §42-9-10(C) (2011 Order at page 35; R. at page 200).

The Defendants/Respondents appealed the Hearing Commissioners Order of April 19, 2012 to the Full Commission. The Full Commission reversed the Hearing Commissioner's finding that the Claimant had suffered a physical brain injury. In particular, the Full Commission found as follows:

> The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101.
> (2012 Order at page 10; R. at page 32).

Based on its finding, the Full Commission reversed the findings of fact and conclusions of law of the Hearing Commissioner that the Claimant was totally disabled, accompanied by physical brain injury pursuant to §42-9-10(C). The Commission concluded that the Claimant sustained an injury pursuant to Regulation 67-1101.

The Full Commission left intact all other findings of fact and conclusions of law of the Hearing Commissioner.

STATEMENT OF FACTS

Accident. The Claimant was injured November 22, 1999, while in the employ of Appellant Kneece Farms when a tire which he was changing violently exploded while under pressure causing him injury to the head, brain and face as well as the left side of his body. The explosion was severe enough to cause the Claimant to lapse into a coma after the explosion and had to be transported by helicopter to the hospital where he was treated for his many injuries. (Tr. Page 46, lines 6-11; R. at page 249).

Physical Brain Damage. It is undisputed that the Claimant suffered a permanent and severe head and brain injury. As characterized by the Hearing Commissioner the 2005 Order sets forth the evidence of the Claimant's admitted physical brain damage as follows:

> Both Dr. Lenwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30 that the Claimant's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2005 Order at page 8; R. at page 1280).

The Commissioner found:

> 9. That as a result of his injury, the Claimant was diagnosed with conditions, including a closed head injury, chronic olecranon bursitis of his left elbow, intraarticular left biceps tendon rupture, patellofemoral syndrome of symptomatic plica, anterior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, nerucognitive deficits, left femoral condyle fracture and a fracture of the nasal bridge and left nasal bone. (2005 Order at page 11; R. at page 1283).

The Commissioner ordered as follows:

> 4. That the Defendants are responsible for treatment for the Claimant's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergmann. (2005 Order at page 13; R. at page 1285).

The 2005 Order constitutes the law of the case and is binding on the parties.

Dr. Lenwood P. Smith, Jr., the Claimant's treating neurologist, in his 9/30/2001 report opined as follows:

> "[Claimant] . . . was very severely injured when he had a compression-type truck wheel blow apart and strike him in the head. He had injuries to the right frontal pole, diffuse cerebral edema was seen, he had subarachnoid hemorrhage across the tentorium, and a left tentorial subdural hematoma. He had high right posterior frontal epidural and very thin bilateral convexity subdural hematomas. He had a left posterior frontal parasagittal contusion." (APA at page 202; R. at page 614).

Dr. Smith further opined that:

> [Claimant's] problems **are severe and will be permanent.** I agree that their concerns are well founded. These concerns can be summarized by saying that Mr. Kneece may no longer be able to be the same competitive businessman that he would have been in the past and our society and culture has provided for these people to be compensated. (emphasis added) (APA at page 203; R. at page 615).

From an MRI taken in 2007, Dr. Carl A. White, found a "**dead zone**" in the Claimant's brain. In particular, Dr. White found a 32 x 43 mm area in the Claimant's right frontal lobe which Dr. White found compatible with encephalomalacia (or softening of the brain) related to the Claimant's 1999 head injury and skull fracture. Dr. White opined in 2007 that the Claimant's hypothyroidism was related to his head trauma. Further, Dr. White opined that Claimant's hypothyroidism was related to pituitary insufficiency and results in lethargy, weight gain, and general lack of energy and desire. Moreover, Dr. White confirmed that the Claimant's emotional changes and memory loss were related to his head trauma and frontal lobe damage. After his diagnosis, Dr. White began treating Claimant for his hypothyroidism and headaches with medication (APA at pages 175-176; R. at pages 587-588). Dr. Christopher Wicker has now succeeded Dr. White as Claimant's family physician. Dr. Wicker continues to treat the Claimant for his hypothyroidism.

In 2010, Dr. Charles Shissias, a neurologist, began treating the Claimant for chronic daily headaches, memory loss and depression arising from Claimant's 1999 accident. Dr. Shissias concluded that the Claimant was suffering from Organic Brain Syndrome secondary to traumatic brain injury which Claimant suffered when he was hit with the locking ring tire and experienced an injury to his right frontal lobe and a right supra orbital fracture. Dr. Shissias also found that the Claimant has fragmented sleep, chronic daily headaches, and chronic mood disturbance, in fact, Dr. Shissias found that the Claimant was unable to make major decisions without input from his wife and that without her, the Claimant would require legal guardian or payee to manage his affairs. Dr. Shissias is treating the Claimant with medication (APA at pages 6-9; R. at pages 409-410). Dr. Shissias states that the Claimant is responding to treatment (APA at pages 348-350; R. at pages 413-415).

Dr. L. Randolph Waid, a licensed psychologist, treated the Claimant in 2004. Dr. Waid determined that radiographic studies conducted at the time of the Claimant's injury revealed disruptive physical injury to the brain and concluded that the Claimant, whose intellectual functioning was in the low average range, continued as a result to experience difficulties with sustaining attention, concentration, and suffered from slowed mental processing speed. The Claimant's memory was impaired; he suffered continuing impairment of visual spatial skills and mild executive dysfunction both regard to cognitive and emotional/psychological functioning. Moreover, the Claimant continued to suffer with social executive changes to his personality common to one suffering traumatic brain injury, particularly to an injury to the anterior portion of the brain. The Claimant experienced disruptive difficulties associated with apathy, executive dysfunction, and emotional dysregulation. Overall, Dr. Waid found that the brain injury made the Claimant more irritable with lower frustration tolerance and was withdrawn. Indeed, Dr.

Waid assigned a 22% whole person impairment to the Claimant as a result of his neurocognitive deficits. (APA at pages 15-16).

The Claimant has a full scale IQ of 76, according to Dr. Waid. Dr. Waid described the impact of the Claimant's brain and head injury as follows:

> Mr. Kneece's intellectual functioning is in the low average range. Neurocognitive evaluation revealed Mr. Kneece to continue to experience difficulties with the effective sustainment of attention/concentration and slowed mental processing speed. Assessment of anterograde memory continued to reveal a lateralized pattern of impairment as Mr. Kneece continues with difficulties with immediate visual learning/memory capacities. There is also continuing impairment of visual spatial skills compared to estimates of his premorbid level of functioning. Mr. Kneece continues to demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning.
>
> Assessment of emotional/psychological functioning revealed Mr. Kneece to continue with social executive changes to his personality that are common after a traumatic brain injury, particularly when there is injury to the anterior portion of the brain. He is assessed as experiencing disruptive difficulties associated with apathy, executive dysfunction, and disinhibition/emotional dysregulation. Overall, he is more irritable, with lower frustration tolerance and remains quite withdrawn with regard to social and recreational pursuits. (APA at Page 15)

As a result of his evaluation, Dr. Waid made the following assessment of the Claimant:

> Axis 1
> Cognitive Disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury
>
> Personality change labile/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury
>
> Axis 3
> Status post traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and left shoulder

Based on his evaluation, Dr. Waid opined that as a result of his neurocognitive impairments, the Claimant was assessed as having a Class II impairment to the whole person with a 22% impairment as a result of his neurocognitive deficits (APA at page 16).

Dr. Lawrence H. Bergmann, PhD and Dr. Roger W. Deal, MD treated the Claimant since March of 2005 and corroborated the opinion of Dr. Waid. Dr. Bergmann, a psychotherapist, treated the Claimant for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment, anger and depression. Dr. Deal similarly treated the Claimant for sleep disturbance, headaches, poor concentration, memory loss, loss of interest, irritability, fatigue and depression. In addition, Dr. Deal treated the Claimant with various medications for his symptoms and illness. Dr. Bergmann found the Claimant at maximum medical improvement in January of 2007. Dr. Bergmann found that Claimant continued to have symptoms of dysphoria, difficulties adjusting to his cognitive disability, irritability and withdrawal and symptoms consistent with the head injury. Both Dr. Bergmann and Dr. Deal opined that the Claimant experienced an 11% whole person, permanent impairment (APA page 334; R. at page 314). However, Drs. Bergmann and Deal opined in 2007, and again as recently as September of 2010, that the Claimant will require the use of psychotropic medication and medication management as long as he is experiencing chronic pain and cognitive difficulties. Dr. Bergmann further opined in September of 2010 that the Claimant will require the use of psychotropic medication for the foreseeable future (APA at page 26; R. at page 430).

Importantly, the Defendants'/Respondents' clinical psychologist Tora Brawley, PhD, after evaluating the Claimant in January of 2011, concluded that the Claimant suffered from several vegetative symptoms, chronic pain, and stressors. In fact, Dr. Brawley felt as though the Claimant was not at maximum medical improvement with regard to his vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, and decreased frustration tolerance. In other words, Dr. Brawley's findings corroborate those of Dr. Waid, Dr. Bergmann,

Dr. Deal, Dr. White, and Dr. Shissias, all of whom continue to treat the Claimant for his physical brain damage. Moreover, Dr. Brawley accepted Dr. Waid's test results reflecting that the Claimant had a full-scale IQ of 76. Last, Dr. Brawley concluded that the Claimant would benefit from continued treatment for his personality and psychological symptoms for which he is being treated by his physicians. (APA at pages 356-358; R. at pages 824-826).

Left Arm and Leg Injuries. Complicating his permanent and severe physical brain damage, the Claimant's left side was severely injured in the explosion as well. The Claimant sustained an injury to his left knee, his injuries to his left knee were so severe as to require two (2) surgeries and as a result of Claimant's injuries, Dr. James O'Leary assigned a 10% impairment rating to the Claimant's lower left extremity (APA at page 146; R. at page 558). The Claimant also suffered a causally-related injury to his left shoulder and elbow. These injuries were so severe as to require two (2) surgeries as well. As a result of these injuries, Dr. Michael Green assigned a 17% impairment to the Claimant's upper left extremity (APA at page 96; R. at page 508).

Loss of Earning Capacity. Dr. William W. Stewart, a Board-Certified vocational rehabilitation counselor, recognized that the Claimant enjoyed a "benevolent and sheltered employment situation" and opined that, "In an open, competitive labor market [the Claimant] would find himself vocationally disabled and unable to work gainfully (APA at page 4; R. at page 400)."

Dr. Stewart opined as follows:

> Based on Mr. Kneece's original and update (sic) vocational and rehabilitation evaluations it is concluded that to a reasonable degree of vocational and rehabilitation certainty he is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. (APA at page 4; R. at page 400).

Dr. Stewart, who evaluated the Claimant in 2004 and again in September of 2010, explained his opinion as follows:

This vocational opinion is consistent with the mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning "...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs..." (APA at page 4; R. at page 400).

Dr. Stewart recommended that the Claimant continue with "medical care, medical pain management care, neurological care, psychiatric care and professional/trauma counseling care, continue prescribed medications, and medical case management services to coordinate his care/needs." (APA at page 4; R. at page 400).

The Family Farm. Delano R. Kneece & Son, Inc. operates a farm on approximately 2,000 acres in Lexington County. Delano R. Kneece & Son, Inc. is a corporation owned by the Claimant, his father, Delano R. Kneece, and other family members (Depos. of Roxanne Kneece at page 13; R. at page 1194). The Claimant's wife, Roxanne Kneece, is the corporate treasurer and bookkeeper and works on the family farm. Prior to his accident, the Claimant was a general decision-maker for Delano R. Kneece & Son, Inc. The Claimant lives on the Delano R. Kneece & Son, Inc. Farm – the Family Farm. His home is steps away from the farm, fields and shops. Prior to his accident, the Claimant was able to perform all of the functions, duties and responsibilities of a farmer on the family farm.

The Claimant was injured while working for Kneece Farms. Kneece Farms is owned by the Claimant's uncle Everett Kneece. However, the Claimant also worked on his family farm his entire life. The Claimant has not worked for the Appellant Kneece Farms since the accident.

The Claimant. The impact of his injuries on the Claimant was stunning. Farming is very strenuous; however, the Claimant is no longer able to farm. The Claimant's wife, who the

Hearing Commissioner found to be a very credible witness, described the Claimant as completely different from the man he was prior to his accident. It was only with great difficulty that the Claimant's wife was able to describe the Claimant and his weaknesses which resulted from the accident. The Claimant's wife testified, "I was married to one man for 17 years. I'm married to a totally different man now. Same body. There's a shell there but there's not a person. And it's hard. Excuse me. And it really hurts to have to talk about him in front of him. His dignity is worth something." (Tr. page 49, lines 9-11; R. at page 252).

The Claimant's 1999 injury affected his physical strength, his memory and his temperament. The Claimant's forgetfulness interfered with his ability to seek and obtain medical treatment. The Claimant is unable to remember the nature of his treatment and the instructions given him by his physicians. (Tr. page 52, lines 1-5; R. at page 255).

The Claimant's memory loss has affected his ability to farm effectively. A farmer must be able to manage the farm's finances. A farmer must be able to determine the appropriate crops to be planted, the appropriate pesticides and fertilizer to be applied. A farmer must be able to calculate the amount of seed to be planted and pesticide and fertilizer to be broadcast. A farmer must be able to calibrate and repair the equipment. He must be able to drive a farm tractor and other equipment to plant the seed or broadcast the fertilizer or pesticide. A farmer must be able to operate irrigation equipment. The Claimant's memory does not permit him to perform these tasks. The risk to the farm is obvious.

The Claimant is no longer able to manage the farm's finances or his own. Prior to the accident, the Claimant understood the family farm's revenue and expenses, deliveries and inventory and the family farm's financial position. He is no longer able to do so. Delano R. Kneece & Son, Inc. will order farm supplies for neighboring farms and advance payment for

these supplies. The neighbors will reimburse the farm for these supplies. The Claimant would forget to bill his neighbors for these supplies and it is only by virtue of the honesty of these neighbors that the farm gets reimbursed. The Claimant's forgetfulness has almost certainly cost loss to the farm. Dr. Shissias affirms the fact that the Claimant can no longer manage his finances. (Tr. page 54, line 14 - page 56, line 2; R. at pages 257-259).

The Claimant cannot effectively calculate or broadcast chemicals, seeds or fertilizer. The appropriate amount of seed must be planted and were the fertilizer to be misapplied, the crops could be damaged or killed. The Claimant cannot be trusted to calculate the amount of seed and fertilizer to be applied to the farm. These chemicals are expensive and in the event the Claimant misjudges what to plant or how to fertilize, he would not only waste the costly chemicals but also damage the crop. The Claimant is no longer able to perform these functions and they are carried out by another. (Tr. page 52, line 19 - page 54, line 8; R. at pages 255-257).

The Claimant can no longer safely operate farm equipment. First, there are certain farm implements which the Claimant's family refuses to allow him to drive. To permit the Claimant to participate on his farm, the family farm has purchased a fully-automated tractor complete with a GIS device, programmed planting devices and alarm systems which the Claimant is permitted to drive. However, a farm hand must follow the Claimant to the field he is to work. A farm hand must program the GIS equipment and computer. Once the Claimant is led to the field on the pre-programmed tractor, he "mashes" a button and the tractor plows the fields using the GIS coordinates. Even then, the Claimant makes costly mistakes. Farm hands must often go back to the field and re-plow where the Claimant has misused the computerized equipment. If the tractor loses the GIS satellite signal, the Claimant is unable to reestablish contact with the satellite, and a farm hand must recalibrate the GIS equipment. The tractor is completely mechanized and

requires no physical exertion to drive. The Claimant's family has accommodated him to permit him some dignity and self worth. (Tr. page 58, line 6 - page 60, line 24; R. at pages 261-263).

The family farm has taken additional measures to accommodate the Claimant's inability to farm. The farm has bought a corn dryer which is operated by the push of a button which the Claimant is capable of operating. However, the corn dryer is also equipped with an alarm which shuts off the dryer and notifies others on the farm if the corn dryer or the Claimant has experienced a problem. These devices are as foolproof as humanly possible. (Tr. page 63, line 5 - page 64, line 13; R. at pages 266-267).

The Claimant's memory loss has impaired his ability to irrigate the crops. The Claimant can no longer program or adjust the irrigation equipment so as to avoid repetition or excess watering (Tr. page 17, lines 13-23; R. at pages 220).

In addition to equipment purchases made to accommodate the Claimant's mental and physical infirmities, additional farm hands have been employed to do the work that the Claimant was able to do prior to his accident but can no longer perform. After the accident, the Claimant's son, Kain Kneece, was employed to work full time on the farm. Kain Kneece performs 95% of the duties that the Claimant performed prior to his accident. (Tr. page 65, line 7 - page 66, line 15; R. at pages 268-269). Although he retired, the Claimant's father, Delano Kneece, continues to work on the family farm. Since the Claimant's accident, the family farm has been forced to employ farm hands on temporary part time and full time bases to make up for the Claimant's inability to perform as a farmer. (Tr. page 71, line 21 - page 73, line 22; R. at pages 274-276; Claimant's Ex. 4; R. at page 680). These farm hands have been hired to help with fencing, electrical work, weed pulling, truck driving, shop work on equipment, cattle vaccination and records, and making sure everything runs smoothly when Claimant is in the field. (Tr. page 73,

line 8 - page 75, line 9; R. at pages 276-278). In particular, the farm employed Mr. Willie Dobbs to take over many of the Claimant's responsibilities. For instance, Mr. Dobbs drives tractors, spreads chicken manure, spreads fertilizer, sprays, feeds cows, helps dry corn, helps harvest and dry peanuts, and helps harvest cotton. In other words, Mr. Dobbs performs farm chores that the Claimant could perform without help prior to the accident. (Tr. page 98, lines 8-19; R. at page 301).

The Claimant attempts to help with the cattle. Whereas before the accident, the Claimant could give the cattle shots and vaccinations by himself, after the accident other farm hands must help perform these chores. The Claimant cannot remember how much medicine is required for the shots or which cows he has vaccinated. At times, four or five farm hands might help the Claimant give the shots to the cattle; a chore Claimant could perform by himself before the accident. In fact, there are occasions when the farm hires farm hands simply to watch the Claimant in the field. (Tr. page 75, lines 2-9; R. at page 278).

Prior to Claimant's accident, he was able to perform very physical farm chores which required climbing, stooping, lifting and bending. He had no limitations in this regard. His chores would include climbing grain bin legs, performing irrigation duties, and doing roof work. The Claimant was able to climb sheds in need of repair. He was able to climb elevator legs which are 200 feet tall. The Claimant was able to stoop and bend. A farmer or farm hand must be able to crawl under farm implements and behind tractors to repair or adjust them. A farmer must be able to stoop to get around grain facilities and unloading facilities. The Claimant was able to stoop so as to get under farm implements or behind the tractor and make repairs or to get around grain facilities and unloading facilities. The Claimant had no restrictions on the use of farm equipment. The Claimant's physical injuries no longer permit him to perform these farm chores

(Tr. page 15, line 7 - page 16, line 9; R. at pages 218-219).

The Claimant is unable to stay focused on a task. He will spend hours on the cell phone talking with others or visiting with a stranger that may come by the farm. His time spent on the farm is not productive for the farm. (Tr. page 16, line 16 - page 57, line 9; R. at pages 219-260).

Claimant's physical brain damage has affected his temper. Before the accident, the Claimant was mild-mannered. Since the accident, Claimant has developed a "very short fuse." The Claimant's temper was so bad that he alienated his oldest son, other family members, and people around him. Indeed, the Claimant was almost arrested for an outburst against the County Fire Marshal. Treatment by Drs. Bergmann and Deal has helped the Claimant control his anger. (Tr. page 49, line 19 - page 50, line 15; R. at pages 252-253).

Since his accident, the Claimant has been unable to get a good night's sleep. The Claimant yells in his sleep, has nightmares, he jumps, jerks twitches and falls off the bed; he never has a restful night. Drs. Deal and Shissias are trying to treat this Claimant for the causes of his fitful sleep and their treatment has been somewhat helpful. (Tr. page 50, line 25 - page 51, line 17; R. at pages 253-254).

Prior to the accident, the Claimant was energetic and active. However, he has become lifeless since his accident. He is also depressed. Drs. Deal, Bergmann, and Shissias are working with the Claimant to address his depression. (Tr. page 57, line 10 - page 58, line 2; R. at pages 260-261).

Sheltered Employment. The Claimant is paid $4,175 per month by the family farm. In order to afford to make these payments, the Claimant's father, Delano Kneece, who retired after the Claimant's accident in 1999, reduced his pay by approximately half so the Claimant might be paid that amount notwithstanding his inability to farm. In addition, the Claimant's mother

retired from her employment on the family farm and her salary was put back into the farm budget. The Claimant's check is not calculated based on performance. The Claimant's wife, the farm bookkeeper and treasurer, was instructed by the Claimant's father, Delano Kneece, to pay the Claimant that amount. The Claimant's father's justification for these monthly payments is because "we love him that much." In fact, the Claimant's wife writes the check and deposits it; the Claimant never sees it. The Claimant's father, Delano Kneece, has determined to buy additional land for the farm. He has also instructed that the Claimant, as owner and shareholder, is to receive an additional $25,000 dividend a year for the purpose of providing the Claimant with the ability to make payments on additional land purchased by the farm. These payments are made out of love and affection for the Claimant by his family (Tr. page 69, line 6 - page 71, line 18; R. at pages 272-274).

Further, after the Claimant's accident to accommodate the loss of production caused by the Claimant's injuries, the family farm determined to stop planting less productive crops such as soybeans and wheat and to grow peanuts which are more productive. Whereas prior to his accident the Claimant was able to make all such production decisions, after the accident and because of the Claimant's incapacity, the family farm hired a grain broker to assist in making marketing decisions (Tr. page 68, line 8 - page 69, line 5; R. at pages 271-272).

The job market in farming is very competitive. With the availability of migrant farm workers and others, the Claimant cannot compete for these farm jobs or any farm jobs in today's market. Moreover, no employer would tolerate the lack of productivity, errors, and costs such as those caused on the family farm by the Claimant. (Tr. page 76, line 25 - page 79, line 4; R. at pages 279-282). It is clear that the Claimant could never compete in the job market for farm positions and that the family farm would never hire a stranger with the Claimant's disabilities.

(Tr. page 79, line 25 - page 80, line 21; R. at pages 282-283).

Asked whether the Claimant was capable of performing the functions of a farmer, field crop farm worker general, liquid-fertilizer servicer, or tractor operator as described in the report of Cynthia P. Grimley and Associates, LLC, Mrs. Kneece explained that Claimant was no longer capable of performing any of those farm positions. First, Claimant requires supervision in the performance of his farm chores. Second, the risk of harm or loss from a miscalculation in calculating or spreading fertilizer is too great to be entrusted to the Claimant. Third, the Claimant cannot operate farm tractor or equipment without expensive equipment to accommodate his physical and mental disability. Mrs. Kneece testified that the job market in farming was very competitive. Mrs. Kneece testified that with the availability of migrant farm workers, the Claimant could not compete for these farm jobs or any farm jobs in today's market. Nor would an employer tolerate the lack of productivity, errors, costs, and disruption such as those caused on the farm by the Claimant (Tr. page 76, line 25 - page 79, line 4; R. at pages 279-282). Mrs. Kneece testified that the Claimant could never compete in the market place for farm positions and that the family farm would not hire a stranger with the Claimant's disabilities. (Tr. page 79, line 25 - page 80, line 21; R. at pages 282-283).

The Claimant has benefited from the treatment by Dr. Shissias and further treatment was warranted. Dr. White and Dr. Wicker, the Claimant's family physicians, are treating the Claimant for a thyroid condition which Dr. White opines is related to the accident. (Tr. page 84, lines 18-20; R. at page 287). Further, the Claimant's unsteadiness or staggers have led to further injury. In November of 2010, the Claimant became dizzy and suffered a fall requiring treatment from Dr. Michael R. Ugino for a left hand injury. (Tr. page 23, line 12 - page 24, line 6; R. at pages 226-227).

Both the Claimant and his wife testified that the Claimant has benefited from the treatment of Drs. Deal and Bergmann but that the Claimant was in need of additional medical treatment by Drs. Deal and Bergmann. (Tr. page 81, lines 14-18; R. at page 284). Mrs. Kneece explained that the Claimant sought to be reimbursed for all prescriptions purchased in treating the Claimant's injuries. In particular, Mrs. Kneece testified that the Carrier has not reimbursed the Claimant for prescriptions purchased since 2005. The prescriptions are found on Claimant's Exhibit E-2. (Tr. page 81, lines 19 - page 83, line 5; R. at pages 284-286).

In addition to treatment by Drs. Bergmann and Deal, Mrs. Kneece testified that Dr. Shissias' treatment for the Claimant's headaches and depression was beneficial and that the Claimant was asking the Commission to require the Carrier to accept treatment by Dr. Shissias and continue his treatment. (Tr. page 83, line 17 - page 84, line 14; R. at pages 286-287).

Mrs. Kneece testified that Dr. White and Wicker were Kneece family physicians. Dr. White diagnosed the Claimant's hypothyroidism as being connected to the accident, and both Dr. White and Dr. Wicker have been treating the Claimant for his hypothyroidism. Mrs. Kneece testified that the Claimant was requesting the Commission to order the Carrier to accept treatment by Dr. Wicker for the thyroid condition and provide treatment going forward. (Tr. page 84, lines 15-24; R. at page 287).

Mrs. Kneece testified that Dr. Ugino treated the Claimant for his left hand injury in November of 2010 and that the Claimant was requesting that the Commission order Carrier to pay for any future treatment for Dr. Ugino and reimburse Claimant for his out-of-pocket expenses related to this treatment. (Tr. page 84, line 25 - page 85, line 9; R. at pages 287-288).

Mrs. Kneece explained that the Claimant had not been reimbursed for mileage. She testified she calculated the mileage that the Claimant is seeking reimbursement of the mileage

found on Claimant's Exhibit 1. Mrs. Kneece testified that she had calculated the amount of mileage due to date and requested reimbursement for any mileage from the date of the hearing forward. (Tr. page 83, lines 6-16; R. at page 286).

When asked to explain why the Claimant's family has incurred the additional cost and expense of farm equipment and farm help, the Claimant's wife explained that the Claimant's family had gone to great cost so that "Ricky's dignity can be saved. The work has to get done. He can't do it. So, we hire people to get help us get it done. And he sort of hangs out with them." (Tr. page 79, lines 13-17; R. at page 282).

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." Hill v. Eagle Motor Lines, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) *see* S.C. Code Ann. §§1-23-31-, et. Seq. Under the APA, this 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 (A)(5); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 442 (2000). It is not within the appellate court's province to reverse the appellate panel's factual findings if they are supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. The appellate panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Houston v. Deloach & Deloach, 378 S.C.

543, 663 S.E.2d 85 (Ct. App. 2008).

Moreover,

> [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(a)-(f).
>
> Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013)

ARGUMENT I

THE CLAIMANT SUFFERED SEVERE AND PERMANENT PHYSICAL BRAIN DAMAGE AND IS TOTALLY AND PERMANENTLY DISABLED WITH PHYSICAL BRAIN DAMAGE THAT IS COMPENSABLE PURSUANT TO SECTION 42-9-10(C).

The Workers' Compensation Commission found that: " a claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain injury. The claimant sustained an injury pursuant to Regulation 67-1101." (Order page 10; R. at page 32). There is no evidence in the record to support the Commission's finding. Instead, the record is replete with evidence that the Claimant suffered severe and permanent physical brain damage and is totally and permanently disabled with physical brain damage compensable pursuant to §42-9-10 (C). For the reasons set out, the Order of the Workers' Compensation Commission should be reversed.

The Supreme Court held that Section 42-9-10(C) awards lifetime weekly disability

payments only in cases where the physical brain damage is severe and permanent. Section 42-9-10(C) provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and **shall** receive the benefits for life. (emphasis added)

The statute makes no exceptions. Construing §42-9-10(C), the Supreme Court explained:

> Section 42-9-10(C) awards lifetime benefits for totally disabled claimants suffering "physical brain damage as an exception to the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I Fund, Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013).

In Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013), the Court relied in part on S.C. Code Ann. §42-9-400(d) which addresses brain damage as a permanent physical impairment. S.C. Code Ann. §42-9-400(d) defines "permanent physical impairment" as follows:

> As used in this section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a **hindrance or obstacle to obtaining employment** or to obtaining reemployment if the employee should become unemployed. S.C. Code Ann. § 42-9-400(d) [Emphasis added]

The Court concluded that for the injury to the brain to be "severe", the Court held that a worker with severe physical brain damage must be unable to return to suitable gainful employment.

Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.

The holding in Crisp is consistent with existing case law which provides that total disability does not require complete abject helplessness; rather it is an inability to perform

services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). In fact, the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996). Here, the Claimant's permanent and severe physical brain damage together with his impairment and disability resulting from the injuries to his left upper and lower extremities in combination with his low IQ, limited work history and education, leave Claimant unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E. 2d 100 (2003). As discussed in Argument II, infra, the Full Commission did not reverse the Hearing Commissioner's finding that the Claimant had suffered a loss of earning capacity.

The Full Commission erred as a matter of law in finding that "a claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury," is wholly unsupported by the facts and evidence of record. First, there is no evidence of record that the Claimant's severe and permanent physical brain damage prevents him from driving a tractor. Second, there is absolutely no evidence in the record that the Claimant drives a tractor for fifty (50) hours per week. The evidence of record does reflect that the Claimant's family has acquired a tractor for farm use which is equipped GIS and other technology to operate. The GIS and other technology are designed to automatically guide the tractor and broadcast fertilizer and pesticides. The evidence only reflects that the Claimant drives the tractor. Except to "mash" the button to turn the equipment on, the Claimant cannot operate the technology. The GIS and other equipment must be programmed by some other farm hand. Because the Claimant cannot be trusted, he is followed to the field where someone assists

him in operating the technological accommodations on the tractor to get started. Even with his family's accommodation to his disabilities, the Claimant still makes mistakes which must be corrected by another farm hand. Last, there is no evidence in the record to reflect that a stable market exists for farm hands with limited capacity who require accommodations by his employer such as technology and assistance from other farm hands to perform farm chores ordinarily performed by a single farm hand.

Because of the lack of evidentiary support for the finding appealed from, the Commission necessarily based the finding on surmise, conjecture and speculation. In addition, the Commission cherry picked evidence from only one side of the case in making its finding and as a consequence, the finding appealed from does not withstand scrutiny when viewed in context of the record as a whole. Houston v. Deloach & Deloach, *supra.*

The medical evidence reflects that the Claimant suffered severe and permanent physical brain damage -and accordingly, the Commission erred in finding and concluding that the claimant's severe and permanent physical brain damage was compensable under Regulation 67-1101. First, the Claimant's severe and permanent physical brain damage injury is specifically compensable under §42-9-10(C). Second, Regulation 67-1101 does not address physical brain damage. Third, the application of Regulation 67-1101 is arbitrary and capricious as applied here. The Regulation would purport to address total loss, partial loss or loss of use of the brain and would assign a period of compensation of 25 to 250 weeks. A claimant who has suffered the total loss of use of the brain would be in a vegetative state. Yet, in that condition, he would not be deemed totally disabled under Regulation 67-1101 but would be eligible for benefits of up to 250 weeks. Further, the Regulation 67-1101 ascribes a higher value to the total loss of the scrotum and testicles, tongue, biliary tract, small intestine, and skin to that of a total loss to the

brain. The regulatory scheme of Regulation 67-1101 defies logic and is arbitrary, capricious and violates due process.

There being no evidence of record to support the Commissioner's finding, the only inference from the evidence of record supports the finding that the Claimant was totally and permanently disabled with permanent and severe physical brain damage.

The Court in Wigfall v. Tideland Utilities, Inc., *supra,* set out the manner in which a claimant may prove total disability under Section 42-9-10:

> A Claimant may obtain total disability in one of three ways under §42-9-10.
>
> First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in §42-9-10. However, because the Legislature has categorized certain types of injuries as ***per se*** totally disabling, the Claimant need not show a loss of earning capacity. The loss of earning capacity is, like a scheduled loss in §42-9-30, conclusively presumed. Therefore, even in a category in which the earning capacity serves as a benchmark for disability, the Legislature has determined that certain injuries equal a permanent disability without the need to consider earning capacity.[Cite omitted]
>
> Second, a Claimant may establish total disability under §42-9-20 by showing an injury, which is not a §42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled. An example of such a claim occurred in Coleman v. Quality Concrete Prod.'s, Inc., 245 S.C. 625, 142 S.E. 2d 43 (1965), where a Claimant experienced a double hernia after being injured while at work. The Claimant established the double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment. The injury, combined with those other factors, diminished his earning capacity to such an extent as to entitle him to total disability.
>
> Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCollum v. Singer Co., 300 S.C.103,386 S.E. 2d 471 (Ct. App. 1989) (Court found Claimant totally disabled due to combined partial impairments to the back, stomach and leg).

The Claimant is totally and permanently disabled by application of any of three tests for total and permanent disability. First, the Claimant is presumptively totally disabled. It is undisputed in the record that the Claimant suffered physical brain damage in addition to the

extensive injuries suffered to his upper and lower left extremities, head and face. It is undisputed that the Claimant's physical brain damage was disabling. As recognized by the Hearing Commissioner below,

> Both Dr. Lenwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report date September 30 that the Claimant's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2011 Order at page 20; R. at page 185).

The Claimant's physical brain damage created mental and emotional deficits so severe that they would cause the Claimant difficulties in coping with everyday life. The Claimant's physical brain damage is permanent and severe. Claimant's physical brain damage interferes with his abilities to operate equipment safely or enjoy farming or recreation. His wife is forced by the circumstances of his permanent physical brain damage to manage his affairs.

The Claimant's permanent physical brain damage is *per se* disabling. Wigfall v. Tideland Utilities, Inc., *supra*. Therefore, the Claimant is deemed totally disabled and need not demonstrate a loss of earning capacity to recover Workers' Compensation benefits. The Defendants/Respondents argue that the Claimant is paid wages by his family. Assuming for the sake of argument that the payment made to the Claimant by his family are to be considered wages, it is irrelevant to the Commission's inquiry. Indeed, even after being adjudged totally disabled, many employees receiving benefits under one of the specific statutory presumptions of total disability, continue to work either in the same or different field and the Defendants/Respondents are liable to pay the total disability benefits even though the Claimant retains earning capacity after the accident. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App.

1993).

Second, the Claimant may also establish total disability under Section 42-9-10 by showing an injury which is not a Section 42-9-30 scheduled injury caused sufficient loss of earning capacity to render him totally disabled. The Claimant's permanent and severe physical brain damage is not a Section 42-9-30 scheduled injury. The Claimant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant's mental and emotional deficits cause him difficulties in coping with everyday life. Indeed, the Claimant's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and enjoy farming and recreation. Farming is all the Claimant knows. The Claimant now functions in the low average IQ range and has no formal education beyond high school. Without his wife, Claimant would need a legal guardian to manage his affairs.

The Claimant's wife testified that because of Claimant's disabilities he would be unable to compete in an open job market. In fact the family farm would not hire a farm hand with Claimant's disabilities. Her testimony is consistent with that of Dr. Stewart. The Claimant has demonstrated loss of earning capacity resulting from his permanent and severe physical brain damage and is totally and permanently disabled. Wigfall v. Tideland Utilities, Inc., *supra.*

Third, the Claimant may establish his total disability through multiple physical injuries. Here the Claimant suffered not only permanent and severe physical brain damage but also injuries to his left upper and lower extremities. Dr. Stewart's opinion, recognizes that the Claimant enjoys a sheltered, benevolent employment, but concludes to a reasonable degree of vocational and rehabilitation certainty that the Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming

operation, or any other kind of job or gainful employment on a reliable sustained basis. Dr. Stewart stated that his vocational opinion is consistent with the:

> ...mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning '...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs....' (APA at page 4; R. at page 400).

Moreover, as stated above, Roxanne Kneece, Claimant's wife, testified that the Claimant with his mental and physical disabilities was unemployable, that the Claimant could not compete as a farm hand in an open market made competitive by availability of immigrant labor.

For the foregoing reasons, it is clear that based on the evidence of record, the Claimant satisfies any one or all of the tests for total and permanent disability with physical brain damage provided for in Section 42-9-10. The Full Commission erred in finding that the Claimant did not sustain a physical brain injury and should be reversed.

ARGUMENT II

THE CLAIMANT HAS SUFFERED A TOTAL LOSS OF EARNING CAPACITY NOTWITHSTANDING THE FINANCIAL SUPPORT OFFERED HIM BY HIS FAMILY FARM.

The Full Commission affirmed the holding of the Hearing Commissioner that the Claimant has suffered a loss of earning capacity, notwithstanding the financial support offered him by his family farm. In particular, the Commission correctly found the Claimant to be permanently and totally disabled in terms of performing his past job as a farmer/owner/operator

of a farm supply and farming operation or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the Commission also correctly concluded the claimant is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist. Last, the Commission correctly found that the services that the Claimant performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exits for the services the Claimant provides for the family farm. In so finding, the Commission found and concluded that the work offered by Claimant's family farm is sheltered employment and benevolent in nature.

The Defendants/Respondents argue South Carolina law does not recognize the doctrine of sheltered or benevolent employment. The Defendants/Respondents misapprehend the nature of the sheltered or benevolent employment doctrine. In applying the benevolent employer doctrine to the facts of this claim, the Commission was applying or extending longstanding South Carolina case law to the facts below.

In order to be entitled to total and permanent disability Workers' Compensation benefits for a work injury, the Claimant must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). South Carolina courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996). Indeed, evidence that a claimant has been able to earn occasional wages or perform certain kinds

of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. that a person who becomes a paraplegic, as a result of a work related accident, may recover for permanent and total disability under Section 42-9-10 yet continue to work. Likewise, the Claimant who has suffered physical brain damage as a result of a work-related accident may likewise recover for permanent and total disability under Section 42-9-10 yet continue to work.

Because the South Carolina Workers' Compensation Act was based on the North Carolina Act, the Court turned to North Carolina case law for guidance. See, e.g., Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E. 2d 110 (2002). Citing Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E. 2d 798 (1986) the Commission held "an injured employee's earning capacity must be measured not by the largesse of a particular employer, but by the employee's own ability to compete in the labor market. The fact that an employee is capable of performing employment tendered by employer is not, as a matter of law an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E. 2d 746 (1997).

As the Commission correctly pointed out, the rationale behind the benevolent employment rule is simple: proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitation at a comparable wage level. The same is true if the accommodations or modification of the job to meet the employee's limitations are not ordinarily found in the competitive job market. Simply put, if the Claimant does not have the ability to earn wages competitively, he will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra*. See also Baker v. Sam's Club, 589 S.E. 2d 387 (N.C. App. 2003).

Clearly, the benevolent employment doctrine as articulated by the Commission below is merely an extension of long-standing South Carolina law. See McCollum v. Singer Co., *supra;* Stephenson v. Rice Services, Inc., *supra.* See also Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc., *supra.*

The Defendants/Respondents' principal objection to the Commission's application of the benevolent employment doctrine to the facts of this case stem from the fact that the family farm makes regular payment to the Claimant. The Defendants/Respondents argue that because the amounts paid the Claimant meet or exceed the Claimant's wages prior to his workers' compensation injury, he has earning capacity and therefore Defendants/Respondents argue that the benevolent employment doctrine is not applicable to the facts of this case.

The Defendants/Respondents' argument overlooks the evidence of record that the services that the Claimant performs for his family farm, given the accommodations his family has made so as to enable the Claimant to perform certain limited tasks, are not evidence that a reasonably stable market exists for the services Claimant provides for the family farm. Dr. Stewart concluded that the Claimant suffered a total loss of earning capacity. Claimant's wife testified that the Claimant was unemployable and that the Delano R. Kneece & Son, Inc. would not employ a stranger with the Claimant's disabilities. The Defendant/Respondents also overlook the undisputed testimony of record that those amounts paid the Claimant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant on behalf of the family farm, but rather those amounts paid the Claimant are in the nature of a gift and do not constitute wages for work expended on behalf of the farm or wages calculated on the basis of productivity. The testimony of Claimant's wife, the family farm bookkeeper and treasurer, is undisputed on this point. Indeed, the Claimant's

wife was a very credible witness whom the Hearing Commissioner found testified truthfully and accurately to her husband's physical and psychological limitations--testimony corroborated by the undisputed medical evidence of record. The Claimant's wife also testified very honestly about the nature of the work the Claimant is able to perform and the fact that the family has essentially kept him working because he is family. The Claimant's wife was often emotional when honestly describing the fact that the Claimant is now a "shell" of his former self. The fact that the Claimant's family, through personal sacrifice and careful business practices, is able to afford to pay the Claimant any amount whatever is not evidence of the Claimant's earning capacity.

The Defendants/Respondents argue that the adoption of the sheltered or benevolent employment doctrine will open the floodgates to abuse. The Defendants/Respondents argue that the application of the benevolent employment doctrine to this case would make self-employment in South Carolina tantamount to benevolent employment. However, the Delano R. Kneece & Son, Inc. is a corporation with a number of employees and independent contractors and not a sole proprietorship. Moreover, it would be impossible for a sole proprietor who was totally and permanently disabled with a physical brain injury to afford to pay himself, for he would have no income with which to do so. Out of love and respect, the Claimant's family has gone to considerable cost and expense to give the Claimant a feeling of self worth. The Claimant's claim offers a text book case for the doctrine of benevolent employment.

The Defendants/Respondents argue that the payments made by the family farm to the Claimant must be in the nature of wages as opposed to a gift because he reports him on his income tax. However, the payments to the Claimant are taxable. The Claimant and his family are simply obeying the law.

Last, the Defendants/Respondents argue that in the event that the Hearing Commissioner's Order is allowed to stand, the Defendants/Respondents should be entitled to a credit for the amount the Claimant receives from his employment from the family farm. The Defendants/Respondents are entitled to no credit. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

ARGUMENT III

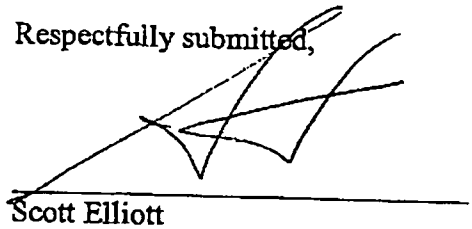
CROSS APPEAL OF DEFENDANTS/RESPONDENTS KNEECE FARMS AND LEGION IN LIQUIDATION AND THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION.

The Defendants/Respondents have filed a cross appeal challenging the Full Commission's award to the Claimant of certain benefits under the Workers Compensation Act. The issues raised in the Defendants/Respondents' cross appeal are without merit.

CONCLUSION

WHEREFORE, based on the foregoing, the Claimant respectfully requests that the Court reverse the finding of fact of the Workers' Compensation Commission that the Claimant did not suffer physical brain damage and the attendant conclusion of law compensating him under Regulation 67-1011 and order Workers' Compensation Commissioner to enter its order awarding benefits under S.C.Code Section 42-9-10(C) together with the benefits previously ordered by the Commission.

Respectfully submitted,



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Columbia, South Carolina

March 19, 2013

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Janet Brooks Holmes
Peter P. Leventis

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May 18, 2012

Via Hand Delivery
Ms. Beth Carrigg
Clerk of Court for Lexington County
205 East Main Street
Lexington, SC 29072

RE: ***Ricky Kneece v. Kneece Farms***
WCC File No: 9920867
Claim No.: L16755
DOI: 11/22/99
Our File No.: 5400-0032

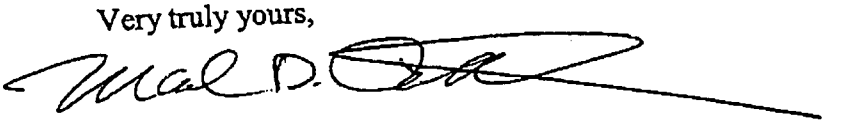
Dear Ms. Carrigg:

Enclosed for filing, please find the original and one copy of a Petition for Judicial Review in the above-referenced matter, along with proof of service, civil cover sheet and the filing fee of $150.00. Please return a clocked copy of the Petition to us in the enclosed self-addressed envelope.

The appeal is addressed to an Order of the Appellate Panel of the SC Workers' Compensation Commission dated April 19, 2012, a copy of which is also enclosed. Please place this matter on the non-jury roster.

By copy of this letter, we are serving the Petition for Judicial Review on counsel for the employee/Respondent and the Workers' Compensation Commission.

Very truly yours,



Mark D. Cauthen

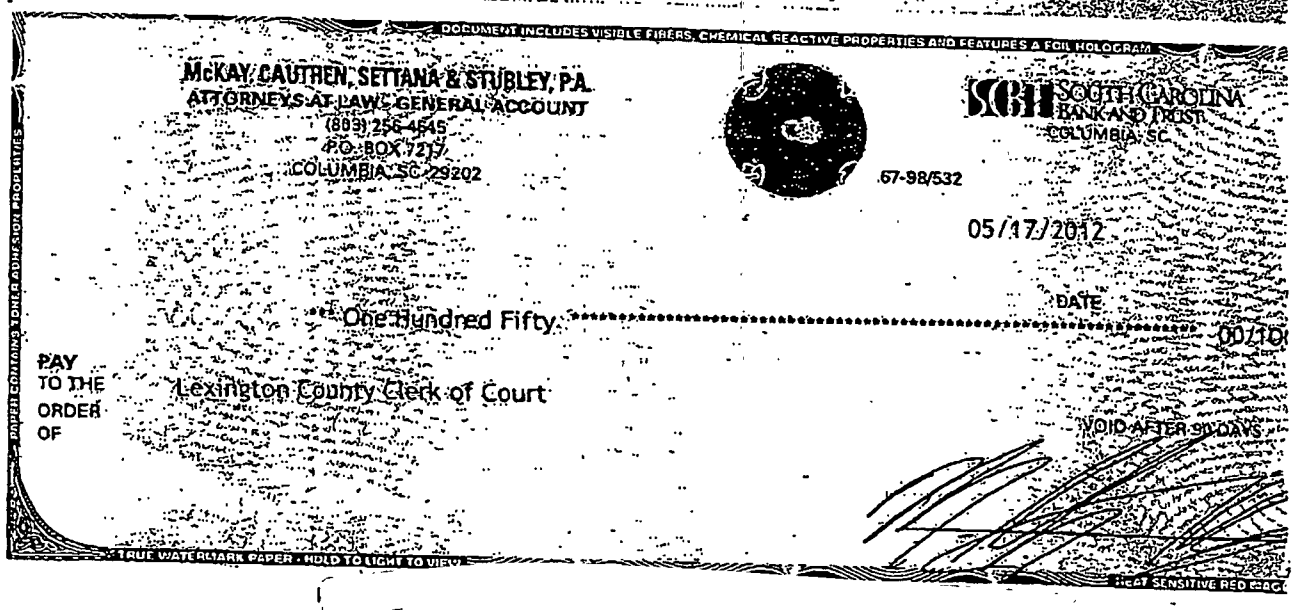
Cc: Scott A. Elliott, Esquire
S.C. Workers' Compensation Commission
Randy Mason

McKAY, CAUTHEN, SETTANA & STUBLEY, P.A. • GENERAL ACCOUNT
COLUMBIA, SC 29202

DATE	CHECK #	AMOUNT	MATTER#	VENDOR ACCT#
May 17, 2012	18608	$150.00	5400-0032	

EXPLANATION

PAID TO
Lexington County Clerk of Court



Ricky D. Kneece, Plaintiff(s)

vs.

Kneece Farms, Defendant(s)

-CP- -

FILED

2012 MAY 23 P 4:30

Submitted By: Mark D. Cauthen, Esquire

SC Bar #: 64309
Telephone #: 256-4645
Fax #: 765-1839
Other:
E-mail: mcauthen@mckayfirm.com

Address: PO Drawer 7217
Columbia, SC 29202

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

2012CP3202111

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.

☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

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- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Mark D. Cauthen **Date:** May 21, 2012.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S,C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)
) WCC FILE NO.: 9920867
) C/A NO.: _____

Ricky Kneece,

Claimant / Respondent,

vs.

Kneece Farms,

Employer,

and

Legion Insurance Company in Liquidation through The South Carolina Property & Casualty Insurance Guaranty Association,

Carrier,
Defendants / Appellants.

2012CP3202111

PETITION FOR JUDICIAL REVIEW

Pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, Defendants Kneece Farms and Legion Insurance Company in Liquidation through The South Carolina Property & Casualty Insurance Guaranty Association (hereinafter "Defendants"), hereby appeal the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter "Appellate Panel") filed on April 19, 2012, a copy of which is attached. The grounds for this appeal are as follows:

1. The Appellate Panel of the Workers' Compensation Commission erred in affirming the Hearing Commissioner's award of lifetime medical benefits under S.C. Code Ann. § 42-9-10 (c), the error being that the Appellate Panel specifically reversed the findings and conclusions of the Hearing Commissioner that Claimant was totally disabled

accompanied by a physical brain injury pursuant to S.C. Code Ann. § 42-9-10 (c) and, therefore, the Claimant is not entitled to lifetime medical benefits under the Act.

2. The Appellate Panel of the Workers' Compensation Commission erred in affirming a Finding that Claimant is entitled to lifetime compensation benefits pursuant to S.C. Code Ann. § 42-9-10(C), the error being that the Appellate Panel specifically reversed the Finding that the Claimant was totally disabled accompanied by a physical brain injury and Claimant is, therefore, not entitled to benefits under S.C. Code Ann. § 42-9-10(C).

3. The Appellate Panel erred in affirming the Finding of the Hearing Commissioner that Claimant is entitled to continuing and future treatment with Dr. Charles Shissias, Dr. Christopher Wicker, Dr. Michael Ugino, Dr. Lawrence Bergmann and Dr. Roger Deal pursuant to S.C. Code Ann. § 42-9-10(C), the error being that the Appellate Panel reversed the award of total disability and Claimant is, therefore, not entitled to medical care pursuant to S.C. Code Ann. § 42-9-10(C).

4. The Appellate Panel erred in affirming the Finding of the Hearing Commissioner that Defendants are responsible for reimbursing Claimant for medical treatment provided by Dr. Ugino, Dr. Shissias, Dr. Wicker, and Dr. White pursuant to S.C. Code Ann. § 42-9-10 (C), the error being that the Appellate Panel determined the Claimant was not totally and permanently disabled under S.C. Code Ann. § 42-9-10(C) and, therefore, Claimant is not entitled to benefits under this section.

5. The Appellate Panel erred in affirming the Finding of the [illegible] Defendants are responsible for past or future medical care with Dr. Shissias, Dr. Wicker, Dr. Ugino and Dr. White, the error being that treatment obtained by the Claimant with these providers was unauthorized and obtained without notice to Defendants and, further, that such Finding is not supported by substantial evidence.

6. The Appellate Panel erred in affirming the Hearing Commissioner's Finding that Defendants are responsible for reimbursement of all prescription medications associated with Claimant's treatment to date and, specifically, for such prescriptive drugs found in Claimant's Exhibit 2, the error being that such reimbursement includes (a) medication for unauthorized and unrequested medical treatment, (b) medication for treatment not causally related to Claimant's compensable injuries, (c) is effected by Claimant's own latches in failing to timely request authorization for such prescriptions, and (d) such Finding is not supported by medical evidence in the record.

7. The Appellate Panel erred in affirming a Finding that Defendants are responsible for all prescription medications associated with Claimant's injuries to date, the error being that Claimant failed to raise this issue at a prior hearing before the Commission in January 2005 and, therefore reimbursement for all prescriptions not requested prior to that date are barred by the doctrines of res judicata, collateral estoppel and/or law of the case.

8. The Appellate Panel erred in affirming a Finding that Defendants are responsible for reimbursing Claimant for all mileage incurred to date and, specifically, as set forth in Claimant's Exhibit 1, the error being such Finding is (a) unsupported by substantial

evidence (b) contrary to South Carolina law where such mileage includes travel to providers or pharmacies for unauthorized medical visits including treatment not causally related to Claimant's compensable injuries, or for any reason prior to August 23, 2004, to or from a pharmacy, and (c) the Claimant's failure to request such mileage benefits for a period up to approximately ten (10) years constitutes laches and is prejudicial to Defendants' ability to properly assess and evaluate these requests, and (d) Claimant failed to provide properly itemized reimbursement requests to Defendants.

9. The Appellate Panel erred in affirming a Finding of the Hearing Commissioner that Claimant is entitled to payment of weekly compensation from the date of his November 22, 1999 accident as well as future weekly compensation for Claimant's lifetime pursuant to S.C. Code Ann. § 42-9-10(C) the error being that the Appellate Panel specifically reversed the Findings and Conclusions of the Hearing Commissioner that Claimant was totally disabled with a physical brain injury pursuant S.C. Code Ann. § 42-9-10(C), the Claimant returned to work with earnings equivalent to or greater than at the time of the compensable injury, the Claimant executed a Form 17 in 2005, and such Finding is inconsistent with the Commission's prior Order issued in 2005.

10. The Appellate Panel erred in affirming an award for weekly compensation benefits to the Claimant while failing to address credit for wages/earnings of the Claimant from his date of return to work to the present, the error being that such issue was raised by Defendants in their appeal but not ruled upon by the Appellate Panel.

11. The Appellate Panel erred in affirming a Finding of [illegible] zygomatic arch, thyroid, scarring and finger, the error being that Claimant failed to allege these injuries in his 2005 hearing before the Commission, failed to notify Defendants of such injuries, and these injuries were not included in the prior Order, therefore, Claimant is barred from asserting said injuries by principles of res judicata, collateral estoppel and/or law of the case, and, further, that evidence in the record does not support this Finding.

12. The Appellate Panel erred in affirming a Finding that Claimant's weight gain and hypothyroidism are causally related to his 1999 head injury, the error being that Claimant failed to notify Defendants of such conditions and sought unauthorized treatment for these conditions without notice to Defendants and such finding is unsupported by substantial evidence in the record.

13. The Appellate Panel erred in affirming a Finding that Claimant's fall and fractured left metacarpal and resulting treatment was causally related to his 1999 accident and claim for benefits, the error being that Claimant failed to notify or request treatment from Defendants for such injury and sought unauthorized treatment on his own and such Finding is unsupported by substantial evidence in the record.

14. The Appellate Panel erred in affirming in part Findings of the Hearing Commissioner relating to Claimant's alleged inability to perform gainful work, inability to maintain employment in a competitive job market and alleged dependence upon benevolent/gratuitous employment offered by Claimant's family, the error being such

Findings are inconsistent with the Appellate Panel's determination that Claimant can operate a "complicated computer operated tractor for 50 hours per week" and is, therefore, not totally disabled accompanied by a physical brain injury, and, further, that such Findings are irrelevant, ambiguous, based upon speculation, and not supported by substantial evidence.

15. The Appellate Panel erred in making the following Statement in the body of the Order: "After careful review in the instant case, the Commission, by unanimous vote, has determined to affirm in part and reverse in part;" said error being that the Appellate Panel ordered that the decision and Order of the Hearing Commissioner was Reversed and Remanded to the Jurisdictional Commissioner for a decision regarding any permanency to Claimant's brain only pursuant to Regulation 67-1101.

16. The Appellate Panel erred in Finding that "all other Findings of Fact and Conclusion of Law" of the Hearing Commissioner are affirmed; said error being that the appellate Panel ordered that the Findings of Fact and Conclusions of Law made by the Hearing Commissioner were Reversed and the Panel Remanded the claim to the Jurisdictional Commissioner for a decision regarding any permanency to Claimant's brain only pursuant to Regulation 67-1101.

17. The Appellate Panel erred in issuing an Order Finding and Concluding that the Claimant sustained permanent physical brain damage pursuant to the reports of Dr. Waid, Dr. Shissias, Dr. White, and Dr. Smith; said error being that the Appellate Panel's Order clearly states that the Claimant did not sustain a permanent physical brain injury and that he only sustained an injury to the brain pursuant to Regulation 67-1101; moreover, the Appellate Panel ordered that the Decision and Order of the Hearing Commissioner was

Reversed and Remanded the claim to the Jurisdictional Commissioner for a decision regarding any permanency to Claimant's brain only pursuant to Regulation 67-1101.

18. The Appellate Panel erred in Finding and Concluding that there is "essentially no evidence contradicting several doctors finding a physical brain injury"; said error being that the Appellate Panel's Order clearly states that the Claimant did not sustain a permanent physical brain injury and that Claimant only sustained an injury to the brain pursuant to Regulation 67-1101; moreover that the Appellate Panel ordered that all Findings of Fact and Conclusions of Law made by the Hearing Commissioner were Reversed and the Panel Remanded the claim to the Jurisdictional commissioner for a decisions regarding any permanency to Claimant's brain only pursuant to Regulation 67-1101.

Mark D. Cauthen
Peter P. Leventis
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorneys for Defendants

Columbia, South Carolina
May 21, 2012.

FILED
2012 MAY 21 P 4:30

ATTORNEYS AT LAW
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COLUMBIA, SOUTH CAROLINA 29201
selliott@elliottlaw.us

SCOTT ELLIOTT

TELEPHONE (803) 771-0555
FACSIMILE (803) 771-8010

May 18, 2012

VIA HAND DELIVERY
The Honorable Beth Carrigg
Lexington County Clerk of Court
205 East Main Street
Lexington, SC 29072

RE: Ricky Kneece vs. Kneece Farms
WCC No.: 9920867

Dear Ms. Carrigg:

Enclosed for filing please find the original and three (3) copies of the Claimant's Notice of Intent to Appeal Full Commission Order in the above matter together with a Certificate of Service and a Civil Cover Sheet. Additionally, please find our firm's check in the amount of $150.00 which represents the filing fee.

By copy of this letter, I am serving counsel of record with a copy of the Notice of Intent to Appeal Full Commission Order.

If you have questions, please feel free to contact me.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott

SE/mjl

Enclosures

cc: Mark D. Cauthen, Esquire w/enc.

Plaintiff(s)

vs.

Kneece Farms

Defendant(s)

2012-CP - 32-

(Please Print)
Submitted By: Scott Elliott, Esquire
Address: 1508 Lady Street
Columbia, SC 29201

SC Bar #: 1872
Telephone #: 803-771-0555
Fax #: 803-771-8010
Other:
E-mail: selliott@elliottlaw.us

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

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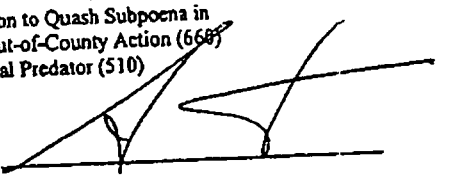
Submitting Party Signature: 

Date: May 18, 2012

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IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

CASE NO. ____ - CP - _____ - _____

Ricky D. Kneece,

Employee
Claimant/Appellant,

vs.

Kneece Farms,

Employer,

And

Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association,

Carrier
Defendants/Respondents.

NOTICE OF INTENT TO APPEAL ORDER OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

(W.C.C. FILE NO. 9920867)

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND MARK D. CAUTHEN, ATTORNEY FOR DEFENDANTS/RESPONDENTS

YOU WILL PLEASE TAKE NOTICE that the above-named Claimant/Appellant does hereby appeal to the Court of Common Pleas for Lexington County, South Carolina, from the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission filed April 19, 2012.

This appeal is made on the following grounds and exceptions:

1. The Claimant/Appellant suffered an admitted workers' compensation injury November 22, 1999. The Claimant/Appellant subsequently filed his claim with the South Carolina Workers' Compensation Commission for injuries, *inter alia*, to his brain.

2. By Decision and Order dated April 18, 2005 (2005 Order), the Workers' Compensation Commission found and concluded that the Claimant/Appellant sustained injuries to his brain and head and ordered the Defendants/Respondents to be responsible for treatment for the Claimant/Appellant's closed head injury and depression. The Defendants/Respondents withdrew their appeal of the 2005 Order and the 2005 Order constitutes the law of the case.

3. All physicians and other medical providers submitting evidence concerning Claimant/Appellant's injuries to his head and brain diagnosed, opined and/or reported that the Claimant/Appellant suffered a physical brain injury. No medical testimony to the contrary was submitted into evidence below.

4. Subsequently, by Decision and Order dated April 28, 2011 (2011 Order), the single Commissioner found the Claimant/Appellant to be totally and permanently disabled with physical brain damage pursuant to Section 42-9-10 and ordered the Defendants/Appellants to be responsible for payment of all weekly compensation from the date of the accident for life, after due credit, and ordered the Defendants/Respondents to be responsible for Claimant/Appellant's related medical treatment for his compensable injuries for his lifetime pursuant to Section 42-9-10(C).

5. The Defendants/Respondents appealed the 2011 Order to the full Commission. In their appeal to the full Commission from the 2011 Order, the Defendants/Respondents admitted

Commission in both the 2005 Order and the 2011 Order.

6. The Appellate Panel of the Workers' Compensation Commission issued its Decision of April 19, 2012, and found that "a claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101." (See Decision of Appellate Panel of April 19, 2012, attached hereto as Exhibit A.)

7. Having reversed the finding in the 2011 Order that the Claimant/Appellant sustained a physical brain injury, the Appellate Panel remanded the Claim to the jurisdictional Commissioner for a decision with regard to permanency. All other findings of fact and conclusions of law were affirmed by the Appellate Panel in its Decision of April 19, 2012.

8. In affirming the remaining findings of fact and conclusions of law set out in the 2011 Order, the Appellate Panel authorized past and future treatment of the Claimant/Appellant's physical brain damage by the doctors and other medical providers who diagnosed, opined and/or reported the Claimant/Appellant's physical brain damage.

9. The 2005 Order found and concluded that the Claimant/Appellant had suffered physical brain damage and ordered the Defendants/Respondents responsible for the Claimant/Appellant's treatment therefore.

EXCEPTIONS/ERRORS OF FACT AND LAW

10. It was error for the Appellate Panel to find that a "claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury [and that] the Claimant sustained an injury pursuant to Regulation 67-1101," the error

sustained physical brain damage, and that there is a total absence of evidence of record to support the finding of the Appellate Panel. In his exception to the Appellate Panel Order, the Claimant/Appellant further excepts to any finding of the Appellate Panel which by implication may overturn any finding of the 2011 Order.

11. The finding of the Appellate Panel of the Workers' Compensation Commission that the Claimant has not sustained a physical brain injury, has absolutely no evidentiary support whatsoever in the record, and the Order of the Appellate Panel should be reversed and the 2011 Order be reinstated in full. Welch Moving and Storage Co., Inc. v. Public Service Com'n of South Carolina, 301 S.C. 259, 391 S.E.2d 556 (S.C. 1990); Houston v. DeLoach & DeLoach, 378 S.C. 543, 663, S.E.2d 85 (Ct. App. 2008).

12. Because of the total absence of evidence in the record to support the Appellate Panel's finding that the Claimant/Appellant has not sustained a physical brain injury, the Appellate Panel's finding is:

a. based only upon surmise, conjecture, or speculation;

b. in violation of applicable statutory provisions;

c. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and

d. is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Therefore, the Order of the Appellate Panel should be reversed and the 2011 Order be reinstated in full. Section 1-23-380; Section 42-9-10(C); Houston v. DeLoach & DeLoach, 378 S.C. 543, 663, S.E.2d 85 (Ct. App. 2008).

finding that the Claimant/Appellant has not sustained a physical brain injury, the conclusion of the Appellate Panel of the Workers' Compensation Commission that the Claimant was not totally and permanently disabled with physical brain damage pursuant to Section 42-9-10(C),

a. constitutes error of law;

b. is in violation of applicable statutory provisions;

c. is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Therefore, the Order of the Appellate Panel should be reversed and the 2011 Order be reinstated in full. Section 1-23-380; Section 42-9-10(C); Houston v. DeLoach & DeLoach, 378 S.C. 543, 663, S.E.2d 85 (Ct. App. 2008).

14. Because the 2005 Order found and concluded that the Claimant/Appellant had suffered physical brain damage, and because the 2005 Order is the law of the case, the Appellate Panel committed an error of law in finding that the Claimant/Appellant had not suffered a physical brain injury, and therefore, the Order of the Appellate Panel should be reversed and the 2011 Order be reinstated in full. Brunson v. American Koyo Bearings, 395 S.C. 450, 718 S.E.2d 755 (Ct. App. 2011); Green v. City of Columbia, 311 S.C.78, 427 S.E.2d 685 (Ct. App. 1993); Floyd v. C.B. Askins & Co. Contractors, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009).

15. Because the 2005 Order found and concluded that the Claimant/Appellant had suffered physical brain damage, and because the 2005 Order is the law of the case, the Appellate Panel's Order finding that the Claimant/Appellant had not suffered a physical brain injury was made upon unlawful procedure, and therefore, the Order of the Appellate Panel should be

S.C. 450, 718 S.E.2d 755 (Ct. App. 2011); Green v. City of Columbia, 311 S.C.78, 427 S.E.2d 685 (Ct.App. 1993); Floyd v. C.B. Askins & Co.Contractors, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009).

WHEREFORE, based on the foregoing, the Claimant/Appellant respectfully submits that his substantial rights have been prejudiced because of the administrative findings, inferences, and conclusions of the Workers' Compensation Commission and that its Decision of April 19, 2012, is:

a. in violation of constitutional or statutory provisions;

b. in excess of the statutory authority of the agency;

c. made upon unlawful procedure;

d. affected by other error of law;

e. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

f. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Accordingly, the April 19, 2012 Order of the Appellate Panel should be reversed and the 2011 Order be reinstated in full.

Signature Page Follows

Respectfully submitted,

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By: _____

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September 6, 2011

The Honorable Virginia Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: ***RE: Ricky Kneece v. Kneece Farms***
WCC File No: 9920867
Claim No.: L16755
DOI: 11/22/99
Our File No.: 5400-0032

Dear Ms. Crocker:

Enclosed for filing are an original and three (3) copies of the Appellants' Reply Brief in the above-referenced claim.

By copy of this letter to Scott A. Elliott, counsel for the Claimant, I am serving him with a copy of the Reply Brief.

Very truly yours,

Mark D. Cauthen

MDC/mbc
Enclosures
cc: Scott A. Elliott, Esquire
Randy Mason

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
SCWCC FILE NO. 9920867

Ricky Kneece,

Claimant/Respondent,

vs.

Kneece Farms,

Employer,

and

Legion in liquidation/SCPCIGA,

Carrier.

Defendants/Appellants.

REPLY BRIEF OF THE APPELLANTS

Appellants Kneece Farms and Legion Insurance Company in liquidation / SCPCIGA submit this brief in reply to the Respondents' brief in the above matter.

Permanent Total Disability/Physical Brain Injury:

The Claimant/Respondent in this case is not entitled to a statutory presumption of permanent totally disability. In his appeal brief the Claimant appears to misapprehend this point. (See Claimant's Brief at pp. 18 and 20). While the Claimant does have a physical brain injury, such an injury is not *per se* disabling as argued by the Claimant. This case does not involve a back injury (or an occupational exposure injury). Nonetheless, statutorily speaking, under the South Carolina Workers' Compensating Act (Tile 42 of the S.C. Code Ann.), the only statutory presumption for PTD arises under S.C. Code Ann. §42-9-30, or §42-9-10. The §42-9-30 PTD

presumption arises for loss of use of 50% or greater of the injured [illegible]

back injury alleged in this case.

The §42-9-10 PTD presumption arises from "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, [constitutes total and permanent disability...]" (Note, shoulders/hips were added after the 2007 amendments to this statute). Neither the §42-9-10 nor the §42-9-30 presumption of PTD is available in his case as no back injury is involved, nor impairment assigned, and the Claimant has not lost any appendages/limbs or vision.

The Claimant's brief misconstrues §42-9-10 to stand for the proposition that a physical brain injury, in and of itself, would constitute a statutory presumption of PTD. This presumption does not exist in S.C. Case Law, nor the Workers' Compensation Act or accompanying regulations. To the contrary, S.C. Code Ann. Reg. §67-1101 actually cites the scheduled value of the brain at 250 weeks – clearly evidencing that a permanent physical brain injury has been contemplated to exist which would not *per se* be totally disabling.

Further still, the language of the third paragraph, paragraph (C), of §42-9-10, clearly states that, "(C) Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person **determined to be totally and permanently disabled** who as a result of a compensable injury...has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." That is, PTD accompanied by a physical brain injury creates the entitlement to life time benefits, and not, as argued by the Claimant/Respondent, that a physical brain injury itself creates an entitlement to a finding of permanent totally disability.

Therefore, and importantly to the case before the Commission, the only way the Claimant can be found to be PTD is by a general disability under §42-9-10 showing that he has suffered a complete wage loss due to his injuries. However, as clearly pointed out by Appellant's brief and the record in this case, the Claimant has suffered no loss of earning capacity whatsoever. Notably he currently has greater earnings than he had at the time of his injury. The wages are from a another employer, Delano Kneece & Son Farms, of which the Claimant is the largest stake holder/owner. (Delano Kneece & Son Farms is a separate and distinct entity from the Claimant's employer, Kneece Farms). Hence, the only way the Claimant can prove permanent total disability under the facts and circumstances of this case, is to show that the wages he is earning with his company constitute 'benevolent employment,' a legal doctrine heretofore not adopted by the Courts of South Carolina.

In support of a finding of benevolent employment, the Claimant points out that his work at Delano Kneece & Son Farms after the accident was so limited and valueless to the farm that the wages he received were a gift. The Claimant further alleges that he was essentially 'costing' the farm, which was employing him, a great expense due – apparently in addition to his unearned wages –to upgrades and multiple other full time and part time employees that were hired to do the work he previously did. The Appellants would first argue that the business model of the farm, profitable or otherwise, is not a basis for finding a wage loss of or loss of earning capacity to the Claimant himself. However, the Appellants also do not concede that this was actually the case for the farm where the Claimant is now employed either, which remains profitable.

Wages of the Claimant

In spite of all of the alleged expenses, and numerous employees and upgrades the farm has allegedly had to hire/incorporate to accommodate the Claimant's supposed benevolent

employment there – the Claimant is not only p[illegible]

largest stake holder of the company which current employees him) which is apparently of no intrinsic value to the farm, he also receives raises and bonuses. As of 2010, his last raise having been in 2007, when the Claimant went from making $3,500.00 per month, to $4,175.00 per month. (See Depo. of Roxanne Kneece, Treasurer of Delano & Son Farms, a pp. 10-11).

Further still, despite the fact that the Employer alleged at the hearing, and in his brief that these monies given to the Claimant on a monthly basis are a "gift," the Claimant clearly treats it differently from a gift by virtue of the fact that he reports these payments to the IRS and S.C. Dept. of Rev. as taxable income. (See Defendant's APA exhibits with multiple years of the Claimant's tax filings post injury). The Claimant could, for instance, at some future point, file for social security disability insurance benefits, unemployment benefits and other benefits based on the fact that he and his employer pay/file/withhold and otherwise treat this money as taxable earnings. The only exception for when such monies are being called a "gift" or treated as a "gift" is to bolster the Claimant's allegation that he is only being 'benevolently' employed by his own company.

Furthermore, little seems to be made of the "gift" Mr. Kneece gives back to the farm where he operates a tractor – admittedly – for about 30 to 40 plus hours per week from at least March to November each year, among other duties. These services may be considered a benevolent gift by Ricky Kneece back to the company (in which he is the largest stake holder), but it is worth noting that in exchange for this 'gift' he receives a monthly wage ('gift') on which he files and reports taxes. Moreover, as a rightful owner of the company in which he is currently self-employed – family members of the Claimant purport to benevolently continue the Claimant's employment with his own company. It is worth pointing out that it may

symbiotically be beneficial to the employees of Delano Kneece & Son Farms to keep Mr. Ricky Kneece happy – as he is the largest shareholder of that company, and they are technically his employees.

Claimant's Responsibilities at Kneece Farms

Part of the argument of the Claimant in attempting to show and support a finding that his employment with Delano Kneece & Son Farms is benevolent employment, was to outline all of the additional help Delano Kneece & Son Farms has allegedly acquired to make up for the loss of the Claimant – who apparently no longer provides any value to the Farm (according to Claimant's arguments). Notably, in his current capacity, the Claimant drives tractors several hours per day for the Farm – up to six days per week during planting and harvesting seasons according to the Claimant's own 2010 deposition. Planting and harvesting seasons run from about March – November of each calendar year. As confirmed by the testimony of the Claimant's wife and Farm secretary/treasurer, Mrs. Roxanne Kneece:

> Q. [The Claimant Ricky Kneece] had previously testified that he drives a tractor [for Delano & Son Farms] maybe five to seven hours a day. Would that be accurate or not?
>
> A. In the right seasons, yes sir, that would be very accurate.

(Deposition of Mrs. Roxanne Kneece, Sept. 29, 2010, at p. 16, line 25 – p. 17, line 4).

Mrs. Kneece went on to testify that those seasons would be planting and harvesting season which lasts from March through November. (Roxanne Kneece Depo. at p. 17).

The Claimant contends that due to his brain injury, he can no longer take care of the farm's finances. Claimant's/Respondent's brief clearly states, "[t]he Claimant's memory loss

has affected the Claimant's ability to [illegible]

finances." (Claimant's/Respondent's brief at p. 9). However, the Claimant *never* handled the finances of the farm either before or after his 1999 injury. Mrs. Roxanne Kneece, wife of the Claimant is the current secretary/treasurer of the farm. (Roxanne Kneece Depo. at p. 3). She took over this position in January 1999 from her mother-in-law – the Claimant's mother – who performed these tasks herself for several years prior to that. (Roxanne Kneece Depo. at p. 5). The farm also has a CPA who further helps with its tax filings. (*Id.* at p. 5). Furthermore, this job, secretary/treasurer of the farm, which has apparently never been held by the Claimant, is a 40 hour per week job. (Roxanne Kneece Depo. at p. 6). Therefore, this claim does not support the Claimant's argument that his responsibilities with the farm have been curtailed due to his injury.

The hearing Commissioner found Roxanne Kneece to be "very credible." However, a closer look at the evidence reveals numerous inconsistencies regarding her testimony. The Claimant's appeal brief indicates, that in order to keep paying the Claimant his monthly salary, his father – retired – had to take a pay cut, and his mother, Shirley Kneece, (the farm secretary and treasurer), "retired from her employment on the family farm and her salary was put back into the farm budget." (Claimant's brief at p. 14). The importance of this is highlighted by juxtaposing this statement with the fact that the Claimant was injured on Nov. 22, 1999. Yet, according to the testimony of Roxanne Kneece, her mother-in-law, Shirley Kneece retired from her position with the farm in "January of '99," a mere 10 months or so before this accident ever happened. Also, since that time Mrs. Roxanne Kneece has taken over that position, and she received $16.50/hour for a forty hour work week for her services to the farm. (Depo. of Roaxanne Kneece at p. 11, lines 11-25).

More to the point on these issues, the testimony and evidence presented on behalf of the Claimant to support a finding that his current employment with Delano Kneece & Son Farms is benevolent – which was relied upon by the hearing Commissioner to make such findings – is logically inconsistent. First, the Claimant asserts that his son, Kain, has been hired to replace the work that he used to do prior to his accident. "Kain Kneece performs 95% of the duties the Claimant performed prior to his accident." (Claimant's/Respondent's brief at p. 11) (Hearing Trans. p. 65-66). If this is to be believed, that means the other 5% of work that the Claimant used to perform, consists of the Claimant's own time working for the farm – driving tractors between 5-7 hours per day, five to six days per week from March through November – as testified to by the Claimant and corroborated by his wife. This 5% further includes all sorts of updated technology that has been incorporated into farm equipment. The 5% further includes the fact that the Claimant's own wife – according to her own deposition – now has to do manual farm labor, such as driving tractors, due to the fact that her husband is injured and cannot perform at his prior level, and further still the Claimant's father who is semi-retired also has to work part-time.

Further still, this 5% of work not covered by the Claimant's son's performing "95%" of the work the Claimant used to do also includes/requires the hiring of a new farm hand to cover the Claimant's responsibility (that is above and beyond the Claimant's own son Kain Kneece) Mr. Willie Dobbs. (See Hearing Trans. at p. 98). **Amazingly**, however, and Respondents contend stretching credulity to the absolute breaking point – this is still not enough to cover all of the work the Claimant by himself used to perform. Several other part time farm hands have to be hired as well, to do still more functions that the Claimant used to do – that are apparently not covered or taken care of by: (a) all of the equipment upgrades; (b) the Claimant's continued

service of 50-40 plus hours a week driving tractors for the farm; (c) the

son admittedly performs 95% of the work done by the Claimant prior to the accident; (d) the fact that the farm has actually hired another full person other than the Claimant's son, Mr. Willie Dobbs, to cover the Claimant's prior responsibilities; (e) the fact that Mrs. Kneece has to perform additional farming duties herself now due to her husband's injuries; and (f) additionally that the Claimant's own father has had to partially come out of retirement and work now also.

Yet still, this is not enough, "[a]t times, four or five farm hands might help the Claimant give shots to the cattle; A chore the Claimant could perform by himself before the accident." (Claimant's brief at p. 12). Note, quite incredibly, all of this is in addition to the 95% of the of the Claimant's pre-injury work duties that the Claimant's own son already performs for him. Furthermore, the Commission is asked to assume that the 'expensive' upgrades to the farming equipment installed such as GPS guidance of the air conditioned tractors owned by the farm, and push button operation of its corn dryers, was done to make up for the Claimant's deficiencies. Nothing in the record indicates these are specialized devices or upgrades that were specifically designed for the Claimant – nor that such innovations are not routine upgrades that may have happened in the world of agricultural machinery and technology since 1999 independently from the Claimant's physical injuries that occurred 12 years ago.

Benevolent Employment

The Claimant is a part owner of his family farm from which all of his post injury wages have been paid. He is for all purposes self employed. The Claimant's tax return lists him as "sole proprietor" of the farm operation. The finding of the Single Commissioner that the Claimant's employment is benevolent belies the very meaning of the word benevolent. The Merriam-Webster dictionary defines the adjective benevolent as: "having or marked by

sympathy and consideration for *others*." (See Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct.App.2001) (holding dictionaries can be helpful tools for the purpose of defining terms). The Claimant's self employment in a business in which he is a largest stake holder is motivated by his own self interest and certainly is not out of sympathy and consideration of others. As testified to at the hearing, his company – allegedly – loses money, and goes to great expense to continue his employment.

The Respondent, following his accident, has not worked for Kneece Farms, his employer at the time of the accident. Kneece Farms, the employer, is not alleged to have provided the Claimant with Benevolent Employment. Following his accident, the Respondent has worked solely for his family farm, Delano R. Kneece and Son Farm, Inc, of which he is an owner. It is the Claimant's self-employment with Delano Kneece & Son Farms that was found to be benevolent. This point distinguishes the current case from the North Carolina cases relied on by the Claimant and the Single Commissioner in support of adoption of the Benevolent Employment Doctrine. Most importantly, none of the claimant's in the cases cited accepted or were able to accept the offers of benevolent employment; as a result, they did not receive wages in addition to their compensation benefits.

The Claimant in Peoples v. Cone Mills Corp. suffered a compensable respiratory injury while working for Cone Mills Corp. 316 N.C. 426, 342 S.E.2d 798 (1986). Following his injury, the employer created a sedentary job specifically to fit the post injury abilities of Mr. Peoples which included different and lessened duties as compared to his pre-injury job but was compensated at the same rate. **Mr. Peoples refused to accept the employment that was created for, and offered to, him.** Therefore, the employer claimed that Mr. Peoples was not able to show that he had suffered a diminished earning capacity to support a finding of disability

based on wage loss. The North Carolina Court held that the [illegible]

evidence of earning capacity.

The Claimant in the case of Saums v. Raleigh Community Hospital suffered a back injury while working as a housekeeper in the hospital. 346 N.C. 760, 487 S.E.2d 746 (1997). After multiple attempts at returning to her previous job were thwarted by the Claimant's physical limitations, the Claimant return to work with the hospital as a quality control clerk, a job that was created with limited duties to accommodate the Claimant's return to work. **After undergoing additional surgical treatment, the Claimant failed to return to the position that had been created for her,** despite the fact that the treating doctor had found no reason to prevent her from returning. The North Carolina Industrial Commission found the Claimant to be permanently and totally disabled. The Court of Appeals reversed the finding and held that any newly created job was presumed to be readily available in the open job market. The Supreme Court of North Carolina reversed this presumption and remanded the case back down for reentry of the original award.

The Claimant in the case of Baker v. Sam's Club suffered multiple injuries when she slipped and fell while working as an outside marketing representative for Sam's Club. 161 N.C.App. 712, 589 S.E.2d 387 (2003). Following her post injury return to work for Sam's Club, the Claimant worked as a demonstrator with reduced job duties as compared to other demonstrators but with substantially higher wages as compared to other demonstrators. **Despite the accommodations made for the Claimant, she was still unable to perform her work without pain and was removed from work by her doctor.** Thereafter, the Claimant sought compensation benefits including temporary benefits during the period she worked for the employer following her injury. The North Carolina Industrial Commission failed to make any

findings regarding the sustainability of the post-injury employment. For this reason, the Court of Appeals of North Carolina remanded the case.

Note that sham/benevolent employment is historically something that is provided in one of two ways by **the employer with whom the injured worker was employed at the time of the accident.** Either: (a) an employee who is otherwise unable to work is paid a gratuitous wage by a nefarious employer who wishes to keep the Claimant in his employee for the purpose of defending and defeating an allegation of PTD (based on his continued employment with that employer); or (b) by a truly benevolent employer who, out of guilt/kindness/good will or otherwise, chooses to keep and pay a totally disabled worker who was injured in their employ, but has been rendered unable to earn wages from his work place injury. As outlined above, Mr. Kneece has found a *truly* benevolent employer in his own company, in that he has actually received raises and ongoing annual bonuses from his company since his injury. In 2007 for instance he received a raise from $3,500.00 per month to $4,175.00 per month according to his wife's deposition. Mrs. Roxanne Kneece is also the secretary and treasurer of Delano Kneece & Son Farms.

In the cases relied on by the Respondent and the Single Commissioner in support of adoption of the benevolent employment doctrine, all of the employment found to be benevolent was post injury employment with or offered by the Claimants' employer at the time of the accident. In the present case, the Respondent's post injury return to work, with similar job duties, at greatly increased earnings, for entity that he owns **is not the same employer as he worked for at the time of the accident.** Therefore, this case is simply not analogous to the cases from other states cited to support the adoption of the benevolent employment doctrine.

Entitlement to Indemnity Benefits from Date of Injury to Present

The Claimant contends that the Single Commissioner was correct in ruling that he is entitled to an award of weekly permanent disability benefits from the date of the accident until the end of his life. The Respondent's basis for this argument is that Section 42-9-10(C) expressly provides that: "any person determined to be totally and permanently disabled who as a result of a compensable injury... has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." The Respondent's argument on this point is non-persuasive for at least two reasons: (1) Section 42-9-10(C) does not properly apply in this case and (2) the mandates of Section 42-9-10(C) are triggered by, and run from, a finding of permanency as opposed to the occurrence of an accident.

Section 42-9-10(C) provides lifetime benefits for Claimants that meet two requirements: (1) have been determined to be totally and permanently disabled; and (2) as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage. The Respondent's interpretation of this statute attempts to satisfy these two separate requirements by meeting only one. The Respondent's argument is that he is totally and permanently disabled because he suffered physical brain damage. This argument must fail because there has been no showing that the Respondent's brain injury has rendered him totally and permanently disabled. Moreover, the Respondent's claim for being totally and permanently disabled is based on general disability through a loss of wage earning capacity. For the reasons explained above, the Respondent has suffered no loss of earning capacity and cannot, as a matter of law, satisfy the requirements to show a general disability. Therefore, he cannot be found to be totally and permanently disabled and his brain injury alone is insufficient to entitle him to application of Section 42-9-10(C).

In the event that Section 42-9-10(C) is held to apply, it does not mandate that benefits be paid from the date of the accident. The triggering event for application of Section 42-9-10(C) is the determination of total and permanent disability. Temporary disability and permanent disability are separated by the date of finding of maximum medical improvement. Our courts have held that, "[e]ssentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006)."

This is particularly true where, as here, the claim for being totally and permanently disabled is made under authority other Section 42-9-10(B), which entitles certain injuries to a presumption of resulting total and permanent disabled. The Respondent sought a finding of being totally and **permanently disabled** pursuant to general disability. Accordingly, Section 42-9-10(C) could not apply at the time of the accident and would not apply until the there was finding of total and permanent disability, or at the very least maximum medical improvement. Therefore the Commissioner erred in awarding back due permanent indemnity benefits to the Claimant from the date of injury to present on such a basis.

The Claimant also cites the case of *Hamilton v. Bob Bennett Ford*, 336 S.C. 72, 518 S.E.2d 599 (Ct.App.1999), for the proposition that a signed Form 17 does not affect the Respondent's right to apply for future benefits. Regardless of the application of this case to future benefits after the execution of the Form 17, the Form 17 clearly blocks the Claimant from seeking benefits from the time period prior to the execution of, and covered under, the Form 17.

Laches

The Respondent also asserts that the doctrine of *Laches* does not apply to the Respondent's claims because the Appellants cannot show prejudice. By failing to assert his claims for five years after the 2005 Order in this case and then adding additional claims regarding total and permanent disability the Respondent impaired the Appellant's right to direct his treatment and the handling of this claim. The Defendants/Appellants have clearly been prejudiced by Claimant's decision to seek medical care from physicians of his own choice without authorization from or even a request to Defendants to provide additional treatment.

The Claimant's position on lack of prejudice is also based, in part, on his belief that a physical brain injury entitles a claimant to a finding of total and permanent disability. This is highlighted by the following quote from Section in Respondent's brief regarding the Appellant's Motion to Compel and Motion to Postpone the Hearing: "Appellants were well aware that the Claimant continued to treat with Dr. Deal and **could not have been surprised** that the Claimant was seeking further benefits under Section 42-9-10, because of his undisputed physical brain damage." (Respondent's Brief at 35).

A physical brain injury is not listed in Section 42-9-10(C) as creating a presumption of total and permanent disability. Therefore, the Appellants had no prior notice that the Respondent's claim was for total and permanent disability until the filing of the final Form 50. The Appellant's were surprised by the nature of the Respondent's claim, and reason for the delay in asserting such – for over 50 plus months – was unreasonable in light of the circumstances.

Award and Provision of Unauthorized Medical Treatment

The Respondent claims that the Single Commissioner was correct in ordering payment for medical treatment, mileage, and prescription medicine relating to treatment from Drs. White,

Whicker, Shissias, and Ugnio. The Respondent claims that the Appellant misreads Section 42-15-60 to provide only the employer with the right to determine and authorize medical treatment. The Respondent correctly points out that Section 42-15-60 vests the Commission with authority to direct an employer to provide medical treatment – yet that was never done or requested in this case prior to the 2010 hearing request by the Claimant. The Claimant Respondent overlooks, and did not follow, the procedural requirements of Section 42-15-60.

Section 42-15-60(A), in pertinent parts, provides:

> [T]he employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, **unless otherwise ordered by the commission for good cause shown.... If in an emergency, on account of the employer's failure to provide the medical care as specified in this section,** a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, **if ordered by the commission.**
>
> (emphasis added).

This Section provides an employer the right to provide and direct treatment, *unless* otherwise ordered by the Commission for good cause shown. Additionally it provides an exception that controls when the employer is responsible for payment for treatment provided to the Claimant other than treatment which was authorized by the employer or the Commission. The Commission is allowed to order previously provided unauthorized treatment if it was provided "in an emergency, on account of the employer's failure to provide medical care as specified by" Section 42-15-60.

Following the 2005 Agreement of the parties, the Claimant requested that the Respondent authorize him to undergo a neurological examination with Dr. Julian Adams. The Respondent

authorized this examination and it was conducted on May 14, 2008. Dr. ...

Respondent's neurological examination to be **"absolutely normal"** and diagnosed him with a mild to moderate injury with a contusion to his right frontal lobe. At Dr. Adams request, an electroencephalogram (EEG) test was performed on the Respondent and the results were **normal.**

Dr.Adams recommended no further treatment and released the Respondent from further treatment. Despite Dr. Adams examination, testing, and assessing of the Respondent, the Respondent now claims that Dr. Adams **"declined to treat"** him. That is not accurate. In fact, Dr. Adams found no condition for which to provide further treatment. Other than the treatment provided by Dr. Adams, the Respondent requested no medical treatment be provided following the 2005 Agreement of the parties other than ongoing psychological treatment provided and paid for by Appellants. Instead the Respondent sought treatment through other doctors without first seeking authorization from the Appellant or the Commission as required by Section 42-15-60.

The Appellant provided all recommended and requested medical treatment. Accordingly, the authorized treatment sought by the Respondent from the Defendants, or that was prescribed by the treating physicians. Note, the record does not show than an IME was requested by the Claimant from the Commission or the Carrier, for treatment of his brain after Dr. Adams assessment was made. Furthermore, the additional treatment had was not in response to "an emergency, on account of the employer's failure to provide the medical care." Nor had such been directed by the Commission. Therefore, there is no authority support requiring the Appellant make any payment for any expenses relating to the unauthorized treatment provided by Drs. White, Whicker, Shissias, and Ugnio.

The Respondent classifies the Single Commissioner's denial of Appellants' right to evaluations under Section 42-15-80 as dictatorial powers. The Respondent also argues that it was within the Single Commissioner's discretion to allow further proceedings to go forward without requiring the Respondent to submit to the evaluation. Far from acting in a doctorial fashion, the Appellants are simply exercising one of the numerous rights given to them by state law in exchange for providing Workers' Compensation Coverage.

The right to require evaluations was specifically created and granted to employers by the express language of Section 42-15-80. Section 42-15-80(A), in pertinent parts, provides:

> (A) "**After an injury and so long as he claims compensation**, the employee, **if so requested by his employer** or ordered by the commission, **shall submit himself to examination**, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission.... **If the employee refuses** to submit himself to or in any way obstructs the examination requested by and provided for by the employer, **his right to compensation and his right to take or prosecute a proceeding** under this title **must be suspended until the refusal or objection ceases** and compensation is not payable at any time for the period of suspension unless in the opinion of the commission the circumstances justify the refusal or obstruction...."

The rights granted under Section 42-15-80 are not limited to the constraints the Respondent seeks to impose nor are they limited by any temporal limitation. The first section of subsection (A) expressly provides that the right lasts so long as the Claimant claims compensation. Furthermore, the language of Section 42-15-60(A) regarding the employers right to an evaluation is expressed in mandatory terms. The Statute provides that the employee **SHALL** submit to an evaluation upon request of the employer and if he refuses, his right to compensation and further proceedings **MUST** be suspended. Moreover, the request for the

examination is not required to be made at any particular [illegible]

11 SE2d 386 (1940). The Single Commissioner is authorized to excuse the refusal or obstruction when circumstances justify. However, the Single Commissioner failed to make findings of facts or conclusions of law in regards to any alleged justification of the refusal to submit to the evaluation. This alone requires reversal of the underlying Order and a de novo hearing. *See Aaron v. Viro Group*, 344 S.C. 321, 543 S.E.2d 574 (S.C.App 2001).

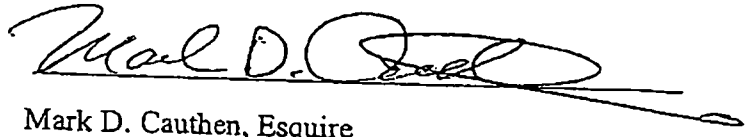
In support of the argument against the right to an evaluation being used to require the Respondent to submit to requested evaluations, the Respondent argues that the Appellant had the benefit of the evaluations conducted by Dr. Smith during the Respondent's initial hospitalization and Dr. Adams in 2009. Clearly, the Appellants should be entitled to an updated evaluation in an ongoing claim when years have passed since the last evaluation. More importantly, the Appellants should be entitled to seek additional evaluations to address new or updated opinions / reports (including Dr. Shissias and Dr. Stewart) and to address changes in the nature of the claim as occurred in this case with filing of the Respondent's Form 50. By refusing to submit to the evaluation requested pursuant Section 42-15-80(A), the Respondent waived its right to further proceedings until he complied with the Appellants' requests and direction. Accordingly, the express language of Section 42-15-80(A) required that "his right to... prosecute a proceeding under this title must be suspended until the refusal or objection ceases." The Single Commissioner failed to adhere to this statutory requirement or to make findings of facts and conclusions of law to support any exercise of discretion. This alone requires reversal of the underlying Order and a de novo hearing.

Finally, despite the Respondent's contention to the contrary, the Appellants have properly preserved all objections regarding the testimony presented by Dr. Stewart.

Conclusion

Based upon the foregoing Arguments, case law, and statutes cited herein, the Defendants respectfully request the Full Commission reverse the Decision and Order of the Hearing Commissioner and/or grant a de novo Hearing.

Respectfully Submitted,



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August 19, 2011

The Honorable Virginia Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

RE: Ricky Kneece vs. Kneece Farms
WCC No.: 9920867

Dear Ms. Crocker:

Enclosed for filing please find the Respondent's Brief in the above matter together with a Certificate of Service. By copy of this letter, I am serving counsel of record with a copy of Respondent's Brief.

If you have questions, please feel free to contact me.

Sincerely,

Elliott & Elliott, P.A.

Scott Elliott

SE/jcl

Enclosures

cc: Mark D. Cauthen, Esquire w/enc.

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 9920867

Ricky D. Kneece, Claimant, vs. Kneece Farms, Employer, and Legion in Liquidation and The South Carolina Property and Casualty Insurance Guaranty Association Carrier/Defendant.	**BRIEF OF RESPONDENT**

For the reasons hereinafter set out, the Claimant Ricky Kneece submits that the Order issued by the Honorable Derrick L. Williams dated April 28, 2011, should be affirmed in full by this Commission.

STATEMENT OF THE CASE

This matter was commenced by the filing and service of a Form 50 dated November 7, 2001, alleging that the Claimant, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999. Subsequent to Claimant's accident, the Defendant Employer and its Carrier provided certain treatment to the Claimant for his injuries and paid Claimant certain temporary total disability benefits.

On or about July 28, 2003, the Carrier, Legion Insurance Company (Legion) went into

liquidation and the claim was turned over to the South Carolina Property and Casualty Guarantee Association (Guarantee Association). Thereafter, the Claimant sought additional treatment for injuries to his left upper extremity and left lower extremity as well as psychological treatment. However, the Appellants refused to provide the treatment requested by the Claimant. After a hearing held January 11, 2005, the Hearing Commissioner Michelle Childs issued her order finding that the Claimant had suffered compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth. The Hearing Commissioner also found that the Claimant also sustained compensable injuries to his left shoulder, left elbow and for depression (2005 Order). The 2005 Order also found that as a result of his injury, the Claimant was diagnosed with conditions which include a closed head injury, chronic olecranon bursitis of his left elbow, intra articular left biceps tendon rupture, patello femoral syndrome of symptomatic plica, interior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femor condyle fracture, and a fracture of the nasal bridge and left nasal bone. The 2005 Order found that the Claimant was not at MMI (2005 Order).

The 2005 Order held the Appellants responsible for Claimant's causally-related medical treatment predating its 2005 Order including that by Dr. Michael Green for the left upper extremity and by Dr. Green and Dr. James O'Leary for the left lower extremity and for treatment rendered by Dr. Randolph Waid, a licensed clinical psychologist. In addition, the 2005 Order found the Claimant was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up treatment with Dr. Waid. Last, the Order found that the Appellants were responsible for Claimant's additional medical treatment from Dr. Green including medications and surgery for Claimant's left shoulder and elbow (2005 Order).

