THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-001494

Theodore P. Polansky, Employee, ... Respondent,

v.

SC Office of the Attorney General,
Employer, and State Accident Fund, Carrier,.....Appellants.

FINAL BRIEF OF RESPONDENT

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I. Did the Commission err as a matter of law by: (A) admitting over an objection of bias one report of Dr. Avie Rainwater; (B) by referring to Dr. Rainwater as an Authorized Treating Physician; and/or (c) by concluding that Dr. Rainwater's medical opinions were not pivotal and necessary to the Commission's determination of permanent brain damage?

II. Did the Commission err as a matter of fact based on the facts before the Commission and/or concluding as a matter of law that the Respondent had suffered physical brain damage that was both serious and severe as contemplated by Crisp and Sparks?

III. Did the Commission err as a matter of law by finding that the Appellants had notice of physical brain, "injury" and by failing to apply the equitable doctrine of laches to the Respondent's request for lifetime compensation benefits for, "permanent" physical brain "damage"?

IV. Additional Sustaining Ground I: Was the Defendants'/Appellants' Request for Review (commonly called an "appeal") of the Award made by the Hearing Commissioner to the Commission timely filed under SC Code §42-17-50 and the Supreme Court decision in Allison v. W.L. Gore and Associates, 394 S.C. 