The Appellants appealed the 2005 Order. However, the Claimant was desirous of

obtaining medical treatment required by the 2005 Order. In exchange for the Appellant's commitment to provide for all of the medical treatment authorized by the 2005 Order, the Claimant agreed to try to go back to work and to permit the Appellants to stop making temporary total disability payments. While the Appellants did provide treatment for the Claimant by Dr. Green and Dr. O'Leary as required by the 2005 Order, the Appellants did not fully comply with the parties' agreement. While the Appellants provided counseling treatment by Dr. Lawrence Bergmann and his associate psychiatrist, Dr. Roger Deal, the Appellants failed and refused to pay for the medication prescribed by Dr. Deal, the treating physician. (Claimant's Exhibit 3)

On or about July 9, 2010, the Claimant filed a Form 50 requesting a hearing seeking an Order of this Commission finding him to be permanently and totally disabled with a physical brain injury and pursuant to S.C. Code Ann. Section 42-9-10; Claimant sought all benefits to which he was entitled under the act. A hearing on Claimant's Form 50 was scheduled for October 4, 2010. However, the October 2010 hearing was continued to allow the parties the opportunity to mediate this claim. Mediation was unsuccessful. The matter was thereafter rescheduled for February 14, 2011. After a full hearing on all matters raised by the parties, the Hearing Commissioner found the Claimant totally and permanently disabled with a physical brain injury and ordered the Appellants to provide the Claimant with the relief afforded him under the Workers' Compensation Act for life.

STATEMENT OF FACTS

The Claimant was injured November 22, 1999, while in the employ of Appellant Kneece Farms when a tire which he was changing exploded while under pressure causing him injury to the head, brain and face as well as the left side of his body. The explosion was severe enough to cause the Claimant to lapse into a coma after the explosion and had to be transported by

helicopter to the hospital. (Tr. Page 46, lines 6-11).

It is undisputed that the Claimant suffered a permanent and severe head and brain injury. As characterized by the Hearing Commissioner the 2005 Order sets forth the evidence of the Claimant's admitted physical brain damage as follows:

> Both Dr. Linwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30 that the Claimant's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2011 Order at Page 8).

The Claimant has a full scale IQ of 76, according to Dr. L. Randolph Waid, a licensed clinical psychologist. Dr. Waid described the impact of the Claimant's brain and head injury as follows:

> Mr. Kneece's intellectual functioning is in the low average range. Neurocognitive evaluation revealed Mr. Kneece to continue to experience difficulties with the effective sustainment of attention/concentration and slowed mental processing speed. Assessment of anterograde memory continued to reveal a lateralized pattern of impairment as Mr. Kneece continues with difficulties with immediate visual learning/memory capacities. There is also continuing impairment of visual spatial skills compared to estimates of his premorbid level of functioning. Mr. Kneece continues to demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning.
>
> Assessment of emotional/psychological functioning revealed Mr. Kneece to continue with social executive changes to his personality that are common after a traumatic brain injury, particularly when there is injury to the anterior portion of the brain. He is assessed as experiencing disruptive difficulties associated with apathy, executive dysfunction, and disinhibition/emotional dysregulation. Overall, he is more irritable, with lower frustration tolerance and remains quite withdrawn with regard to social and recreational pursuits. (APA at Page 15)

As a result of his evaluation, Dr. Waid made the following assessment of the Claimant:

> Axis 1
> Cognitive Disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury

Personality change labile/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury

Axis 3
Status post traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and left shoulder

Based on his evaluation, Dr. Waid opined that as a result of his neurocognitive impairments, the Claimant was assessed as having a Class II impairment to the whole person with a 22% impairment as a result of his neurocognitive deficits (APA at Page 16).

Dr. Lawrence H. Bergmann, PhD and Dr. Roger W. Deal, MD have treated the Claimant since March of 2005 and corroborate the opinion of Dr. Waid. Dr. Bergmann, a psychotherapist, is treating the Claimant for headaches, sleep loss, dizziness, fatigue, irritability, memory impairment, anger and depression. Dr. Deal similarly is treating the Claimant for sleep disturbance, headaches, poor concentration, memory loss, loss of interest, irritability, fatigue and depression. In addition, Dr. Deal has treated the Claimant with various medications for his symptoms and illness. Dr. Bergmann found the Claimant at maximum medical improvement in January of 2007. Dr. Bergmann found that Claimant continued to have symptoms of dysphoria, difficulties adjusting to his cognitive disability, irritability and withdrawal and symptoms consistent with the head injury. Both Dr. Bergmann and Dr. Deal opined that the Claimant experienced an 11% whole person, permanent impairment (APA Page 334). However, Drs. Bergmann and Deal opined in 2007, and again as recently as September of 2010, that the Claimant will require the use of psychotropic medication and medication management as long as he is experiencing chronic pain and cognitive difficulties. Dr. Bergmann further opined in September of 2010 that the Claimant will require the use of psychotropic medication for the foreseeable future (APA at Page 26).

The Claimant's personal physician, Dr. Carl A. White, found a 32 x 43 mm area in the

Claimant's right frontal lobe which Dr. White found compatible with encephalomalacia (or softening of the brain) related to the Claimant's 1999 head injury and skull fracture. In essence, Dr. White found a "dead zone" in the Claimant's brain. Dr. White opined in 2007 that the Claimant's hypothyroidism was related to his head trauma. Further, Dr. White opined that Claimant's hypothyroidism was related to pituitary insufficiency and results in lethargy, weight gain, and general lack of energy and desire. Moreover, Dr. White confirmed that the Claimant's emotional changes and memory loss were related to his head trauma and frontal lobe damage. After his diagnosis, Dr. White began treating Claimant for his hypothyroidism and headaches with medication (APA at pages 175-176). Dr. Christopher Wicker has now succeeded Dr. White as Claimant's family physician. Dr. Wicker continues to treat the Claimant for his hypothyroidism.

Dr. Charles Shissias, a neurologist, is treating the Claimant for chronic daily headaches, memory loss and depression arising from Claimant's 1999 accident. Dr. Shissias concluded that the Claimant was suffering from Organic Brain Syndrome secondary to traumatic brain injury which Claimant suffered when he was hit with the locking ring tire and experienced an injury to his right frontal lobe and a right supra orbital fracture. Dr. Shissias also found that the Claimant has fragmented sleep, chronic daily headaches, and chronic mood disturbance, in fact, Dr. Shissias found that the Claimant was unable to make major decisions without input from his wife and that without her, the Claimant would require legal guardian or payee to manage his affairs. Dr. Shissias is treating the Claimant with medication (APA at Pages 6-9). Dr. Shissias states that the Claimant is responding to treatment (APA at Pages 348-350).

Importantly, the Appellants' clinical psychologist Tora Brawley, PhD, after evaluating the Claimant in January of 2011, concluded that the Claimant suffered from several

vegetative symptoms, chronic pain, and stressors. In fact, Dr. Brawley felt as though the Claimant was not at maximum medical improvement with regard to his vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, and decreased frustration tolerance. In other words, Dr. Brawley's findings corroborate those of Dr. Waid, Dr. Bergmann, Dr. Deal, Dr. White, and Dr. Shissias, all of whom continue to treat the Claimant for his causally-related injuries. Moreover, Dr. Brawley accepted Dr. Waid's test results reflecting that the Claimant had a full-scale IQ of 76. Last, Dr. Brawley concluded that the Claimant would benefit from continued treatment for his personality and psychological symptoms for which he is being treated by his physicians. (APA Pages 356-358).

Complicating his permanent and severe brain injury, the Claimant's left side was severely injured in the explosion as well. The Claimant sustained an injury to his left knee, his injuries to his left knee were so severe as to require two (2) surgeries and as a result of Claimant's injuries, Dr. James O'Leary assigned a 10% impairment rating to the Claimant's lower left extremity (APA at page 146). The Claimant also suffered a causally-related injury to his left shoulder and elbow. These injuries were so severe as to require two (2) surgeries as well. As a result of these injuries, Dr. Michael Green assigned a 17% impairment to the Claimant's upper left extremity (APA at page 96).

Dr. William W. Stewart, a Board-Certified vocational rehabilitation counselor, recognized that the Claimant enjoyed a "benevolent and sheltered employment situation" and opined that, "In an open, competitive labor market [the Claimant] would find himself vocationally disabled and unable to work gainfully (APA at page 4)."

Dr. Stewart opined as follows:

> Based on Mr. Kneece's original and update (sic) vocational and rehabilitation evaluations it is concluded that to a reasonable degree of vocational and rehabilitation certainty he is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. (APA at page 4).

Dr. Stewart, who evaluated the Claimant in 2004 and again in September of 2010, explained his opinion as follows:

> This vocational opinion is consistent with the mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning "...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs..." (APA at page 4).

Dr. Stewart recommended that the Claimant continue with "medical care, medical pain management care, neurological care, psychiatric care and professional/trauma counseling care, continue prescribed medications, and medical case management services to coordinate his care/needs." (APA at page 4).

The Claimant lives on the Delano R. Kneece & Son, Inc., and his home is steps away from the farm, fields and shops. Delano R. Kneece & Son, Inc. is a corporation; owned by the Claimant, his father, Delano R. Kneece, and other family members (Depos. of Roxanne Kneece at page 13). Prior to his accident, the Claimant was a general decision-maker for Delano R. Kneece & Son, Inc. Prior to his accident, the Claimant was able to perform all of the functions, duties and responsibilities of a farmer on the family farm. The Claimant also worked from time to time on Kneece Farms, a farm owned by Claimant's uncle where the Claimant was working at the time of his accident in 1999. Delano R. Kneece & Son, Inc. operates on approximately 2,000 acres. The Claimant's wife, Roxanne Kneece, is the corporate treasurer and bookkeeper and works on

the family farm.

As stated, the Claimant was injured while working for Kneece Farms. Kneece Farms is owed the Claimant's uncle Everett Kneece. However, the Claimant also worked on his family farm his entire life. The Claimant has not worked for the Appellant Kneece Farms since the accident.

The impact of his injuries on the Claimant was stunning. Farming is very strenuous; however, the Claimant is no longer able to farm. The Claimant's wife, who the Hearing Commissioner found to be a very credible witness, described the Claimant as completely different from the man he was prior to his accident. It was only with great difficulty that the Claimant's wife was able to describe the Claimant and his weaknesses which resulted from the accident. The Claimant's wife testified, "I was married to one man for 17 years. I'm married to a totally different man now. Same body. There's a shell there but there's not a person. And it's hard. Excuse me. And it really hurts to have to talk about him in front of him. His dignity is worth something." (Tr. Page 49, lines 9-11).

The Claimant's 1999 injury affected his physical strength, his memory and his temperament. The Claimant's forgetfulness interfered with his ability to seek and obtain medical treatment. The Claimant is unable to remember the nature of his treatment and the instructions given him by his physicians. (Tr. Page 52, lines 1-5).

The Claimant's memory loss has affected his ability to farm effectively. A farmer must be able to manage the farm's finances. A farmer must be able to determine the appropriate crops to be planted, the appropriate pesticides and fertilizer to be applied. A farmer must be able to calculate the amount of seed to be planted and pesticide and fertilizer to be broadcast. A farmer must be able to calibrate and repair the equipment. He must be able to drive a farm tractor and

other equipment to plant the seed or broadcast the fertilizer or pesticide. A farmer must be able to operate irrigation equipment. The Claimant's memory does not permit him to perform these tasks. The risk to the farm is obvious.

The Claimant is no longer able to manage the farm's finances or his own. Prior to the accident, the Claimant understood the family farm's revenue and expenses, deliveries and inventory and the family farm's financial position. He is no longer able to do so. Delano R. Kneece & Son, Inc. will order farm supplies for neighboring farms and advance payment for these supplies. The neighbors will reimburse the farm for these supplies. The Claimant would forget to bill his neighbors for these supplies and it is only by virtue of the honesty of these neighbors that the farm gets reimbursed. The Claimant's forgetfulness has almost certainly cost loss to the farm. Dr. Shissias affirms the fact that the Claimant can no longer manage his finances. (Tr. Page 54, line 14 - Page 56, line 2).

The Claimant cannot effectively calculate or broadcast chemicals, seeds or fertilizer. The appropriate amount of seed must be planted and were the fertilizer to be misapplied, the crops could be damaged or killed. The Claimant cannot be trusted to calculate the amount of seed and fertilizer to be applied to the farm. These chemicals are expensive and in the event the Claimant misjudges what to plant or how to fertilize, he would not only waste the costly chemicals but also damage the crop. The Claimant is no longer able to perform these functions and they are carried out by another. (Tr. Page 52, line 19 - Page 54, line 8).

The Claimant can no longer safely operate farm equipment. First, there are certain farm implements which the Claimant's family refuses to allow him to drive. To permit the Claimant to participate on his farm, the family farm has purchased a fully-automated tractor complete with a GIS device, programmed planting devices and alarm systems which the Claimant is permitted

to drive. However, a farm hand must follow the Claimant to the field he is to work. A farm hand must program the GIS equipment and computer. Once the Claimant is led to the field on the pre-programmed tractor, he "mashes" a button and the tractor plows the fields using the GIS coordinates. Even then, the Claimant makes costly mistakes. Farm hands must often go back to the field and re-plow where the Claimant has misused the computerized equipment. If the tractor loses the GIS satellite signal, the Claimant is unable to reestablish contact with the satellite, and a farm hand must recalibrate the GIS equipment. The tractor is completely mechanized and requires no physical exertion to drive. The Claimant's family has accommodated him to permit him some dignity and self worth. (Tr. Page 58, line 6 - Page 60, line 24).

The family farm has taken additional measures to accommodate the Claimant's inability to farm. The farm has bought a corn dryer which is operated by the push of a button which the Claimant is capable of operating. However, the corn dryer is also equipped with an alarm which shuts off the dryer and notifies others on the farm if the corn dryer or the Claimant has experienced a problem. These devices are as foolproof as humanly possible. (Tr. Page 63, line 5 - Page 64, line 13).

The Claimant's memory loss has impaired his ability to irrigate the crops. The Claimant can no longer program or adjust the irrigation equipment so as to avoid repetition or excess watering (Tr. Page 17, lines 13-23).

In addition to equipment purchases made to accommodate the Claimant's mental and physical infirmities, additional farm hands have been employed to do the work that the Claimant was able to do prior to his accident but can no longer perform. After the accident, the Claimant's son, Kain Kneece, was employed to work full time on the farm. Kain Kneece performs 95% of the duties that the Claimant performed prior to his accident. (Tr. Page 65, line 7 - Page 66, line

15). Although he retired, the Claimant's father, Delano Kneece, continues to work on the family farm. Since the Claimant's accident, the family farm has been forced to employ farm hands on temporary part time and full time bases to make up for the Claimant's inability to perform as a farmer. (Tr. Page 71, line 21 - Page 73, line 22, Claimant's Ex. 4). These farm hands have been hired to help with fencing, electrical work, weed pulling, truck driving, shop work on equipment, cattle vaccination and records, and making sure everything runs smoothly when Claimant is in the field. (Tr. Page 73, line 8 - Page 75, line 9). In particular, the farm employed Mr. Willie Dobbs to take over many of the Claimant's responsibilities. For instance, Mr. Dobbs drives tractors, spreads chicken manure, spreads fertilizer, sprays, feeds cows, helps dry corn, helps harvest and dry peanuts, and helps harvest cotton. In other words, Mr. Dobbs performs farm chores that the Claimant could perform without help prior to the accident. (Tr. Page 98, lines 8-19).

The Claimant attempts to help with the cattle. Whereas before the accident, the Claimant could give the cattle shots and vaccinations by himself, after the accident other farm hands must help perform these chores. The Claimant cannot remember how much medicine is required for the shots or which cows he has vaccinated. At times, four or five farm hands might help the Claimant give the shots to the cattle; a chore Claimant could perform by himself before the accident. In fact, there are occasions when the farm hires farm hands simply to watch the Claimant in the field. (Tr. Page 75, lines 2-9).

Prior to Claimant's accident, he was able to perform very physical farm chores which required climbing, stooping, lifting and bending. He had no limitations in this regard. His chores would include climbing grain bin legs, performing irrigation duties, and doing roof work. The Claimant was able to climb sheds in need of repair. He was able to climb elevator legs which are

200 feet tall. The Claimant was able to stoop and bend. A farmer or farm hand must be able to crawl under farm implements and behind tractors to repair or adjust them. A farmer must be able to stoop to get around grain facilities and unloading facilities. The Claimant was able to stoop so as to get under farm implements or behind the tractor and make repairs or to get around grain facilities and unloading facilities. The Claimant had no restrictions on the use of farm equipment. The Claimant's physical injuries no longer permit him to perform these farm chores (Tr. Page 15, line 7 - Page 16, line 9).

The Claimant is unable to stay focused on a task. He will spend hours on the cell phone talking with others or visiting with a stranger that may come by the farm. His time spent on the farm is not productive for the farm. (Tr. Page 16, line 16 - Page 57, line 9).

Claimant's brain injury has affected his temper. Before the accident, the Claimant was mild-mannered. Since the accident, Claimant has developed a "very short fuse." The Claimant's temper was so bad that he alienated his oldest son, other family members, and people around him. Indeed, the Claimant was almost arrested for an outburst against the County Fire Marshal. Treatment by Drs. Bergmann and Deal has helped the Claimant control his anger. (Tr. Page 49, line 19 - Page 50, line 15).

Since his accident, the Claimant has been unable to get a good night's sleep. The Claimant yells in his sleep, has nightmares, he jumps, jerks twitches and falls off the bed; he never has a restful night. Drs. Deal and Shissias are trying to treat this Claimant for the causes of his fitful sleep and their treatment has been somewhat helpful. (Tr. Page 50, line 25 - Page 51, line 17).

Prior to the accident, the Claimant was energetic and active. However, he has become lifeless since his accident. He is also depressed. Drs. Deal, Bergmann, and Shissias are working

with the Claimant to address his depression. (Tr. Page 57, line 10 - Page 58, line 2).

The Claimant is paid $4,175 per month by the family farm. In order to afford to make these payments, the Claimant's father, Delano Kneece, who retired after the Claimant's accident in 1999, reduced his pay by approximately half so the Claimant might be paid that amount notwithstanding his inability to farm. In addition, the Claimant's mother retired from her employment on the family farm and her salary was put back into the farm budget. The Claimant's check is not calculated based on performance. The Claimant's wife, the farm bookkeeper and treasurer, was instructed by the Claimant's father, Delano Kneece, to pay the Claimant that amount. The Claimant's father's justification for these monthly payments is because "we love him that much." In fact, the Claimant's wife writes the check and deposits it; the Claimant never sees it. The Claimant's father, Delano Kneece, has determined to buy additional land for the farm. He has also instructed that the Claimant, as owner and shareholder, is to receive an additional $25,000 dividend a year for the purpose of providing the Claimant with the ability to make payments on additional land purchased by the farm. These payments are made out of love and affection for the Claimant by his family (Tr. Page 69, line 6 - Page 71, line 18).

Further, after the Claimant's accident to accommodate the loss of production caused by the Claimant's injuries, the family farm determined to stop planting less productive crops such as soybeans and wheat and to grow peanuts which are more productive. Whereas prior to his accident the Claimant was able to make all such production decisions, after the accident and because of the Claimant's incapacity, the family farm hired a grain broker to assist in making marketing decisions (Tr. Page 68, line 8 - Page 69, line 5).

The job market in farming is very competitive. With the availability of migrant farm

workers and others, the Claimant cannot compete for these farm jobs or any farm jobs in today's market. Moreover, no employer would tolerate the lack of productivity, errors, and costs such as those caused on the family farm by the Claimant. (Tr. Page 76, line 25 - Page 79, line 4). It is clear that the Claimant could never compete in the job market for farm positions and that the family farm would never hire a stranger with the Claimant's disabilities. (Tr. Page 79, line 25 - Page 80, line 21).

Asked whether the Claimant was capable of performing the functions of a farmer, field crop farm worker general, liquid-fertilizer servicer, or tractor operator as described in the report of Cynthia P. Grimley and Associates, LLC, Mrs. Kneece explained that Claimant was no longer capable of performing any of those farm positions. First, Claimant requires supervision in the performance of his farm chores. Second, the risk of harm or loss from a miscalculation in calculating or spreading fertilizer is too great to be entrusted to the Claimant. Third, the Claimant cannot operate farm tractor or equipment without expensive equipment to accommodate his physical and mental disability. Mrs. Kneece testified that the job market in farming was very competitive. Mrs. Kneece testified that with the availability of migrant farm workers, the Claimant could not compete for these farm jobs or any farm jobs in today's market. Nor would an employer tolerate the lack of productivity, errors, costs, and disruption such as those caused on the farm by the Claimant (Tr. Page 76, line 25 - Page 79, line 4). Mrs. Kneece testified that the Claimant could never compete in the market place for farm positions and that the family farm would not hire a stranger with the Claimant's disabilities. (Tr. page 79, line 25 - page 80, line 21).

The Claimant has benefited from the treatment by Dr. Shissias and further treatment was warranted. Dr. White and Dr. Wicker, the Claimant's family physicians, are treating the

Claimant for a thyroid condition which Dr. White opines is related to the accident. (Tr. Page 84, lines 18-20). Further, the Claimant's unsteadiness or staggers have led to further injury. In November of 2010, the Claimant became dizzy and suffered a fall requiring treatment from Dr. Michael R. Ugino for a left hand injury. (Tr. Page 23, line 12 - Page 24, line 6).

Both the Claimant and his wife testified that the Claimant has benefited from the treatment of Drs. Deal and Bergmann but that the Claimant was in need of additional medical treatment by Drs. Deal and Bergmann. (Tr. Page 81, lines 14-18). Mrs. Kneece explained that the Claimant sought to be reimbursed for all prescriptions purchased in treating the Claimant's injuries. In particular, Mrs. Kneece testified that the Carrier has not reimbursed the Claimant for prescriptions purchased since 2005. The prescriptions are found on Claimant's Exhibit E-2. (Tr. Page 81, lines 19 - Page 83, line 5).

In addition to treatment by Drs. Bergmann and Deal, Mrs. Kneece testified that Dr. Shissias' treatment for the Claimant's headaches and depression was beneficial and that the Claimant was asking the Commission to require the Carrier to accept treatment by Dr. Shissias and continue his treatment. (Tr. Page 83, line 17 - Page 84, line 14).

Mrs. Kneece testified that Dr. White and Wicker were Kneece family physicians. Dr. White diagnosed the Claimant's hypothyroidism as being connected to the accident, and both Dr. White and Dr. Wicker have been treating the Claimant for his hypothyroidism. Mrs. Kneece testified that the Claimant was requesting the Commission to order the Carrier to accept treatment by Dr. Wicker for the thyroid condition and provide treatment going forward. (Tr. Page 84, lines 15-24).

Mrs. Kneece testified that Dr. Ugino treated the Claimant for his left hand injury in November of 2010 and that the Claimant was requesting that the Commission order Carrier to

pay for any future treatment for Dr. Ugino and reimburse Claimant for his out-of-pocket expenses related to this treatment. (Tr. Page 84, line 25 - Page 85, line 9).

Mrs. Kneece explained that the Claimant had not been reimbursed for mileage. She testified she calculated the mileage that the Claimant is seeking reimbursement of the mileage found on Claimant's Exhibit 1. Mrs. Kneece testified that she had calculated the amount of mileage due to date and requested reimbursement for any mileage from the date of the hearing forward. (Tr. Page 83, lines 6-16).

When asked to explain why the Claimant's family has incurred the additional cost and expense of farm equipment and farm help, the Claimant's wife explained that the Claimant's family had gone to great cost so that "Ricky's dignity can be saved. The work has to get done. He can't do it. So, we hire people to get help us get it done. And he sort of hangs out with them." (Tr. Page 79, lines 13-17).

ARGUMENT I

THE HEARING COMMISSIONER CORRECTLY FOUND AND CONCLUDED THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AND ENTITLED TO LIFETIME BENEFITS FOR A PHYSICAL BRAIN INJURY PURSUANT TO S.C. CODE ANN. §42-9-10 (Appellants' Argument I)

The Hearing Commissioner correctly found and concluded that the Claimant was permanently and totally disabled and entitled to lifetime benefits for his physical brain injury pursuant to S.C. Code Ann. Section 42-9-10. The order below should be affirmed in full.

Writing for the South Carolina Supreme Court in Wigfall v. Tideland Utilities, Inc., 354

S.C. 100, 580 S.E,2d 100 (2003), Justice E. C. Burnett set out the manner in which a claimant may prove total disability under Section 42-9-10, writing for the Court Justice Burnett explained as follows:

A Claimant may obtain total disability in one of three ways under §42-9-10.

First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in §42-9-10. However, because the Legislature has categorized certain types of injuries as ***per se*** totally disabling, the Claimant need not show a loss of earning capacity. The loss of earning capacity is, like a scheduled loss in §42-9-30, conclusively presumed. Therefore, even in a category in which the earning capacity serves as a benchmark for disability, the Legislature has determined that certain injuries equal a permanent disability without the need to consider earning capacity.[Cite omitted]

Second, a Claimant may establish total disability under §42-9-20 by showing an injury, which is not a §42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled. An example of such a claim occurred in Coleman v. Quality Concrete Prod.'s, Inc., 245 S.C. 625, 142 S.E. 2d43 (1965), where a Claimant experienced a double hernia after being injured while at work. The Claimant established the double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment. The injury, combined with those other factors, diminished his earning capacity to such an extent as to entitle him to total disability.

Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCollum v. Singer Co., 300 S.C.103,386 S.E. 2d 471 (Ct. Appl. 1989)(Court found Claimant totally disabled due to combined partial impairments to the back, stomach and leg).

First, the Claimant is presumptively totally disabled. It is undisputed in the record that the Claimant suffered physical brain damage in addition to the extensive injuries suffered to his upper and lower left extremities, head and face. It is undisputed that the Claimant's physical brain damage was disabling. As recognized by the Hearing Commissioner below,

Both Dr. Linwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life.

Dr. Smith noted in his report date September 30 that the Claimant's injuries, both permanent and severe, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2011 Order at Page 20).

Dr. Shissias, who is treating the Claimant for chronic daily headaches, memory loss, and depression associated with the Claimant's right frontal lobe injury in 1999 concluded as follows: "[patient] has fragmented sleep, chronic daily headaches, and chronic disturbance of mood. He is unable to make major decisions without input from wife, his primary care giver. Believe that without her, he would require legal guardian or payee to manage his affairs." (APA at Page 6)

Dr. Waid determined that radiographic studies conducted at the time of the Claimant's injury revealed disruptive physical injury to the brain and concluded that the Claimant, whose intellectual functioning was in the low average range, continued as a result to experience difficulties with sustaining attention, concentration, and suffered from slowed mental processing speed. The Claimant's memory was impaired; he suffered continuing impairment of visual spatial skills and mild executive dysfunction both regard to cognitive and motional/psychological functioning. Moreover, the Claimant continued to suffer with social executive changes to his personality common to one suffering traumatic brain injury, particularly to an injury to the anterior portion of the brain. The Claimant experienced disruptive difficulties associated with apathy, executive dysfunction, and emotional dysregulation. Overall, Dr. Waid found that the brain injury made the Claimant more irritable with lower frustration tolerance and was withdrawn. Indeed, Dr. Waid assigned a 22% whole person impairment to the Claimant as a result of his neurocognitive deficits. (APA at Pages 15-16)

Dr. Carl A. White, the Claimant's personal physician, found a 32 x 32 x 43 mm area in the right frontal lobe which is compatible with an area of encephalomalacia. Dr. White opined that the Claimant's hypothyroidism resulted from the physical brain damage caused by the accident. Indeed, as a result, the Claimant suffers from headaches which are at times

incapacitating since the Claimant's head injury (APA at Page 176).

The Claimant's physical brain damage created mental and emotional deficits so severe that they would cause the Claimant difficulties in coping with everyday life. The Claimant's physical brain damage is permanent and severe. Claimant's physical brain damage interferes with his abilities to operate equipment safely or enjoy farming or recreation. His wife is forced by the circumstances of his permanent physical brain damage to manage his affairs.

The Claimant's permanent physical brain damage is *per se* disabling. Wigfall v. Tideland Utilities, Inc., *supra*.. Therefore, the Claimant is deemed totally disabled and need not demonstrate a loss of earning capacity to recover Workers' Compensation benefits. The Appellants argue that the Claimant is paid wages by his family. Assuming for the sake of argument that the payment made to the Claimant by his family are to be considered wages, it is irrelevant to the Commission's inquiry. Indeed, even after being adjudged totally disabled, many employees receiving benefits under one of the specific statutory presumptions of total disability, continue to work either in the same or different field and the Appellants are liable to pay the total disability benefits even though the Claimant retains earning capacity after the accident. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993).

Second, the Claimant may also establish total disability under Section 42-9-10 by showing an injury which is not a Section 42-9-30 scheduled injury caused sufficient loss of earning capacity to render him totally disabled. The Claimant's permanent and severe physical brain damage is not a Section 42-9-30 scheduled injury. The Claimant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant's mental and emotional

deficits cause him difficulties in coping with everyday life. Indeed, the Claimant's permanent and sever physical brain damage interferes with his abilities to operate farm equipment safely and enjoy farming and recreation. Farming is all the Claimant knows. The Claimant now functions in the low average IQ range and has no formal education beyond high school. Without his wife, Claimant would need a legal guardian to manage his affairs.

The Claimant's wife testified that because of Claimant's disabilities he would be unable to compete in an open job market. In fact the family farm would not hire a farm hand with Claimant's disabilities. Her testimony is consistent with that of Dr. Stewart. The Claimant has demonstrated loss of earning capacity resulting from his permanent and severe physical brain damage and is totally and permanently disabled. Wigfall v. Tideland Utilities, Inc., *supra.*

Third, the Claimant may establish his total disability through multiple physical injuries. Here the Claimant suffered not only permanent and severe physical brain damage but also injuries to his left upper and lower extremities. Dr. Stewart's opinion, recognizes that the Claimant enjoys a sheltered, benevolent employment, but concludes to a reasonable degree of vocational and rehabilitation certainty that the Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable sustained basis. Dr. Stewart stated that his vocational opinion is consistent with the

> ...mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning '...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs....' (APA at Page 4)

Moreover, as stated above, Roxanne Kneece, Claimant's wife, testified that the Claimant with his mental and physical disabilities was unemployable, that the Claimant could not compete as a farm hand in an open market made competitive by availability of immigrant labor.

As correctly set out by the Hearing Commissioner below, total disability does not require complete abject helplessness; rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). In fact, the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., *supra*. Here, the Claimant's permanent and severe physical brain damage together with his impairment and disability resulting from the injuries to his left upper and lower extremities in combination with his low IQ, limited work history and education, leave Claimant unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. Wigfall v. Tideland Utilities, Inc., *supra*.

For the forgoing reasons, it is clear that based on the evidence of record, the Claimant satisfies any one or all of the tests for total and permanent disability with physical brain damage provided for in Section 42-9-10. The Hearing Commissioner correctly found Claimant totally and permanently disabled and entitled to benefits under the Workers Compensation Act for life.

The Appellants suggest that the Claimant's injuries are not property pled. In particular, the Appellants argue that the Claimant's Form 50 alleges permanent total disability due to a general disability and not due to a specific disability. The Appellants argue that therefore the Claimant can only meet the requirements for permanent total disability through the general disability standard by showing a loss of earning capacity. First, the Appellants failed to raise this

issue in their exceptions raised in their Form 30 and accordingly the issue is not preserved for the purposes of appeal to the full Commission. Creech v. Ducane Co., 320 S.C. 559, 467 S.E. 2d 114 (Ct. App. 1995). Assuming for the sake of argument that the Appellants' argument is properly before the Commission, as set out above, the Claimant met his burden of proof of total and permanent disability with physical brain damage under each of the theories of liability under Section 42-9-10 as set out in Wigfall v. Tideland Utilities, Inc., *supra.* However, the Appellants confuse the nature of the allegations set out on the Form 50. In fact, the term general disability refers to a showing of disability under Sections 42-9-10 or 42-9-20. Injuries giving rise to specific disability are found in Section 42-9-30 such as loss or loss of use of a member, organ, or part of the body for which specific awards are listed in the statute. Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E. 2d 172 (1990). In addition, the "niceties" of pleadings and process in the law courts are not required in Workers' Compensation proceedings. Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 450 S.E. 2d 112 (Ct. App. 1994). Moreover, Appellants can claim no prejudice from the alleged defect in Claimant's Form 50. The parties fully and completely litigated the issue of the Claimant's closed head injury and physical brain damage in 2005, and the 2005 Order of the Commission finding and concluding that the Claimant had suffered a closed head injury and requiring the Appellants to treat that injury is unappealed.

ARGUMENT II

THE HEARING COMMISSIONER CORRECTLY FOUND AND CONCLUDED THAT THE CLAIMANT HAS SUFFERED A LOSS OF EARNING CAPACITY AND THAT HE WAS TOTALLY AND PERMANENTLY DISABLED WITH PHYSICAL BRAIN DAMAGE NOTWITHSTANDING THE FINANCIAL SUPPORT OFFERED HIM BY HIS FAMILY FARM. (Appellants' Arguments II and III)

The Hearing Commissioner correctly found that the Claimant has suffered a loss of earning capacity and that he was totally and permanently disabled with physical brain damage, notwithstanding the financial support offered him by his family farm. In particular, the Hearing Commissioner correctly found the claimant to be permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the Hearing Commissioner also correctly concluded the claimant is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist. Last, the Hearing Commissioner correctly found that the services that the Claimant performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exits for the services the Claimant provides for the family farm. In so finding, the Hearing Commissioner found and concluded that the work offered by Claimant's family farm is sheltered employment and benevolent in nature.

The Appellants argue that the Hearing Commissioner should be reversed because South Carolina law does not recognize the doctrine of sheltered or benevolent employment. The Appellants misapprehend the nature of the sheltered or benevolent employment doctrine. In

applying the benevolent employer doctrine to the facts of this claim, the Hearing Commissioner was applying or extending longstanding South Carolina case law to the facts below.

The Hearing Commissioner correctly concluded that in order to be entitled to total and permanent disability Workers' Compensation benefits for a work injury, the Claimant must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). South Carolina courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996). Indeed, evidence that a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. that a person who becomes a paraplegic, as a result of a work related accident, may recover for permanent and total disability under Section 42-9-10 yet continue to work. Likewise, the Claimant who has suffered physical brain damage as a result of a work-related accident may likewise recover for permanent and total disability under Section 42-9-10 yet continue to work.

Recognizing that benevolent employment doctrine has not been specifically addressed by our courts, the Hearing Commissioner below appropriately turned to North Carolina case law for guidance. See, e.g., Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E. 2d 110 (2002). Citing Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E. 2d 798 (1986) the Hearing Commissioner below noted "an injured employee's earning capacity must be measured not by the largesse of a

particular employer, but by the employee's own ability to compete in the labor market. The fact that an employee is capable of performing employment tendered by employer is not, as a matter of law an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E. 2d 746 (1997).

As the Hearing Commissioner correctly pointed out, the rationale behind the benevolent employment rule is simple: proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitation at a comparable wage level. The same is true if the accommodations or modification of the job to meet the employee's limitations are not ordinarily found in the competitive job market. Simply put, if the Claimant does not have the ability to earn wages competitively, he will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra*. See also Baker v. Sam's Club, 589 S.E. 2d 387 (N.C. App. 2003).

Clearly, the benevolent employment doctrine as articulated by the Hearing Commissioner below is merely an extension of long-standing South Carolina law. See McCollum v. Singer Co., *supr;* Stephenson v. Rice Services, Inc., *supra*. See also Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc., *supra*.

The Appellants' principal objection to the Hearing Commissioner's application of the benevolent employment doctrine to the facts of this case stem from the fact that the family farm makes regular payment to the Claimant. The Appellants argue that because the amounts paid the Claimant meet or exceed the Claimant's wages prior to his workers' compensation injury, he has earning capacity and therefore Appellants argue that the benevolent employment doctrine is not applicable to the facts of this case.

The Appellants' argument overlooks the evidence of record that the services that the

Claimant performs for his family farm, given the accommodations his family has made so as to enable the Claimant to perform certain limited tasks, are not evidence that a reasonably stable market exists for the services Claimant provides for the family farm. Dr. Stewart concluded that the Claimant suffered a total loss of earning capacity. Claimant's wife testified that the Claimant was unemployable and that the Delano R. Kneece & Son, Inc. would not employ a stranger with the Claimants disabilities. The Appellants also overlook the undisputed testimony of record that those amounts paid the Claimant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant on behalf of the family farm, but rather those amounts paid the Claimant are in the nature of a gift and do not constitute wages for work expended on behalf of the farm or wages calculated on the basis of productivity. The testimony of Claimant's wife, the family farm bookkeeper and treasurer, is undisputed on this point. Indeed, the Claimant's wife was a very credible witness whom the Hearing Commissioner found testified truthfully and accurately to her husband's physical and psychological limitations--testimony corroborated by the undisputed medical evidence of record. The Claimant's wife also testified very honestly about the nature of the work the Claimant is able to perform and the fact that the family has essentially kept him working because he is family. The Claimant's wife was often emotional when honestly describing the fact that the Claimant is now a "shell" of his former self. The fact that the Claimant's family, through personal sacrifice and careful business practices, is able to afford to pay the Claimant any amount whatever is not evidence of the Claimant's earning capacity.

The Appellants argue that the adoption of the sheltered or benevolent employment doctrine will open the floodgates to abuse. The Appellants argue that the application of the benevolent employment doctrine to this case would make self-employment in South Carolina

tantamount to benevolent employment. However, the Delano R. Kneece & Son, Inc. is a corporation with a number of employees and independent contractors and not a sole proprietorship. Moreover, it would be impossible for a sole proprietor who was totally and permanently disabled with a physical brain injury to afford to pay himself, for he would have no income with which to do so. Out of love and respect, the Claimant's family has gone to considerable cost and expense to give the Claimant a feeling of self worth. The Claimant's claim offers a text book case for the doctrine of benevolent employment.

The Appellants argue that the payments made by the family farm to the Claimant must be in the nature of wages as opposed to a gift because he reports him on his income tax. However, the payments to the Claimant are taxable. The Claimant and his family are simply obeying the law.

Last, the Appellants argue that in the event that the Hearing Commissioner's Order is allowed to stand, the Appellants should be entitled to a credit for the amount the Claimant receives from his employment from the family farm. The Appellants are entitled to no credit. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

ARGUMENT III

THE HEARING COMMISSIONER CORRECTLY CONCLUDED THAT THE CLAIMANT IS ENTITLED TO PAYMENT OF WEEKLY COMPENSATION FROM THE DATE OF THE 1999 ACCIDENT CONTINUING FOR LIFE AND GAVE APPELLANTS ALL CREDITS TO WHICH THEY WERE ENTITLED. (Appellants' Argument IV).

The Hearing Commissioner correctly found and concluded that the Claimant was entitled to benefits under the Workers' Compensation Act for life. The Appellants misapprehend the nature of the award authorized by statute in this matter. In particular, the Hearing Commissioner correctly held that the Claimant was entitled to an aware of weekly permanent disability payments from the date of his accident.

Section 42-9-10(C) applies to the issue of lifetime benefits and provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and **shall** receive the benefits for life. (emphasis added)

The provisions of Section 42-9-10(C) provide that a Claimant who is totally and permanently disabled with a physical brain injury is entitled to weekly compensation from the date of the accident for life. The statute makes no exceptions. The record reflects that the Appellants made 157 1/7 temporary total disability payments to the Claimant since his 1999 accident for which the Appellants were given credit. The Hearing Commissioner correctly determined that the Claimant was entitled to an award under the plain terms of the statute and gave the Appellants a complete credit for payments made.

The Appellants erroneously argue that because the Claimant attempted to return to work

having executed a Form 17, he is barred from receiving weekly compensation.

As the record will reflect, the Claimant attempted to return to work on two occasions. First, the Claimant attempted to return to work at Delano R. Kneece & Son, Inc. as owner and operator in 2004 but was unable to perform his regular duties as he was suffering from mental and physical limitations. In exchange for the Appellants providing him with the medical treatment for his injuries as ordered in the 2005 Order, the Claimant agreed to stop payment of his temporary total disability benefits and attempt to go back to work on the family farm in 2005. (Claimant's Exhibit No. 3). As required, the Claimant executed a Form 17 authorizing the Appellants to stop payment of temporary total disability payments at that time. The Claimant's effort to return to work does not act as a waiver of his rights under the Workers' Compensation Act.

As can be seen from the record, the Form 17 executed by the Claimant authorizing the Appellants to stop his temporary total disability benefits provides as follows:

I UNDERSTAND THAT MY WEEKLY TEMPORARY COMPENSATION CHECKS WILL STOP; HOWEVER, I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT, OR MEDICAL CARE. (Bold and upper case on Form 17)

The parties' agreement on its face provides that the Claimant's efforts to return to work do not prejudice him from any future benefits. Further, the Form 17 does not operate as an adjudication of the Claimant's ability to work or lack of earning capacity. A signed Form 17 does not terminate the Claimant's claim nor affect his right to apply for future benefits. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E. 2d 599 (Ct. App. 1999). See also Lyles v. Quantum Chemical Co., *supra*.

Indeed, the Claimant's effort to return to work is evidence of his good faith attempt to comply with the law. Ultimately, the Appellants failed to fully honor their obligation under the

parties' agreement to provide authorized treatment. While the Appellants did provide counseling by Dr. Deal, the Appellants refused to pay for Claimant's prescription medicine as prescribed by Dr. Deal (Claimant's Ex. No. 3). The Workers' Compensation Act encourages injured employees to attempt to return to work and encourages employers to provide prompt medical treatment so as to enable employees to return to work. Here only the Claimant complied with the letter and spirit of the Act.

The Appellants argue that the 2005 Order bars Claimant's right to benefits after the date of that Order. The opposite is true. The 2005 Order requires the Appellants to provide the Claimant not only weekly temporary total disability payments but also medical treatment. By failing to provide the Claimant authorized prescriptive medicine, the Appellants failed to abide by the terms of the 2005 Order and are estopped from raising any objection to the Commission granting Claimant all benefits he is entitled to under the Workers Compensation Act.

The Appellants next argue that the Claimant's claims to weekly benefits are barred by the doctrine of *laches*. The Doctrine of *laches* does not apply. Here the Claimant timely filed his Form 50. There was no unreasonable delay. Throughout the life of the claim, the Claimant sought and the Appellants provided certain benefits under the Workers' Compensation Act. The Appellants can claim no prejudice arising from the length of time the claim. The Appellants' partial compliance with the Act disproves any such prejudice as is required by the Doctrine of *laches*. In fact, the case of Muir v. C. R. Baird, Inc., 336 S.C. 266, 519 S.E. 2d 583 (Ct. App. 1999) cited by the Appellants supports the Claimant's argument. In Muir v. C. R. Baird, Inc., the Claimant delayed filing his claim and the Court of Appeals recognized that the Doctrine of *laches* might apply to a late-filed claim. However, the Court found that the claimant's tardiness in filing his claim was not barred by the Doctrine of *laches*. The Court in Muir held that delay in

the ascertaining of a right does not in of itself constitute *laches;*, rather the employer must be prejudiced by the delay. Here, the Appellants well knew that the Claimant suffered permanent and severe physical brain damage and was undergoing treatment for his injuries from Dr. Bergmann and Dr. Deal. Indeed, the Appellants were paying for part of the Claimant's medical treatment for his injuries. Clearly, there was no delay in prosecuting the claim nor were the Appellants prejudiced. The Doctrine of *laches* does not apply.

The Hearing Commissioner correctly applied the provisions of Section 42-9-10(C) in his award weekly compensation from the date of his accident and for life. The Appellants were granted the full credit for payments to which they were entitled.

ARGUMENT IV

THE HEARING COMMISSIONER PROPERLY FOUND AND CONCLUDED THAT THE APPELLANTS WERE RESPONSIBLE FOR PAYMENT OF CLAIMANT'S MEDICAL TREATMENT, MILEAGE AND PRESCRIPTION MEDICINE. (Appellants' Argument V)

The Hearing Commissioner found that the Claimant has benefited from the treatment of his personal physicians and ordered the Appellants to provide for treatment by Dr. White, Dr. Wicker, and Dr. Shissias and Dr. Ugino. Moreover, the Hearing Commissioner found that the Appellants were responsible for all mileage associated with treatment and for prescriptive medicine prescribed by Claimant's physicians. The Hearing Commissioner's findings are clearly supported by the record and should be sustained.

Citing Section 42-15-60, the Appellants argue that Drs. White, Whicker, Shissias, and Ugnio were not authorized by the Appellants prior to treatment and therefore the Appellants were under no obligation to pay for past treatment or to provide future treatment by these

physicians. The Appellants argue that Section 42-15-60, provides that the employer and only the employer may determine an authorized medical treatment. The Appellants misread Section 42-15-60.

Section 42-15-60, vests the Commission with authority to direct an employer to provide medical treatment which in the judgment of the Commission will tend to lessen the period of disability. Here, the Hearing Commissioner found that the Claimant suffered from hyperthyroidism as a consequence of his head trauma suffered in his 1999 accident and that the Claimant had benefited from the treatment Doctors White and Whicker and that the Claimant will continue to benefit from the treatment of his hypothyroidism by Dr. Wicker. The Hearing Commissioner found that Dr. Shissias treated the Claimant for his chronic daily headaches, memory loss and depression, cause related injuries and that the Claimant would continue to benefit from Dr. Shissias' treatment. The Claimant received treatment from Dr. Ugino on an emergency basis. The Hearing Commissioner found that Dr. Ugino's treatment of the Claimant's injury caused when his dizziness, which was causally related to Claimant's accident, lead to his falling and fracturing a bone in his left hand was a benefit to the Claimant and that the Claimant would continue to benefit. Clearly, the Hearing Commissioner was justified in ordering the treatment by these physicians based on the expert medical evidence of record.

Moreover, Section 42-15-60, authorizes the Hearing Commissioner to order a change in medical treatment if circumstances justify it. When Claimant sought treatment of a neurologist, the Appellants sent the Claimant to Dr. Julian Adams for treatment. Dr. Adams declined to treat the Claimant. The Claimant then sought out the services of Dr. Shissias. In addition, the Appellants refused to pay for the prescription medications authorized by Dr. Deal, Claimant's treating physician. The Appellants have demonstrated their indifference to the Claimant's

treatment needs, and the Claimant was certainly justified on these facts in seeking medical treatment on his own. The Appellants do not dispute the qualifications of that the physicians in question. The overwhelming evidence of record supports the opinions of these physicians. Clearly the Claimant was justified in seeking out his own treatment and under the circumstances, the Hearing Commissioner was justified in ordering the Appellants to provide treatment by Drs. White, Whicker, Shissias and Ugino.

The Commission is afforded considerable discretion under Section 42-15-60. Where it deems necessary, the Commission may override an employer's choice of medical provider or refusal to treat. Indeed, the Commission may excuse a claimant's justified refusal to seek treatment from the employer's provider. Clearly Section 42-15-60, does not require the Commission to limit its choice of medical care to the providers approved by the appellants.

The Worker's Compensation Act should be liberally construed in furtherance of the purposes to which it was designed and any reasonable doubts as to its construction should be resolved in favor of the Claimant. The Appellants argue that they are the exclusive arbiter of the Claimant's medical treatment. Accepting the Appellants' argument would lead to the absurd result of depriving the Commission of any authority over a claimant's treatment and violates the spirit and letter of the Worker's Compensation Act. CF Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 576 S.E. 2d 191(Ct. App. 2003).

Accordingly, the Hearing Commissioner below correctly found and concluded that treatment by Drs. White, Wicker, Shissias, and Ugino was justified and in authorizing the Appellants to pay for all past and future medical care including treatment, prescription medication, and mileage.

ARGUMENT V

THE HEARING COMMISSIONER ACTED WITHIN HIS DISCRETION IN DENYING DEFENDANT'S MOTION TO COMPEL AND MOTION TO POSTPONE THE HEARING AND WITH RESPECT TO EVIDENTARY RULINGS. (Appellants' Argument VI)

The Hearing Commissioner acted within his discretion in denying Defendant's motion to compel and motion to postpone the hearing.

The Appellants complain that they did not have an opportunity to obtain expert witnesses in this claim which had been pending for 10 years. The Appellants had ample opportunity to obtain expert testimony and the Hearing Commissioner acted well within his discretion to deny the Appellants' eleventh hour motions to compel and for a continuance.

The Claimant's accident occurred in November 1999. The Appellants have provided some treatment for Claimant's injuries. A hearing in this matter was held in 2005 which resulted in the 2005 Order requiring the Appellants to treat the Claimant's closed head injury and injuries to his left, upper and lower, extremities. The evidence of record in 2005 included medical opinions from Dr. Smith, neurologist, as to Claimant's head injury, Dr. Waid as to the Claimant's impairments resulting from his head injury and testimony of Dr. Stewart, opining that the Claimant's physical brain damage in combination of other injuries combined to cause the Claimant a loss of earning capacity. The Appellants provided the Claimant with some, but not all, of the medical treatment which they had agreed to provide by Dr. Deal, refusing to pay for Claimant's prescriptive medication(s). Appellants were well aware that the Claimant continued to treat with Dr. Deal and could not have been surprised that the Claimant was seeking further benefits under Section 42-9-10, because of his undisputed physical brain damage.

Indeed, when the Claimant requested further treatment by a neurologist, the Appellants sent the Claimant to Dr. Adams, who after consultation declined to treat the Claimant. The Claimant filed a Form 50 on July 9, 2010. A hearing on Claimant's Form 50 was scheduled for October 2010 and continued. In December 2010, the Appellants sought to compel the Claimant to submit to examinations by a neurologist, a clinical psychologist and a vocational consultant. The Claimant agreed to submit to an examination by the psychologist, Dr. Brawley, but declined to submit to examination by the neurologist or vocational consultant. In January of 2011, the Appellants moved to compel and for a continuance. The Hearing Commissioner denied the motions.

The Appellants could have sought to require the Claimant to undergo evaluations by a neurologist or forensic psychologist or a vocational expert in July of 2010, but instead the Appellants choose to sit on their rights until December of 2010 before attempting to compel the evaluations. It is important to note that the Appellants did not intend to provide any further treatment of the Claimant. Rather, the Appellants were simply attempting to execute trial strategy by obtaining expert evidence at the eleventh hour. Here, the Appellants were not surprised by the allegations in Claimant's Form 50. The history of the Claimant's injuries were obvious to the Appellants who delayed five months, from the date of the request for hearing, to seek the authority to evaluate the Claimant for physical brain damage of which they were thoroughly familiar.

The Hearing Commissioner necessarily exercises wide discretion in managing his case and decisions denying requests for continuance are rarely overturned. Here the Hearing Commissioner acted well within his discretion in refusing to continue the case at the eleventh hour to compel the Claimant to submit to evaluation by a neurologist or vocational expert.

Trotter v. Trane Coil Facility, Supreme Court Opinion No. 27024 (Filed August 15, 2011).

The Appellants' argue under Section 42-15-80, the Claimant was required to submit to a neurologist for an examination. However, Section 42-15-80, does not give the Appellants dictatorial powers to compel the Claimant to undergo an evaluation. The circumstances below justified the Claimant's refusal to commit to an examination by Appellants neurologist. First, the Claimant was treated by Dr. Smith during Claimant's hospitalization after his accident. Thereafter, the Claimant requested treatment by a neurologist, he submitted to an examination by Dr. Adams, a neurologist provided for by the Appellants. The Claimant cooperated fully with Drs. Smith and Adams, the authorized treating neurologists. The Claimant only sought out treatment from Dr. Shissias for his physical brain damage after Dr. Adams declined to treat him. The Appellants stated purpose in seeking to have the Claimant evaluated by a fourth neurologist for purposes of trial. Here the Claimant was justified in refusing to undergo an examination by a fourth neurologist named by the employer at the eleventh hour when three other physicians had examined him and had offered evidence in the case. Section 42-15-80 does not authorize the employer to compel an examination for the purposes of a last minute trial tactic. Singleton v. Young Lumber Co. 236 S.C.454m 114 S.E.2d 837 (1960)

The Appellants would also argue that the spirit of Section 42-15-80 would likewise compel Claimant's evaluation by a vocational consultant who is not a physician. The Statute on its face clearly applies only to physicians or surgeons and had no application as to expert witnesses.

The Hearing Commissioner was well within the discretion vested in him by Section 42-15-80 to determine that the Claimant's failure to appear for examination was justified and in refusing to continue the hearing Trotter v. Trane Coil Facility, *supra*

The Appellants also argue, that the reports of Dr. Stewart opining the Claimant's total loss of earning capacity should be excluded from the evidence as being irrelevant, speculative and contrary to law. However, the Appellants offer no authority for this proposition. Dr. Stewart's opinions were admitted into the record without objection. Moreover, this issue was not raised by the Appellants exceptions below and should not be addressed by this Commission. Creech v. Ducane Co., *supra* Certainly, the Appellants were aware of the opinions of Dr. Stewart since 2004; clearly the Appellants had ample opportunity over the next seven years to timely seek further evaluation of the Claimant by their vocational witness.

The Appellants argue that Claimant's Ex.4 was admitted into evidence for purpose of allowing the Claimant to recover these costs. The Appellants misunderstand the nature of Claimant's Ex. 4. Claimant's Ex. 4 consist of a list of employees or contractors who were hired by the Delano R. Kneece & Son, Inc. to perform the duties and tasks which the Claimant could no longer perform after his 1999 accident. The purpose of the evidence was to demonstrate that the family farm made every effort humanly possible to compensate for the fact that the Claimant was no longer able to serve productively on the farm. As testified to by Claimant's wife, the employees and contractors identified on Claimant's Ex. 4 performed the jobs that the Claimant was able to perform prior to his accident. The exhibit was relevant and probative and the Hearing Commissioner was fully justified in admitting it into evidence.

ARGUMENT VI

THE HEARING COMMISSIONER CORRECTLY FOUND AND CONCLUDED THAT THE CLAIMANT SUFFERED CAUSALLY RELATED AND COMPENSABLE INJURIES RELATED TO HIS BRAIN HEAD AND FACE. (Appellants Arguments VII & VIII)

The Appellant complained that the Hearing Commissioner erred in finding and concluding that the Claimant suffered injuries to his zygomatic arch, thyroid, scarring and/or finger. Basically, the Appellant argue that although evidence of the injuries are undisputed in the evidence record, these injuries were not found in the 2005 Order to be compensable. Therefore, the Hearing Commissioner below erred in finding injuries to be causally related to the Claimant's 1999 accident. While the 2005 Order is conclusive as to the injuries established therein, the findings of the Hearing Commissioner complained of are consistent with and related to the injuries to Claimant's brain/head/face.

As conceded by the Appellants in their brief, the Claimant's zygomatic arch or the temporal bond of the skull below the eye was injured in the Claimant's accident. The explosion causing his brain/head/face injury was so traumatic that it damaged his skull. The Appellants can have no defense to the causal relationship between the accident and this particular injury.

The Appellants complain that Commissioner Williams erred in finding and concluding that the Claimant's hypothyroidism is related to the Claimant's accident. Dr. White did not diagnose this causal related injury until after the 2005 order below. There is no medical record of evidence to dispute Dr. White's diagnosis of this causally related injury. The Appellants' definition of hypothyroidism in their brief is not found anywhere in the record. The record does reflect that Dr. White's concern was for the dead mass of brain tissue located near the pituitary

gland which is found tucked under the damaged portion of the Claimant's brain. Clearly Dr. White's concern was the impact of the brain damage on the function of the pituitary gland which ultimately gives rise to hypothyroidism. Clearly the evidence of record supports the Hearing Commissioner's finding and conclusion that the hypothyroidism is related to the Claimant's accident and that the Claimant is entitled to treatment.

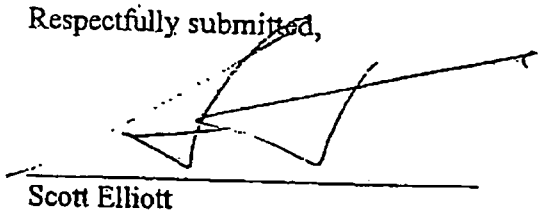
Last, the Appellants complain about the finding and conclusion by the Hearing Commissioner that the Claimant's injury to his finger suffered when he became dizzy at work and fell breaking the metacarpal bone in his left hand as he fell. The evidence of record is undisputed that a result of the damage to the Claimant's brain/head/face gave rise to dizziness or what the Claimant called "the staggers". The Claimant's unsteadiness caused by his brain injury caused him to fall causing the injury to Claimant's finger. It is axiomatic that all injuries flowing from the Claimant's admitted accident are compensable. The Hearing Commissioner correctly found and concluded that the injury to Claimant's finger arising after the 2005 Order was compensable.

The 2005 Order was not a final order. The issues litigated and determined in the 2005 Order are unassailable. All remaining issues arising after the entry of the 2005 Order are the proper subject of this claim. The Hearing Commissioner found and concluded correctly that the zygomatic arch, hypothyroidism, and damage to Claimant's left metacarpal were compensable.

CONCLUSION

WHEREFORE, based on the foregoing, the Claimant respectfully submits that the Order of the Hearing Commissioner below should be upheld in full and affirmed by the Full Commission.

Respectfully submitted,



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July 25, 2011

Honorable Virginia Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
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RE: ***RE: Ricky Kneece v. Kneece Farms***
WCC File No: 9920867 *DOI: 11/22/99*
Claim No.: L16755 *Our File No.: 5400-0032*

Dear Ms. Crocker:

Enclosed for filing are an original and three (3) copies of the Appellants' Brief with attached Order from which the appeal arises, in the above-mentioned claim.

By copy of this letter to Scott A. Elliott, counsel for the Claimant, I am serving him with a copy of the Brief.

Very truly yours,

Mark D. Cauthen

MDC/mbc
Enclosures
cc: Scott A. Elliott, Esquire
Randy Mason

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 9920867

Ricky Kneece, Claimant, vs. Kneece Farms, Employer, and Legion Insurance Company in Liquidation and The South Carolina Property and Casualty Insurance Guaranty Association, Carrier.	**APPELLANTS' BRIEF**

STATEMENT OF THE CASE

Defendants/Appellants Kneece Farms and Legion Insurance Company in liquidation/SCPCIGA, (hereinafter "Defendants"), appeal from a Decision and Order filed by Commissioner Derrick L. Williams on April 28, 2011.

The claimant, Ricky D. Kneece (hereinafter "Claimant"), sustained compensable injuries on November 22, 1999, while working for Kneece Farms, which is owned by Claimant's uncle, including injuries to his head/brain, left lower extremity and left upper extremity. The Defendants provided medical as well as indemnity benefits for Claimant's injuries.

It is important to note that at the time of the accident as well as prior to the accident, the Claimant was also working for Delano Kneece & Son, Inc., a family farm owned and operated by Claimant and his father. The Claimant and his father farmed their own land while also working as sharecroppers on land owned by Kneece Farms. The Claimant never returned to employment with the Defendant Employer in this claim – Kneece Farms – but instead, returned to full time employment with a different employer, Delano R. Kneece & Son Farms, Inc., a business in which he was and is a part owner before and after his injury. Although Delano R. Kneece & Son Farms, Inc. continued to sharecrop the land owned by Kneece Farms following the Claimant's injury, there is no evidence of post-injury employment between the Claimant and Kneece Farms.

The Claimant returned to limited work duties with Delano R. Kneece & Son Farms, Inc. within months of his accident and admitted, per a signed Form 17, that he was able to return to full time work with Delano R. Kneece & Son Farms, Inc. during 2005.

The Claimant, per testimony during the hearing, has never been without his salary or wages as a result of his injuries. During the hearing, the Claimant's Wife, who is also the bookkeeper for Delano R. Kneece & Son Farms, Inc., testified that the Claimant's wages from the family farm for 2007 and 2009 were $76,600.00 and $77,600.00. She also testified that these yearly amounts were over two times the amount of the Claimant's yearly salary at the time of the accident.

On April 16, 2004, claimant's treating physician for his left lower extremity, Dr. James O'Leary, released Claimant at MMI with a 10% impairment rating to his left lower extremity. As for the injury to Claimant's left upper extremity, Claimant treated with Dr.

Michael Green who released claimant at MMI with a 17% impairment rating to his left upper extremity on September 23, 2004.

Accordingly, the Defendants filed a Form 21 Request to Stop Payment of TTD benefits and a Hearing on this Form 21 was held on January 11, 2005, before Commissioner Childs. On April 18, 2005, Commissioner Childs issued her Decision and Order finding and concluding the Claimant sustained compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, left shoulder, left elbow and depression, and that Claimant had not yet reached MMI for those injuries. As a result, the Hearing Commissioner ordered Defendants to provide additional medical treatment for injuries to the Claimant's left knee and shoulder, as well as treatment for Claimant's closed head injury and depression with Dr. Randy Waid and Dr. Larry Bergmann.

Finally, the Hearing Commissioner ordered that although the Claimant was earning wages from Delano Kneece & Son during the same time period he was receiving TTD benefits from the Carrier, the Defendants were not allowed to receive a setoff or credit for the TTD benefits that were paid because the Claimant's wages were paid by a "collateral source" -- specifically, the salary Claimant earned by working at Delano Kneece & Son which he owned with his father, Delano Kneece.

The Defendants appealed numerous rulings contained in this April 18 2005 Order. However, prior to the Full Commission Hearing, the parties entered into an agreement whereby the Defendants agreed to provide certain medical treatment and the Claimant agreed to execute a Form 17 agreeing that he was able to return to work as of October 4, 2005. (See, Letter from Claimant's counsel to Defendants' counsel dated September 27, 2005 (Claimant's Exhibit #3). Therefore, the Defendants stopped TTD payments as of

Waid; his neurologist, Dr. Charles Shissias; and his vocational consultant, Dr. Bill Stewart. Finally, the Defendants also sought an order compelling production of the tax records specified in Defendants' subpoena dated December 10, 2010. The Claimant subsequently provided the requested tax records and resolved that portion of the motion.

By Order dated February 2, 2011, the Defendants' Motion to Compel the medical and vocational evaluations and to postpone the hearing was denied; however, this Order from Commissioner Williams failed to give any findings or conclusions indicating his reasons for the denial of the Motion.

At the Hearing on October 4, 2010, Defendants renewed their Motion to Compel and Postpone the Hearing and objected to Claimant's Exhibit 4 of his September 29, 2010 APA submissions, which were records reflecting certain expenditures. The Defendants' objection and Motion were denied. The Commissioner stated the evaluations could have been done prior to the Hearing. (H.T. at 12).

The Claimant's position at the Hearing was that he was entitled to benefits for permanent and total disability as a result of a physical brain injury pursuant to Section 42-9-10. It was the position of the Defendants that the Claimant had not sustained a loss of earning capacity and was not permanently and totally disabled. However, both parties agreed the Claimant was at MMI. (H.T. at 12).

On April 28, 2011, Commissioner Derrick L. Williams issued his Decision and Order, containing the following pertinent Findings of Fact:

1. "The Claimant was an employee of Kneece Farms on our about November 22, 1999, on which date he sustained injuries to his brain/head, nasal passage, sinus, left eye, left knee, left shoulder, left elbow (left upper and lower extremities), finger, zygomatic arch, thyroid, scarring, teeth and psychological."

2. "That as a result of his injuries, the Claimant is no longer able to operate as a farmer/owner/operator of a farm supply and farming operation; his cognitive and emotional/psychological impairments and memory loss do not permit him to make calculations or calibrations of irrigation equipment, sprayers, chemical mixes, medications, or operate sprayers or combines or to manage the farm purchases, expenses, accounts or farm business; his physical limitations do not permit Claimant to climb, bend or stoop and prohibit him from the physical movement involved in climbing stairs or ladders, making repairs of equipment or the physical activity of planting, weeding and harvesting; and that only by virtue of the accommodations that the family farm has made is the Claimant able to perform very limited activities normally associated with farming."

   This Finding was unilaterally added by Claimant's counsel and was not included in Commissioner Williams' detailed Findings and Conclusions in his Hearing notes.

3. "That as a result of this accident, the Claimant has sustained permanent physical brain damage pursuant to the reports of Dr. Waid, Dr. Shissias, Dr. White, and Dr. Lenwood Smith."

4. "That the Claimant now functions in the low to moderate IQ range with an IQ of 76 pursuant to reports of Dr. Randolph Waid; that as a result of neurocognitive impairments, the Claimant has suffered a 22% impairment as a result of his neurocognitive deficits assigned by Dr. L Randolph Waid. Dr. Waid made the following Assessment of the Claimant:

   Axis 1: Cognitive disorder NOS (294.90) secondary to the sustainment of a traumatic brain injury

   Personality Change: Labile-/apathetic type (DSM-IV 310.10) due to sustainment of a traumatic brain injury

   Axis 3: Status post-traumatic brain injury; headaches; residual pain and discomfort affecting the left knee and shoulder.

5. "That as a result of Claimant's accident, the Claimant has suffered irritability, sleep disturbance, headaches, poor concentration, memory loss, fatigue, loss of interest in his vocational and avocational pursuits; mood swings and depression for which he has been treated by Drs. Bergmann and Deal; that as a consequence of the foregoing, the Claimant has experienced a permanent impairment of 11% to the whole person for his psychological status and not for his cognitive impairments as opined by Dr. Bergmann; that the Claimant has benefitted from and will continue to benefit from treatment by Dr. Bergmann and Dr. Deal for his workers' compensation injuries."

6. "That the Claimant has suffered hypothyroidism as a consequence of his head trauma suffered in his 1999 accident; that the Claimant's lethargy, weight gain, general lack of energy and desire, that the Claimant has been treated by Dr. White and is currently being treated by Dr. Wicker for his hypothyroidism and that Claimant has benefitted from this treatment and will continue to benefit from treatment from Dr. Wicker for this hypothyroidism."

This Finding was unilaterally added by Claimant's counsel and was not included in Commissioner Williams' detailed Findings and Conclusions in his Hearing notes.

7. "Dr. Charles Shissias has treated Claimant for his chronic daily headaches, memory loss and depression; that the Claimant has benefitted from Dr. Shissias' treatment of his causally-related injuries and Claimant will continue to benefit from further treatment from Dr. Shissias."

8. "That Claimant's dizziness which is causally related to this accident resulted in a fall and fracture of the index metacarpal of his left hand; that the Claimant has benefitted from the treatment of Dr. Ugino of this injury and will continue to benefit from Dr. Ugino's treatment for this injury."

This Finding was unilaterally added by Claimant's counsel and was not included in Commissioner Williams' detailed Findings and Conclusions in his Hearing notes.

9. "That the Claimant continues to suffer from certain vegetative symptoms such as fatigue, weight gain, decreased energy level, loss of interest in recreational activities, feelings of depression, feelings of anxiety, increased irritability, decreased frustration tolerance and decreased libido as diagnosed by Dr. Tora Brawley, Defendant's neuropsychologist; that the Claimant will benefit from treatment for these symptoms as recommended by Dr. Brawley."

10. "That the Claimant has not returned to work for the Defendant employer Kneece Farms since his November 22, 1999 accident."

11. "That the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature. Claimant's wife gave credible testimony that no such job ordinarily exists, and that but for this being his family, the Claimant could not and would not be hired given his great cognitive and physical limitations; that he has been "working" and drawing a paycheck from the farm, this is only due to the largesse of his family, not because he performs any substantial, beneficial work for the farm."

12. "That the services that Claimant performs for the family farm, Delano R. Kneece & Son, Inc., given the accommodations his family has made so as to enable Claimant to perform certain limited services, are not evidence that a reasonably stable market exists for the services Claimant provides for the family farm."

13. "That those amounts paid the Claimant by the family farm, Delano R. Kneece & Son, Inc., are not intended to represent wages earned and the amount is not calculated on the basis of services performed by Claimant on behalf of his employer; that, further, those amounts paid the Claimant by the family farm are in the nature of a gift and do not constitute wages for work expended on behalf of his employer or wages calculated on the basis of productivity."

14. "That the Claimant is permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation, or any other kind of job or gainful employment on a reliable, sustained basis in accordance with the opinion of Dr. Stewart; that therefore, the Claimant is unable to perform services other than those that are so limited in quality, dependability, and quantity that a reasonable stable market for them does not exist."

15. "That based on the substantial weight of the medical evidence in this case, the Claimant is permanently and totally disabled, with a physical brain injury, pursuant to §42-9-10; that there is essentially no evidence contradicting several doctors finding a brain injury; that due to the combination of his injuries (Left knee, left shoulder, psychological), and the fact that Claimant's employment is found to be benevolent or sheltered in nature, the Claimant is permanently and totally disabled and entitled to lifetime benefits."

16. "That the Claimant sustained a causally related injury to his left knee; that his injuries to his left knee were as severe as to require two surgeries; that as a result of Claimant's injuries, Dr. James O'Leary assigned a 10% impairment rating to Claimant's lower left extremity."

17. "That the Claimant suffered a causally related injury to his left shoulder and elbow; that his injuries to his left shoulder were so severe as to require two surgeries; that as a result of Claimant's injuries, Dr. Michael Green assigned a 17% impairment rating to Claimant's upper left extremity."

18. "That since the date of Claimant's accident on November 22, 1999, the Defendants have paid the Claimant temporary total disability payments of 157 1/7 weeks."

19. "The Defendants have failed to pay for all medications prescribed by Claimant's physicians, to include Drs. Deal, Wicker, Shissias, and Ugino. The Claimant will benefit from future treatment. The Defendants are ordered

to pay for those medications for which the Defendants are responsible including medications for all causally related injuries."

20. "That the Claimant has accumulated mileage of 3,658 for which he is entitled to reimbursement."

21. "That the Claimant has accumulated charges of $14,010.77 in prescriptive medications for which he is entitled to reimbursement."

Accordingly, based upon the Findings of Fact and Conclusions of Law made by the Hearing Commissioner, he ordered the following :

(1) "The Defendants are responsible for the payment to Claimant pursuant to § 42-9-10(C) of all weekly compensation in the amount from the period beginning November 22, 1999, for life with credit given for 157 and 1/7 weeks of weekly compensation heretofore paid to Claimant."

(2) "The Defendants are responsible for Claimant's causally related medical treatment for his compensable injuries pursuant to § 42-9-10(C) as set out herein."

(3) "The Defendants are responsible for the Claimant's future medical treatment for his compensable injuries for his lifetime pursuant to § 42-9-10(C) as set put herein."

(4) "The Defendants are responsible for reimbursing the Claimant all mileage and prescriptions as herein set out."

(Decision and Order of Commissioner Williams at 35).

From this Decision and Order, the Defendants appealed to the Appellate Panel of the South Carolina Workers' Compensation Commission. This Brief addresses those issues outlined in Defendants' Form 30.

STATEMENT OF FACTS

The Statement of Facts are located in the Argument portion of this Brief.

ARGUMENT

I. THE HEARING COMMISSIONER ERRED IN FINDING AND CONCLDUNG THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AND ENTITLED TO LIFETIME BENEFITS FOR A PHYSICAL BRAIN INJURY PURSUANT TO S.C. CODE ANN. § 42-9-10

The Hearing Commissioner erred in finding and concluding that Claimant was permanently and totally disabled and entitled to lifetime benefits for a physical brain injury pursuant to S.C. Code Ann. § 42-9-10, where the Claimant experienced no loss of earning capacity; he returned to work full time with a different employer performing the same or similar job duties; and he executed a Form 17 on April 18, 2005.

The Hearing Commissioner, at Conclusion of Law Number 7, found that South Carolina Courts have not yet specifically adopted the sheltered employment doctrine. Despite this finding, the Hearing Commissioner proceeded to utilize this doctrine to find a loss of earning capacity and, therefore, find the Claimant to be permanently and totally disabled pursuant to S.C. Code Ann. Section 42-9-10. However, to the contrary, there are only three ways a claimant can be found permanently and totally disabled under the South Carolina Workers' Compensation Act.

The traditional approach to permanent total disability under the South Carolina's Workers' Compensation Act was thoroughly analyzed by the Supreme Court of South Carolina in the case of *Wigfall v. Tidelands Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003). In summarizing the traditional approach, the Court stated:

> A claimant may obtain total disability in one of three ways under § 42-9-10.
>
> First, a claimant may be presumptively totally disabled. As such, a claimant must show a physical injury enumerated in

> § 42-9-10. However, because the Legislature has categorized certain types of injuries as *per se* totally disabling, the claimant need not show a loss of earning capacity....
>
> Second, a claimant may establish total disability under § 42-9-10 by showing an injury, which is not a § 42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled....
>
> Third, a claimant may establish total disability through multiple physical injuries. Under this scenario a claimant who has a § 42-9-30 scheduled injury must show an additional injury....

Claimant's Form 50 expressly alleges permanent total disability due to a General Disability; he made *no allegation of permanent total disability based on a Specific Disability*. It is settled law that a Claimant in South Carolina who alleges permanent and total disability based upon general disability, to include claims based on multiple injuries, must show a loss of earning. Accordingly, the Claimant can only meet the requirements for permanent total disability through the general disability standard by showing a loss of earning capacity.

Permanent total disability based on general disability is governed by Section 42-9-10(A). This Subsection requires proof of loss of earning capacity. See *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 117-9, 473 S.E2d 699, 701-3 (1996); *Fields v. Owens Corning Fiberglass*, 301 S.C. 554, 555, 393 S.E2d 172, 173 (1990). This issue was recently addressed by the Court of Appeals of South Carolina in *Hutson v. South Carolina State Ports Authority*, 390 S.C. 108, 700 S.E.2d 462 (Ct. App 2010). In its analysis, the Court stated:

> Under the South Carolina Workers' Compensation Act, a claimant may proceed under §42-9-10 or §42-9-20 to prove a general disability; alternatively, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing.

Hutson v. South Carolina State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App 2010). Therefore, given that the Claimant has sought permanent and total disability based upon a general disability, a finding in favor of the Claimant must be based on diminished earning capacity regardless of the number of body parts injured.

At Finding of Fact # 19, the Commissioner finds that the Claimant, due to the combination of injuries to his brain, left knee, left shoulder, and psychological, and the fact that Claimant's employment was found to be benevolent in nature, that Claimant is permanently and totally disabled and entitled to lifetime benefits. However, there is no evidence, medical or otherwise, that the combined effects of the Claimant's injuries rendered him permanently and totally disabled. Thus, given that the Claimant's Form 50 only sought benefits pursuant to general disability, the Claimant must establish a loss of earning capacity to justify a finding of permanent total disability.

Furthermore, in order for the Claimant to be entitled to benefits beyond five hundred weeks, the Claimant must be found to be permanently and totally disabled in addition to having suffered a physical brain injury. Section 42-9-10(C) provides:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Therefore, in the absence of loss of earning capacity, the Claimant's claim for permanent and total disability must fail, and he is not entitled to benefits for life. As explained below, the Claimant has not experienced a diminished earning capacity and, to the contrary, has continued to engage in his same employment at an increased income. Specifically, the greater weight of the evidence does not support a finding that the Claimant is permanently totally disabled per the first or third paragraphs of §42-9-10 (now sections (A) & (C)).

Under the South Carolina Workers' Compensation Act, "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." See *Parrott v. Barfield Used Parts, et. al.*, 206 S.C. 381, 34 S.E.2d 802 (1945), S.C. Code §42-1-120. "The definition of disability in South Carolina's workers' compensation statute clearly stems from the earning impairment model of workers' compensation." *Stephenson* at 116, 701.

> Workmen's Compensation Act was not intended to provide any award for pain and suffering as such or for any of the other elements of damages recoverable in an ordinary action for personal injuries, except to the extent that the employee has sustained an injury resulting in the diminution of his earnings...

Parrott at 804. "[A]s the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity." *Parrott* at 804.

Since the Claimant returned to work with Delano R. Kneece & Son Farms, Inc. (a separate business entity from Kneece Farms) over half a decade ago, he has: (1) regularly worked in excess of 40 hours per week; (2) performed the same kind of work with the similar or same responsibilities he had when he was injured in 1999; (Compare the Sept. 23, 2010 deposition transcript of the Claimant (at pp. 20-21) to his November 11, 2005 hearing testimony - each noting he works about six days a week spending 75% of his time driving a tractor, working 8-12 hours per day); (3) earned the same income, or much greater income, than when he was originally injured in the same capacity as a full time employee and part owner of Delano R. Kneece & Son Farms, Inc. (see tax records of the Claimant); and (4) signed a Form 17 indicating that he was able to return to work as of October 4, 2005.

Essentially, the fact that the Claimant has been working for many years, doing the same or similar work as he was doing prior to the accident, and earning greater income, countermands any argument that the Claimant is permanently totally disabled under a wage loss theory.

"The rule in most states is that an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury." *Wynn v. Peoples Natural Gas*, 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961) (Citing *Clark v. Henry & Wright Mfg. Co.*, 1950, 136 Conn. 514, 72 A. (2d) 489; *Frennier's case*, 1945, 318 Mass. 635, 63 N.E.2d 461; *Stillwater Worsted Mills, Inc. v. Beal*, R.I. 1959, 150 A.2d 704; *Larson's Workmen's Compensation Law*, Section 57.53). The *Wynn* court went on to state that, "[t]he generally accepted test of total disability is

inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.' *Id.* at 12; (internal citations omitted). However, the *Wynn* Court noted that:

> [t]ested by these principles, the finding of total disability here cannot stand. Respondent's testimony to the effect that since his recuperation in the fall of 1958 he has not been able to do any work is belied by the agreed statement in the transcript that he 'began a limited return to his work about the middle of December, 1958, on an ever-increasing basis...;

Wynn at 13.

Unlike the claimant in *Wynn* who never sought additional work, after being terminated upon his original return to work post injury, the Claimant Ricky Kneece, has worked continuously ever since returning to work at this family farm in 2000. Importantly, Ricky Kneece actually did return to the same vocation, i.e. farming, in which he was employed at the time of injury. For these reasons, Claimant has failed to satisfy the requirements of general disability to establish entitlement to a finding of permanent and total disability pursuant to the South Carolina Workers' Compensation Act.

Therefore, as outlined below, Claimant's entitlement to a finding of permanent and total disability is dependent upon the benevolent employment doctrine which is inconsistent with the South Carolina Workers' Compensation Act and not supported by the facts of this case. Furthermore, even if his earning capacity in "the open job market" were shown to be lessened, no showing has been made that they have been totally abolished. Accordingly, to the extent there has been a partial diminution of the Claimant's earning capacity, an award under Section 42-9-20 would have been the appropriate statute for the Claimant to seek benefits under.

II. THE HEARING COMMISSIONER ERRED IN FINDING THAT THE CLAIMANT'S POST INJURY EMPLOYMENT IS SHELTERED OR BENEVOLENT EMPLOYMENT WHERE SOUTH CAROLINA HAS NOT ADOPTED THE DOCTRINE OF SHELTERED OR BENEVOLENT EMPLOYMENT

The Hearing Commissioner, at Finding of Fact Number 15, found that: "the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature." At Conclusion of Law Number 7, the Commissioner sets forth the Benevolent Employment Doctrine as follows: "[A]n injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986).

A review of the Doctrine as applied by other States reveals that sheltered employment exists when the employment of a previously injured claimant is essentially a facade, and the claimant himself is not actually physically capable of earning any of the wages being paid by the employer. This can be done either as a sham to defeat a finding of permanent total disability, or out of the employer's own benevolence.

'Sheltered employment', also known as 'benevolent employment' and 'make-work' is presented by *Larson's* as 'employer sympathy.' The doctrine recognizes that actual post-injury earnings naturally create a presumption of earning capacity commensurate with them. (*Larson's Workers' Compensation Law*, §81.01[4]). This is particularly true under the South Carolina Workers' Compensations Act, which defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Despite this presumption, according to *Larson's*, employer sympathy in some States has been found to rebut the presumption that there is no loss of earning capacity if the claimant can demonstrate actual post-injury earnings at least equal to his pre-injury earnings. *See, Larson's* at §81.06.

As recognized by the Hearing Commissioner, South Carolina has not adopted nor recognized the doctrine of benevolent employment, either by statute or through judicial interpretation. Accordingly, given that the Claimant has consistently earned more after his injury than he did prior to it, he has not suffered a disability as defined by the Act and should not be entitled to a finding of permanent total disability.

In *Parrott*, the claimant had actual post-injury wages equal to or greater than his pre-injury wages. The Commission, relying on a physician's testimony that the claimant had sustained a 20% disability, awarded permanent partial disability of 20%. *Parrott,* at 804. The Court, in relying on a contemporaneous North Carolina Supreme Court decision interpreting the identical statutes in that state, rejected this award relying on a doctor's definition of disability, and found that "the statute provides how disability shall be determined. Hence, medical opinion as to the extent of disability can have no probative value against actual earnings." *Parrott* at 804; *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 25 S.E.2d 865.

The Court in *Parrott* notes that the North Carolina Supreme Court in *Branham* did reject the claimant's employer sympathy argument because of the express terms of the Act. *Parrott* at 804. Based upon the court's reasoning in *Parrott,* that court would have also rejected any employer sympathy argument just as the North Carolina Supreme Court did.

Since *Parrott* and *Branham* were decided in the mid-1940's, North Carolina has adopted the sheltered employment doctrine. See *Stamey v. North Carolina Self-Insurance Guar. Ass'n.*, 131 N.C. App. 662, 507 S.E.2d 596 (1998). South Carolina, to the contrary, has not changed its position at all since *Parrott*. *Parrott* was affirmed in *Keeter v. Clifton Mfg. Co. et al.* 225 S.C. 389, 82 S.E.2d 520 (1954), *Walker v. City Motor Car Company*, 232 S.C. 392 (1958) and *Floyd v. City of Charleston*, 287 S.C. 474 (1986) (all quoting *Parrott* or its progeny for the rule that "medical opinion as to the extent of physical disability can have no probative value against actual earnings.").

One of the few, if not the only case in South Carolina that deals directly with an argument for sheltered employment is *Keeter v. Clifton Manufacturing Company*, 225 S.C. 389, 82 S.E.2d 520 (1954). The claimant in *Keeter* showed no lost wages, but the claimant argued that his earning capacity had been affected nonetheless and that he was very likely to experience wage loss in the near future.

The Commission agreed that they could not award any permanent partial or total benefits immediately because there were no lost wages, but they issued an award that would require the payment of partial or total disability benefits if the claimant's wages dropped below his pre-injury wage level. *Keeter* at 522. The Circuit Court reversed this finding holding,

> ...the authority of the Industrial Commission only extended to passing upon the status of the claim as it stood at the time of the hearing; and that it was not empowered to make an anticipatory finding that claimant's physical impairment may develop into a compensable disability.

Keeter at 522.

The Supreme Court affirmed the Circuit Court's reversal, holding that the Commission's ruling had the effect of "circumventing the limitation of twelve months

within which an award may be reviewed for change in condition." *Keeter* at 523. The court in *Keeter* basically found that the Commission can only look at the disability, as defined under S.C. Code Ann. §42-1-120, at the time of the hearing and can not make an anticipatory finding that the claimant may develop a compensable disability in the future.

The claimant is limited to the one year change of condition provision if his condition worsens into a compensable disability. The Court recognizes that if this rule results in an unjust result for some claimants, it is the Legislature's responsibility to amend the Act to allow the Commission to retain jurisdiction beyond the one year currently provided. *Keeter* at 523.

III. THE HEARING COMMISSIONER ERRED IN FINDING AND CONCLUDING THAT CLAIMANT'S POST INJURY EMPLOYMENT WITH A DIFFERENT EMPLOYER OF WHICH THE CLAIMANT IS A PARTIAL OWNER IS SHELTERED OR BENEVOLENT EMPLOYMENT

The Hearing Commissioner, at Finding of Fact Number 15, determined that "the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc., is sheltered employment and benevolent in nature." The reasons for this finding are set forth in Findings of Fact 15 through 18 and include: (1) Claimant's Wife's testimony that no similar job ordinarily exists with the employer and but for the Claimant's family relation, he would not be hired given his mental and physical limitations; (2) Claimant has been allowed to work and draw "paychecks" out of the family's largess, with his "paychecks" essentially amounting to gifts not wages based on the services he performs; and (3) After considering the accommodations made to enable the Claimant to perform his limited service, the services he performs are not evidence of a stable job market.

These reasons fail to justify a departure from the currently accepted methods of determining permanent and total disability based on a general disability.

The Claimant's Wife, who is the bookkeeper for the farm, testified that no similar job ordinarily exists with the employer and but for the Claimant's family relation, he would not be hired given his mental and physical limitations is not persuasive. Specifically, the Claimant testified that he worked in excess of 40 hours per week performing many of the same functions he performed prior to his accident. The Claimant spends the majority of his day driving a tractor which is what he spent the majority of his day doing prior to his injury.

The Claimant's Wife testified that the Claimant drives a tractor for five to seven hours per day, six days a week, and rarely misses a day of work. (Roxanne Kneece Deposition, September 29, 2010, P. 17 & 19). She also testified that the Claimant received a raise in 2007, that resulted in an increase in Claimant's compensation from $3500.00 per month to $4,175.00 per month. (Roxanne Kneece Deposition, September 29, 2004, P. 11). All farming functions performed by the Claimant would have to be performed by someone if he did not do them.

Accordingly, there is a need for the farming functions the Claimant is performing. "The rule in most states is that an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury." *Wynn v. Peoples Natural Gas*, 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961).

It has also been alleged that the Claimant has been allowed to work and draw "paychecks" out of the family's largess, with his "paychecks" essentially amounting to

gifts not wages based on the services he performs. The Claimant testified to a substantial work life following his injury despite his limitations. (Ricky Kneece Deposition, December 17, 2004, P. 15-21). The claim of payments as a gift instead of as wage is not supported by the farm's or the Claimant's tax records which treat the payments as wages not as gifts. A review of the applicable 1040 tax returns from 2000- 2006 reveals that Claimant is listed as the sole proprietor on the "Schedule F – Profit or Loss from Farming" form. Section E of Schedule F specifically asks: "Did you 'materially participate' in the operation of this business during" the year of the filing. The Claimant consistently answered that question in the affirmative.

Most importantly, both prior to and after the Claimant's injury, he has been and is a part owner in the Family Farm, along with his father. **Accordingly, to the extent the payments he receives now are not intended as compensation for services rendered, there is no evidence to establish that the Claimant's pre-injury payments were intended as compensation for service rendered instead of the Claimant's distribution as partial owner.**

The Claimant testified during his first deposition that he and his father split the profits evenly. (Ricky Kneece Deposition, December 17, 2004, P. 13-4). The Claimant's wife testified that she was paid by the hour, for forty hours a week at the rate of $16.50. (Roxanne Kneece Deposition, September 29, 2010, P. 5-6). Mrs. Kneece's pay is clearly tied to the number of hours she works.

The Claimant, as testified to by Mrs. Kneece, received a set amount of compensation per month. However, there is no evidence that the Claimant has ever been paid by the hour or that his pay has been tied to the amount of work he has actually done.

The fact that the Claimant's wife and other employees have been compensated on an hourly basis establishes that their pay has been tied to the work they have actually performed. The fact that the Claimant has always received a set amount per month regardless of the seasonal changes in the number of hours worked establishes that his pay has never been directly tied to the amount of work he actually performed.

The Hearing Commissioner also found that after considering the accommodations made to enable the Claimant to perform his limited work, the work he performs is not evidence that a reasonably stable job market exists for the work he provides. **However, there is no evidence in the record that the Claimant has ever had to compete in a competitive job market.** The Claimant testified during the hearing and his depositions that his sole work experience has been working on family farms, one of which he was a part owner.

Furthermore, there is no evidence of any risk of demise to the family farm which would subject the Claimant to entry into the job market. The family farm's and the Claimant's earnings have continually increased since the Claimant's injury. (Roxanne Kneece Deposition, September 29, 2004, P. 17 & 23; Tax Records). Accordingly, the Hearing Commissioner's findings as to the job market are irrelevant and speculative. The Hearing Commissioner's holding in this regard is attempting to provide redress for a problem that may never occur. This holding should be overturned and disregarded based upon the South Carolina Supreme Court's decision in *Keeter v. Clifton Mfg. Co. et al.* 225 S.C. 389, 82 S.E.2d 520 (1954).

Moreover, the accommodations that have been attributed to the Claimant's injuries have come with increased production, earnings, and profitability. These same

modifications, i.e. replacing old equipment with newer and more advanced equipment and adjusting farm crops, are utilized by farmers across the board to improve profitability. This is particularly true given the numerous technological advancements that have occurred in farm equipment since the Claimant's injury in 1999.

The family farm was started by the Claimant's father and is owned by the Claimant and his father. It is worked by the Claimant's father, the Claimant, the Claimant's son and wife, and other additional employees. Mrs. Kneece testified that the Claimant's son "was as skillful in farming, if not more so, than the claimant prior to his accident." It appears that the progression of the Family Farm through the generations is set to continue and is in a better financial position than when the Claimant was injured.

Florida utilizes the Sheltered Employment Doctrine in the workers' compensation setting but does not allow reasonable accommodations to convert employment into sheltered employment. In Florida, a worker's compensation claimant is not entitled to PTD benefits if she obtains "gainful employment" after a work-related injury. *Shaw v. Publix Supermarkets*, 609 So. 2d at 684. However, an employer is not permitted to create a position for a claimant, that is, to provide "sheltered employment," for the sole purpose of defeating a PTD claim. *Id.*

In *Wal-Mart Stores, Inc. v. Liggon*, 668 So. 2d 259, 271 (Fla. 1st DCA 1996), the court explained that the, "sheltered employment doctrine does not have a life of its own" but instead exists "to vindicate the legislatively imposed parameters of permanent and total disability." Therefore, "[i]f an employer creates a job for an employee merely as a litigation tactic in a worker's compensation case, such a job cannot be said to constitute "gainful employment" as that term is used in section 440.15(1)(b), Florida Statutes.

Reasonable job modification for the purpose of accommodating an injured or partially disabled employee will not, however, place the job outside of the definition of gainful employment. See *Cooper v. Escambia County School Bd.*, 734 So. 2d 1072, 1073 (Fla. 1st DCA 1999)("The modifications the employer made in the claimant's job to accommodate her disability do not, as a matter of law, render it sheltered employment so as to place this job outside of 'gainful employment' under section 440.15(1)(b), Florida Statutes (1989)"). *Goodwill Indus. v. Heard*, 863 So. 2d 389, 390-391 (Fla. Dist. Ct. App. 1st Dist. 2003). To the extent that accommodations have been made to allow the Claimant to work beyond those that were made to realize increased production and profits generally, they are reasonable accommodations and should not render his employment sheltered employment.

The claims made regarding the accommodations of acquiring newer equipment and hiring additional help to offset the work the Claimant could no longer perform are not supported by the applicable tax records. A review of the applicable "Schedule F – Profit or Loss from Farming" form from the 1040 tax returns from 2000- 2006 shows no entry for expenses for vehicles, machinery, or equipment, except for Car/Truck expenses in 2006 for $433.00. Likewise, the forms show no labor expenses listed except for $365.00 in 2000 for casual labor expenses, and $665.00 in 2001 for casual labor expenses.

Since his injury, the Claimant, as a self employed farmer, has experienced increased earnings personally and so has the family farm. It is undisputed that the Claimant provides at least some service on the farm. These two facts should be enough to prevent the Claimant from receiving an award of permanent total disability under a

general disability claim because he has not experienced a loss of earning capacity. This is particularly true considering the holding in *Hutson v. South Carolina State Ports Authority*, 390 S.C. 108, 700 S.E.2d 462 (Ct. App 2010). Mr. Hutson was a crane operator who suffered a work place injury to his back and right leg. As a result of these injuries, he was unable to return to work as a crane operator. Hutson sought permanent and total disability benefits based on general disability. During his hearing, Hutson stated that he intended to open a restaurant. He noted that his family had been in the restaurant business all their lives, cooking was not as strenuous as manual labor, and he could make a decent living if he could supervise others to work for him.

The Hearing Commissioner denied Hutson's claim for permanent total disability, but expressly noted that Hutson would have been found to be permanently and totally disabled but for his testimony regarding his plans to open a restaurant. The Hearing Commissioner found that Hutson had failed to establish a loss of earning capacity. Hutson appealed the Hearing Commissioner's ruling based, in part, on the speculative nature of the testimony regarding his ability to run a restaurant.

The Hearing Commissioner's ruling was upheld by the Appellate Panel and, ultimately, the Court of Appeals of South Carolina. If Mr. Hutson's testimony regarding his plans to open a business of his own was enough to defeat his claim of lost earnings, clearly the evidence regarding the Claimant's continued employment with a business he has owned for decades at proven consistent higher earnings should be.

Assuming South Carolina decides to adopt the Benevolent Employment Doctrine, it should not extend to the facts of this case. **The application of the Benevolent Employment Doctrine to this case would make Self Employment in South Carolina**

tantamount to Benevolent Employment. The Claimant receives payment from the farm that he is partial owner of. This has been the case for over a decade since his accident with Kneece Farms (which is not his current employer) occurred.

To find sheltered employment in this case would essentially allow the Claimant to provide sheltered employment to himself. This would not serve the policy behind the doctrine as there is no possibility of a sham employment concocted by the employer to avoid a finding of permanent total disability. Instead, the Claimant is self employed by an entity other than the employer for which he was working at the time of injury and is the one seeking the finding of permanent total disability. Additionally, the Claimant is providing services to his employer and there is no basis for finding his earnings are a gift.

Furthermore, sheltered employment in the context of self employment creates many problems which are prejudicial. There is no non-interested representative of the employer in this case. All parties who have provided evidence on the Claimant's behalf stand to benefit from his award of benefits. This holding will authorize a double dip for a self employed Claimant and prevent any possible means of independently verifying the self employed claimant's claims.

Under the holding of the Hearing Commissioner, the Claimant will be entitled to receive his permanent and total disability benefits **in addition to** his compensation from the farm. These combined payments will violate the requirements of S.C. Code Ann. § 42-9-10, which provides in pertinent part that: "The injured employee may not be paid more each week than the average weekly wage in this State for the preceding fiscal year."

At the time of Mrs. Kneece's deposition on September 29, 2010, she testified that the Claimant received $4,175.00 per month plus a yearly bonus. If the Claimant is to

receive permanent and total disability benefits in this case, the Carrier should be entitled to a credit for the amount the Claimant receives from his employment with his family farm.

The Claimant did not return to employment with the Defendant Employer in this claim – Kneece Farms – but rather, has returned to full time employment with a different employer, Delano R. Kneece & Son Farms, Inc., a business in which the Claimant was and is a part owner both before and after his injury which gave rise to this claim. Furthermore, the Claimant has not been paid a wage for 'not working,' or for performing only menial tasks with no value to the company for which he works. To the contrary, the Claimant has worked up to six days a week, from eight to thirteen hours a day, operating expensive, several ton farm machinery for about three quarters of the time that he works. This is according to the Claimant's own deposition testimony taken in September of 2010. **It should also be noted that the only conclusion that can be reached from the evidence in the record regarding the earnings of the Claimant and Delano R. Kneece & Son Farms, Inc. is that both improved greatly since the Claimant's injury.**

Hence, with no evidentiary or legal basis for a factual substantiation or judicial presumption of a finding and conclusion of permanent and total disability, the fact that the Claimant remains fully employed, with earnings well in excess of his earnings prior to his injury, is unassailable evidence that he has not sustained a loss of earning capacity.

Therefore, the Defendants respectfully submit that the appropriate remedy in this case is to award the Claimant his entitlement to **permanent partial disability benefits** based upon the impairment ratings to his affected body parts. The remedy sought by the

Claimant, i.e.: permanent and total disability benefits ***plus*** receipt of earnings in excess of his pre-injury earnings, will result in a large and improper windfall for the Claimant.

IV. THE HEARING COMMISSIONER ERRED IN RULING THAT THE CLAIMANT IS ENTITLED TO PAYMENT OF WEEKLY COMPENSATION FROM THE DATE OF THE 1999 ACCIDENT WITH THE DEFENDANTS REQUIRED TO PAY $461.67 PER WEEK FOR THE REST OF THE CLAIMANT'S LIFE WITH A CREDIT FOR 157 1/7 WEEKS PAID AND NOT APPLYING ADDITIONAL CREDITS.

The Defendants contend that no benefits are due Claimant as he is currently working and earning a wage that is more than double his wage at the time of his injury. However, in the event the award of permanent total disability is affirmed, the Defendants assert that they are entitled to a credit for all wages earned by the Claimant while receiving benefits, pursuant to Section 42-9-210, which provides:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

Assuming for the sake of argument that the Claimant is entitled to payment of weekly benefits, the Single Commissioner erred in setting the date for the period of payment as starting on the date of injury. First, as explained above, the Defendants filed a Form 21 Request to Stop Payment of TTD benefits and a Hearing on this Form 21 was held on January 11, 2005, before Commissioner Childs.

On April 18, 2005, Commissioner Childs issued her Decision and Order finding and concluding, in part, that the Claimant sustained compensable injuries to his

brain/head, face, nasal passage, sinus, left eye, left knee, left shoulder, left elbow and depression, and that Claimant had not yet reached MMI for those injuries. The Hearing Commissioner also ordered that although the Claimant was earning wages from Delano Kneece & Son during the same time period he was receiving TTD benefits from the Carrier, the Defendants were not allowed to receive a setoff or credit for the TTD benefits that were paid because the Claimant's wages were paid by a "collateral source" -- specifically, the salary Claimant earned by working at Delano R. Kneece & Son Farms, Inc. which Claimant owned with his father, Delano Kneece.

The Defendants appealed numerous rulings contained in this April 18, 2005 Order. However, the Appeal was withdrawn upon the parties reaching an agreement. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (citations omitted). An unappealed ruling is the law of the case and requires affirmance. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (citations omitted).

Accordingly, Commissioner Child's Order on this point can not be disturbed by this current Order. Additionally, for the reasons discussed above in relation to additional injuries and Commissioner Child's April 18, 2005, Order, the Defendants assert that the issue of payment of weekly benefits from the date of injury until the date of Commissioner Child's Order is barred by *res judicata* and *collateral estoppel*. For these reasons, it is improper for the current Order to attempt to modify the ruling of Commissioner Childs by now requiring payment of weekly benefits during the period of time prior to Commissioner Child's Order.

Following the Defendants' filing an appeal with the Full Commission regarding Commissioner Child's Order, the parties entered into an agreement whereby the Defendants agreed to provide the medical treatment ordered by the Hearing Commissioner and the Claimant agreed to execute a Form 17 agreeing that he was able to return to work as of October 4, 2005. (See, Letter from Claimant's counsel to Defendants' counsel dated September 27, 2005 (Claimant's Exhibit #3).

Therefore, the Defendants stopped TTD payments as of October 4, 2005, pursuant to the signed Form 17, and withdrew their Form 30 Request. Moreover, the Claimant, as part of agreement reached between the parties to resolve the appeal of Commissioner Child's order agreed to, and did, sign a Form 17 and agreed that the Defendants would stop TTD payments as of October 4, 2005. Furthermore, the Form 17 specified the time for which the Claimant had been paid weekly benefits and the Claimant's signature affirmed the correctness of the Form 17. This ended the Defendant's obligation to pay weekly benefits under Commissioner Child's Order. Accordingly, there were no weekly benefits due until the current Order purported to revive the Defendants' obligation to pay weekly benefits.

As explained above, the doctrine of *res judicata* and the law of the case prevents this current Order from modifying the terms of Commissioner Childs' Order and modification would include an attempt at reviving it. Additionally, the Claimant waived his right to seek additional weekly benefits after signing the Form 17, including any weekly benefits he was due at the time of the signing of the Form 17 since the Form specifically stated the dates for which benefits had been paid agreed to those dates.

Furthermore, the Claimant's claims in regards to weekly benefits are barred by the Doctrine of *Laches*. The South Carolina Supreme Court has recognized the application of the Doctrine of Laches in workers' compensation cases and has defined the doctrine 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." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999) (citations omitted). The Claimant signed the Form 17 which stopped his weekly benefits on October 4, 2005. Claimant then waited until he filed a Form 50, on July 9, 2010, to seek any additional weekly benefits. There is no justification or explanation for waiting almost five years to pursue the claim for additional weekly benefits in this case. The Defendants, pursuant to Section 42-9-210, should receive a credit for all wages earned by the Claimant subsequent to reaching maximum medical improvement.

Most importantly, the interests of equity and fairness require that if the award of benefits to the Claimant is upheld, the Defendants should be entitled to credit as the Claimant's earnings since his injury have consistently been above his rates prior to his injury and he returned to work within months of his injury.

The undisputed evidence, including the tax records, indicate that he has enjoyed consistently increasing earnings since the injury in 1999, and currently earns approximately twice as much as he did prior to the accident. There is no indication that this trend will change. Therefore, Defendants should be entitled to credit for Claimant's future earnings from Delano R. Kneece & Son.

V. **THE HEARING COMMISSIONER ERRED IN FINDING AND CONCLUDING DEFENDANTS ARE RESPONSIBLE FOR: (1) PAYMENT OF CLAIMANT'S MEDICAL TREATMENT WITH HIS UNAUTHORIZED PHYSICIANS; (2) REIMBURSEMENT TO CLAIMANT FOR MILEAGE TO AND FROM HIS UNAUTHORIZED TREATING PHYSICIANS; (3) PAYMENT OF PRESCRIPTIONS OBTAINED BY CLAIMANT'S UNAUTHORIZED PHYSICIANS; AND (4) PAYMENT OF FUTURE MEDICAL TREATMENT WITH CLAIMANT'S UNAUTHORIZED PHYSICIANS**

The Defendants respectfully submit that the Hearing Commissioner erred in finding and concluding that Defendants are responsible for: (1) payment of claimant's medical treatment with his unauthorized physicians; (2) reimbursement to claimant for mileage to and from his unauthorized treating physicians; (3) payment of prescriptions obtained by claimant's unauthorized physicians; (4) payment of future medical treatment with claimant's unauthorized physicians; and (5) payment of prescriptions submitted by Claimant as an Exhibit at the Hearing.

Pursuant to established South Carolina law, during the whole or any part of the Claimant's disability resulting from the work injury, the employer may furnish or cause to be furnished medical treatment to claimant and "the employee *shall* accept" said medical treatment unless otherwise ordered by the Commission. The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by he employer *shall bar* the employee from further compensation until such refusal ceases and no

compensation shall at any time be paid for the period of refusal. S.C. Code Ann. § 42-15-60(emphasis added).

While this statute ultimately gives great deference to the Appellate Panel, the statute "does not give a unilateral right to claimants to seek their treating physician, and such an unencumbered right undermines the authority of the Commission, as prescribed by the legislature." *Turner v. S.C. Dept of Health and Environmental Control*, 377 S.C. 540, 661 S.E.118 (Ct. App. 2008).

Following the 2005 Agreement of the parties, the **Claimant requested** and the Defendants authorized Claimant to undergo a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. This evaluation was performed on May 14, 2008, at which time Dr. Adams found the Claimant's examination to be **"absolutely normal"** and he diagnosed Claimant with a "**mild to moderate head injury with a contusion** to his right frontal lobe."

To further evaluate the mild/moderate head contusion, Dr. Adams ordered an electroencephalogram (EEG) test to measure Claimant's brain electrical activity which was also **normal**. No further treatment was recommended by Dr. Adams and Claimant was released from any further treatment with Dr. Adams.

Following his release by Dr. Adams, the **Claimant never requested authorization from Defendants for another neurological evaluation or any other type of medical treatment** (aside from ongoing psychological counseling). Instead, the Claimant sought unauthorized medical treatment with providers of his own choice. (H.T. at 41). The Defendants were never notified of this unauthorized treatment until Claimant filed his Form 50 in 2010.

Subsequent to Claimant's unauthorized treatment, he filed a new Form 50 on July 9, 2010, requesting additional medical treatment for multiple injuries and also alleged he was entitled to an award of permanent and total disability based upon general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. This 2010 Form 50 was the Claimant's first hearing request since the Hearing before Commissioner Childs more than five (5) years earlier and the **first request for additional medical treatment** since Claimant's request for treatment with Dr. Adams which the Defendants provided.

In support of his claim for permanent and total disability based upon an alleged loss of earning capacity, the Claimant relied upon the opinions/reports of the unauthorized physicians. However, pursuant to S.C. Code Ann. § 42-15-60, the Claimant did not have the right to seek his own treating physicians. Moreover, it was error for the Hearing Commissioner to rely upon these unauthorized opinions in forming the basis of his award for permanent and total disability.

The authorized physicians the Claimant treated with for his causally related compensable injuries (Drs. Green, O'Leary, Waid and Deal), all released Claimant at MMI with no recommendation for further treatment or medications. Accordingly, Defendants are not responsible for payment of any further medical treatment.

However, in the event that the finding of total disability is affirmed, the Order Directives of Commissioner Williams clearly state that Defendants are responsible only for treatment "directed by [claimant's] authorized treating physicians." As already discussed, the only treating physicians in this case since approximately 2005, have been Drs. Deal and Bergmann. Defendants have never been requested to authorize treatment

by any other providers since 2005, with the exception Dr. Adams. Thus, Defendants respectfully request that they should be found to have no responsibility for any past or future treatment of Drs. Shissias, White, Ugino, or Wicker.

In addition, the Defendants respectfully submit that they should not be held responsible for payment of numerous prescriptions dating back to 1999. Specifically, Claimant's counsel submitted a list of prescriptions he wanted to be reimbursed for as an Exhibit at the Hearing. However, Defendants can not be held responsible for payment of these prescriptions based upon several reasons.

First, it is impossible to tell from the list provided by Claimant what these prescriptions are for, who they were prescribed by (authorized or unauthorized physician), and whether the prescriptions were needed as treatment for a causally related injury ordered compensable by Commissioner Childs and/or agreed to by the parties.

Second, this list of prescriptions dates back to 1999; yet Claimant never requested payment for the prescriptions from 1999 to 2005 at the Hearing with Commissioner Childs in 2005. Accordingly, pursuant to the doctrine of *res judicata*, the Claimant is barred from now requesting reimbursement for these prescriptions.

Finally, the Claimant's wife testified at the Hearing in 2011, that all of these prescriptions were paid for by their personal health insurance plan. (H.T. at 100). She further testified that neither she nor the Claimant ever sought authorization for payment of these prescriptions by the workers' compensation carrier although she obviously knew that she was entitled to do so. (*Id.*). Thus, Defendants are not responsible for also paying for these prescriptions.

Therefore, because Defendants are not responsible for payment of claimant's medical treatment with his unauthorized physicians, they are not responsible for; (1) reimbursement to claimant for mileage to and from his unauthorized treating physicians; (2) payment of prescriptions obtained by claimant's unauthorized physicians; (3) payment of future medical treatment with claimant's unauthorized physicians; and (4) payment of prescriptions submitted by Claimant as an Exhibit at the Hearing.

VI. PURSUANT TO S.C. CODE ANN. § 42-15-80, THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW IN OVERRULING AND DENYING DEFENDANTS' MOTION TO COMPEL CLAIMANT TO SUBMIT TO A NEUROLOGICAL EVALUATION AS WELL AS DENYING DEFENDANT'S MOTION TO POSTPONE THE HEARING IN ORDER TO OBTAIN THIS EVALUATION. AS A RESULT, THE HEARING COMMISSIONER ERRED IN FAILING TO SUSPEND CLAIMANT'S RIGHT TO ANY COMPENSATION UNTIL HE COMPLIED WITH EVALUATIONS SCHEDULED BY DEFENDANTS.

Defendants did not have an opportunity to obtain their own expert opinions in order to defend Claimant's claim for permanent and total disability until **after** the failed mediation as Defendants were not made aware of Claimant's new position or that he was relying upon the opinions of the expert witnesses discussed herein.

A. FACTS RELATED TO DEFENDANTS' MOTION TO COMPEL

After the 2005 Agreement of the parties, the **Claimant requested** and the Defendants authorized Claimant to undergo a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. This evaluation was performed on May 14, 2008, at which time Dr. Adams found the Claimant's examination to be **"absolutely normal"** and he diagnosed Claimant with a "**mild to moderate head injury with a contusion** to his right frontal lobe." To further evaluate the mild/moderate head

contusion, Dr. Adams ordered an electroencephalogram (EEG) test to measure Claimant's brain electrical activity which was also **normal**. No further treatment was recommended by Dr. Adams and Claimant was released from any further treatment with Dr. Adams.

Following his release by Dr. Adams, the **Claimant never requested authorization from Defendants for another neurological evaluation or any other type of medical treatment**, except for ongoing psychological treatment the Defendants have provided. Instead, the Claimant sought unauthorized medical treatment with a provider of his own choice, Dr. Charles Shissias of Low Country Medical Group in Beaufort, South Carolina, beginning in March of 2010. (H.T. at 41). The Defendants were never notified of this unauthorized treatment until the Claimant file a new Form 50 in 2010.

The Claimant filed a new Form 50 on July 9, 2010, requesting additional medical treatment for multiple injuries and also alleged he was entitled to an award of permanent and total disability based upon general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. This 2010 Form 50 was the Claimant's first hearing request since the Hearing before Commissioner Childs more than five (5) years earlier and the **first request for additional medical treatment** since Claimant's request for treatment with Dr. Adams which the Defendants provided. In support of his claim for permanent and total disability based upon an alleged loss of earning capacity, the Claimant relied upon the opinions/reports of **Dr. Randy Waid**, a neuropsychologist, **Dr. Charles Shissias**, a neurologist, and **Dr. William Stewart**, a vocational evaluator. Defendants did not receive all of Dr. Shissias' records until Claimant served his APA submissions for a hearing set

for October 4, 2010. This Hearing was postponed to allow the parties to mediate this claim, but the parties failed to reach a resolution through the mediation.

After the conclusion of the failed mediation, Defendants scheduled evaluations with Dr. Tora Brawley, a neuropsychologist; Dr. Ben Bashinski, a neurologist; and Cynthia Grimley, a vocational expert, and promptly notified Claimant's counsel of these evaluations. However, Claimant's counsel refused to make claimant available for these evaluations.

On January 26, 2011, Defendants filed a Motion to Compel and Postpone the hearing scheduled for February 2011, based upon the fact that Claimant failed to submit himself to the evaluations scheduled by the Defendants in order to address the opinions of Claimant's experts. On February 10, 2011, Commissioner Williams issued an Administrative Order denying Defendants' Motion; however, this Order from Commissioner Williams failed to give any findings or conclusions indicating his reasons for the denial of this Motion.

At the Hearing on February 14, 2011, Defendants renewed their Motion to Compel and Postpone the Hearing (H.T. at 7). However, the Hearing Commissioner again denied this Motion, stating the evaluations could have been done prior to the Hearing. (H.T. at 12). The Hearing Commissioner failed to recognize the fact that Defendants were not even provided with all of the reports and opinions of Claimant's experts until immediately prior to the Hearing originally scheduled for October 4, 2010. The short notice combined with the Claimant's obstructionism deprived the Defendants their opportunity to procure experts to meet the new evidence presented by the Claimant. Accordingly, the Defendants' Motions should have been granted.

NEUROLOGICAL EVALUATION WITH DR. BASHINSKI:

On January 21, 2011, counsel for Defendants notified Claimant's counsel of a neurological examination scheduled for the Claimant with Dr. Ben Bashiniski of Neurological Associates in Augusta, Georgia for February 4, 2011. The purpose of this evaluation with Dr. Bashinski was to address the opinions of Claimant's neurologist, Dr. Shissias. Defendants offered to provide transportation for the Claimant to this appointment if needed; however, Claimant's counsel responded by letter dated January 24, 2011, simply stating that his client would not submit to the neurological evaluation with Dr. Bashinski.

The Defendants respectfully submit that S.C. Code Ann. § 42-15-80 mandates that Claimant shall not be entitled to any compensation until he has complied with Defendants' requests for this evaluation and that it was error for the Hearing Commissioner to allow the Claimant to proceed with the Hearing over the Motion and Objections of Defendants. S.C. Code Ann. § 42-15-80(A) clearly provides:

> After an injury and so long as he claims compensation, the employee, ***if so requested by his employer*** or ordered by the commission, ***shall submit himself to examination***, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission. The employee has the right to have present at the examination any qualified physician or surgeon provided and paid by him. . . . If the employee ***refuses to submit himself to or in any way obstructs the examination*** requested by and provided for by the employer, ***his right to compensation and his right to take or prosecute a proceeding under this title must be suspended until the refusal or objection ceases*** and compensation is not payable at any time for the period of suspension unless in the opinion of the commission the circumstances justify the refusal or obstruction.

S.C. Code Ann. § 42-15-80(A) (emphasis added).

S.C. Code Ann. § 42-15-80 makes it clear that unless in the opinion of the Commissioner the circumstances justify the refusal of a claimant to make himself available for evaluations scheduled by defendants, the provisions of S.C. Code Ann. § 42-15-80 prevail.

The Claimant's counsel argued at the Hearing that Defendants request for claimant to submit to these evaluations was "too late" and that Defendants' "intentions are suspect." However, there is no time limit under § 42-15-80 other than the requirement to timely serve APA submissions. Defendants immediately requested these evaluations once they received the reports of Claimant's expert witnesses after mediation was unsuccessful. As for Defendants' "intentions" being "suspect," there is nothing suspect about a Carrier requesting medical evaluations to counter opinions from unauthorized physicians obtained by a Claimant.

By failing to postpone the Hearing and compel the Claimant to attend the neurological evaluation with Dr. Bashinski the Hearing Commissioner denied the Defendants' due process right to properly defend this claim and violated the mandates of S.C. Code Ann. § 42-15-80. Therefore, the Defendants respectfully request the Full Commission to find and conclude the Hearing Commissioner erred in failing to order the Claimant to undergo this evaluation and in failing to postpone the Hearing until Claimant's compliance with the evaluations. In addition, Defendants respectfully request the Full Commission find and conclude that because the Claimant violated the provisions of S.C. Code Ann. § 42-15-80, he is barred from receiving any benefits under the Act until he undergoes the examinations requested by Defendants. Furthermore, Defendants

respectfully request the Full Commission to vacate the order of the Hearing Commissioner as the Hearing was improperly convened pursuant to S.C. Code Ann. § 42-15-80. See, *Hill v. Skinner*, 195 S.C. 330, 11 S.E.2d 386 (1940).

VOCATIONAL EVALUATION WITH CYNTHIA P. GRIMLEY:

On *September 17, 2010*, the Claimant submitted a new and updated report of Dr. William Stewart dated September 16, 2010, along with his APA Submissions for the Hearing previously scheduled for October 4, 2010. However, ***Defendants had no opportunity to respond to the opinions of Dr. Stewart set forth in this report prior to the October 2010 hearing, as the parties agreed to mediation which was held on November 29, 2010.***

Immediately after the unsuccessful mediation concluded, the Defendants promptly notified Claimant's counsel on December 14, 2010, that they had retained vocational expert Cynthia Grimley to perform a vocational evaluation of Claimant. Both Dr. Stewart and Cynthia Grimley are vocational rehabilitation consultants and are board certified rehabilitation counselors. Defense counsel indicated in this correspondence on December 14, 2010, of two (2) available dates for the evaluation and also indicated that if neither of those dates worked, to notify Defense counsel of dates available to the Claimant. Moreover, Defense counsel included the Curriculum Vitae of Ms. Grimley in this correspondence. In addition, Ms. Grimley separately phoned and wrote to Claimant's counsel requesting available dates for the interview for her vocational evaluation. Although Claimant's counsel indicated he spoke with Ms. Grimley in

December 2010, and was "checking her references," he subsequently advised that he would not agree to make the Claimant available for a vocational evaluation with Defendant's expert.

While Defendants acknowledge that S.C. Code Ann. § 42-15-80 does not necessarily apply to the vocational evaluation with Defendant's expert, Defendants respectfully submit that Claimant should have nonetheless been ordered to comply with this evaluation in the interest of equity, fairness, and due process. The Claimant relied upon the opinions of Dr. Stewart in his attempt to establish his claim for total disability based upon a loss of earning capacity and, more importantly, the Hearing Commissioner relied upon the opinions of Dr. Stewart in issuing his Decision and Order finding and concluding the Claimant is permanently and totally disabled based upon a loss of earning capacity.

The interests of equity, fairness, and due process, mandate this result as it was error for the Hearing Commissioner to refuse to consider the Defendants' expert's report but to consider Claimant's expert's report of a similar type. Accordingly, the Defendants respectfully request the Full Commission to conduct a de novo hearing and consider the report of Ms. Grimley or, in the alternative, exclude all reports of from the Claimant's vocational expert Dr. William Stewart and not give these reports any weight in reviewing this decision.

Additionally, the reports of Dr. Stewart should be excluded from consideration as they are contrary to South Carolina law, irrelevant, and speculative. Dr. Stewart's opinion was that the Claimant enjoyed "a benevolent and sheltered employment situation" but that "in an open, competitive labor market [the Claimant] would find

himself vocationally disabled and unable to work gainfully." (APA, Page 4). South Carolina has not recognized the benevolent or sheltered employment doctrines so his report is contrary to South Carolina law and should not be considered. Additionally, the report is speculative and irrelevant for the following reasons: there is no evidence the Claimant has ever had to compete in a competitive job market as his sole work experience has been working on family farms, one of which he was a part owner; there is no evidence of any risk of demise to the family farm which would subject the Claimant to entry into the job market since the family farms and the Claimant's earnings have continually increased since the Claimant's injury.

B. THE HEARING COMMISSIONER ERRED IN OVERRULING AND DENYING DEFENDANTS' MOTION TO EXCLUDE CLAIMANT'S EXHIBIT NO. 4.

At the Hearing, counsel for Defendants objected to Claimant's Exhibit No. 4 which consisted of payroll transactions and alleged expenses of Delano R. Kneece & Son Farms, Inc.; however, it was unclear as to what exactly the transactions referred to as it appeared they listed all payroll transactions for a very long period of time, part of which is irrelevant to the work accident of November 22, 1999. (H.T. at 4).

Claimant submitted these records in an effort to support his argument that Delano Kneece R. Kneece & Son Farms, Inc. sustained increased expenses and overhead as a result of making accommodations in order for Claimant to "draw a check." However, under the Workers' Compensation Act, there is no provision that allows for recovery of these types of expenses, especially by an employer that is different than the one where claimant was working at the time of his accident.

Instead, it is the Claimant's burden in this case to prove that he either did or did not sustain a loss of earning capacity in order to recover for permanent and total disability

pursuant to S.C. Code Ann. § 42-9-10. Therefore, the documents in Claimant's Exhibit No. 4 are irrelevant and have no bearing on whether or not the Claimant is permanently or totally disabled pursuant to the Workers' Compensation Act. As a result, it was error for the Hearing Commissioner to allow these documents into the record over the objections of the Defendants.

VII. THE HEARING COMMISSIONER ERRED IN FINDING AND CONCLUDING THAT CLAIMANT SUSTAINED COMPENSABLE INJURIES TO HIS ZYGOMATIC ARCH, THYROID, SCARRING, AND/OR FINGER; THEREFORE, IT WAS ERROR FOR THE HEARING COMMISSIONER TO FIND AND CONCLUDE THAT DEFENDANTS ARE RESPONSIBLE FOR ALL MEDICAL TREATMENT RELATED TO THESE INJURIES

The Hearing Commissioner erred in finding and concluding that Claimant sustained compensable injuries by accident to his zygomatic arch, thyroid, scarring, and finger, and that Defendants are responsible for all medical treatment related to these injuries for several reasons as outlined below:

A. THE HEARING COMMISSIONER MADE NO FINDINGS OR CONCLUSIONS REGARDING ANY ALLEGED INJURIES TO CLAIMANT'S ZYGOMATIC ARCH, THYROID, SCARRING, AND/OR FINGER

In his detailed Order Instruction Notes, the Hearing Commissioner never made any findings or conclusions regarding any injuries by accident to Claimant's "zygomatic arch, thyroid, scarring, and/or finger" or any other similar body parts. Instead, the only body parts the Hearing Commissioner found Claimant injured in the work accident were the injuries to Claimant's: (1) Brain; (2) Left knee; (3) Left shoulder; and (4) Psyche. (See, Order Instruction Notes from Commissioner Williams dated March 10, 2011.).

Claimant's counsel improperly inserted these Findings of Fact and Conclusions of Law related to Claimant's zygomatic arch, thyroid, scarring, and finger, when in fact, the

Hearing Commissioner never even mentioned any injuries to these body parts in his Order Instructions. While it is true that the Order Instructions state that Claimant's attorney may add additional Findings of Fact, the Instructions are also very clear that any additional Findings of Fact must be "consistent" with the Hearing Commissioner's ruling.

Given the very detailed Order Instructions, had the Hearing Commissioner intended for these body parts to be included as compensable injuries, he could have easily made a specific finding listing them as compensable injuries just as he did in making the specific findings regarding the injuries to Claimant's brain, left knee, left shoulder, and psyche.

Accordingly, the Defendants respectfully submit that it was error for Claimant's counsel to insert these improper findings in the proposed Decision and Order that were not made by the Hearing Commissioner. Moreover, Defendants respectfully submit it was error for the Hearing Commissioner to sign Claimant's proposed Order with these (and others) erroneous Findings and Conclusions included.

B. **THE CLAIMANT FAILED TO ALLEGE THAT HE SUSTAINED INJURIES TO THESE BODY PARTS PRIOR TO AND AT THE ORIGINAL HEARING BEFORE COMMISSIONER CHILDS ON JANUARY 11, 2005, NOR WAS THERE ANY MENTION OF THESE ALLEGED INJURIES IN COMMISSIONER CHILDS' ORDER OF APRIL 18, 2005, WHICH IS NOW THE LAW OF THIS CASE. ACCORDINGLY, CLAIMANT'S CLAIM FOR COMPENSATION FOR THESE INJURIES IS BARRED BY THE DOCTRINE OF *RES JUDICATA***

As stated by the Decision and Order of Commissioner Williams dated April 28, 2011, the Findings and Conclusions from the 2005 Order from Commissioner Childs are the law of this case except as to certain provisions which the parties agreed to in exchange for Defendants to withdraw their Form 30 Request for Appellate Review, which Defendants did do.

In this 2005 Order, Commissioner Childs found and concluded that the Claimant sustained the following compensable injuries: (1) brain/head/face; (2) nasal passage; (3) sinus; (4) left eye[1]; (5) left lower extremity; (6) left upper extremity; and (7) depression. Following Commissioner Childs' issuance of her Decision and Order in 2005, the parties settled several issues in Commissioner Childs' Order via a written Agreement. Specifically, the Defendants agreed to accept the injuries to Claimant's brain, left lower extremity (knee) and left upper extremity (shoulder), and provide medical treatment for same.

In exchange for the Agreement by Defendants to accept these three (3) injuries and to provide medical treatment for same, as well as withdraw their Form 30, the Claimant executed a Form 17, acknowledging that he returned to work as of October 4, 2005. Therefore, Defendants were able to stop TTD payments as of October 4, 2005. Accordingly, in addition to the written Agreement between the parties, the **2005 Decision and Order of Commissioner Childs has been and remains the law of the case.**

Therefore, pursuant to the doctrine of *res judicata*, the Defendants respectfully submit the Hearing Commissioner erred in failing to find and conclude the Claimant is now barred from asserting he is entitled to compensation for these injuries.

The doctrine of *res judicata* is based upon the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action. *Hayes v. Hayes,* 312 S.C. 141, 439 S.E.2d 305 (Ct. App. 1993). In order for a claim to be barred pursuant to the doctrine of *res judicata,* three elements must be shown:

(1) the prior judgment/order must be final, valid and on the merits;

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[1] The eye is not a part of this claim as Claimant conceded on p. 47 of his 9/23/2010 deposition, that the alleged eye problems do not adversely affect his vision. (See S. C. Code of Reg. 67-1105 impairment ratings for the eye based on loss of vision).

(2) the parties in the subsequent action must be identical to those in the first action; and

(3) the second action must involve matters properly included in the first action. See, *Owenby v. Owens Corning Fiberglas,* 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993).

More specifically, a final judgment on the merits in a prior action will ***preclude*** the parties from relitigating ***any issues*** actually litigated or those that ***might have been litigated*** in the first action. *Foran v. USAA Casualty Ins. Co.,* 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993)(emphasis added). The South Carolina Supreme Court has specifically held that the doctrine of *res judicata* applies in workers' compensation action. See, *Cromer v. Newberry Cotton Mills,* 201 S.C. 349, 23 S.E.2d 19 (1942).

In *Bennett v. South Carolina Department of Corrections,* 305 S.C. 310, 408 S.E.2d 230 (1991), the Court found that when a request for benefits for an alleged injury could have been asserted by a claimant and/or awarded by the Hearing Commissioner in an original workers' compensation hearing, but is not done so, the original Order issued by the workers' compensation tribunal normally precludes the relitigation of those issues addressed by that tribunal in a collateral action.

The Defendants respectfully submit that pursuant to the doctrine of *res judicata,* the Claimant is barred from asserting or receiving compensation for the following injuries:

1. *Zygomatic Arch*: This term refers to the part of the temporal bone of the skull that forms the prominence of the cheek (the cheekbone). Immediately following the work accident, the Claimant was seen at Palmetto Richland Health. On November 22, 1999, the date of the work accident, Claimant underwent a neurology consult which

specifically found that based upon the CT scan of Claimant's head, he sustained a right frontal and zygomatic/orbital fracture, but that no surgery was necessary. (Defendants' APA p. 250; 253).

Accordingly, as of the date of the accident on November 22, 1999, the claimant had been diagnosed with a zygomatic arch fracture. While claimant may not have been informed of the diagnosis on the date of the accident, the Claimant was made aware of this diagnosis prior to the January 2005 Hearing, as Claimant submitted the records from Palmetto Richland Health from the date of the accident as part of his APA's for the Hearing on January 11, 2005. Therefore, this claim is barred by *res judicata*.

2. *Thyroid/Hypothyroidism*: At the Hearing before Commissioner Williams on February 6, 2011, the Claimant alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. Hypothyroidism is a condition characterized by abnormally low thyroid hormone production. Thyroid hormones are produced by the thyroid gland which is located below the Adams Apple.

As evidenced by the medical documentation in the record, there was never any mention of claimant injuring his thyroid in the 1999 accident. Instead, when claimant started seeing family practitioners Drs. White and Wicker prior to 2005, for what Claimant described as "staggers," he was incidentally diagnosed with hypothyroidism and given medication for same beginning in at least 2005. However, on June 17, 2009, Dr. Wicker states that he wanted to test Claimant's T4 levels regarding the cause of his fatigue. It was noted that Claimant had testosterone deficiency but that his thyroid was "okay." (H.T. at 170-71).

Accordingly, while the greater weight of evidence in the record demonstrates that Claimant's alleged hypothyroidism is not causally related to the 1999 work injury, that issue is moot as claimant failed to assert that this condition was a compensable injury (even though he was treated for it prior to 2005), and there is absolutely no mention of this condition as being compensable in the 2005 Order of Commissioner Childs. Therefore, this claim is barred by *res judicata*.

3. *Finger:* Not only did Claimant not allege an injury to his finger at the Hearing in 2005, he did not assert an injury to his finger on his 2010 Pre-Hearing Brief or Amended Pre-Hearing Brief. However, Claimant alleged at the Hearing that on November 19, 2010, he experienced a "stagger" while climbing the steps to a grain bin, causing him to fall and injure his left index finger. (H.T. at 47).

The Hearing Commissioner cited Defendants' APA's pp. 25-254, in support of his Finding that Claimant's left index finger injury is causally related to the 1999 work injury and that Defendants are responsible for the payment of Claimant's past and future medical treatment with Dr. Ugino. (Finding of Fact # 12).

Not only are there no records from Dr. Ugino referencing this left index finger in evidence, the APA submissions cited by the Hearing Commissioner in support of his Finding are records from Palmetto Health dated November 22, 1999, and have nothing to do with any injury to Claimant's finger or treatment by Dr. Ugino for same. In fact, the only records from Dr. Ugino submitted into the record were submitted by Defendants as APA page #'s 293-296, and they all reference Claimant's prior dislocations to his left shoulder.

Furthermore, with regard to the statement by Claimant and his wife at the hearing that claimant's "stagger" (which Claimant described as a feeling of dizziness upon standing up from a seated position) caused the Claimant to fall and injure his right hand, the medical reports Healthsouth indicate that other than his headaches and lower extremity pain, "most of his other bothersome symptoms have improved." (Claimant's APA p. 194). More importantly, Claimant states shortly before the alleged fall that his "staggers" have improved "in that when he changes posture and gets up, he feels steady and stable from the get-go." (Claimant's APA p. 194). In addition, in June of 1999, he informed Dr. Wicker that he has not had any lightheadedness or dizziness since he began treatment for his unrelated hypertension. (Claimant's APA p. 162).

Accordingly, Defendants respectfully submit that Claimant's claim for compensation for an injury to his index finger should have been barred by the Hearing Commissioner.

C. *CONCLUSION*

Based upon the foregoing arguments, the Defendants respectfully request the Full Commission to reverse the Hearing Commissioner's Findings and Conclusions that he has sustained compensable injuries by accident to his zygomatic arch, thyroid, scarring, and/or finger and, therefore, that the Hearing Commissioner erred in ordering Defendants responsible for all medical treatment related to these injuries.

VIII. THE HEARING COMMISSIONER ERRED IN FINDING AND CONCLUDING THAT CLAIMANT'S WEIGHT GAIN AND HYPOTHYROIDISM ARE CAUSALLY RELATED TO AND RESULTING FROM HIS COMPENSABLE 1999 HEAD INJURY AND THAT DEFENDANTS ARE RESPONSIBLE FOR TREATMENT FOR THESE CONDITIONS

The Hearing Commissioner erred in finding and concluding that Claimant's hypothyroidism and weight gain are causally related to and resulting from his 1999 work injury. At the Hearing before Commissioner Williams on February 14, 2011, the Claimant alleged for the very first time in this case that his hypothyroidism is causally related to his 1999 head injury. The Finding relating to hypothyroidism is addressed in the prior section.

In addition, with regard to the finding that defendants are responsible for claimant's weight gain, the medical evidence in the record clearly demonstrates that there has been no significant weight gain by claimant and even if claimant had gained significant weight, the greater weight of evidence in the record does not support a finding that such weight gain was related to the 1999 work accident.

In 1999, the Claimant weighed 205 pounds based upon the records from Palmetto Richland Health. (Defendants' APA #1). In 2004, claimant' weight was also 205. (Claimant's APA p. 5E). A review of the medical evidence shows that claimant's weight never fluctuated more than 10 to 15 pounds.

Accordingly, while the greater weight of evidence in the record demonstrates that Claimant's alleged hypothyroidism and weight gain is not causally related to the 1999 work injury, that issue is moot as claimant failed to assert that this condition was a compensable injury (even though he was treated for it prior to 2005), and there is absolutely no mention of this condition as being compensable in the 2005 Order of Commissioner Childs. Therefore, this claim is barred by *res judicata*.

CONCLUSION

Based upon the foregoing Arguments, case law, and statutes cited herein, the Defendants respectfully request the Full Commission reverse the Decision and Order of the Hearing Commissioner and/or grant a de novo Hearing.

Respectfully Submitted,

Mark D. Cauthen, Esquire
McKay, Cauthen, Settana & Stubley, P.A.
1303 Blanding Street
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(803) 256-4645

Attorneys for Defendants

July, 25 2011.

ax Manor St.
O. BOX 1715
lumbia, SC 29202-1715
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Carrier File #: L16755
Carrier Code #: 148-N
Employer FEIN #:

aimant's Name: Ricky Kneece SSN: [redacted]
ddress: 204 Delano Kneece Road
y: Pelion State: SC Zip: 29123
ome Phone: ( ) - Work Phone: ( ) -

Employer's Name: Kneece Farms
Address: 1752 Juniper Springs Road
City: Gilbert State: SC Zip: 29054
Insurance Carrier: Legion Insurance Company/SCIGA

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

REQUEST FOR COMMISSION REVIEW

quest for Commission Review by ☐ claimant ☒ employer (check one) Date of injury: 11/22/1999 (m/d/yyyy)

e undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for view is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question esented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use ditional pages if necessary).

ee attached.

SCWCC
MAY 17 2011
JUDICIAL

SCWCC
MAY 17 2011
JUDICIAL

heck one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Scott Elliott, Esquire;

Name

Elliot & Elliott 1508 Lady Street, Columbia, SC 29201; SCWCC, Virginia Crocker, Judicial Director, South Carolina Workers' Compensation Commission, P.O. Box 1715, Columbia, SC 29202

Address

on the 12th day of May by ☒ first class mail ☐ personal service ☐ certified mail.

Mark D. Cauthen
Preparer's Signature

Attorney at Law
Title

May 12, 2011
Date

Check this box if you are not represented by an attorney. ☐

the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the pposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 ays from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are able to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

STATE OF SOUTH CAROLINA COUNTY OF CALHOUN Ricky Kneece, Claimant/Respondent, vs. Kneece Farms, Employer, and Legion in liquidation/SCPCIGA, Carrier. Defendants/Appellants.	BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WCC FILE NO. 9920867 **FORM 30 ADDENDUM OF DEFENDANTS KNEECE FARMS AND THE SOUTH CAROLINA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION**

The above captioned case was heard before Commissioner Derrick L. Williams on February 14, 2011. Commissioner Williams issued an Order determining the disputed issues among the parties on April 28, 2011. The Defendants/Appellants herein appeal the hearing Commissioner's findings and conclusions based on the following grounds for exception:

1. Whether the hearing Commissioner erred in overruling and denying the Defendants motion at the hearing to exclude the Claimant's Exhibit No. 4 as to certain payroll records, the error being these records were irrelevant to the issues before the Commission and were offered without a proper foundation?

2. Whether the hearing Commissioner erred as a matter of law in overruling and denying the Defendants motion to compel the Claimant to submit to an examination by a neurologist, and to postpone the hearing to permit time for such an examination, or in the alternative, erred as a matter of law a matter of law in permitting the Claimant to submit his own neurologist's reports while denying the opportunity to the Defendants to obtain the same?

3. Whether the hearing Commissioner erred in relying on evidence in the case that Claimant's wife (Roxanne Kneece) had been working on Delano R. Kneece & Son Farms, "since her husband's injury," when her employment with the Farm actually started after her mother in law stopped working for the farm and this finding is therefore inconsistent with the evidence.

4. Whether the hearing Commissioner erred in relying on evidence in the record regarding, the Claimant's familiarity with the farm finances vis a vis the fact that, "since the accident he is unable to manage the farm's finances," when the evidence indicated that the Claimant never actually managed the Farm's finances before or after his injury, nor served as its accountant/bookkeeper, as that job was handled by the Claimant's mother and his wife both before and after this accident?

5. Whether the hearing Commissioner erred in relying on evidence in the record that Kain Kneece, Claimant's son, now performs 95% of the duties that were performed by his father prior to the accident , when the Claimant simultaneously presented evidence that, (a) he still works more than eight hours per day as much as seven days a week, (b) several other farm hands – other than his adult son Kain – have had to be hired to perform the jobs that he, the Claimant, used to do prior to his accident, and (c) every manner of expensive new equipment has had to be purchased by the Delano R. Kneece & Son since the Claimant's accident in order to perform the tasks that Mr. Ricky Kneece used to perform for the farm?

6. Whether the hearing Commissioner erred in finding the existence and compensability of injuries to Claimant's zygomatic arch, thyroid, scarring and finger, the error being that Claimant failed to allege these injuries prior to the initial hearing before the Commission on January 11, 2005, these alleged injuries were not included in the Commission's prior order, and the Claimant is therefore barred from now raising these injuries by principles of *res judicata*, collateral etoppel, and/or law of the case?

7. Whether the Commissioner erred in giving no weight to the report of vocational rehabilitation specialist Cynthia P. Grimley, the error being that Mrs. Grimley is a

qualified expert in the field of vocational assessment and evaluations with many years of experience and training in that field?

8. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant's weight gain and hypothyroidism are causally related to and resulting from his compensable 1999 head injury, and that the Defendants are responsible for such treatment with Dr. Wicker and/or Dr. White for such treatment, when such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law?

9. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant's treatment with Dr. Shissias is causally related to the 1999 accident and resulting injuries, when such a finding is against the greater weight of the evidence in the record, and contrary to existing South Carolina case law?

10. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant's fall and fractured left metacarpal, and resulting treatment with Dr. Ugino is casually related to this 1999 accident and claim for benefits, when such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law?

11. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant is entitled to additional treatment based on the medical evidence and opinions of Dr. Shissias, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Defendants were precluded from the opportunity to obtain an evaluation of the Claimant with a neurologist prior to the hearing, particularly considering Defendant's motion to compel the same?

12. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the work performed by the Claimant with Delano R. Kneece & Son is sheltered employment that is benevolent in nature, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina

law, where the Claimant was not injured while working for Delano R. Kneece & Son, the Claimant has not worked for his employer, Kneece Farms, in any capacity since his injury and evidence of subsequent employment with another employer is irrelevant to a determination of this issue?

13. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the work performed by the Claimant with Delano R. Kneece & Son is not substantial or beneficial to the farm, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant has consistently worked in excess of 40 per week for the farm and, per his own testimony, and continues to perform similar duties with a similar work schedule as he did prior to this accident?

14. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the only basis for the Claimant obtaining a paycheck from the farm is the largesse of his family, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant returned to full time employment of the same or similar nature following his injury?

15. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that given the accommodations made by the Claimant's family farm in order to permit him to perform limited services, his employment with Delano R. Kneece & Son is not evidence that a stable job market exists for the services the Claimant provides the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law?

16. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that all wages paid to the Claimant by his current employer, Delano R. Kneece & Son, were actually not paid in the form of wages for any services rendered on behalf of the employer, but in fact constituted a gift, the error being that such a finding is against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant's wages were paid and taxed as actual earnings, he is an owner

of Delano R. Kneece & Son Farms, and Claimant has consistently reported his earnings to State and Federal taxing authorities?

17. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant is permanently totally disabled as a result of his 1999 injuries sustained with another employer, Kneece Farms, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant has returned to working the same or similar duties and schedule with another employer, and has consistently enjoyed increased earnings subsequent to his injury?

18. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant is entitled to life time benefits due to permanent and total disability with a physical brain injury pursuant to §42-9-10, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant is a self-employed owner of his own business whose earnings have continually increased since returning to work with another employer and Claimant failed to meet his burden of proof to establish loss of earning capacity per §42-9-10?

19. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant's employment is benevolent or sheltered in nature and, therefore, he is permanently totally disabled with a physical brain injury pursuant to §42-9-10, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant has ongoing employment with a subsequent employer, in a business which he owns, making higher wages, and South Carolina has not adopted the doctrine of sheltered or benevolent employment?

20. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law that the doctrine of benevolent or sheltered employment should be applied

in this case to support a finding of permanent and total disability, the error being that benevolent employment has never been recognized in South Carolina prior to this case?

21. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law that the doctrine of sheltered or benevolent employment should be applied in this case, the error being that the hearing Commissioner's ruling on this issue makes self employment tantamount to benevolent employment in that the Claimant could essentially provide benevolent employment to himself?

22. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the "Defendants are ordered to pay for those medications for which the Defendants are responsible to pay including medication for all causally related injuries[,]" and specifically Drs. Wicker, Shissias, Ugino and White, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant did not previously make a specific request for authorization or reimbursement for such medications or treatment, and instead sought unauthorized treatment without the knowledge of Defendants, precluding the Defendants' right to direct treatment as provided by the S.C. Workers' Compensation Act?

23. Whether the hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant is entitled to mileage reimbursement for 3,658 miles, the error being that such findings are against the greater weight of the evidence in the record, and contrary to South Carolina law where: (a) such mileage includes trips to the doctor's office or pharmacy for unauthorized medical visits or treatment, including treatment not causally related to the Claimant's compensable injuries, or for any reason prior to August 23, 2004; (b) the Claimant's failure to request such mileage benefits over the past 10 years which prejudiced the employer/carrier's ability to properly assess and evaluate these requests and gave rise to a *Laches* defense; (c) the Claimant failed to request authorization or evaluation from for the Defendants for treatment/prescriptions and diagnostics he sought – thus prejudicing the Defendants'/Appellants' opportunity to assess and evaluate these claims; and (d) the Claimant failed to submit properly itemized reimbursement requests to Defendants?

24. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant is entitled to in excess of $14,000.00 in reimbursement, to the degree that such reimbursement includes: (a) medication for unauthorized and unrequested medical visits or treatment; (b) medication for treatment or medication not causally related to these injuries; (c) is affected by the Claimant's own *laches* in failing to timely request such medical reimbursements over the past 10 years and has thereby removed the ability of the employer/carrier to properly assess and evaluate these requests; (d) when the Claimant sought treatment/prescriptions and diagnostics of his own accord for conditions or symptoms that were not previously accepted, but also for which he never requested treatment or evaluation from the Defendants – thus precluding the Defendants'/Appellants' from an opportunity to assess and evaluate these claims previously, the error being that such a finding is against the greater weight of the evidence in the record, and contrary to South Carolina law?

25. Whether the Claimant should be barred from reimbursement for all prescription medication not requested up to the date of the prior hearing before the Commission, January 11, 2005 based on the doctrines of *res judicata*, collateral estoppel and/or law of the case, in that the Claimant failed to raise this issue at the prior hearing before the Commission.

26. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant is permanently totally disabled with a physical brain injury pursuant to S.C. Code Ann. §42-9-10, the error being that such a conclusion is against the greater weight of the evidence in the record, and contrary to South Carolina law?

27. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant (based on permanent total disability, accompanied with a physical brain injury) is entitled to life time indemnity benefits from the date of his accident in November of 1999 onwards, the error being that such a conclusion is against the greater weight of the evidence in the record, and contrary to South Carolina law

where: (a) the Claimant has returned to work in the interim; (b) the Claimant executed a Form 17 in 2005; (c) this finding is inconsistent with the Commission's prior order issued on April 18, 2005; and (d) such lifetime indemnity benefits are presumptively for permanent indemnity and should not be available prior to attainment of maximum medical improvement?

28. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant was permanently totally disabled pursuant to the reasoning of *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003), the error being that such a conclusion is against the greater weight of the evidence in the record, and contrary to South Carolina law where the Claimant has returned to work with a subsequent employer, of which he is partial owner, and has worked for years at consistently higher earnings than prior to his injury?

29. Whether the hearing Commissioner erred as a matter of law, in applying the cases of *Stephenson v. Rice Services, Inc.* 323 S.C. 113, 473 S.E. 2d 699 (1996); *McCollum v. Singer Co.*, 300 S.C. 103, 386 S.E.2d 471(Ct. App. 1989); *Lyles v. Quantum Chemical Company* 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); *Wigfall v. Tideland Utilities, Inc.* 354 S.C. 100, 580 S.E. 2d 100 (2003) to make a conclusion that the Claimant is permanently totally disabled, the error being that such conclusions are against the greater weight of the evidence and/or contrary to and not supported by existing South Carolina law where the Claimant has signed a Form 17, has admitted returning to gainful employment in excess of 40 hours per week at a business in which he is self-employed, and is making a higher salary than prior to the injury?

30. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that the Claimant was permanently totally disabled under S.C. Code Ann. §42-9-10(C) entitling him to life time medical and indemnity benefits on that basis, the error being that such a conclusion is against the greater weight of the evidence and/or contrary to and not supported by existing South Carolina law?

31. Whether the hearing Commissioner erred in finding and concluding that Defendants are responsible for payment of past medical treatment provided by Dr. Shissias, Dr. Wicker, Dr. White, and Dr. Ugino and that Defendants are responsible for future medical care to be provided by Dr. Shissias, Dr. Wicker and Dr. Ugino, the error being that treatment provided by these physicians was without the knowledge or authorization of Defendants and in violation of the Defendants rights to direct medical treatment and to provide treatment for Claimant's causally related injuries pursuant to §42-15-60 and further that there is insufficient evidence to establish the need for such future medical treatment?

32. Whether the hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law, that the Defendants were responsible for all medical bills and prescriptions, as well as, mileages, submitted in the Claimant's Exb's. No's. 1 and 2, the error being that such conclusions are against the greater weight of the evidence in the record, and contrary to South Carolina law for the same reasons outlined herein above?

33. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that:

> Because the Claimant is totally and permanently disabled with physical brain damage as set out in S.C. Code Ann. §42-9-10 (C) he is entitled to payment of weekly compensation from the date of this November 22, 1999 accident. The Claimant has been paid 157 1/7 weeks of weekly compensation. The Defendants shall pay the Claimant for the remaining weeks of weekly compensation through the date of this order. The Defendants shall continue making weekly compensation to the Claimant in the amount of $461.67 per week for his lifetime.

the error being that such conclusions are against the greater weight of the evidence and/or contrary to and not supported by existing South Carolina law where such a finding awards the Claimant permanent indemnity benefits, (a) prior to his attainment of maximum medical improvement; (b) during a period in which the Claimant signed a Form 17 and returned back to full time work as a self-employed farmer at consistently higher earnings; (c) awards him permanent indemnity benefits while he was still actively treating and making medical progress; and (d) this finding is inconsistent with the

Commission's prior order dated April 18, 2005 finding that the Claimant returned to work as owner and operator by April 12, 2004?

34. Whether the hearing Commissioner erred in finding as a fact, and/or concluding as a matter of law, that"[t]he Claimant has benefited from the treatment of Dr. Lawrence H. Bergmann, Dr. Roger Deal, Dr. Charles Shissias, Dr. Christopher Wicker and Dr. Michael R. Ugino and pursuant to §42-9-10 (C) Claimant is entitled to continuing treatment by these physicians...for life. §42-9-10 (C)," the error being that such conclusions are against the greater weight of the evidence and/or contrary to South Carolina law where: (a) such treatment was not casually related to the Claimant's compensable injuries arising from his November 22, 1999 accident; (b) the proper standard is not whether a Claimant benefits from the treatment provided, but whether it is for treatment of symptoms and injures that are causally related to the work injury(s); (c) the Claimant sought treatment with unauthorized physicians without Defendants knowledge, thereby prejudicing the Defendants right to direct medical treatment under §42-15-60; and (d) there was insufficient evidence to establish the necessity for future medical treatment by some doctors?

35. Whether the hearing Commissioner erred in failing to award a credit for temporary indemnity benefits paid or awarded for all weeks of wages earned by the Claimant from his date of return to work until the date he was determined permanently totally disabled and/or reached maximum medical improvement pursuant to the evidence in the record and §42-9-210, §42-15-60 and South Carolina Law?

36. Whether the hearing Commissioner erred in failing to find that Claimant had reached maximum medical improvement before making an award for permanent disability, and/or a finding as to his date of attainment of maximum medical improvement?

37. Whether the hearing Commissioner erred in failing to award credit against permanent indemnity benefits awarded for all wages earned by the Claimant subsequent to reaching maximum medical improvement pursuant to the evidence in the record and §42-9-210, §42-15-60 and South Carolina Law?

38. Whether the hearing Commissioner erred in considering evidence that a reasonably stable market does not exist for the services Claimant provides for the family farm, the error being that such evidence is irrelevant where the Claimant is a self-employed owner of the farming operation and is entitled to earnings/profits of the farming operation and no evidence was offered that the Claimant has sought or will need to seek other employment?

39. Whether the hearing Commissioner erred in considering the opinions of Dr. Bill Stuart in connection with the determination of total disability, the error being that Dr. Stuart's opinions were conditioned on the concept of benevolent employment which is not consistent with the law in South Carolina?

Respectfully Submitted,

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January 26, 2011

VIA EMAIL & US MAIL
The Honorable Virginia Crocker
Judicial Director
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: Ricky Kneece v. Kneece Farms
WCC File No: 9920867 *DOI: 11/22/99*
Claim No.: L16755 *Our File No.: 5400-0032*

Dear Ms. Crocker:

Enclosed please find a Notice of Motion and Motion to Compel Medical Examinations and Vocational Evaluation and to Postpone Hearing along with supporting Memorandum. Also enclosed is a check in the amount of $25.00 for filing fees.

By copy of this letter to Scott Elliott, counsel for the claimant, I am serving him with the Motion and Memorandum.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Mark D. Cauthen

MDC/msb
Enclosures
cc: The Honorable Derrick L. Williams (Via Email & US Mail)
Scott Elliott, Esquire (Via Email & US Mail)
Randy Mason

COUNTY OF LEXINGTON	WORKERS' COMPENSATION COMMISSION
	WCC FILE NO. 9920867
Ricky Kneece, Claimant, vs.	**NOTICE OF MOTION AND MOTION TO COMPEL MEDICAL EXAMINATIONS AND VOCATIONAL EVALUATION AND TO POSTPONE HEARING**
Kneece Farms, Employer and	
Legion Insurance Co. in liquidation /SC Property & Casualty Insurance Guaranty Association, Carrier.	

TO: SCOTT A. ELLIOTT, ESQUIRE, ATTORNEY FOR CLAIMANT AND THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION:

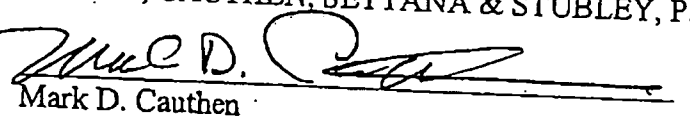
YOU WILL PLEASE TAKE NOTICE that the Employer/Carrier herein, by its undersigned attorney, hereby moves before the Commission, as soon as this matter can be heard, pursuant to S.C. Code Ann. §42-15-80 and Reg. 67-613, for an Order to compel medical examinations of the Claimant by a neuropsychologist and a neurologist as well as an evaluation with a vocational rehabilitation expert designated and paid by Defendants and to postpone the hearing currently scheduled for February 14, 2011. The grounds for this motion are that the Claimant seeks additional benefits under the Workers' Compensation Act for a work-related injury but has failed to comply/cooperate with Defendants requests for examinations/evaluations

experts despite Claimant's reliance upon the opinions of experts of the same type, as more fully set forth in the memorandum of law submitted herewith.

Pursuant to Rule 11, SCRCP, the undersigned hereby certifies that he has attempted in good faith to resolve the matters contained in this motion prior to filing.

Respectfully submitted,

MCKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

By: 

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Attorney for Employer/Carrier

Columbia, South Carolina
January 26, 2011.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WCC FILE NO. 9920867
Ricky Kneece, Claimant, vs. Kneece Farms, Employer and Legion Insurance Co. in liquidation /SC Property & Casualty Insurance Guaranty Association, Carrier.	**MEMORANDUM IN SUPPORT OF EMPLOYER/CARRIER'S MOTION TO COMPEL MEDICAL EXAMINATIONS AND VOCATIONAL EVALUATION AND TO POSTPONE HEARING**

Kneece Farms, Employer, and Legion Insurance Company in liquidation/SCPCIGA, Carrier, submit this memorandum in support of their motion to compel medical and vocational evaluations/examinations and to postpone the hearing currently scheduled for February 14, 2011.

FACTUAL BACKGROUND

The Claimant, Ricky Kneece, sustained compensable injuries on November 22, 1999 while employed by Kneece Farms, including injuries to his head/brain, left lower extremity and left upper extremity. The Defendants provided medical as well as indemnity benefits for the Claimant's injuries. On January 11, 2005, a hearing was held before Commissioner Childs to determine various issues including the Claimant's entitlement to ongoing medical treatment and

temporary total disability benefits. This hearing resulted in an order issued on April 18, 2005 that required Defendants to provide additional medical care for injuries to the Claimant's left knee and shoulder with Dr. Michael Green and treatment for the Claimant's closed head injury and depression with Dr. Randy Waid and Dr. Larry Bergmann. The Defendants continued to provide medical treatment pursuant to this order as well as ongoing TTD benefits. The Claimant subsequently signed a Form 17 agreeing that he was able to return to work as of 10/4/05 and that the Defendants were entitled to stop TTD payments as of that date. The Claimant was found to be at maximum medical improvement on 4/16/04 for the injury to his left lower extremity by Dr. James O'Leary and to have reached MMI for the injury to his left upper extremity by Dr. Michael Green on 9/23/04. The Claimant also was found to be at MMI by Dr. Waid on 2/8/07 and on 1/11/07 by Dr. Bergmann.

On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Claimant's examination to be "absolutely normal". Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. No further treatment was recommended by Dr. Adams and no further request was made to Defendants for treatment with a neurologist. Instead, the Claimant sought unauthorized treatment beginning in March 2010 with a provider of his own choice, Dr. Charles Shissias of Low Country Medical Group in Beaufort, S.C.

On July 9, 2010, the Claimant served a new Form 50 requesting additional medical treatment for multiple injuries and also alleging permanent and total disability based on a general disability/loss of earning capacity arising from the Claimant's injuries of 11/22/99. This was the

Claimant's first hearing request since the hearing before Commissioner Childs more than 5 years earlier. In support of his claim for total disability based on alleged loss of earning capacity, the Claimant relies on the opinions/reports of Dr. Randy Waid, a neuropsychologist and Dr. Charles Shissias, a neurologist. The Claimant also relies on the opinions of Dr. William Stewart, a vocational expert, in an attempt to establish loss of earning capacity.

A hearing was previously scheduled before Commissioner Williams on October 4, 2010 at which time the parties agreed to mediate this claim. Mediation was held on November 29, 2010 but was not successful.

On December 7, 2010, counsel for Defendants notified Claimant's counsel of a neuropsychological evaluation for the Claimant with Dr. Tora Brawley of University Specialty Clinics, Department of Neuropsychiatry and Behavioral Science, scheduled for January 4, 2011. (See Exhibit A). Instead of attending this appointment, Claimant's counsel wrote Dr. Brawley and improperly cancelled the evaluation without consent of the Defendants. Despite having more than three weeks notice of the evaluation with Dr. Brawley, Claimant's counsel waited until December 30, 2010 to cancel the evaluation set for January 4, 2011, insisting that he "talk with" Defendants expert before the evaluation. (See Exhibits B & C). The Claimant subsequently failed to show for the neuropsychological evaluation on January 4, 2011. Defendants contend that the failure to keep the scheduled appointment with Dr. Brawley on January 4, 2011 and belated notice of cancellation by Claimant's counsel were designed to improperly delay and obstruct Defendants right to the examination pursuant to S.C. Code Ann. §42-15-80.

Claimant's counsel subsequently agreed to the neuropsychological evaluation with Dr. Brawley which has been rescheduled for January 28, 2011. However, due to the delay

occasioned by Claimant's failure to comply with the original appointment on January 4, 2011, the report from Dr. Brawley's evaluation will not be available in time to submit with Defendant's APA Submissions for the hearing scheduled for February 14, 2011. (See letter from Dr. Brawley, Exhibit D (note that an evaluation scheduled for January 31, 2011 referenced in this letter has been moved up to January 28, 2011)).

On December 14, 2010, Counsel for Defendant wrote to Claimant's counsel requesting that the Claimant submit to an interview with Defendants vocational expert, Cynthia P. Grimley, and also requesting available dates for an interview. (See Exhibit E). Ms. Grimley also separately phoned and wrote to Claimant's counsel requesting available dates for the interview for her vocational evaluation. (See Exhibit F). Although Claimant's counsel indicated he spoke with Ms. Grimley in December and was "checking her references" he subsequently advised that he would not agree to make the Claimant available for a vocational evaluation with Defendant's expert.

Defendants also served a subpoena on December 10, 2010 for copies of updated tax returns of the Claimant for 2007 to present. (See Exhibit G). The due date for response to the subpoena was December 20, 2010; however, the documents requested by the subpoena have not been produced. On January 13, 2011, counsel for Defendants wrote to Claimant's counsel requesting that the outstanding documents specified in the subpoena be produced within the next seven days (See Exhibit H). To date however, Claimant has still not provided the tax records responsive to Defendant's subpoena.

Finally, on January 21, 2011, counsel for Defendants notified Claimant's counsel of a neurological examination scheduled for the Claimant with Dr. Ben Bashinski of Neurological Associates of Augusta, Georgia for February 4, 2011. Defendants also offered to provide

transportation for the Claimant to this appointment if needed. (Exhibit I). Claimant's counsel responded by letter dated January 24, 2011 that his client would not submit to the neurological evaluation with Dr. Bashinski. (Exhibit J).

ARGUMENT

Employer/Carrier assert they are entitled to have claimant examined by a neurologist, a neuropsychologist and a vocational rehabilitation consultant of their choice. These examinations are needed to independently assess the current status of Claimant's injuries and vocational abilities and to counter similar evidence relied upon by Claimant. S.C. Code Ann. §42-15-80 provides in pertinent part:

> After an injury and so long as he claims compensation, the employee, if so requested by his employer or ordered by the commission, shall submit himself to examination, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission. ... **If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute a proceeding under this Title shall be suspended until such refusal or objection ceases....**

This Section is clearly applicable to the neurological examination scheduled by Defendants with Dr. Ben Bashinski. Because the Claimant has refused to comply with this evaluation, the Claimant's right to further compensation benefits as well as his right to a hearing in this matter "shall be suspended until such refusal or objection ceases...". Section 42-15-80 is likewise applicable to the neuropsychological evaluation with Dr. Tora Brawley. Dr. Brawley is a licensed clinical psychologist and specializes in neuropsychology. Accordingly, Dr. Brawley has the same licensing and specialization as Claimant's neuropsychologist, Dr. Randy Waid. The opinions and reports of Doctors with such licensing and specialization have been treated as

medical evidence in Workers' Compensations proceedings related to physical brain injuries. *See Order of Comm. Bass, Dated November 2, 2005, W.C.C. File Number 0015768, Whitman, Employee, v. Standard Corporation, Employer, and North River Insurance Company, Carrier,* 2006 WL 2465460 (S.C. Work.Comp.Comm.)(listing Dr. Waid as one of six doctors who provided medical evidence to support a finding of a physical brain injury).

Although the Claimant has now agreed to the evaluation with Dr. Brawley on January 28, 2011, he nonetheless violated §42-15-80 by refusing to submit to and obstructing the original evaluation with Dr. Brawley scheduled for January 4, 2011. The original evaluation was scheduled at a "reasonable time and place" as required by §42-15-80 and with approximately four weeks notice to Claimant's counsel. Because the Claimant failed to show for the original evaluation when scheduled, it is not possible for Defendants to timely submit Dr. Brawley's evaluation report with their APA Submissions for the February 14th hearing due to the turnaround time. As indicated in Dr. Brawley's correspondence attached as Exhibit D, the report would already be available had the Claimant complied with the originally scheduled evaluation. Thus, based on Claimant's violation of the provisions of §42-15-80, the Claimant should be ordered to comply with the examinations of Dr. Bashinski and Dr. Brawley and the hearing in this matter should be cancelled pending the Claimant's compliance with these examinations. Furthermore, under the provisions of §42-15-80, the Claimant is statutorily barred from further benefits under the Workers' Compensation Act "until the refusal or objection ceases...".

Although §42-15-80 does not apply to the vocational evaluation with Defendant's expert, Cynthia Grimley, the Claimant should nonetheless be ordered to comply with this evaluation in the interest of fairness. The Claimant himself relies on the opinions of Dr. Bill Stewart, a vocational rehabilitation expert, to establish his claim for total disability based on loss of earning

capacity. The Claimant submitted new/updated opinions of Dr. Stewart in a report dated 9/10/10 along with his APA Submissions for the hearing previously scheduled for October 4, 2010. Defendants had no opportunity to respond to the opinions of Dr. Stewart set forth in this report prior to the October 2010 hearing, at which time the parties agreed to mediation. After mediation was unsuccessful on November 29, 2010, Defendants promptly notified Claimant's counsel of the request for a vocational evaluation with Defendant's expert, Cynthia Grimley.

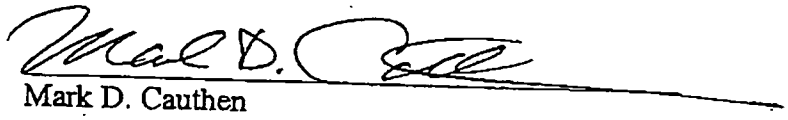
Dr. Stewart and Cynthia Grimley are both vocational rehabilitation consultants and are both board certified rehabilitation counselors. Inasmuch as the Claimant relies on the opinions of Dr. Stewart to support his claim for loss of earning capacity, equity and fairness dictate that the Employer/Carrier be permitted to respond to Claimant's expert's opinions with their own evidence of a similar type. Accordingly, the Claimant should be ordered to fully cooperate with the vocational evaluation with Cynthia Grimley. However, in the event that a vocational evaluation is not ordered, Ms. Grimley has indicated that the report from Dr. Brawley's neuropsychological evaluation will be necessary as part of the basis for her vocational opinions in this case. (See Exhibit K). Due to the delay occasioned by Claimant's failure to comply with the original date for the neuropsychological evaluation with Dr. Brawley, her report will not be available until close to the date of the hearing currently scheduled for February 14. Thus, in addition to Defendant's request that the hearing be cancelled due to Claimant's failure to comply with the requirements of §42-15-80, Defendants should also be permitted sufficient time for preparation of their vocational expert's report/opinions. Alternatively, Defendants move to exclude all reports of Dr. Bill Stewart.

CONCLUSION

For the foregoing reasons, the Defendants request an order compelling the Claimant to attend and cooperate with examinations to be conducted by Defendant's neurologist, neuropsychologist and vocational rehabilitation expert as set forth above. Defendants also request an order suspending Claimant's right to compensation benefits and cancelling the hearing scheduled for February 14, 2011 due to Claimant's noncompliance with the statutory mandates of §42-15-80 and in the interest of fairness. Alternatively, Defendants request an order excluding from evidence and barring from consideration all reports and opinions of Claimant's neuropsychologist, Dr. Randy Waid, his neurologist, Dr. Charles Shissias and vocational consultant, Dr. Bill Stewart. Finally, Defendants also request an order compelling production of the tax records specified in Defendant's subpoena dated December 10, 2010.

Respectfully submitted,

MCKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

By: 

Mark D. Cauthen
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorney for Employer/Carrier

Columbia, South Carolina
January 26, 2011

M. Stephen Stubley
Janet Brooks Holmes
Marcy J. Lamar
Erin M. Farrell
Peter P. Leventis
Temus C. Miles, Jr.
Meredith A. McMillan

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December 7, 2010

VIA EMAIL & US MAIL
Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201

Re: Ricky Kneece v. Kneece Farms
WCC File No: 9920867
Our File No.: 5400-0032

Dear Scott:

This letter is to advise you that an appointment for neuropsychological evaluation has been scheduled for your client, Ricky Kneece, for January 4, 2011 at 9:15 a.m. with Dr. Tora Brawley of University Specialty Clinics, Department of Neuropsychiatry and Behavioral Science. Dr. Brawley's office is located at 15 Medical Park, Suite 141 in Columbia, South Carolina. Please advise your client that testing with Dr. Brawley will begin promptly at 9:30 a.m. and to plan on staying until approximately 2:00 p.m.

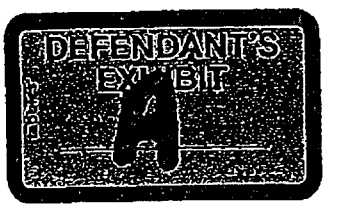
Please note that if your client "no shows or cancels" this appointment, there will be a charge of "$250.00" for the missed appointment. Enclosed is a letter from Dr. Brawley's office concerning the appointment.

If you should have any questions regarding this appointment, please let me know.

Very truly yours,

Mark D. Cauthen

MDC/msb
cc: Bill Morrison



From: Scott Elliott [selliott@elliottlaw.us]
Sent: Thursday, December 30, 2010 4:10 PM
To: 'Mark Cauthen'
Subject: RE: Ricky Kneece

Thank you for Dr. Brawley's resume. I have had a chance to review her resume and check her references. However, I have put a call into her to speak to her and have not heard back from her. Nor have I heard from her assistant to determine Dr. Brawley's availability later in the month. I will need to talk with Dr. Brawley before I am able to recommend to my clients that we meet with her but I don't want to run afoul of her cancellation policy.

I have talked with Mrs. Grimley and am checking her references. I will get back to you in the next several business days. In any event let's put off that Dr. Brawley interview. Thanks.

PS
I found the main number to Dr. Brawley's practice and was advised by the answering service that their offices are closed until January 4th. Do you have a contact number to cancel the January 4th appointment?

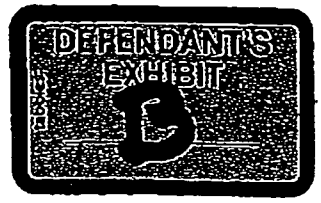
From: Mark Cauthen [mailto:mcauthen@mckayfirm.com]
Sent: Wednesday, December 22, 2010 4:20 PM
To: 'Scott Elliott'
Subject: FW: Ricky Kneece

Scott, attached is a CV for Dr. Tora Brawley. She is a neuropsychologist with the same qualifications as Randy Waid. They have been involved in lots of cases together on opposite sides. Although she is a PhD and not a physician, your client relies on the opinions of a neuropsychologist and such an expert is likely the most qualified to address the cognitive deficits from which your client allegedly suffers. I have also seen 42-15-80 applied to order evaluations of a psychologist numerous times; therefore, I fully expect the Commissioner would order the evaluation if we can't agree. I also think he would probably order your client to comply with a voc. assessment with Cindy Grimley. Since you rely on the voc assessment of Bill Stewart, that's only fair.

As far as the date for the eval w/ Dr. Brawley, that was the earliest time available and her schedule is predictably tight. It could be rescheduled, but that may require pushing the hearing back. Please let me know as soon as possible if you will agree with these evaluations. I am also awaiting an appointment date for an evaluation with a neurologist and I will let you know about this as soon as possible.
Thanks, Mark

From: Mary Bush [mailto:mbush@mckayfirm.com]
Sent: Monday, December 20, 2010 4:22 PM
To: 'Mark Cauthen'
Subject: Ricky Kneece

Mary S. Bush, Paralegal
McKay, Cauthen, Settana & Stubley, PA
1303 Blanding Street
PO Box 7217
Columbia, SC 29202-7217
(803) 256-4645 office
(803) 705-2156 direct dial



ELLIOTT & ELLIOTT, P.A.
ATTORNEYS AT LAW
1508 Lady Street
COLUMBIA, SOUTH CAROLINA 29201
selliott@elliottlaw.us

SCOTT ELLIOTT

TELEPHONE (803) 771-0555
FACSIMILE (803) 771-8010

December 30, 2010

VIA FAX & US MAIL
Ms. Janice P. Treisch
Neuropsychiatry &
Behavioral Science
15 Medical Park, Ste. 141
Columbia, SC 29203

RE: Ricky Kneece

Dear Ms. Treisch:

Please be advised that I represent Ricky Kneece. Mark Cauthen, the attorney for Mr. Kneece's employer, has scheduled an appointment for Mr. Kneece with Dr. Brawley for January 4, 2011, at 9:15 a.m. I have attempted to call your office today to discuss this appointment with Dr. Brawley and have not heard back. On behalf of Mr. Kneece, I am cancelling the January 4th meeting. Since I am cancelling more than 48 hours prior to be scheduled appointment, I trust that no late fee will apply.

Please call me upon receipt of this correspondence to discuss rescheduling. I look forward to hearing from you.

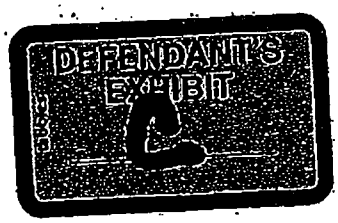
Sincerely,

Elliott & Elliott, P.A.

Scott Elliott

SE/jcl

cc: Mark D. Cauthen, Esq.



UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF MEDICINE

UNIVERSITY SPECIALTY CLINICS®

January 20, 2011

Mark D. Cauthen
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7217
Columbia, SC 29202

RE: Ricky Kneece Evaluation

Dear Mr. Cauthen,

As you are aware, the above captioned patient is scheduled to be evaluated in my office January 31, 2011. Due to the complexity of the evaluation, amount of materials that need to be reviewed and my schedule, the normal turn around time for reports of my findings is two weeks. This is standard for all of my evaluations. To further complicate things I will be in North Carolina from February 1- 4 for a family medical matter. Despite this, I will make sure that the report from this evaluation is completed within the two week period following the evaluation. You should have my report by February 14th.

I would like to point out that Mr. Kneece was originally scheduled for an evaluation with me on January 4, 2011 but did not attend this appointment due to attorney objections. Had Mr. Kneece attended his original appointment, you would already have received my report.

I thank you in advance for your understanding and cooperation.

Sincerely,

Tora Brawley, Ph.D.

NEUROPSYCHIATRY
AND BEHAVIORAL SCIENCE
15 Medical Park, Suite 141, Columbia, SC 29203
803-434-4300, FAX 803-434-4351

Daniel R. Settana, Jr.
M. Stephen Stubley

Janet Brooks Holmes
Marcy J. Lamar
Erin M. Farrell
Peter P. Leventis
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E-Mail
mms@mckayfirm.com
Web
www.mckayfirm.com

December 14, 2010

VIA EMAIL & US MAIL
Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201

Re: Ricky Kneece v. Kneece Farms
WCC File No: 9920867
Claim No.: L16755
Our File No.: 5400-0032

Dear Scott:

We have retained Cynthia P. Grimley to perform a vocational evaluation of Ricky Kneece in the above matter. Enclosed is a copy of Ms. Grimley's CV. Ms. Grimley is available to perform this evaluation on December 17, 2010 anytime this day or December 22, 2010 at 3:00 p.m. and is able to meet your client at his home, place of business or your office whichever is most convenient. If neither of these dates will work, please let me know when your client is available.

Thank you for your assistance with this matter.

Very truly yours,

Mark D. Cauthen

MDC/msb
Enclosure
cc: Cynthia P. Grimley
Bill Morrison

DEFENDANT'S EXHIBIT E

Cynthia P. Grimley & Associates, LLC

CYNTHIA P. GRIMLEY, MS, CRC, CCM, DABVE
REHABILITATION MANAGEMENT
VOCATIONAL EXPERT

December 27, 2010

Scott Elliott, Esq.
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201

Case name: Ricky Kneece vs. Kneece Farms

SENT CERTIFIED MAIL

Dear Mr. Elliott:

I have been requested by Mark Cauthen, Esq. to perform a Vocational Assessment on your client Ricky Kneece.

I left a voice message and sent you an email previous to this letter. I have not received a response from you.

I would request that I be able to meet with Mr. Kneece and his wife within the few weeks. I provided several dates but those dates have already passed. Please contact me so that we may schedule a convenient time. I would agree to meet with him at his home or your office. It is expected that this meeting would last 2 - 4 hours, depending if testing were required.

Thank you in advance for your cooperation.

Respectfully Yours,

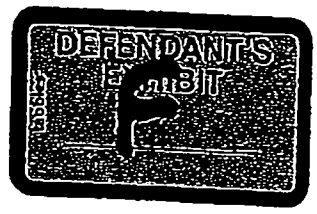
Cynthia P. Grimley

Cynthia P. Grimley, MS, CRC, CCM, D-ABVE
Certified Rehabilitation Counselor
Certified Case Manager
Board Certified-Diplomate; American Board of Vocational Experts

cc: Bill Morrison, SCPCIGA
Mark Cauthen, Esq.

CPG:dbe

100 Old Cherokee Road, Suite F-226 • Lexington, SC 29072
(803) 765-1513 • fax: (803) 753-9026
email: cgrimley@sc.rr.com • hhtp://www.cpgrimley.com



(803) 737-5700

Employer I.D. [redacted]

Ricky Kneece			[redacted]	Kneece Farms			
Claimant's Name			SSN	Employer's Name			
204 Delano Kneece Road	Pelion	SC	29123	1752 Juniper Springs Rd	Gilbert	SC	29054
Address	City	State	Zip	Address	City	State	Zip
( )				Legion Insurance Company/SCIGA			
Home Phone	Work Phone			Insurance Carrier			

Mark D. Cauthen — Preparer's Name
P.O. Box 7217, Columbia, South Carolina 29202-7217 — Address
803-256-4645 — Phone #

Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
To: Columbia, SC 29205

☐ YOU ARE COMMANDED to appear before the above named Commission at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY: _____ ROOM: _____

DATE AND TIME: _____

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION: _____ DATE AND TIME: _____

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

Copies of all State and Federal income tax returns with attachments, including all W-2s and 1099s for your client, Ricky Kneece, SS#250-11-3236, for tax years 2007 to the present

PLACE: Mark D. Cauthen, Esquire, PO Box 7217, Columbia, SC 29202-7217 DATE AND TIME: December 20, 2010

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES: _____ DATE AND TIME: _____

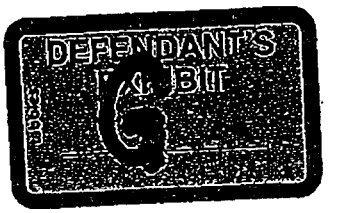
THIS SUBPOENA SHALL REMAIN IN EFFECT UNTIL YOU ARE GRANTED PERMISSION TO DEPART BY THE COMMISSIONER OR AN OFFICER ACTING ON BEHALF OF THE COMMISSIONER. QUESTIONS CONCERNING THIS SUBPOENA SHOULD BE ADDRESSED TO THE ISSUING OFFICER.

Mark D. Cauthen, Attorney for Employer/Carrier
ISSUING OFFICER'S SIGNATURE AND TITLE

803-256-4645
PHONE#

December 10, 2010
DATE

Serve this form according to R.67-212B. Refer to R.67-212 and R.67-214 for additional information. Procedural questions may be addressed to the Judicial Department (803/737-5675).



27

WCC FORM # 27 . REV. DATE 3/96

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stubley

Janet Brooks Holmes
Marcy J. Lamar
Erin M. Farrell
Peter P. Leventis
Temus C. Miles, Jr.
Meredith A. McMillan

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

P.O. Box 7217
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1303 Blanding Street
Columbia, South Carolina 29201

Douglas McKay, Jr.
(1917-2098)

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(803) 765-1839
E-Mail
mms@mckayfirm.com
Web
www.mckayfirm.com

January 13, 2011

VIA EMAIL & US MAIL
Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201

Re: Ricky Kneece v. Kneece Farms
WCC File No: 9920867
Claim No.: L16755
Our File No.: 5400-0032

Dear Scott:

As you know, I previously served a subpoena on December 10, 2010 for copies of updated financial records of your client from 2007 to present. The due date for production of these records was December 20, 2010; however, to date, we have received no response. I would appreciate it if you would provide me with the documents responsive to the subpoena within seven (7) days of the date of this letter so that we may avoid the trouble and expense of a motion to compel.

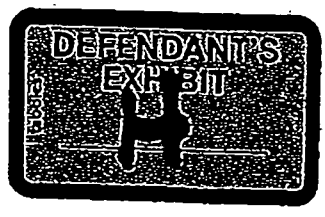
Thank you for your cooperation in this matter.

Very truly yours,

Mark D. Cauthen

MDC/msb

cc: Randy Mason



Daniel R. Senana, Jr.
M. Stephen Stubley
Janet Brooks Holmes
Marcy J. Lamar.
Erin M. Farrell
Peter P. Leventis
Ternus C. Miles, Jr.
Meredith A. McMillan

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Web
www.mckayfirm.com

January 21, 2011

VIA EMAIL & US MAIL
Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201

Re: Ricky Kneece v. Kneece Farms
WCC File No: 9920867
Our File No.: 5400-0032

Dear Scott:

This letter is to notify you of a neurological evaluation which has been scheduled for your client, Ricky Kneece, on February 4, 2011 at 1:15 p.m. with Dr. Ben Bashinski, M.D. of Neurological Associates of Augusta. Dr. Bashinski's office is located at 1210 Roy Street in Augusta, Georgia 30909. Should your client need transportation to this appointment, please contact our office and we will make the arrangements with the carrier.

Please make sure your client is notified of this appointment and ask that he bring his picture ID with him to this appointment.

If you should have any questions or concerns regarding this appointment, please contact me.

Very truly yours,

Mark D. Cautheri

MDC/msb

cc: Randy Mason

DEFENDANT'S EXHIBIT

ELLIOTT & ELLIOTT, P.A.
ATTORNEYS AT LAW
1508 LADY STREET
COLUMBIA, SOUTH CAROLINA 29205
selliott@elliottlaw.us

SCOTT ELLIOTT

TELEPHONE (803) 771-0555
FACSIMILE (803) 771-8010

January 24, 2011

VIA EMAIL&US MAIL
Mark D. Cauthen, Esquire
McKay, Cauthen, Settana
Martin & Addison, P.A.
P. O. Drawer 7217
Columbia, SC 29202

RE: D. Ricky Kneece
WCC File No: 5920867
Claim No.: L16755

Dear Mark:

I am in receipt of your correspondence of January 21, 2011 wherein you advise that you have scheduled a neurological evaluation for Ricky Kneece with a Dr. Ben Bashinski. As I advised you in a recent email, Mr. Kneece would decline to submit to any further neurological evaluation. When we asked your client to refer Mr. Kneece to a neurologist for treatment in 2008, your client referred him to Dr. Julian Adams, who refused to treat Mr. Kneece. As you are aware, Mr. Kneece is treating with Dr. Charles Shissias, a neurologist in Beaufort, South Carolina. Mr. Kneece would be happy for you to authorize continuing treatment with Dr. Shissias. Your client certainly has had ample opportunity to assist Mr. Kneece with his treatment and has declined to do so (for instance, your client has refused to pay for the medications prescribed by Dr. Deal, the authorized treating psychiatrist). The final hearing in this matter is set for February 14, 2011. No useful purpose would be served by submitting to an evaluation by a neurologist of your choice at this time.

If you have questions, please feel free to contact me.

Sincerely,

ELLIOTT & ELLIOTT, P.A.

Scott Elliott

SE/jrw

CYNTHIA P. GRIMLEY, MS, CRC, CCM, DABVE
REHABILITATION MANAGEMENT
VOCATIONAL EXPERT

January 26, 2011

Mark Cauthen, Esq.
McKay, Cauthen, Settana & Stubley
1303 Blanding, Street
Columbia, SC 29201

RE: Ricky Kneece

Dear Mr. Cauthen:

I understand that there has been a delay in obtaining Dr. Brawley's neuropsychological evaluation on Mr. Kneece. Given the fact, that Dr. Brawley will not be evaluating Mr. Kneece until January 28, 2011 and her report will follow approximately two weeks later I am requesting that I postpone my vocational evaluation until after her report is finalized. It is very important that I have this updated information especially because the injury Mr. Kneece sustained is a brain injury. It is of most importance that an updated neuropsychological evaluation be obtained so that I may consider his current functional levels as is relates to his vocational capacity.

Respectfully submitted,

Cynthia P. Grimley, MS, CRC, CCM, DABVE
Vocational Expert

cc: Randy Mason, SCPCIGA

100 Old Cherokee Road, Suite F-226 • Lexington, SC 29072
(803) 765-1513 • fax: (803) 753-9026
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COLUMBIA, SC 29202

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South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739
www.wcc.sc.gov

Carrier #: L16755
Carrier Code #: 148-N
Employer FEIN #: 57-0934134

Claimant's Name: Ricky Kneece SSN: [redacted]
Address: 204 Delano Kneece Road
City: Pelion State: SC Zip: 29123
Home Phone: Work Phone: ( ) -
Date of Injury: 11/22/99

Employer's Name: Kneece Farms
Address: 1752 Juniper Springs Road
City: Gilbert State: SC Zip: 29054
Insurance Carrier: Legion Insurance Co. in liquidation/SCPCIGA

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

Date of Injury or Illness: 11/22/99

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

1. It is admitted the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
   Admit claimant sustained injuries as alleged in Form 50 pursuant to prior Order of the Commission.
2. It is admitted both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
3. It is admitted the relationship of employer and employee existed at the time in question. The reasons for denial are:
4. It is admitted at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
5. It is admitted notice of injury was given the employer. The reasons for denial are:
6. It is denied the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
   All necessary and appropriate medical care has been provided.
7. It is denied the employee is entitled to temporary total disability for the period(s) of :
   All required TTD benefits were paid. Claimant returned to work and signed Form 17 effective 10/4/05.
8. It is denied the employee is permanently disabled. The reasons for denial are:
   The employer/carrier will require proof of permanent disability
9. It is denied the employee has serious disfigurement.
10. It is contended that an average weekly wage of **$ Form 20** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are:
    All defenses under 42-9-60; 42-15-20; 42-15-40; 42-15-60; 42-15-80; 42-17-90; 42-1-160; 42-9-210 and §38-31-10 et. seq., Code of Laws of South Carolina, 1976. Defendant/Carrier also reserves the right to amend this Answer.
12. Estimated time needed for hearing: 1 Hour

SCWCC
AUG 11 2010
JUDICIAL

I certify I have served this document pursuant to R.67-212 by delivering a copy to:
Name: Scott Elliott, Esquire
Address: Elliott & Elliott, PA 1508 Lady Street, Columbia, SC 29201
on the 9th day of August, 2010 by ☒ first class mail ☐ personal service ☐ certified mail.
I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature — Attorney for Employer/Carrier — Title — mcauthen@mckayfirm.com — Email — August 9, 2010 — Date

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

WCC Form # 51
Revised 9/07

51

Employer's Answer to Request for Hearing

000528

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5739
www.wcc.sc.gov

Carrier Case #: L16755
Carrier Case #: 148-N
Employer FEIN #: 57-0934134

Claimant's Name: Ricky Kneece SSN: [redacted]
Address: 204 Delano Kneece Road
City: Pelion State: SC Zip: 29123
Home Phone: Work Phone: () -
Date of Injury: 11/22/99

Employer's Name: Kneece Farms
Address: 1752 Juniper Springs Road
City: Gilbert State: SC Zip: 29054
Insurance Carrier: Legion Insurance Co. in liquidation/SCPCIGA

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

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

Date of Injury or Illness: 11/22/99

1. It is **admitted** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
Admit claimant sustained injuries as alleged in Form 50 pursuant to prior Order of the Commission.

2. It is **admitted** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:

3. It is **admitted** the relationship of employer and employee existed at the time in question. The reasons for denial are:

4. It is **admitted** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:

5. It is **admitted** notice of injury was given the employer. The reasons for denial are:

6. It is **denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
All necessary and appropriate medical care has been provided.

7. It is **denied** the employee is entitled to temporary total disability for the period(s) of :
All required TTD benefits were paid. Claimant returned to work and signed Form 17 effective 10/4/05.

8. It is **denied** the employee is permanently disabled. The reasons for denial are:
The employer/carrier will require proof of permanent disability

9. It is **denied** the employee has serious disfigurement.

10. It is contended that an average weekly wage of **$ Form 20** applies, according to attached Form 20 as provided by law.

11. Further contentions, grounds of defense, or unusual aspects are:
All defenses under 42-9-60; 42-15-20; 42-15-40; 42-15-60; 42-15-80; 42-17-90; 42-1-160; 42-9-210 and §38-31-10 et. seq., Code of Laws of South Carolina, 1976. Defendant/Carrier also reserves the right to amend this Answer.

12. **Estimated time needed for hearing:** 1 Hour

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

Name: Scott Elliott, Esquire
Address: Elliott & Elliott, PA 1508 Lady Street, Columbia, SC 29201
on the 9th day of August, 2010 by ☒ first class mail ☐ personal service ☐ certified mail.
I verify the contents of this ~~form~~ are accurate and true to the best of my knowledge.

Mark D. Cauthen — Preparer's Signature
Attorney for Employer/Carrier — Title
mcauthen@mckayfirm.com — Email
August 9, 2010 — Date

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

South Carolina Workers' Compensation Commission
P.O. Box 1715 ☐ 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # 9920867
Carrier File # L16755
Carrier Code # 148-N
Employer FEIN 57-0934134

D. Ricky Kneece [redacted] SSN
Claimant's Name

204 Delano Kneece Road Pelion S.C. 29123
Address City State Zip

(803) 894-3280 (803) 894-3418
Home Phone # Work Phone #

Kneece Farms
Employer's Name

1752 Juniper Springs Road Gilbert S.C. 29054
Address City State Zip

SC Guaranty for Legion Insurance Company
Insurance Carrier

(803) 771-0555
Phone #

ELLIOTT & ELLIOTT, P.A.
Preparer's Name

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

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

1a. That Claimant sustained an accidental injury to head, brain, face, left shoulder, left arm, nasal passages, sinus, left eye and left leg (Part of body hurt) on 11/22/99 (month day year) of in Lexington County, State of South Carolina.

1b. Describe briefly how the accident occurred Claimant was attempting to change a flat tire on a motorgrader when the tire exploded, injuring his head, brain, face, left shoulder, left arm, nasal passages, sinus, left eye and left leg

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of the injury.

3. The relationship of employer and employee existed at the time of the injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the employer on 11/22/99 in the following manner:
Employer witnessed the accident

[X] 6. Due to the injury, the claimant is in need of (check one):
[ ] (a) medical examination and treatment for
[X] (b) additional medical examination and treatment for head, brain, face, left shoulder, left arm, nasal passages, sinus, left eye and leg injury

[X] 7. Due to the injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: to be determined

[X] 8. Due to the injury, the claimant has permanent disability of the following nature and extent: (check one)
[X] (1) General Disability [X] Total [ ] Partial
[ ] (2) Specific Disability [ ] Total [ ] Partial

Body part(s) affected are: head, brain, face, left shoulder, left arm, nasal passages, sinus, left eye and left leg

[ ] 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of

10a. At the time of injury the claimant was paid weekly wages of $461.67; and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident.
Delano R. Kneece & Son, Inc. 209 Delano Kneece Road, Pelion, SC 29123

11a. Further grounds of claim:

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident. see attachment A

11c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe:

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers Compensation Commission may direct as just and proper.

[ ] 13a. I am filing a claim. I am not requesting a hearing at this time.
[X] 13b. I am requesting a hearing.

Signature of Claimant/Representative

July 9, 2010
Date

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC FORM #50 Rev.Date 9/90 **Employee's Notice of Claim and/or Request for Hearing.**

50

000530

South Carolina Workers' Compen. ion Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

C File # 9920867
Carrier File # L16755
Carrier Code #
Employer FEIN 570934134

Ricky Kneece [redacted]
Claimant's Name SSN

204 Delano Kneece Road Pelion, SC
Address City State Zip

()
Home Phone Work Phone

Kneece Farms
Employer's Name

1752 Juniper Springs Road Gilbert, SC 29054
Address City State Zip

SCPCIGA/Legion Insurance in Liquidation
Insurance Carrier

Request for Commission Review by ☐ claimant ☒ employer (check one) Date of injury: 11/22/99

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

1. Did the Single Commissioner err in finding the Claimant's depression as a compensable injury and awarding past and future medical treatment; the error being that this finding is not supported by the evidence?
2. Did the Single Commissioner err in finding the Claimant's left shoulder injury as a compensable and awarding past and future medical treatment; the error being that this finding is not supported by the evidence?
3. Did the Single Commissioner err in finding the Claimant's left elbow injury as a compensable and awarding past and future medical treatment; the error being that this finding is not supported by the evidence?
4. Did the Single Commissioner err in not awarding an offset or credit for TTD paid where the Claimant has been receiving a salary since the time of injury?
5. Did the Single Commissioner err in finding that the Claimant was not at MMI for his causally related injuries; the error being that the medical evidence supported a finding of MMI?
6. The Single Commissioner erred in finding that defendants were estopped to assert a setoff for salary received by Claimant while also receiving TTD benefits; the error being such finding is inconsistent with the Workers' Compensation Act.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that Lorna Manglona-Williams I have served this document pursuant to R.67-211 by delivering a copy to Scott A. Elliott, Esquire
Name

721 Olive Street, Columbia, SC 29205
Address

on the 3 day of May 2005 by ☒ first class mail; ☐ personal service; ☐ certified mail.

M. Stephen Stubley
Preparer's Signature

Attorney for Employer/Carrier
Title

May 3, 2005
Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701 B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 9920867
Carrier File # L16755
Carrier Code # 00148
Employer FEIN 570934134

Ricky Kneece [redacted] SSN
Claimant's Name

204 Delano Kneece Road Pelion, SC
Address City State Zip

( ) ( )
Home Phone Work Phone

Kneece Farms
Employer's Name

1752 Juniper Springs Road Gilbert, SC 29054
Address City State Zip

SCPCIGA/Legion Insurance in Liquidation
Insurance Carrier

Edwin P. Martin, Jr. (803)256-4645
Preparer's Name Phone #

The date of injury reported on the From 12A is: 11/2/2/99

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

☒ I. **Stop payment of compensation.** Compensation payments are current as of 11/9/04 (date) and shall continue until otherwise ordered or until a Form 17 is signed by the claimant. A Form 17 was offered and refused on. 11/04/04 (date)

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

☐ II. **Terminate temporary compensation suspended per R.67-505.** Date suspended: _____.
The basis for suspension of benefits is (check one):
☐ (a) The claimant refuses medical treatment.
☐ (b) The employer states the claimant is working, has worked for at least fifteen calendar days, and the claimant refuses to sign the Form 17. Requesting: ☐ Informal Conference ☐ Hearing

☐ III. **Pay compensation** in the amount of $ _____, based on the following grounds: _____.

☒ IV. **Request Credit for overpayment of temporary compensation.**

☐ V. **Reduce Payment of compensation** from $ _____ to $ _____, based on the following grounds: _____.
Compensation payments are current as of _____ (date) and shall continue until otherwise ordered or until a Form 17 is signed by the claimant.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Scott A. Elliott
721 Olive Street, Columbia, SC 29205

On the 5th day of November, 2004 by X first class postage, ____certified mail, ____personal service.

Preparer's Signature Attorney (Title) November 5, 2004 (Date)

PO Box 7217, Columbia, SC 29202
Address

The claimant may respond by writing the preparer at the address above and filing a copy of the response with the Commission's Judicial Department at the address at the top of the form. Refer to R.67-208, R.67-21 1, R.67-505, R.67-506. and R.67-601 - R.67-616. Questions about the use of this form should be directed to the Judicial Department at (803) 737-5675.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

File # 9920867
Carrier File # L16755
Carrier Code # 00148
Employer FEIN 570934134

Ricky Kneece [redacted]
Claimant's Name SSN

204 Delano Kneece Road Pelion, SC
Address City State Zip

( ) ( )
Home Phone Work Phone

Kneece Farms
Employer's Name

1752 Juniper Springs Road Gilbert, SC 29054
Address City State Zip

SCPCIGA/Legion Insurance in Liquidation
Insurance Carrier

Edwin P. Martin, Jr. (803)256-4645
Preparer's Name Phone #

The date of injury reported on the From 12A is: 11/2/2/99

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

☒ I. **Stop payment of compensation.** Compensation payments are current as of 11/9/04 (date) and shall continue until otherwise ordered or until a Form 17 is signed by the claimant. A Form 17 was offered and refused on 11/04/04 (date)

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

☐ II. **Terminate temporary compensation suspended per R.67-505.** Date suspended: _____.
The basis for suspension of benefits is (check one):
☐ (a) The claimant refuses medical treatment.
☐ (b) The employer states the claimant is working, has worked for at least fifteen calendar days, and the claimant refuses to sign the Form 17. Requesting: ☐ Informal Conference ☐ Hearing

☐ III. **Pay compensation** in the amount of $ _____, based on the following grounds: _____

☒ IV. **Request Credit for overpayment of temporary compensation.**

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

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

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Scott A. Elliott
721 Olive Street, Columbia, SC 29205

On the 5th day of November, 2004 by X first class postage, ____ certified mail, ____ personal service.

Preparer's Signature — Attorney (Title) — November 5, 2004 (Date)

PO Box 7217, Columbia, SC 29202
Address

The claimant may respond by writing the preparer at the address above and filing a copy of the response with the Commission's Judicial Department at the address at the top of the form. Refer to R.67-208, R.67-21 1, R.67-505, R.67-506. and R.67-601 - R.67-616. Questions about the use of this form should be directed to the Judicial Department at (803) 737-5675.

SCWCC NOV 0 8 2004 JUDICIAL

STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
CASE NUMBER - 9920867

RICKY KNEECE,	)	
	)	
CLAIMANT,	)	HEARING
	)	
VS.	)	BEFORE
	)	
KNEECE FARMS,	)	COMMISSIONER WILLIAMS
	)	
EMPLOYER,	)	
	)	
LEGION INSURANCE COMPANY,	)	
	)	
CARRIER,	)	
	)	
DEFENDANTS.	)	
	)	

COPY

WORKERS' COMPENSATION COMMISSION HEARING TAKEN BEFORE NADINE A. GARRETT, A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 3:00 PM ON FEBRUARY 14, 2011, AT COUNTY COURT HOUSE ANNEX, 102 COURT HOUSE DRIVE, ST. MATTHEWS, SOUTH CAROLINA.

NADINE A. GARRETT
COURT REPORTER
POST OFFICE BOX 1205
IRMO, SOUTH CAROLINA 29063
803-834-3410

APPEARANCES

FOR THE CLAIMANT
SCOTT A. ELLIOTT, ESQUIRE
ELLIOTT & ELLIOTT, P.A.
1508 LADY STREET
COLUMBIA, SC 29201
803-771-0555

FOR THE CARRIER
MARK DAVIS CAUTHEN, ESQUIRE
MCKAY CAUTHEN SETTANA & STUBLEY, PA
POST OFFICE BOX 7217
COLUMBIA, SOUTH CAROLINA 20202
(803)256-4645

NADINE A. GARRETT
COURT REPORTER
POST OFFICE BOX 1205
IRMO, SOUTH CAROLINA 29063
803-834-3410

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EXHIBIT

DEFENDANTS EXHIBIT NO. 1.....104

CERTIFICATION.....108

THE COURT: Today's date is Valentine's Day, 2011. Workers' Compensation Case of Mr. Ricky Kneece versus Kneece Farms. Legion is the Carrier. It's in liquidation. South Carolina Property and Casualty Insurance Company also noted on the File as the Carrier. WCC File No. 9920867. Date of accident way back on November 22, 1999. Hearing is set on the Forms 50 and 51.

Present for the Claimant is Attorney Scott Elliott. Present for the Employer and Carrier is Attorney Mark Cauthen.

Ratings would be listed on the prehearing briefs certainly in the file.

Average weekly wage is $769.23 with a corresponding comp rate of $461.67.

I do have APA submissions handed up from the parties and - a lot of APA pages as well as a lot of - a memo of law from the Employer/Carrier and several cases, the Wigfall case, the Reed-Richards case, the Stephenson case, the Wynn case. I think that's it. Any objection to jurisdiction, venue or the APA submissions? Mr. Elliott?

MR. ELLIOTT: No, sir. None from the Claimant.

THE COURT: All right. Mr. Cauthen?

MR. CAUTHEN: We have one objection to APA

submissions.

There is, in the Claimant's submissions, a section, which lists - which purports to be transactions, payroll transactions, payroll costs of Delano Kneece & Son Farms. You will see that I think with their first initial APA submission. These particular documents, while they don't give any further detail as to help us substantiate exactly where those come from, they do indicate all transactions. I don't know whether, you know - it looks to me like these list all payroll transactions for a long, long period of time.

The purpose of placing that in, as I understand, is to argue that the Claimant has sustained increased expenses and overhead as a result of his injuries by having to hire others and so forth. We would move to exclude that as irrelevant, as that is not an element that the Workers' Compensation Act can provide recovery for, benefits for. Either he can establish a loss of earning capacity or not. And that is their total - that is their theory, as I understand it, of permanent total disability in this case, is loss of earning capacity under 42-9-10.

You know, the tax records and the W-2s show what the earnings are of joint tax records as well as W-2's

for most of the years. Those will show - it's our position that there has been no diminution or loss of earnings whatsoever. So, those expenses, unless they affected that bottom line, which their - you know, the W-2's would contradict that, they are just not relevant at all. It's not something that you can compensate the Claimant for. So, we move to exclude those as well as any testimony regarding the amount of expenses.

I understand they are going to testify about accommodations they have had to make, which I don't have an objection to. But as far as the cost of accommodations, the cost of overhead, increased overhead, that's just not something that the Workers' Compensation Act can compensate the Claimant for.

THE COURT: Okay. Mr. Elliott?

MR. ELLIOTT: It's exhibit 4, E4, on my September 29 supplemental brief.

Mr. Cauthen misapprehends the nature of these exhibits. He is correct, we will show that the farm itself made any number of accommodations so as to permit Mr. Kneece, the Claimant to draw a check.

What these records represent, and Ms. Kneece, who is the treasurer, among other things of Delano Kneece Farms, Incorporated, will testify that these

individuals were hired by his employer, his employer, not the Defendant, to do the work that Mr. Kneece had been able to do prior to 1999 and his accident. So, they are not for the purposes of establishing some sort of damages, if I understood the argument. It simply will demonstrate to the Commissioner that the individuals here were hired by Delano Kneece Farms to do work that the Claimant would have been able to do, but the Claimant is no longer able to do.

THE COURT: Okay.

MR. ELLIOTT: That will be part of just a sort of a long series of accommodations that Delano Kneece Farms has made to permit Mr. Kneece to be on the farm and to do things on the farm and to -

THE COURT: Okay.

MR. ELLIOTT: So, that's all it is. And Ms. Kneece will testify as to those details.

THE COURT: Let's leave them in for now. I'm not ruling on the relevance of them. But obviously I've got a whole stack of things, so I'm going to leave them in for now and see if I have any issues with it.

MR. ELLIOTT: Yes, sir.

THE COURT: Any other objections outside -

MR. CAUTHEN: No other objections, but just as a preliminary matter and for the record we do want to

renew our motion to compel and postpone the hearing based upon a motion we filed a couple of weeks ago.

Which our position is that the Employer/Carrier has an absolute right to an independent medical evaluation by a neurologist under 42-15-80, that that was - timely notice was given of that evaluation. The Claimant refused it and is in violation of that Section.

As a consequence per that statute, the mandatory language of that statute, he's not even entitled to this hearing until he complies. So, we would renew the motion to compel that and to postpone the hearing as a consequence.

THE COURT: Okay. Let me hear you on that, Mr. Elliott?

MR. ELLIOTT: As set out in my return to the motion, the matter was - the injury occurred in 1999. We had a hearing in 2005. At the hearing, Dr. Wade - the Employer/Carrier had the benefit of Dr. Wade's report, had the benefit of Dr. Stewart's report, had the benefit of Dr. Lenwood Smith's report, the neurologist. The Claimant had to file a 50 seeking treatment by the orthopedists, who have now treated him and given ratings, also to obtain treatment for his admitted physical brain injury. Drs. Bergmann and

Deal have been working with the Claimant since 2005.

In February 2008, as I pointed out on Dr. Deal's note, the Claimant sought - because of his continuing difficulties, sought an examination by a neurologist. The Carrier chose to send him to Dr. Adams. And we've discussed that. They have had the benefit of Dr. Adams' report.

Not being satisfied with Dr. Adams' report, we sought out the services of our own neurologist, Dr. Shissias, who has seen the Claimant on at least two occasions. They have had the benefit of Dr. Shissias' initial report since last September.

As a practical matter, I don't know who this neurologist is. They have simply sent a letter setting an appointment without any kind of vitae or any kind of explanation as to who this doctor is.

Moreover, this record will reflect that, even though Dr. Deal and Dr. Bergmann were ordered to - that the Carrier was ordered to provide services through Dr. Deal and Bergmann, they have been paying for Deal and Bergmann's consulting, but they have not paid for Dr. Deal's medications that have been prescribed. And they have been asked to pay for them and they have simply declined for no reason.

And so, I would submit to you that they are too

late and that their intentions are suspect. The Statute does not permit success of evaluations as a trial tactic. The Singleton case stands for that proposition. So, I would urge that the Commissioner deny the motion.

THE COURT: All right.

MR. CAUTHEN: Can I address some of that?

THE COURT: Yeah, go ahead. Briefly.

MR. CAUTHEN: Commissioner, first of all, the evaluation with Dr. Adams was back in 2008. We would be - our position is that of course 42-15-80 does not limit a Carrier to one evaluation. Plus that evaluation with Dr. Adams was at their request. It was not truly just an independent medical evaluation.

We did not receive the reports of the unauthorized treating doctor that has not become involved, Dr. Shissias, until we received APA submissions submitted in connection with our prior hearing set in October. And really no opportunity since we subsequently mediated the case. We didn't - there is no reason to try to set that up prior to mediation. That we be entitled to respond to that.

There's no limit given by 42-9-80 as to when the evaluation is to be set. And it doesn't limit it to one evaluation, even if there was a prior evaluation

technically. The only time limitation is that reports be submitted timely under the APAs. And we had the opportunity to do that, had they complied with the evaluation with the neurologist, Dr. Bashinski in Augusta, but they - as the documentation we submitted indicates, they refused. And I just think that forecloses the right to go forward on the merits of this hearing until they have complied.

The Defendants certainly take issue with the suggestion Defendants have refused to pay for medical expenses. To my knowledge, all medical expenses provided by the prior order or previously authorized have been provided.

Now, there is an issue with prescriptions. As far as I know, Defendants have - we certainly authorized, following the last hearing, all the treatment with Drs. Green and Drs. O'Leary, Drs. Bergmann and Drs. Deal. That's all been provided and paid for to my knowledge. I don't have any notice from the other side that hadn't been paid for.

There is a list of prescriptions that's submitted with the APAs that we take issue with. They go all the way back to 1999. And, of course, we certainly you will see - I think the copies submitted to the Commission, I know our copy is highlighted. My

understanding is the highlighted - and this was provided by Mr. Elliott's office. The highlighted scripts, and this is going back to 1999 now, are related and the others are not. So, it's a related and unrelated list. We didn't receive that list and didn't have notice that there are apparently unpaid scripts going all the way back to 1999 until service of the APAs for the October hearing.

Number one, that issue was not previously raised. Non-payment of prescriptions was not previously raised by the Claimant in the 2005 hearing. And so anything prior to that, it would be our position, would be barred by principals of Res Judicata, failure to raise it at that time.

We have no objection to paying for causally related scripts subsequent to that time provided that we have sufficient documentation to pay them. That is our position on that.

THE COURT: Okay. I think I issued an admin order on that issue February 10th. Part of the reason I did that is due to the long time period of this case. Were obviously here. Part of what I - and maybe I said it when we were last here. Part of the reason I gave the parties a chance to mediate this case was to try to get it worked out. But during that

interim any scheduled visits hopefully would have been - could and would have been done.

But we are going to go ahead and go forward. That is noted, though, for the record purposes.

MR. CAUTHEN: Okay.

THE COURT: The Commission File is part of the record as well with the exception of any self-serving declarations or any unstipulated medical reports.

We had a lengthy prehearing conference on this case. The Claimant would allege that he is permanently and totally disabled with a physical brain injury pursuant to Section 42-9-10. He would seek lifetime benefits for this case, lifetime causally related medicals under Dodge, reimbursement for any causally related medicals. And he would state that he is at MMI.

The Employer/Carrier certainly I think would acknowledge the - I think they would acknowledge that the Claimant is at MMI, although I believe one of their experts, Ms. Brawley, has stated that he has not reached MMI. However they would allege that, even though he has some diagnosed physical brain injury issues, he is not permanently and totally disabled as he has still been working and they would allege he is able to work. They do feel he has reached MMI and

that he has not sustained a complete loss of earning capacity, which would render him permanently and totally disabled. I believe they would probably stipulate to any causally related medicals that the doctors have set forth.

That being stated, though, and both parties have handed up cases to me on these issues, anything else the parties want to state for the record? Mr. Elliott?

MR. ELLIOTT: No thank you, sir.

THE COURT: Mr. Cauthen?

MR. CAUTHEN: No, sir. Thank you very much.

THE COURT: All right. Mr. Kneece is in the witness chair. Let's swear him in.

RICKY KNEECE,

having been first duly sworn, testified as follows:

THE COURT: All right. Mr. Elliott.

MR. ELLIOTT: Thank you, sir.

DIRECT EXAMINATION

BY MR. ELLIOTT:

Q Mr. Kneece, would you please state and spell your name for the record?

A Delano Ricky Kneece. It's D-E-L-A-N-O, is Delano. Ricky is R-I-C-K-Y. Kneece is K-N-E-E-C-E.

Q All right, sir. And how old are you, Mr. Kneece?

A Fifty-one.
Q How far did you go in school?
A Twelfth grade.
Q And are you married?
A Yes, sir.
Q Is your wife, Roxanne, seated here with us today?
A Yes, sir.
Q Do you have children?
A Yes, sir.
Q How many children?
A Two.
Q What are their names?
A Kain and JD.
Q All right. And do either one work on the farm with you?
A Yes, sir. The youngest one.
Q And the youngest one is Kain?
A Kain.
Q And what farm - let's be clear. What farm do you work on now?
A Delano Kneece & Son.
Q And can you tell the Commission who owns Delano Kneece & Son Farms?
A Me, my dad and mother and son.
Q How long have you worked on this farm?

A Ever since I was a youngster in school.
Q Did you ever work anywhere else?
A No, sir.
Q Before this accident in 1999 - let me ask you this: Do you recall the accident in 1999?
A No, sir.
Q Before the accident, what were your duties and responsibilities on the farm?
A Anything and everything that come about.
Q Could you be a little more - could you give us just some examples please?
A Well, ordering chemicals, pesticides, fuel, seed, fertilizer, seed varieties, just general making decisions of any kind.
Q How about sort of the physical activity that goes with farming? What kinds of things were you able to do prior to your accident?
A Order pesticide, seeds, fertilizer, chemicals, spray, calibrator sprayer.
Q Were you able to work on equipment?
A Yes, sir.
Q Were you able to - is there any climbing or that sort of thing necessary on a farm?
A Yes, sir.
Q Were you able to do that? If so, what were you able

to do?

A Climbing, stooping, bending, climbing grain legs, irrigation, doing roof work, anything.

Q Okay. Were you able to operate equipment?

A Yes, sir.

Q Were you able to - did you have any limitations in your ability to operate any of the equipment on the farm?

A No, sir. None whatsoever.

Q Now, after the accident, can you tell us where you were injured, what parts of your body physically were injured?

A My head and my shoulder and my knee, my leg, left leg, all the left side.

Q All right. And since the accident, are you able to do the kinds of activities that you just described you were able to do before the accident?

A No, sir.

Q Well, what for instance - which of those things are you unable to do? What can you not do that you were able to do before the accident?

A Climbing, making decisions, calibrating sprayers, working on equipment, making decisions on ordering stuff and getting seed, climbing elevator legs, anything high.

Q How has the injury to your brain and your head, how has it affected you? Can you explain that a little bit please?

A My memory, not being stable, not being - can't stay focused. I get the staggers. I get dizzy a lot. I get headaches frequently. Just every day. Just repeating myself, doing things over. I make a lot of mistakes in what I do.

Q Now tell me, the memory, why is that important on your farm?

A Just there are so many things to do and decisions to make. And it's real costly if you mess up.

Q And is it important to have a good memory or focus for the purposes of irrigating your crops?

A Yes, it is.

Q Why is that important?

A To know whether you are just going back over it or to know how much water you are putting out and being able to work on it.

Q How about - excuse me, go ahead.

A Maintaining it. Just knowing when to turn it back on, when you're dry so you don't just spend money and pump water for nothing.

Q How about planting? How is it - what is memory and, you know - what does your loss of memory mean with

respect to planting? Why is memory important?

A Setting your seed, distance, depth, just a lot of decision making and a lot of things to adjust and it's just costly and it's a lot to remember.

Q How about - you mentioned something about spraying. The impact of your loss of memory, your bad memory on spraying, why can't you spray anymore?

A Because it's a lot of figuring and calculating and knowing how much you put. And you've got to know how many gallons of water you put and how fast you run. Some stuff is just ounces per acre instead of gallons and quarts. It's a lot to figure. That's why I'm not good - I'm just not - I get confused.

Q If you don't calculate it correctly, can that have a bad effect on your crops?

A It can mess a crop up, stunt a crop, costly.

Q Now, I think the - some of the information in the file put out by the insurance carrier talks about how you can drive a tractor. Do you drive a tractor?

A Yes, I do.

Q What kind of tractor do you drive?

A A John Deere with a cab on it.

Q And is that the only tractor you all own?

A No, sir.

Q Do you have other tractors?

A Yes, sir.
Q Are you allowed to drive the other tractors?
A Yes, sir.
Q How about that big tall one that's as big as my house? Are you allowed to drive that one?
A No, sir.
Q Now the John Deere with the cab, is that all it's got on it, just a cab?
A No. It's got heat, air, GPS, seed monitors. You name it and it's got it.
Q What's the GPS for?
A Steering.
Q Can you elaborate on that, just explain that a little bit?
A It's got a field finder on it. Once you get to the field, it does the steering. It knows where to come back down each time when you turn around. All you do is mash a button. It runs off satellites, but it's - they get me started and I can run it. But if I have any difficulties, I have to call them, which I do. And I have problem where I can't get started or can't just finish a field or something. They have to come finish it.
Q Even with the self driving feature on the tractor, have you messed up before?

A Yes, I have. Many of times.
Q Back before the accident, were you able to keep up with some of the business accounts at the farm, the people you owed, the people that owed you?
A Yes, sir.
Q Can you do that now?
A No, sir.
Q How about - has your sleep, your sleep or your ability to sleep been affected by this accident?
A Yes, it has.
Q How?
A Not being able to sleep all the time, just - I can't explain that, but that's what I'm trying to get help for.
Q Okay. How about have you noticed any changes since the accident in your personality, who you are?
A Yes, sir.
Q What kind of changes?
A Temper, I can't remember, repeating myself.
Q Has your temper gotten you in trouble?
A Yes, it has.
Q Who has it gotten you in trouble with?
A The sheriff's department.
Q All right. How about your family? Has it gotten you in trouble with your family too?

A Yes, sir.
Q How about your headaches? Have you had - you testified earlier you've had headaches since the accident. How has that affected you?
A Just being irritable all the time and just not having patience and not wanting to do, just being in a dull mood where you just can't hardly focus. You can't hardly go. You don't have no drive to go. You just - ~~you don't look forward to waking up sometime, I get~~ them so bad.
Q Now, you are being treated currently by Drs. Bergmann and Dr. Deal; is that right?
A Yes, sir.
Q What are they trying to help you with?
A My headaches, my moods, my temper and how to cope with things.
Q How about Dr. Shissias? You have been seeing Dr. Shissias, haven't you?
A Yes, sir.
Q What have you been seeing Dr. Shissias for?
A He's been helping me with my memory and my headaches.
Q Has it helped? Has seeing him helped?
A So far he's getting me on a better track than I was. He's changed my medication several times, but it seems to helping more now than it was ever before.

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Q Good, sir. Now, who is your family doctor?
A It used to be Carl White. Now it's Dr. Wicker.
Q All right. And what did Dr. White, what was he treating you for?
A He kept wanting to know how serious my accident was because he wasn't one of my doctors. And he wanted to do a CAT scan because he thought he could help me with my headaches. And he seen where my thyroids wasn't working.

MR. CAUTHEN: Objection to what the doctor may be telling him or have told him. I think the medical records will speak for themselves, Commissioner.

THE COURT: Sustained.

BY MR. ELLIOTT:

Q That's fine. Just tell us - do you know what he is treating you for?
A Thyroids.
Q Thyroids. And you understand that Dr. White and Dr. Wicker believe the thyroid is related to the accident?
A Yes, sir.
Q Let me ask you this. You mentioned earlier in your testimony, you used the word "staggers". Do you remember that?
A Yes, sir.

Q What do you mean when you say staggers?
A If you are getting out of something or getting on something and you come down off or something, go to go back or turn around, I just get like a going up and down motion. I can be in church and get up for the invitation hymn and just - when you get up real quick, you just feel like you are in a boat going back and forth and you just lose your balance.
Q When you mentioned church, does that happen to you on the farm?
A Yes, sir.
Q Do you recall last year when an episode of the staggers sent you to the hospital?
A Yes, sir.
Q What happened?
A I went to go up some stairs and I fell. I broke some bones in my left hand.
Q What did you do for treatment?
A I went to the Urgent Care and they said I would have to see a bone doctor. So, I had to wait from Saturday night at 10:00 until Monday evening.
Q Did you see somebody, though?
A Yes, sir.
Q Who did you see, if you remember?
A Dr. - I can't remember if it was Ugino or Green.

Q Did he treat you for your hand?
A Yes. He put a cast on it.
Q All right, sir. I noticed you are not wearing the cast. Is he finished with it?
A I wore a cast for, like, three and a half weeks and then I wore a brace for three weeks.
Q Now, your home, is it on the farm itself?
A I mean, right in the middle of it.
Q All right. Who pays the bills on the farm for Delano Kneece Farms?
A My wife.
Q Roxanne Kneece?
A Yes, sir.
Q And does Ms. Kneece also pay for your personal expenses for your home?
A Yes, she does.
Q Does your wife Roxanne Kneece issue a check for you from Delano Kneece Farms?
A Yes, she does.
Q Do you know how much that check is?
A No, sir.
Q Do you know how it's calculated?
A No, sir.
Q Do you ever even see the check?
A No, sir.

Q I want to ask you this: Mr. Kneece, do you think I-
are the same man you were before the accident?
A No, sir.
Q Why not?
A Because of my ability to do and think.
Q Your ability is not as good as it was before the accident?
A No, sir.
Q Do you try your best on the farm?
A Yes, I do.
Q Do you have family and friends who help you at the farm?
A Yes, I do.
Q Are they doing the work that you used to do?
A Yes, sir.

MR. ELLIOTT: Thank you. I have no further questions, Commissioner.

THE COURT: Mr. Cauthen?

MR. CAUTHEN: Thank you.

CROSS EXAMINATION

BY MR. CAUTHEN:

Q Mr. Kneece, let me back in - let's go back to not long after your injury, back to November 22, 1999. I understand that you were able to return back to work for Delano Kneece & Sons Farms, the farms that you are

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part owner of, about four months after your accident; is that correct?

A I really don't remember, but -

Q Back in 2000, do you remember going back to work on the farm back in about 2000?

A I don't remember when I went back to work, but I did go back to work.

Q Okay. And when you did go back to work, did you go back to work full time?

A I done what I could.

Q When I say full time, I'm asking about roughly 40 hours a week or more.

A I probably worked maybe 40 hours a week.

Q Okay. When you went back to work?

A Yes, sir.

Q All right. And you have continued to work 40 hours a week or more on the farm since you did go back to work; is that correct?

A Yes, I do.

Q All right. Now, I understand that you primarily operate a tractor. You already testified some about that. But you have some other duties on the farm currently in addition to operating a tractor?

A Yes, sir.

Q Is that right?

A A tractor, you don't do everything on a farm with a tractor.

Q Let me ask you about that. Do you use a tractor for planting?

A Yes, you do.

Q And you use a tractor for harvesting?

A A combine, a totally different piece of equipment.

Q A combine for harvesting?

A Uh-huh.

Q You use a tractor for -

A I don't use a combine, though. They do, but I don't.

Q All right.

A They don't let me run it no more.

Q You use the tractor for plowing?

A Uh-huh.

Q You use the tractor for spraying insecticides?

A It's a - I don't guess you would call it a tractor. You would call it a big sprayer. That's all it's to do.

Q You drag the sprayer behind the tractor? Is that what it is?

A No. It's totally a sprayer. You could walk under it. Most little cars could drive between it, up under the wheels going down the highway. It sits up high so it can go over all the crops.

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Q It's separate from the tractors?
A Right.
Q But you all own multiple tractors obviously on the farm; is that right?
A Well, we've got about three that does everything on the farm.
Q Are you still growing and harvesting peanuts?
A Uh-huh.
Q Corn?
A Uh-huh.
Q Cotton?
A Uh-huh.
Q Okay.

MR. ELLIOTT: Try to remember to say - I think she figures out that's affirmative, but try to say "Yes, sir" if you can.

THE WITNESS: Yes, sir. And we've got cattle.

BY MR. CAUTHEN:

Q I'm sorry?
A We got cattle.
Q You have also got cattle?
A Yes, sir.
Q Who tends to the cattle?
A My oldest son and me.
Q Okay. What generally is involved in tending to

cattle?

A Putting out a bale of hay, or two bales, or three bales, putting out minerals in a feeder if they are empty and making sure they got water all the time.

Q Okay. Let me go back to a few more questions about the tractors. As I understand it from two depositions - you gave a deposition years ago, five years ago, back in 2004, and then you gave another one very recently with my associate, Peter Leventis. Do you remember that? That was just six months ago maybe, six or seven months ago. Do you remember those two depositions?

A I remember one. But if I've done two, I done two.

Q Do you remember the recent one?

A Not really, but -

Q The recent one was September 23, 2010. Do you remember giving that deposition back in September?

A No, sir. But if I did, I did.

Q Okay. You remember one years ago back in December 2004?

A No, sir.

Q You don't remember that one?

A No, sir.

Q You remember one, but you are not sure which one it is?

A Well, right now I don't remember either one of them, but if I did, I mean, I did.

Q Okay. All right. With regard to the tractor, as I understand it - let me back up before I get to that. Let me ask you a little bit about your working hours and a little bit more about your duties on Kneece Farms - I'm sorry, on Delano Kneece - we'll just say the farm. Because when I say farm, I am talking about the farm that you and your dad own. Okay? You currently, as I understand it, work five to six days a week; is that correct?

A Yes, sir.

Q And you work anywhere from seven to nine hours a day?

A Yes, sir.

Q Depending on what's going on, I guess in busier times of the year, do you sometimes work more than even this seven to nine a day?

A Sometimes I do, but it's mainly sitting and watching stuff while they are doing - while they are running machinery. If we are drying corn, I watch the dryer. If it cuts off, it tells you what's wrong with it. And usually I'll have to get one of them to help me cut it back on. Hooking a dryer up to a peanut van, which is a semi. And they come in and unhook it. My cousin helps with the peanuts and he helps me hook the

dryer up to the front of it. And you turn it on and it's got a timer on it. You check the moisture and you set it on so much - how many points you want to take off for so many hours. And sometimes you can manually run them, but sometimes the clock is not long enough, so you have to turn it off, write down what time you started and turn it off. But I do things that I have to watch or look at it while they do. Like gathering peanuts, I don't run a peanut combine. They run a peanut combine. I don't. They run two of them.

Q You do handle some of the irrigation duties, turning on and off equipment?

A Yes, I do.

Q Programming the equipment?

A I don't program no equipment.

Q Who would do that?

A My son and my cousin, Luther.

Q Okay. As I understand it of your roughly seven to nine hour typical day on the farm, about three quarters of that time you spend actually operating a tractor; is that correct?

A No, sir. Not every day and every week.

Q Well, not every day and every week. But I guess in season, when you need to operate a tractor; is that

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correct? I mean, I think that's what you said in your deposition, about three quarters of the time?

A Yes, sir. Because if you go on a tractor, you're usually dragging something in the dirt behind you. I mean, you're planting or either you're plowing or tillage to get ready to plant.

Q Uh-huh.

A But we have the GPS to do that with. They always set it up for me. And when I get to the field, you mash a button and it starts you at the edge. And you turn around at the end and you have got one button you mash. You turn around and you mash it. It steers. All you have to do is turn it at the end, let a gear down, throttle down, throttle up, gear up.

Q Okay. But as I understand it, more than anything else, you operate tractors and you like to operate tractors; is that correct?

A Well, it's nice to sit in one with air conditioner when it's 100 degrees, 95 degrees if the air conditioner works.

Q But is that a yes or a no to my question?

A Yes, sir. I do operate a tractor some.

Q All right. Now, on your tractors, the tractors that you do operate, you don't have to change gears, do you?

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A No, they are automatic.
Q They are automatic?
A Yes, sir.
Q You and your father continue to own and operate Kneece Farms, Delano Kneece & Son Farms; is that correct?
A That's correct. Yes, sir.
Q And you would be entitled to your share of the revenue of the farm as a result of your ownership, right?
A I guess if something happened to my dad, I would. But I'm not a hundred percent sure. But we don't divide what we make in a crop together.
Q You just make what you make, whatever you all agree on?
A It all goes into an account and then we - the farm pays us is all I know.
Q Okay. As I understand your testimony, you are still able to do your job as a farmer. You're just not able to do all the things that you've done in the past. You are not a hundred percent, but you can still do the job; is that correct?
A Not totally. They don't let me do half of what I used to do.
Q All right. But you are still out there working a full day essentially, correct?
A Yes, sir. I'm there. But I might not earn my pay,

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but I'm there.

Q And you perform productive and useful services for the farm; is that not correct?

A To a certain extent I do.

Q Now, I think you've testified before that you don't know exactly how much you're paid?

A No, sir, I don't.

Q Do you have any knowledge of your tax filings and your taxable income over the past 10 or 11 years?

A No, sir. I don't do none of that, don't mess with none of it.

Q Okay. Would you say that you don't even see your check and just -

A No, sir, I don't.

Q Your wife puts it in the bank for you?

A Yes, sir.

Q But you do get a check every week; is that correct? Or is it every month?

A I really don't know.

Q Well, you do get paid by Delano Kneece & Son Farms, don't you?

A Yes, sir.

Q You just don't have any concept for what you are making, what you are earning?

A No, sir.

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Q All right. So, I'm not going to ask you those questions. And I will instead save those questions for your wife. Now, are you all still growing the same crops on the farm currently that you were five years ago and ten years ago?

A Might be added peanuts. Might be added peanuts, but that would be all.

Q Okay. As I understand, the farm is producing about the same amount of crops as you were roughly five years ago. Would that be correct?

A I would say so.

Q Okay. And I also understand you still do some sharecropping work for Kneece Farms, which is owned by your uncle Everett Kneece?

A Which now is my cousin Luther Kneece, which is his son.

Q Has Luther kind of taken it over?

A Yes, sir, he has.

Q As I understand, you all have a sharecropping arrangement.

A Yes, sir.

Q Where you provide, I guess, labor and fertilizer. They provide the land. And you all split the crop - the proceeds from the crop 50/50?

A Yes, sir.

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Q And you all have had that - as I understand it, you've had that arrangement in place for many, many years?

A Yes, sir.

Q But you don't actually - you've never actually gotten a paycheck from Kneece Farms, have you?

A Well, yes and no. He has a fellow that's always helped him. We keep up with ours and then he helps us back. We swap labor out.

Q You got a swapping, bartering kind of scenario? What I'm asking is, you've never actually received a paycheck and like a W-2 or a 1099 from Kneece Farms, have you?

A No, sir. I don't think I have.

Q Okay. Now, do you currently have the five employees - five full time employees with Delano Kneece & Son Farms or has that changed?

A Yes, sir. I believe it's five.

Q And that's about the same number or maybe one more than what you had back in 1999, wasn't it?

A We have my son that we didn't have.

Q Kain?

A Yes.

Q Your son, Kain? Okay. Now Mr. Kneece, do you still have a valid commercial driver's license?

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A Yes, sir.
Q Okay.
A Only because I don't drive for nobody else. I don't drive. I keep it, but I don't have to have them for farm use. But if I ever wanted to drive a truck, I would not be able to keep them.
Q All right. Do you recall when you had your last DOT physical?
A No, sir. Because I forget how long - a CDL license I think goes for about eight years or six. That's a long time. It's not like a regular driver's license you have renewed.
Q Do you remember passing a DOT physical with Dr. White January 23, 2008?
A I know I have passed them to get my CDL. But he told me if I was driving for someone else other than myself, I would not be able to get them.
Q But do you recall passing that DOT physical in 2008 with Dr. White?
A I've had to do so many physicals, I don't know which one was a DOT and which one wasn't. But, yes, I know I did because I got my license.
Q So, you did pass one in 2008 and kept your license?
A Yes, sir.
Q Okay. As I understand it, you don't currently have

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any specific work restrictions from a doctor as to things you can't do on the farm, do you?

A No. But I know what I can and can't do.

Q All right. Going back to the hearing that was held back in 2005. As you may recall, the insurance carrier was to provide you with additional treatment with Drs. O'Leary and Dr. Green. I know Dr. O'Leary and Dr. Green both did surgeries on your shoulder and your knees, right?

A That's correct.

Q And you got those surgeries?

A I did get them, but I do know that Workman's Comp didn't pay for the surgeries. I always paid for the surgeries. They approved the MRI, the CAT scan and then they wouldn't pay for the surgery.

Q What surgery do you believe was not paid for?

A I can't remember which one, but I do know that they didn't. Did not pay for my physical therapy.

Q Did you pay for some of that?

MS. KNEECE: The physical therapy was written -

MR. CAUTHEN: Hold on. You can't talk.

MS. KNEECE: I thought he was asking me. I'm so sorry.

THE WITNESS: I just got aggravated because I can't remember. About the only thing I remember when

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I would go, when I would go to come out from a doctor's visit, you had to wait with six or eight people in the line and it would embarrass you because she would tell you, "I reckon you know you have got an outstanding bill and it's five, six, eight thousand dollars." and I said, "No, ma'am. I'm not responsible for that."

BY MR. CAUTHEN:

Q Well, I guess you would know this better than me. Did you submit to any kind of documentation to show that you've paid for those expenses today?

A I don't know that I did because I don't handle nothing with sending money out. My wife does.

Q Now, I understand that last saw Dr. O'Leary in September 2004.

A I can't remember the date, but -

Q Long ago, yeah. Now, you see Dr. Wicker. He's your current family doctor I think you said.

A Yes, sir.

Q You see him on your own?

A Yes, sir.

Q Have you ever asked for the Worker's Comp Carrier to approve treatment with Dr. Wicker?

A I can't remember if I did. It was my thyroids if I did.

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Q Do you recall requesting, sending him a letter, calling, talking to somebody asking them to approve, Dr. Wicker?

A At the time I don't remember. But it would have been probably Dr. White if I asked.

Q Okay. Now, as I understand you have been seeing Dr. Shissias.

A Yes, sir.

Q Since last year of 2010; is that correct? Since last year approximately? And I'm not asking you for exact dates.

A Right.

Q I'm not going to try to pin you down.

A Yes, sir. It was back 2010 sometime. Probably, just guessing, early spring.

Q Were you sent to Dr. Shissias by your lawyer?

A No, sir.

Q You weren't? How did you get to Dr. Shissias?

A My wife. Because she talked to several people. And for me it was not a good one around Columbia.

Q Not a good what?

A Neurologist.

Q Neurologist?

A Somebody has got to help me out with the -

Q Neurologist.

- brain doctor.

Q So, you are saying your wife located him?

A Well, she did. And then Dr. Wicker made several suggestions that he might would seek out who to see.

Q Did you ever request that the Workers' Comp carrier authorize or pay for any of your treatment with Dr. Shissias?

A I don't remember. But I think they should.

Q Don't you have to drive all the way to Beaufort to see Dr. Shissias?

A Yes, I do. But I don't. My wife carries me.

Q Okay. How often are you seeing Dr. Shissias?

A Probably once every two to three months.

Q Okay. I know you have been seeing Dr. Bergmann and Dr. Deal, your psychologist and psychiatrist, since I think 2005. Has your psychological injury and your mental outlook, your mental condition, has that improved in your - is it your feeling that that's improved since you've been seeing them for five years?

A I don't think my memory has improved and my actions. Dr. Deal has helped me and Dr. Bergmann's helped me with my temper, my anger, just sort of trying to keep me calm. They have really helped me with that. Dr. Shissias so far, since the last time I've seen him, he put me on a different drug than what he was

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giving me. And it seems to be helping more than anything as far as my headaches and from being so sluggish. It seems to be helping some. Especially my headaches.

Q Okay. Did you also see a Dr. Steven Storick not too long ago?

A I can't remember right offhand.

Q Does that name ring a bell, a pain management specialist with a neurosurgical group in Columbia, Dr. Steven Storick?

A I can't remember.

Q Okay. Do you remember seeing any doctor over at Columbia Neurosurgical? Does that ring a bell?

A Where would that be at?

Q For any kind of pain, chronic pain kind of problem?

A Where would this be at in Columbia?

Q I'm not sure exactly where. But none of those names ring a bell to you, Columbia Neurosurgical or -

A Can you name another doctor?

Q Steven Storick, Scot Boyd, Brent Gunter, those guys? They are neurosurgeons. If you don't, you don't.

A No, sir. I don't remember.

Q Okay. You are continuing to see Drs. Bergmann and Dr. Deal on a regular basis -

A Yes, I am.

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Q - as approved by the insurance carrier, right?

A Yes, sir.

Q Now, are you currently, Mr. Kneece, looking for any kind of other employment?

A No, sir. There wouldn't be no need for me to because they wouldn't hire me.

Q Well, you also don't have the need to look for other employment in terms of income, do you?

A Probably not because of my dad.

Q Because of your dad?

A Yes, sir.

Q Why is that?

A Because he wants to see me taken care of. Because he knows I'm not able to do - making decisions and doing what I was able to do at one time.

Q But your employer, your farm, your family have, I understand, made some accommodations that have allowed you to continue to be - to work, continue to work on the farm. Have they not?

A They have, but I do kind of what I am able to do. Sometimes they tell me to do some things that I don't do.

MR. CAUTHEN: Mr. Kneece, thank you very much for your time. I appreciate it..

THE COURT: All right. Any redirect,

Mr. Elliott?

MR. ELLIOTT: No, thank you, Commissioner.

THE COURT: Call your next witness.

MR. ELLIOTT: Thank you. I call Roxanne Kneece, please..

THE COURT: All right. Swear Ms. Kneece in.

ROXANNE KNEECE,

having been first duly sworn, testified as follows:

THE COURT: Mr. Elliott, obviously, both parties, are don't have to go back over what he's testified to. I think she would stipulate to whatever he has testified to.

MR. ELLIOTT: Right.

THE COURT: All right.

MR. ELLIOTT: Thank you.

DIRECT EXAMINATION

BY MR. ELLIOTT:

Q Now, Ms. Kneece, where are you employed?

A Nowhere except for the farm.

Q What are your duties and responsibilities at the farm?

A Bookkeeping, treasurer, decision maker, inventory orderer, you name it.

Q How long have you worked on the farm?

A Since his injury.

Q All right. I want you to take a moment and let's

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describe the farm. How big is the farm?

A It's about 2,000 acres.

Q And what do you all grow on the farm?

A We grow corn, cotton, peanuts, and we have cattle.

Q Prior to the accident, did you grow - Mr. Kneece's accident, did you grow all of those crops that you've described?

A No. Peanuts have been added.

Q All right.

A And the cattle have been enlarged.

Q All right. Who started the Delano Kneece Farm?

A Ricky's dad, Mr. Delano.

Q His name is Delano Kneece, also?

A Uh-huh.

Q But you call him Mr. Delano?

A Uh-huh.

Q And at the time of Ricky's accident, was Mr. Delano still actively working on the farm?

A Yes, he was.

Q Did he receive a paycheck for his work on the farm?

A Yes, he did.

Q Your husband, Ricky Kneece, was working on the farm as well?

A Yes.

Q Now, you heard your husband talk a little bit about

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his abilities before the accident. But I do want to ask you this: He did not recall the accident. Do you recall the accident?

A Vividly.

Q Would you please briefly describe it?

A He was pumping up a tire and he had put it in a very safe place. The tire come apart, cracked his skull, 26 stitches across the top of his forehead, broke his cheekbone, broke his shoulder, broke his leg, messed up an elbow, broke his teeth. And he was airlifted to Richland Memorial Trauma Center unconscious.

Q All right. His abilities since the accident, have his abilities been reduced or diminished since the accident, as a result of the accident?

A Yes, sir. Absolutely.

Q Now, I want to talk a little bit about what Mr. Kneece does at the farm. When I say Mr. Kneece, I'm referring to your husband. I'm forced to look away from -

MR. ELLIOTT: Have my back to everybody and I apologize.

THE COURT: That's all right.

BY MR. ELLIOTT:

Q Let's talk about his physical abilities first. Is he able to do everything since the accident that he was

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physically able to do before the accident?

A No.

Q Now, he has testified a little bit as to those sorts of things that he cannot do, but I'm not sure it's clear in the record. But he talked about climbing. What sorts of farm equipment exists on a farm for climbing?

A We have grain bins. We have elevator legs. We have sheds that are in need of repair and he cannot climb to the top of any of them to do it anymore because of his instability and staggers. If he falls off of a 200 foot elevator leg, well, it was nice knowing you.

Q So, he no longer is permitted to climb stairs and ladders and things of that nature?

A No, sir.

Q Are you familiar with his accident of just last November where he fell?

A Yes, sir, I am.

Q What was he doing then?

A A set of steps is probably about ten. He was going to stop the levers so he could dump cotton into a vat. And he went to go up the steps and got the staggers and fell between that and the cotton picker and broke his hand.

Q Now you say he was about to pull a lever; is that

correct?

A Uh-huh.

Q Does that involve - in pulling that lever, does that involve any mental faculties, intelligence?

A Just moving two little levers. It's that simple.

Q So, he was climbing the step to make one motion?

A Uh-huh.

Q In your view, having worked on this farm, do you consider that farming?

A No.

Q Now, what sort of - he testified he couldn't stoop, he couldn't bend. What does one have to do to stoop or bend on a farm?

A Well, you have to be able to get under the implements behind the tractor and fix them, adjust them. You have to be able to make repairs and that requires a lot of on the floor, up at you. You have to be able to stoop to get around the grain facility, the unloading facility. I mean, it's just a part of the farming.

Q Is he able to do that now?

A Knee won't let him. He has to stick his left leg out and try to lean over and it's too aggravating. He can't do it. So, we pay somebody to do that now off and on.

Q And I will come back to that in a few minutes. Let me ask you this: Let's move from the physical injuries to his brain injury.

A Uh-huh.

Q What sort of - how has this brain injury affected him?

A Well, I was married to one man for 17 years. I'm married to a totally different man now. Same body. There's a shell there but there's not a person. And it's hard. Excuse me. And it really hurts to have to talk about him in front of him. His dignity is worth something.

THE COURT: Are you all right, Ms. Kneece?

THE WITNESS: I'm okay.

MR. ELLIOTT: I don't have a tissue. Do you want to get a cup of water or something? Do you want something?

THE WITNESS: I'm good. I'm sorry.

BY MR. ELLIOTT:

Q Just starting - I want you to elaborate on this concept, this idea, if you will, that Ricky is a shell of his former self. And we're talking about his brain. So, what sort of ways has he been affected by this?

A Well, at 16 he alienated our oldest son with his anger and his dispositions and his irritabilities. He left

home. He has come back now, but -

Q So, his anger has alienated family?

A Uh-huh. He got a fire call, so to speak. They said a neighbor's corn field was on fire, did we have a disc hooked up. Rick got in a tractor. And he can drive from here to the field. The fire trucks were in the way. Rick flipped - I don't want to say flipped out. Rick got angry and he tried to push the fire truck out the road with the tractor. He got out and cussed the fire marshal out, was really, really ugly and the fire marshal went to the magistrate to take a warrant out for him. And the magistrate happened to know him and said, "Wait a minute. Let's go see what's going on." And they talked the fire marshal out of locking him up. He has a very short fuse.

Q Did he have a short fuse before the accident?

A Absolutely not.

Q And are Drs. Bergmann and Deal working with him on the anger issues?

A Had they not come into our life when they did, Ricky Kneece would be a divorced man.

Q Let's talk about - how about his sleep patterns?

A Neither one of us has had a good night's sleep since before he got hurt.

Q What have you observed about his inability to sleep?

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A He has - I assumed, many nightmares. He yells out in his sleep. He jumps. He jerks with nervous twitches like he's falling off the bed. He frails. There is just never a restful night, never.

Q Are Drs. Bergmann, Deal and Shissias trying to help him with that?

A They are. And they are somewhat better, but we still average five out of seven nights something happening to - now, he doesn't remember it. But he wakes up tired. He's fought all night with whatever.

Q Is he getting some medication for the nightmares as far as you know?

A I don't know what medicines are treating him for. I know that Dr. Deal is working on that and I know that Dr. Shissias is in connection with Dr. Deal trying to get a right combination so that when he lays down to rest, he rests.

Q And I should ask here and interject this question: Do you go with Ricky to all of his doctor's appointments or many of them?

A Ninety-five percent of them, yes, sir. About the only one I will let him go by himself, is because it's so repetitious, is Dr. Deal and Bergmann. They are in the same building.

Q And is that because he knows the route to take?

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A Right. He knows exactly which way to go.

Q If Ricky went to a doctor without you, would Ricky be able to report all the things that have happened to him?

A Absolutely not.

Q Why not?

A He wouldn't remember.

Q Has his memory been affected by this?

A Absolutely. And it's in splotches. He may remember something today and then tomorrow you ask him, he won't remember, but can recall something else that he couldn't remember the day before that. It's really - and he will get very argumentative with you if you say, "Well, Ricky, you did so and so." "No, I didn't." "Well, right here is the proof. Yes, you did." "No, I didn't." "Yeah, you did, Hun." And then you have to just back off and leave him alone and fix whatever it was.

Q Let's talk about - I want to talk a little bit about his memory loss and how that affects his ability to be a farmer today at Delano Kneece Farms. Tell me this: He testified that prior to the accident, he could order crops and pesticides, and he could measure chemicals and measure pesticides and handle some of the accounts, I think. Is that true?

A Absolutely it is.
Q Can he do that today?
A No, sir.
Q What's involved in that process at Delano Kneece Farms? Let's start about ordering chemicals and crops or pesticides.
A When you have a crop planted, you have to decide what your problem is, whether it's weeds, whether it's bugs or whatever. And you have to decide there's 25 different ways to treat it, just like a common cold. You have got to decide the most cost efficient way that goes with your crop and figure out how much you got to have based on your acreage. And then you have to order it, then it's delivered. Then somebody has to calibrate the sprayer, somebody has to mix that chemical. That chemical may cost you - we have one that, off the top of my head, costs us $375 an ounce. Okay, I send him to the field to mix it, he puts five ounces instead of one ounce. How many other employers is going to say, "Okay, Rick, costly mistake, Bud," and just keep on going?
Q Let's go back. Let's not get ahead of ourselves.
A Okay.
Q Prior to the accident, was Ricky able to make all of those calculations?

A Absolutely. Nobody had to check behind him on anything.

Q Now who makes them?

A Kain.

Q And who is Kain?

A Our son.

Q He is your young son working on the farm?

A Uh-huh.

Q Does your father-in-law, Mr. Delano, does he continue to work and make decisions like this or help?

A He helps.

Q Are you involved in that process?

A Uh-huh.

Q Now, how about the accounts and the money handling? Prior to the accident, could he handle the accounts?

A Absolutely. He could usually tell you within $1,000 what was in the checking account. And usually he could tell me, "Well, I've ordered X amount of dollars of chemicals and expect this bill to be coming in." Now I get the bills and I say, "Did you order all of this?" "Well, yeah. But so-and-so wanted this and so-and-so might have wanted that." And we end up having to send chemicals back that we didn't open.

Q All right. And in that regard, you all are a large farm.

A Yes, sir. Quite large.

Q Are there other farmers in your community that you buy chemicals and so forth for?

A Yes, sir. Occasionally there's four or five trusted farmers in the community and they will call Ricky and say, "Order me this seed. Order me this." We have a good unloading facility and we have accounts with all the vendors. And they will just pay us because vendors won't give, with the economy, new accounts. I had a farmer, a real good friend of ours, call me in October of this past year and said, "Roxanne, are you going to bill me for the chemicals and seed I got?" I said, "Mr. Ricard, when did you get seed and chemicals?" He said, "April." I said, "What did you get?" The ticket was $8900 had he not been honest. Rick never remembered giving it to him, never remembered he picked it up.

Q Had he called and spoken with you, you would have handled the transaction?

A Right.

Q But he got Rick and Rick attempted to handle it?

A Right.

Q And then forgot to bill him $8900?

A And that's not the only one. That's just the largest one this year. But the guys that have been coming

there, they have been coming for years and they are very honest men.

Q Now, Counsel asked your husband a moment ago on direct about the amount of time he spends on the farm.

A Uh-huh.

Q Were you sitting here when that question was asked?

A Yes, sir.

Q And I want to, again, ask how far is your home from the barn?

A If you open the door and step off the concrete slab you are in a field. With the shops if you step out the front door 100 yards.

Q So, you and Mr. - you and your husband are on the farm all the time?

A Yes, sir.

Q There was some - Mr. Cauthen asked Ricky about the number of hours a day he was on the farm. Would you please describe for us, please, what Ricky might be doing at the farm if he is there six or seven or eight or nine hours a day, what he might be doing during a typical day?

A Talking on the phone. When Rick gets up in the morning and goes to work with the intentions of going to work, he goes outside and he says, "This is what I'm going to do." It may be 5:00 until he actually

gets started. If a stranger comes by the farm, "You all have got a nice place here," Rick will stand there and talk to that man until that man walks off. He cannot stay focused and on task. You can tell him, "Okay, Rick, this is what we need." "Okay. I will get it in a minute." He may. He may not.

Q Would it be fair to say that the vast majority of his time is not necessarily productive for farm purposes?

A No, sir.

Q I want to talk a little bit about his mental frame of mind, coming back to his head injury. Would you describe Mr. Kneece as energetic?

A No.

Q How would you describe him?

A Lifeless. We used to hunt together. We used to fish together in our spare time. I hunt by myself. I fish by myself. He's just there. He doesn't take pleasure in anything like that anymore.

Q Now, Dr. Brawley, who the insurance company asked you all to see last month, also talks about Rick's being depressed. Have you observed that?

A Absolutely.

Q Did he have this outlook on life before the accident?

A Oh, no.

Q And are Dr. Deal, Bergmann and Shissias really trying

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to help him with that depression?

A Yes, they are trying to work it out.

Q Now, I wanted to ask you this: There was some testimony earlier about tractors.

A Uh-huh.

Q I don't know about everybody else in the room, but when I think of tractors, until I came out to your farm, I really kind of thought about that old TV show, Green Acres, with that nice Eddie Arnold riding on that old broken down jalopy.

A That's not quite the way they are now.

Q I want to talk about - Ricky talked about I think a combine.

A Uh-huh.

Q That's not a tractor.

A Uh-uh.

Q Would you describe that combine?

A It is a harvesting machine.

Q Okay.

A It has a big, long front on it with spouts. And the crop runs in the spouts and it goes through the cleaning process. The grain goes in the tank. The hulls go out the back. That's your corn.

Q Hold that thought. Did you have that harvester before the accident?

A Yes.
Q You had that?
A Yes.
Q Could Ricky drive it before the accident?
A Yes, he could.
Q All right.
A Not now. We have the peanut combines. He never could get them quite right. We added them since he got hurt because we weren't doing peanuts when he was - peanuts is a little bit more of a cash crop. And somebody had told us we would make a little bit more money that way. We tried it and we did. But the combines weren't there. He never could get it quite right. So, he doesn't run the combine.
Q All right.
A Kain runs one and his daddy runs one.
Q All right.
A That's how we harvest the peanuts. And the cotton is real tricky. It's cotton pickers and it's the same scenario. It's got spouts where the cotton comes in. And that's what he was doing when he broke his hand. He was trying to attempt to pick some cotton while his dad went home and ate.
Q Trying by walking up the steps and pulling a lever?
A It didn't work too well for us either.

Q What is that big tall -

A That's the spray tractor.

Q Describe - did you have that before the accident?

A No. We had to get it because the way we were spraying before we didn't have enough manpower with Ricky out of the picture to get all the spraying done. So, the youngest son said, "Mom, let's look at a spray tractor. It may, you know, eliminate the rush that we're having with the smaller tractors trying to get it sprayed." And it did. And Kain can run it because it's got three computer boards in it.

Q So, let me understand. Prior to the accident, was Mr. Kneece able to use the kind of traditional equipment to spray the fields?

A Absolutely.

Q But after the accident, he is not able to use this traditional equipment to spray the fields?

A Uh-uh. When you go to mix a chemical to spray it, you can mix two or three chemicals together. And if you dump in one and forget it and you dump it in again, you can kill your crop and expense. You're wasting chemicals. So, he can't remember once he goes to mix, he can't remember what he mixed. So, we mix everything for him.

If he is going to be at the field planting with

the other tractor that everybody so eloquently thinks that is a fulltime job, he goes to the field, he drives it from our house to the field. Somebody goes with him to the truck. It has all of his liquid on it already premeasured, all of the seed there, everything that he needs. We have put a GPS system in it. It keeps it on the row. A bell rings when he is to turn around. We put electronic sensor eyes on the spouts that drop the seed. The seed stops dropping in any row, an alarm goes off. And he can still manage not to plant two or three rows for three or four hundred yards. And when the crop comes up, us have to go back and plant it again because they were stopped up and the bells didn't even go off.

Q So, let me understand. Prior to his accident, as I understand it, Ricky could drive any piece of equipment on the farm.

A And 99 percent of the time there was never a burp in anything. Nothing went wrong. He monitored every bit of that without the GPS, without the seed monitors, without the chemical monitors, every bit of it.

Q So, this tractor with the GPS, you bought that since the accident?

A (No verbal response.)

Q And it has a GPS and it has - doesn't it have other

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electronic equipment in it to assist with the planting and the -

A Yes. Uh-huh.

Q What additional equipment does it have?

A It has a seed monitor. It has a chemical monitor. It has a GPS. What else is on that? It has lift assist, rings to tell him to start to - we're at the end, you have to turn around. And then when you turn around to go back down the field, you turn it loose and you mash a button, mash a button, everything starts again like it's supposed to.

Q So, basically he follows the truck to the field and then mashes a button and the tractor -

A Because somebody else has already laid off the field for him.

Q Your son Kain or someone has already programmed the computers on that complicated piece of equipment so that Mr. Kneece can ride in it -

A Yes, sir.

Q - while it's planting?

A Yes, sir. And if something goes wrong, if it loses satellite, he has to call Kain. "Kain, you have got to come help me. The tractor is not picking up satellite. I've got to sit still until you get here." And Kain will go back to him. So, it's pretty hard on

Kain. We are doing pretty bad.

Q Let's talk a little bit - we'll talk about him just another moment or two.

A Okay.

Q What other pieces of equipment have you bought to try to accommodate for the fact that Mr. Kneece can no longer do - for instance, your peanut or the corn, does it require some kind of processing on the farm?

A Yes. When you pick your corn, it's at a certain moisture level. And you can't store it until your moisture level has dropped. So, you have to put it in what they call a corn dryer. Well, we had an old manual corn dryer where it took a lot to keep up with. You had to pull up. The truck had to be just right. You had to not overfill it. You had to know when to stop. You had to cut it on. You had to babysit it and you had to know what you were doing. You had to send it in this bin or that bin. You had to manually change it. Rick run corn out of the top of grain bins out on the ground so many times, Mr. Delano said, "Wait a minute. There's got to be a better way."

Q Let me interrupt you. Before the accident, could he dry the corn?

A Never had a problem. Never had a problem.

Q It was after the accident he started spilling and

really misusing the equipment?

A Uh-huh.

Q What did Mr. Delano say?

A He said, "Let's look into getting an automatic dryer and building a pit for him just to pull the truck over. And it's a hopper bottom, so you just wind the bottom open and the corn falls in a hole. And you mash a button. It automatically fills. It automatically sends it to the grain bin. When that grain bin's full, an alarm goes off. You know you got to turn it to another grain bin. The machine, if anything goes wrong, it automatically shuts down and sets off an alarm. So, it's a safety system.

Q So, Ricky is allowed to manage it?

A Uh-huh. The peanut dryer, we used to - it's a large peanut dryer we had in the beginning. And it's electronic. And strangely enough, in that particular case the electronics didn't work better for him. After we purchased this dryer and put it up, the computer board just sent him into orbit. He couldn't keep up with it. So, we went back to the old time drying method where you dump the peanuts on an 18-wheeler bed and you pull the truck up there and you just put the dryer on the end of it and cut it on. It blows air up through the bottom of it. And it's

nothing for him to have to set. It's nothing for him to have to keep up with it. When it's dry, it's dry. You take it and set it back down and drive the truck off.

Q So, he watches it.

A Right.

Q Now, let's talk about how you are able to get - how you are able to get this farm production, keep it going in Ricky's absence. First of all, you mentioned your son, Kain, a couple of times.

A Uh-huh.

Q How long has your son, Kain, worked with you on the farm full time?

A Since the day he got out of high school.

Q Approximately how long?

A He's 23, so 18 to 23.

Q All right. About six years ago. And does he work there full time?

A He does.

Q And what are his duties and responsibilities at the farm?

A He does 95 percent of what his dad used to do.

Q And is he - the other five percent, who does that work?

A Rick.

Q All right. Now - go ahead.
A In this, I don't know if it's relevant or not, but Rick's dad retired very shortly after Rick got hurt.
Q I'm going to talk about that next. But I wanted to ask you this: You pay your son - your son is full time.
A Yes.
Q Do you pay him what his services are worth?
A Absolutely not. Kain is very much underpaid.
Q Why does he put up with that?
A Well, he knows that in the big picture he is taking care of his dad and the farm will eventually be his. So, it's not a big deal to him. He survives.
Q So, he is accommodating his daddy?
A Right.
Q He's come to grips with that?
A Right.
Q Now, let's go back to the accident and Mr. Delano, as you call him.
A Uh-huh.
Q Was Mr. Delano, at the time of the accident, full-time employed by the farm?
A Yes, he was.
Q Was he active in his work on the farm?
A Yes, sir.

Q Did he have an active load, I guess - work load I guess I'm asking.

A Yes, sir.

Q And after the accident, what if anything did Mr. Delano do to accommodate Ricky?

A He told me that he was going to take early retirement. And that he had to give dignity back to his son. And that I was to pay him this because we loved him. And he would take this because he could draw his Social Security and live off of it. And that's the way we were going to do it. I wasn't to question, I was to do it. And I said, "Yes, sir."

Q You were the bookkeeper, the treasurer, and at the time he was the boss.

A Uh-huh.

Q Let's be clear. When he retired, he gave Ricky - what did Mr. Delano do to his salary, reduce it?

A Yes, sir.

Q And do you recall about approximately how much he reduced his salary at the time?

A I don't want to say for a fact, but I'm pretty sure it was right around 50,000 down to - he makes $1800 a month now.

Q And so, the difference you pay, you were instructed to pay your husband Ricky?

A And the mother-in-law, Ms. Shirley, retired at the same time so that the farm would not be hurt financially in case Rick's salary needed to be what it needed to be.

Q So, your mother-in-law also quit and put her salary back into the farm budget?

A Uh-huh.

Q You know, I'm curious about this. And you will perhaps get asked about it. It came up in the cross examination of your husband. The farm seems to be doing reasonably well in spite of the fact that Ricky is no longer much of any value.

A Uh-huh.

Q The farm is a business?

A It is.

Q Since the accident, did you change the crops that you were growing as a business decision to try to get more income to accommodate what you were paying Ricky?

A Yes.

Q What did you add?

A We added peanuts, dropped soybeans and wheat, and we added a grain broker to help us market and watch the markets and tell us the best place to sell, the best time to sell, to hedge our crops or not hedge our crops, which is something we didn't have to do before

because Rick kept up with what was going on financially.

Q But Rick is not able to help in that and so you had to change your business practices?

A We had to to stay afloat.

Q And that's permitted you to love your husband by continuing to pay him?

A Absolutely.

Q You heard your husband testify that he gets a check.

A Uh-huh.

Q And you heard him testify that he didn't know what it was.

A Correct.

Q Do you know why he doesn't know?

A Uh-uh.

Q Who writes the check?

A I do.

Q Do you ever give it to him?

A No.

Q You just put it into the bank?

A Uh-huh.

Q How do you calculate that check?

A It's what Mr. Delano said pay him.

Q And do you recall how much it is?

A He makes $4,175 a month. And at the end of the year

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he gets a bonus and so does Mr. Delano. They combine the bonuses because they are purchasing more farm pasture area for the cows because Mr. Delano said we have got to get money coming in at all times of the year instead of just at harvest. And cows are something that you can sell all during the year when the crop is coming off. And he said we've got to have a little bit more space. So, he said, "This is what we are going to do." I said, "Yes, sir."

Q So, again, to accommodate the fact that there's payments going to Mr. Kneece, the Claimant, Mr. Delano Kneece determined that you'd add cattle to the farm.

A Larger. We always had a tiny bit, but larger.

Q And explain about the land again.

A Behind our original pasture there was some land that nobody was utilizing. And Mr. Delano made an attempt to purchase it and the people said, "Sure." And he told Ricky and myself, he said, "This is the way we are going to do this. We are going to purchase - the farm is going to purchase this land in mine and Ricky's name. Every year we are going to get a bonus to pay the payment so that it doesn't hinder Ricky to pay his part of the payment so that we can enlarge the cattle crop."

Q So, Mr. Delano, Ricky's father, has instructed you to

pay Mr. Delano and -

MR. CAUTHEN: Objection to hearsay.

MR. ELLIOTT: - the Claimant -

MR. CAUTHEN: Objection to hearsay.

THE COURT: All right. Sustained.

BY MR. ELLIOTT:

Q So, as a consequence, a decision has been made at the farm to make a bonus, a dividend payment to your husband?

A Yes.

Q So, if you look at the W-9 forms for instance that we've provided - W-2 forms, rather, that we've provided, you will see evidence of that $4175 a month and the bonus every year?

A Uh-huh.

Q And the bonus is strictly to cover the cost of a purchase of land?

A Yes. We haven't talked about cattle.

Q I will get to that.

A Okay.

Q Now, Ms. Kneece, in the records we have submitted in the September 29, 2010 supplemental Form 58 at exhibit E4 -

A Yes, sir.

Q - there are a number of pages here that reflect

generally check transactions for individuals. And I show you these sheets of paper -

MR. CAUTHEN: Commissioner, I renew my objection to these documentations - to all this documentation for the same reasons.

THE COURT: That's noted. Let me see where he is going first before I make a formal ruling on it. Go ahead.

MR. ELLIOTT: Thank you, sir.

BY MR. ELLIOTT:

Q And I ask you if you recognize those forms.

A Yes, sir. I do.

Q Did you prepare those or were they prepared at your direction?

A Yes, sir. They were.

Q What do those forms represent?

A These forms are people that we have had to hire to cover deficits in Ricky's performance.

Q These are records of people that you have hired to do the work that Mr. Kneece used to be able to do before his accident?

A Correct.

MR. ELLIOTT: I would move them in. I mean, I think she's authenticated them and they are consistent with our position that -

THE COURT: That's -

MR. ELLIOTT: - that they are accommodating him.

THE COURT: That's fine. We don't need to go through all of them.

MR. ELLIOTT: No, sir.

THE COURT: That's certainly noted.

BY MR. ELLIOTT:

Q I do want to ask, for instance, sort of in general terms, what are some of the areas where you have had to hire people to do work that Rick could have done before the accident? Let me draw your attention to - do you do fencing at the farm?

A Uh-huh. We have hired fencing work done. We have hired electrical work done. We have hired weed pulling done. You can't leave weeds in your cotton. It stains the lint. Rick used to could do it all day long. Body won't let him. We have hired migrant workers from across the way to do it for us. We have hired out some long-term, long-distance truck driving. Just normal stuff that Rick could have done. We have hired out some shop work on the equipment, stuff that he could have done before and he can't do now.

Q With respect to the cows, I wanted to ask, does Mr. Kneece have any responsibility for keeping the cows?

A Well, he does put out those hay bales that he was talking about. And he does occasionally give them some feed. He rides and looks at them, make sure they're okay and the babies are okay. When it's time to treat them, you have to worm them and give them a shot and vaccinate them and so forth. He used to could do it by himself, didn't need any backup. Now there has to be somebody there to write the cattle's tag number down, what he vaccinated them with. Because all of those records have to be kept because it's beef consumption. So whenever the government says, "What did you give this cow?" we have to produce this piece of paper. We used to never have to go with him. He would bring it in, hand it to you. Now if you want your records right, you had better be standing there with him. Somebody better be pulling the amount of medicine per head or he won't give it right. Now he still gives the shot, but it's four or five people standing there with him, handing him what he needs to do to be able to do it.

Q All right. Are there other times around the farm - we've heard Mr. Kneece testify, we have heard you testify that he can stand at the dryer and he can push the button, he can pull a lever and so forth. Are there other occasions on the - and he can follow the

truck out to the field with the complicated tractor. Are there other occasions where you have to hire people or you have hired hands or your son or someone on the farm has to be there to watch Mr. Kneece do the work so that he gets it done right?

A Yes, sir. Two of the gentlemen in there we have actually just paid $10 an hour to stay at the field when he was planting to make sure that everything ran smoothly.

Q All right. You are aware that the insurance company hired a Ms. Grimley to look at the records and make some analysis about your husband's ability to work.

A Yes. Uh-huh.

Q I show you, it's a sheaf of papers headed Cynthia P. Grimley and Associates, LLC, and ask you if you see that in my hand.

A I do.

Q Now, we had talked about - we looked at this a little bit earlier in my office, didn't we?

A Yes, sir, we did.

Q Now, did Mr. Kneece - did you or Mr. Kneece go to see Ms. Grimley?

A No. I've never laid eyes on her.

Q Okay. You met her out here?

A Until today.

Q Yes, ma'am. And she did analysis. And she reviewed a number of things in here. I noticed that she seems to have reviewed all the medical records and the records including that of Dr. Stewart. Do you see where she saw Dr. - looked at Dr. Stewart's records?

A I do.

Q And I would ask you in that respect, did you and Mr. Kneece meet with Dr. William Stewart during the course of this process?

A Yes, we did. Uh-huh.

Q On more than one occasion?

A Right. More than one occasion.

Q Now, as I understand Ms. Grimley's report, the gist of her report is that she's looked at all the records that are in the file, at least all that she indicated.

MR. CAUTHEN: Object to the characterization of the report. The report speaks for itself.

THE COURT: Okay. Sustained. What is the question that you have for her, Mr. Elliott?

MR. ELLIOTT: Yes, sir.

BY MR. ELLIOTT:

Q You notice in this report where Mr. Grimley identifies four jobs that she thinks that -

A Yes, sir.

Q Now, let me draw your attention to page 344 of the

Employer's submissions.

A Uh-huh.

Q And she has identified a position, farmer field crop.

Do you see that?

A I do.

Q Did you have a chance to review this?

A Briefly.

Q Is Mr. Kneece capable of performing that job?

A No, sir. Not without supervision. He can make one supply error, one acreage error in planting with the kind of crop he was planting, the tillage, the variety, he could - and you have got a costly mistake that could cost you your profit on that particular commodity.

Q Okay. So, Mr. Kneece could not be trusted to do that job?

A If I hired Mr. Kneece to do that job, after about two weeks I would probably fire him. I love him to death, but I couldn't afford to keep him if I didn't love him.

Q Thank you. And then on page 346 of the submission -

A Uh-huh.

Q - we have farm worker, general - that's a one. And there's a job definition there. Could Mr. Kneece perform - Ricky Kneece perform that job?

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A Not without supervision. That goes back to the GPS systems, the laser monitors and so forth. And you can't let him stay with the livestock without supervision with giving him the wrong medicine.

Q All right, ma'am. And turning to page 348 of the APA submission, there's a liquid fertilizer servicer. Could Mr. Ricky Kneece perform that job?

A Liquid fertilizer is going at about $750 a ton. And if you put it out at the wrong rate, it doesn't take you long to use up a couple of tons extra. I don't think another farmer in the area would put up with that kind of mistake.

Q Thank you. And last on page 350 of the submissions, there is something here called a tractor operator. We are back to the tractor. Would you look at that, please?

A Yes, sir. And with the migrant workers in our area, there is no way, without leaving the state, that he could find a job that would support him and me. There's just no way.

Q He steers a tractor.

A Yes. But other people are not going to put those fancy bells and whistles in there to help him steer that tractor properly.

Q Well, could he maintain the implements and so forth?

A No. No. Somebody would have to work on them. If something went wrong, he would have to call somebody to come to the field and say, "This is not working. Can you come help me?"

Q Thank you. Now, you are familiar with - you are familiar with the farmhands that you have on your farm and the temporary workers you've hired; are you not?

A Yes, sir.

Q You pay them?

A Yes, sir.

Q You are on the farm and you see the work they do?

A Yes, sir.

Q Why do you hire those people?

A So, that Ricky's dignity can be saved. The work has to get done. He can't do it. So, we hire people to help us get it done. And he sort of hangs out with them.

Q Now, you write him a check?

A I do.

Q And how is that 4175 calculated?

A Because Mr. Delano said, "We love him that much. Pay him this."

Q Is that check calculated based on his work output?

A Absolutely not.

Q If an 18-year-old young man appeared at the farm

looking for work and explained that he had had a head injury and that he had memory problems and that he had dizziness problems and he had temperament problems, would you hire him?

A Probably not. The liability would be too bad.

Q If that man came to your farm and asked for a job and you did know those details and you hired him, would you tolerate those weaknesses in his performance?

A Financially you couldn't afford to. And that's setting aside the fact how he could hurt himself or someone else.

Q And at the end of the day, what sort of person would Mr. Kneece be competing with in the market place for a job? If, say, Delano Kneece Farms closed tomorrow and Ricky went out to look for a job, physically speaking what sort of persons would he be competing with?

A Due to the fact that he's never done anything but farming, he would be competing with migrant workers. And their bodies, I mean they are physically fit. Those guys work like Trojans. I mean, they do. Ricky couldn't compete with them.

Q And the temporary workers that you've hired, do they have the same weaknesses that poor Mr. Kneece has, the memory problems or the -

A No. No. They are pretty tight young men. And they

are flexible enough that we can pick them up, you know, one here to stay this length of time, one here to stay this length of time. And Kain is back and forth. And I check on them pretty regular. And his dad, you know, is in and around. You usually see one of us pretty much in eye distance of him most of the time.

Q Of Ricky Kneece?

A Uh-huh. His telephone cell usage went from about 200 minutes a month to about 2500.

Q Is he advancing the interest of the farm when he is on the cell phone that much?

A No, sir.

Q In terms of medical treatment, he is being seen by Drs. Deal and Bergmann currently, right?

A Uh-huh.

Q Are you asking this Commission to continue that?

A Yes, please.

Q Are you asking this Commission to require the Carrier to pay for all the prescriptions as well?

A Yes, please.

Q Now, we have, in our second supplemental filing, submitted in September of last year at exhibit E2 we have what appears to be a computer printout where there's some highlighted entries. Do you see those?

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A I do.

MR. CAUTHEN: I'm sorry. Can I see that? Is that the prescription list?

MR. ELLIOTT: Yes.

THE WITNESS: Uh-huh.

MR. CAUTHEN: Okay.

BY MR. ELLIOTT:

Q Is that a list of prescriptions?

A Yes, sir.

Q Now, first of all, are these highlighted prescriptions, are they all related to his accident?

A Yes.

Q Now, Counsel does make a point that some of them pre-date, some of them go back to '99. Do you understand that you have paid these and that the Carrier did not pay these?

A I would have to check on that, to be honest with you, because my pharmacist, we've always gotten our medicine filled there, and I told her just to run it. So, I can find out how far back.

Q Have they paid for anything since -

A 2005? No.

Q Okay.

A Absolutely not. But in fairness, it changed hands, the Carrier, so many times, with this one going out,

we didn't know who to contact. So, the benefit of the doubt is theirs. I didn't know how to get in touch with them for them to pay.

Q But since the last hearing, they have paid nothing?

A No, sir.

Q And also attached to that September 29 submission at E1 is a mileage chart. Do you see that?

A I do.

Q Did you compute that amount?

A I did.

Q Are you seeking reimbursement for that mileage as well?

A Yes, I am.

Q Are you asking for reimbursement for any mileage from this point forward?

A Yes.

Q Now, Drs. Bergmann and Deal, you all are seeing them.

A Yes, sir.

Q And they are helping Ricky for the kinds of things we've discussed earlier, correct?

A Yes, sir.

Q And you are asking the Commission to continue that treatment?

A Yes.

Q Dr. Shissias, some confusion about Dr. Shissias. How

did you find Dr. Shissias?

A Mr. Scott Elliott helped me find Dr. Shissias.

Q Yes, through me. Ricky would not be expected to know or remember those things?

A No.

Q Is Dr. Shissias helping?

A Yes.

Q And he is treating Ricky for the headaches and depression among other things?

A Yes.

Q Are you asking the Commission to require the insurance carrier to continue - to allow you to continue going at their expense to Dr. Shissias?

A Yes.

Q And I think Drs. Wicker and White were the Kneece family physicians?

A White retired and Wicker replaced him.

Q And Dr. White diagnosed the thyroid problem as being connected to the accident?

A He did.

Q And are you asking the Commission to order the insurance carrier to continue to take over that treatment and provide treatment through Dr. Wicker?

A Yes, please.

Q Now, Ricky saw Dr. Ugino for his left hand injury?

A He did.
Q Are you asking the Commission to order the insurance carrier to pay for any future treatment for Dr. Ugino and reimburse you for your out-of-pocket?
A I see it as related, so I would like for that to be the case. Yes, sir.
Q Is Ricky benefitting from the treatment that we have described here?
A Yes, he is.
Q In your view, based on your experience as a secretary/treasurer of Delano Kneece Farms, would any farmer hire Ricky knowing what they know about Ricky?
A No. They would be scared of him.

MR. CAUTHEN: Objection to speculation.

THE COURT: I will let her answer that.

MR. ELLIOTT: Thank you, Commissioner. And I think I've covered all the territory.

THE COURT: Let's go off the record a second.

(OFF THE RECORD)

THE COURT: Mr. Cauthen, whenever you are ready.

MR. CAUTHEN: Yes, sir. Thank you very much, Commissioner.

CROSS EXAMINATION

BY MR. CAUTHEN:

Q Ms. Kneece, I'm not going to be near as long as that

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was because I just really want to ask you about some more specific things. And let me talk to you a little bit about your husband's earnings and the farm earnings from Delano Kneece & Son Farms since he has been back at work. Now, as I understand, he did return to work for Kneece Farms about four months - I'm sorry, not Kneece Farms, but Delano Kneece & Son, the farm, about four months, five months after the injury in 1999; is that correct?

A No.

Q I'm sorry, 2000.

A He started getting the check that Mr. Delano told me to write him in four months. He was there. But if a loud noise happened, he would come to the house. He just sort of stood up and watched for months. And his check was written anyway.

Q But he continued to receive his salary or his wages from the farm during that period of time?

A Yes, he did.

Q Has he ever, since the injury occurred eleven years ago in 1999, been without his salary or wages from Delano Kneece & Son Farm?

A No, sir, he hasn't.

Q He has continued to receive that salary?

A Yes, he has.

Q Even during a roughly approximately three year period of time when he was also receiving temporary total disability benefits from the Workers' Comp?

A Uh-huh. Because it was two entities. Where he was getting it from was not the farm.

Q Okay. But he was receiving both of those for that period of time?

A Uh-huh.

Q Okay.

A Uh-huh.

Q Now, I think -

A At one point I tried. I contacted - what was the first carrier, maybe? The first or the second carrier. And I told them stop the checks. Just stop them until we decide. And it took them another two years to stop them. After they told me they couldn't talk to me. They had to talk to a lawyer. I said, "Okay, fine. I tried."

Q Did you all continue to cash the checks?

A They are put up.

Q They are put up?

A Absolutely.

Q You mean you never cashed them?

A Yeah. But they are - if today this man looks at us and says, "It wasn't right. You shouldn't have got

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them," they are put up so that we can hand them back to you.

Q But you are saying you held them and didn't cash them?

A No, I cashed them. They are in a savings account.

Q Okay.

A They are put up because I tried to get - they are saved because I tried to get the carrier -

THE COURT: You haven't spent those funds?

THE WITNESS: Right. I tried to get the carrier to quit sending them. And they were rude and ugly to me and I said, "Okay, fine." And Rick said, "Roxanne, just put them somewhere safe." So, that's where they are.

BY MR. CAUTHEN:

Q Who is the name of the people or persons that you talked to in order to try to get that done?

A I can't remember.

Q What letters did you write them?

A I didn't write a letter. I made a phone call.

Q You made a phone call?

A Yes, sir.

Q And you don't recall who you talked to?

A No, sir. But it was around the time - if you check his record with the insurance company, they had refused to do a knee surgery and it was a hassle. And

if I could see the names, I might could pull the name when I saw it. But I called her and I said, "Ma'am, how can you justify sending my husband a weekly check and not approve his surgery?" And she said, "I will no longer talk to you." And I said, "Okay."

THE COURT: It's not Tonya Melton?

THE WITNESS: No. It wasn't Melton.

THE COURT: Go ahead. I was just looking through the file. It's a big file, long file, old file.

THE WITNESS: But the Workman's Comp, the entity that he was covered under was the sharecropping part. And a Commissioner ruled -

BY MR. CAUTHEN:

Q Okay. I'm not asking you about all of that. We are getting a little bit far-field.

A Okay.

Q You did explain what you are talking about with regard to contacting the insurance carrier, but you didn't write them.

A No, I didn't.

Q You didn't feel like it was important enough to send them a letter when they are sending disability checks, while he is also being paid his regular salary?

A No, sir. I didn't at the time. You have to understand I was angry at the world. And for me to

call somebody, being an honest person and tell you not to send me money and you be ugly to me yet again, it was sort of like, well, okay, I've got more on my plate to deal with and it was take care of him. The Commissioner had already said it was okay, so -

Q As I understand your testimony and Mr. Kneece's testimony today, he now works fewer hours than he did prior to the injury in 1999.

A Productive-wise, yes, sir. His body is there.

Q Right.

A His body is there 40, 50 hours a week. But to accomplish productivity, no, sir, it's not.

Q Okay. Definitely less productive?

A Oh, absolutely.

Q And he has less job responsibilities today than he had in 1999?

A Absolutely.

Q But yet he earned more now than he did in 1999?

A He does because his daddy and his momma and his -

Q Okay. I'm sorry. Now I'm not asking you to -

MR. ELLIOTT: Pardon me. I object, Your Honor. He asked the question. She is entitled to answer it. He got a yes and she is entitled to explain it.

MR. CAUTHEN: She needs to answer it yes or no.

MR. ELLIOTT: I object.

THE COURT: All right.

MR. CAUTHEN: She needs to answer it yes or no and then she can explain.

THE COURT: Try to answer yes or no and then you can explain. Okay.

THE WITNESS: Yes, sir.

THE COURT: Ask your question, Mr. Cauthen.

BY MR. CAUTHEN:

Q Now as I understand it, he earns significantly more now - and I'm going by your tax filings and your W-2s, which you produced here in discovery. He earns significantly more now than he did at the time of the injury in '99; is that correct?

A Yes, sir, it is.

Q Okay. Let me ask you just a little bit more specifics about that. And we don't need to go over all the tax records. But let me show you - if you'd take a look at this. And this is age - APA Defendants' page 336 in their APAs, which is just a chart that's included in Cynthia Grimley's report, which summarizes - and it's much easier to look at that than it will be to look at all the tax records, which are also in our APAs. But, Ms. Kneece, if you'd just take a look at that. The joint - and I understand you and Mr. Kneece have filed a joint tax return during each of these

years, '99 through 2009; is that correct?

A Uh-huh.

Q You filed joint, married joint.

A Uh-huh.

Q And in that column, total joint income reported on line 7, it's got the total of the joint tax return for each of those years.

A Uh-huh.

Q Does that look accurate to you?

A Uh-huh. Without checking my records, yes, sir. It does.

Q Okay. Then in the middle column it's got the W-2 income for those years that we have W-2s, corresponding W-2s for each of those all the way through 2006.

A Uh-huh.

Q And then what I wanted to ask you about is, you agree that this, your tax records during that period of time, that 11 year period of time, show an increase in earnings for you and your husband through the farm.

A Uh-huh. Yes, sir.

Q And you would agree that it also shows - the tax records also show an increase in wages or earnings for your husband via the W-2s, correct?

A Yes, sir.

Q If you jump - do I have any figures down there for '07, '08 and '09?

A You have line 7 figures, but you don't have W-2s and so forth to back up.

Q Okay. Now, your attorney was kind enough to provide me -

MR. CAUTHEN: And which I do want to submit this as an additional exhibit because we just got it right before the hearing. But the W-2s -

MR. ELLIOTT: I've got another set if you like.

MR. CAUTHEN: Okay. The W-2s have been provided for '09 and '07. I understand that they haven't been located for '08.

THE COURT: Okay.

BY MR. CAUTHEN:

Q But for '09 and '07, Ms. Kneece, I'm just looking at - if you just want to refer to that as well.

A Uh-huh.

Q 2007, your joint 1040 you reported $140,461 in earnings that particular year; is that correct?

A Yes, sir.

Q And Mr. Kneece's W-2 earnings from Delano Kneece & Son Farms I understand for that year was I think $76,600.

A Yes, sir.

Q So, he is making double - right at double or maybe

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even more than double the earnings that he was at the time of the injury with Delano Kneece & Son Farms, isn't he?

A Yes, sir.

Q And then in 2009, even a little bit more, the W-2s showing - actually a little bit less for the total of your joint, showing 137,399 for '09.

A Uh-huh.

Q But his W-2 earnings, just a little bit more than that, 77,600; is that accurate?

A Uh-huh. Yes, sir.

Q Okay. So, you would agree that your husband, Mr. Kneece, has not lost any earnings through Kneece Farms since this injury occurred back in 1999?

A Loss of earnings is - no, sir. He has not.

Q Lost wages, earnings.

A His family loves him enough, he has not lost.

Q Okay.

A But can he get a job and support us outside of our farm? No.

Q That's not what I'm asking you, ma'am. Thank you very much, but we are talking about revenue and earnings right now. I believe you said - you testified he is paid 4175 a month; is that correct?

A Yes, sir.

Q Okay. And let me ask you just a few things about this list that Mr. Elliott asked you about. And I'm definitely not going to go through the whole list. But just a couple that stand out to me. Cyril Kneece, your son?

A That's our youngest son, yes.

Q Your youngest son. This list of transactions is showing one, two, three, four, five, a little over five full pages of transactions from Cyril Kneece from 2001 all the way to 2010. How old is Cyril?

A He graduated - he's 23.

Q Twenty-three. So he was 13 at the time he started receiving -

A Uh-huh.

Q Are you saying that he was taking your husband's place beginning and age 13?

A No. That's not what I said. What I said was he came straight out of high school and started making up the difference. We hired a gentleman named Willie Dobbs -

Q Uh-huh.

A - shortly after we figured out Rick was not going to be able to perform after it was wearing on Mr. Delano's health trying to do the extra.

Q Okay.

A Kain started working part time when he was in high

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school, every afternoon when he got home and all day on Saturdays. When he got out of high school, he went to work full time.

Q Are you representing then that this five, six page list of transactions and payments, basically payroll, to your son Cyril is all the result of Ricky Kneece being unable to do his work, his job, since 2001 to 2010?

A Ask that question again because I am a little confused on -

Q Well, this list that you've provided starts out - I'm looking at 6/22/01 for Cyril K. Kneece.

A Uh-huh.

Q '01, '02, '3, '4, '5, all the way up to the current year, 2010, there are payroll transactions. This would appear to me to be - what it looks like to me it says all transactions. Isn't this all the payroll - isn't this everything you've paid him for that ten year period?

A Yes.

Q Starting when he was about 13 years old?

A Yes.

Q Are you saying to this Commissioner that all of this paid to Cyril Kneece for the past ten, eleven years is a result of Mr. Kneece being unable to do his job the

way he did it before?

A Not necessarily in that manner. No, sir. He is our youngest son. He had a job there ir-regardless.

Q Okay.

A But is his responsibility greater than what they should be because of his father? Yes, sir, they are.

Q So, this would contain both expenditures for things that Cyril had to do for Mr. Kneece as well as things that had nothing to do with Mr. Kneece's injury, that Cyril would have done anyway; is that right?

A Well, I don't want to answer untruthfully, but I'm not real sure how to answer you. Did Kain come home in the afternoons and feed cows because his dad was not doing what he was supposed to do? Sure, he did. Would I have had to go feed the cows or would I have had to hire someone else to? Probably so. It just happened to be he was convenient when he was in high school. When he got out of school, then he resumed the responsibility of picking up what we had all been trying to pick up in bits and pieces.

Q But Cyril would have had a job anyway, regardless of -

A Oh, absolutely. We would have made one.

Q - Mr. Kneece's -

A But he was a very good fill-in.

Q Yes, ma'am. Now, Willie Dobbs, he is the longest

list. I don't even know how many pages this is. But this also goes back to 2001 all the way to 2010.

A He was totally hired to make up the difference of Ricky Kneece's deficiencies. And was also given a homestead. And it is also kept up by the farm as a cost. And him and his wife live on our property rent free.

Q Okay. What all does - is Mr. Willie Dobbs a full-time employee?

A Yes, he is.

Q And has been one from 2001 all the way to -

A Now.

Q Current. And what all are his responsibilities?

A Mr. Willie drives tractors. He spreads chicken manure. He spreads fertilizer. He sprays. He feeds cows. Any of the many - he helps dry corn. He helps dry peanuts. He helps harvest cotton. He helps harvest peanuts. He does everything that Ricky used to could do with no help.

Q Okay. But Ricky's - some of - well, I would say as a farmer, as I understand it, his abilities or his job function, I guess, would fall into a skilled category. Is Mr. Dobbs qualified to offer skilled labor or is it more of like a laborer or farm hand?

A Well now, with that question I feel -

Q Is he more like a laborer or farm hand?
A I feel like you are asking me to characterize Willie.
Q Let me ask it again. For lack of a better term, would Willie be a farmhand or a laborer?
A Well, to me that's the same thing in our world.
Q Yeah. A farmhand or a laborer, I'm just - you can pick which term you like best, but a laborer, someone who goes out and does the physical labor, someone who is not paid to be a manager, a planner, an organizer, a leader.
A Correct.
Q Someone that does what he's told.
A He does the manual labor. Mr. Delano and myself and Kain and Rick's mom makes the financial decisions.
Q Okay.
A Willie picks up the actual physical part that Ricky could not do.
Q Yes, ma'am. Okay. Just a couple of more things I've got. You were asked about Cynthia Grimley's report.
A Yes, sir.
Q You indicated you did not see Ms. Grimley.
A Until today. I didn't realize that was -
Q But you are aware that Ms. Grimley requested the ability to meet and interview you and your husband, requested an opportunity to meet and interview your

husband in connection with doing her evaluation; are you aware of that?

A Yes.

Q Okay. And did you refuse or did - well, that's not important. The fact is you all did not submit to an evaluation with her?

A We did not.

Q Okay. The prescription list that you were asked about -

A Yes, sir.

Q - did you indicate that, and I want to make sure I understood, that you did not get in touch with someone with the carrier to make sure that they started picking up payments?

A Right. I did not.

Q As opposed to you all putting it on your -

A I just let it run through.

Q - at your own group health, right?

A Right.

Q Okay.

A Correct.

Q With regard to the fall that Mr. Kneece had just very recently where he broke a couple of bones in his hand -

A Yes, sir

Q - and saw Dr. Ugino -

A Yes, sir.

Q - did you all notify the Workers' Compensation insurance carrier about that accident?

A No, sir.

Q Did you request their approval to send him or ask them to send him to a doctor?

A You have got to understand, please, sir, for me -

Q If you would answer my question first.

A No, sir. I did not.

Q Okay.

THE COURT: Go ahead and explain.

BY MR. CAUTHEN:

Q You can certainly explain it.

A If you will, please, understand for us that you were not always in this picture.

Q Yes, ma'am.

A We have been through five carriers. And not everybody on you all's end of the world is nice people. I found you all to be, but not everybody is. And I'm the type person, I'm going to take care of him. I love him. I'm not going to fight you over him, but I'm going to take care of him. That's where I am. That's where I was. He said, "Do you think?" I said we will fight over this later. We are going to take care of you

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today. Your hand's hurt. It was a Saturday, Friday afternoon, wasn't it Rick? Maybe Saturday afternoon. Nobody was in, so I went and took care of my husband. And I told Scott about it and there you have it.

Q One other thing that I wanted to ask you. And you had testified before about the deficiencies, the inabilities, the fact that he was not able to be productive like he used to. And I have to ask the question. And I don't mean this disrespectfully in any way. But if that is the case, why not replace him with someone who is productive?

A Because I love him and that's his world. And his dignity and his pride is worth much more.

Q And I respect that and I fully understand that. I just had to ask the question.

A I appreciate you trying to trying to understand. Are you married?

Q Yes, ma'am.

A Can you imagine sitting in 20 meetings and degrading your wife to this big?

Q I do -

A It's hard.

Q And I don't mean to make this difficult for you because I know it's been a tough thing. Unfortunately sometimes the law doesn't -

A It's not fair.

Q It's not capable of compensating us for everything that we feel like we ought to be compensated for. So, I appreciate your time answering questions.

A We are going to keep him.

MR. CAUTHEN: That's all the questions that I have. Thank you.

THE WITNESS: Even with his deficiencies.

THE COURT: Any redirect?

MR. ELLIOTT: Thank you very much.

REDIRECT EXAMINATION

BY MR. ELLIOTT:

Q Ms. Kneece, give me a moment while you collect yourself. There are some words that are going to be in this record once we are through here that may have different meanings to different people. And I want to ask you in connection with the cross examination about these words.

A Okay.

Q A question that you were asked on a number of occasions, and I think perhaps your husband was earlier, was a question concerning Mr. Ricky Kneece's earnings. Do you recall this being asked generally?

A Uh-huh.

Q Let me just show you - we provided a copy. This is

the W-2 statement for 2007.

A Uh-huh.

Q And it shows a figure here for Ricky D. Kneece of $76,600. Do you see that figure?

A I do.

Q And those are characterized by what, according to the IRS?

A Wages, tips.

THE COURT: Do you have a copy? Any objection because -

MR. ELLIOTT: No. Please, I insist.

THE COURT: All right. Thank you.

THE WITNESS: Wages, tips, compensation.

THE COURT: This will be Defendants' 1. Go ahead.

(WHEREUPON Defendants' Exhibit No. 1 was marked into evidence.)

BY MR. ELLIOTT:

Q Note that it does not say the word earnings.

A No, it doesn't. It doesn't say salary. It doesn't say paycheck.

Q In the sense of Ricky doing some constructive work, does he, in that sense, earn the check he gets every week or every month?

A No, sir. He does not earn it.

Q It is calculated based on just a figure that the farm owners want to pay him?

A Uh-huh. Mr. Delano said do this.

Q And in particular in 2007, the $76,600, is there also a bonus in there?

A Yes.

Q And that would be how much approximately?

A It's somewhere in the neighborhood of 25 or 26 thousand dollars. And Mr. Delano gets the same bonus so that they can pay the land payment. That's when it went up to that. He still makes about the 52 whatever that comes into hour home to live on.

Q And you were asked a series of questions also about Mr. Willie.

A Uh-huh.

Q Mr. Dobbs.

A Mr. Dobbs.

Q I think that there was a series of questions wherein Mr. Cauthen asked about whether - trying to draw a distinction between skilled farm labor and unskilled farm labor; do you recall that?

A I do.

Q The words I wrote down are, when he was using to define his meaning of skill, were manager, planner or leader. I would ask you, is Ricky Kneece a skilled

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farmhand by virtue of being a manager, planner or leader?

A No.

Q And then I believe you testified that Mr. Willie was hired to do the physical labor that Mr. Ricky Kneece could no longer do.

A Right.

Q And I think that in that examination we decided that Mr. Willie was unskilled.

A Yes, sir.

Q In the sense that Mr. Ricky Kneece is no longer able to do the kind of work that Mr. Willie does, would you say that Mr. Ricky Kneece is not even an unskilled farmer in his current physical condition?

A Yes, sir. Well, I'm agreeing with you.

Q Yes.

A Yes, sir.

Q So, he is neither a skilled farmer or an unskilled farmer at this stage of his life given his physical and mental capacity?

A He is a man that is loved very much.

MR. ELLIOTT: Thank you. That's all I would have.

MR. CAUTHEN: No further questions, Commissioner.

THE COURT: Any other witnesses for the

Employer/Carrier?

MR. CAUTHEN: No, sir.

THE COURT: Anything else from the Claimant?

MR. ELLIOTT: No thank you, sir.

THE COURT: That'll conclude this hearing.

(THE HEARING CONCLUDED AT 5:15 PM.)

NADINE A. GARRETT
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STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

CERTIFICATE

BE IT KNOWN THAT I TOOK THE FOREGOING WORKERS' COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT 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 25th DAY OF MARCH, 2011.

NADINE A. GARRETT
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES AUGUST 11, 2016

NADINE A. GARRETT
COURT REPORTER
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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE # 9920867

RICKY KNEECE, CLAIMANT, VS. KNEECE FARMS, EMPLOYER, LEGION INSURANCE IN LIQUIDATION THROUGH S.C. PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION, CARRIER, DEFENDANTS.	DEPOSITION OF **ROXANNE KNEECE**

Deposition of Roxanne Kneece, taken pursuant to the South Carolina Rules of Civil Procedure and the Administrative Procedures Act, commencing at the hour of 4:30 p.m., Wednesday, September 29th, 2010, at the law offices of Elliott & Elliott, 1508 Lady Street, Columbia, South Carolina.

COPY

Reported by

Sandra M. Snead

Appearances

For the Claimant: Scott Elliott, Esquire
Elliott & Elliott, PA
1508 Lady Street
Columbia, SC 29201

For the Employer/
Carrier: Peter P. Leventis, Esquire
McKay, Cauthen, Settana &
Stubley, PA
1303 Blanding Street
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Reported By: Sandra M. Snead

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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. Social Security numbers have been redacted or blacked out.

Stipulations

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

Whereupon,

Roxanne Kneece, 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: Roxanne Kneece.

Examination

By Mr. Leventis:

Q Ms. Kneece, can you tell me your Social Security number? It will be redacted from the actual record.

A I can. [redacted].

Q Okay. And are you the spouse of Mr. Ricky Kneece?

A I am.

Q Okay. And can you tell me what your role and responsibilities are with Delano & Sons Farm?

A I am the secretary/treasurer.

Q Okay. Do you have the bookkeeping responsibilities?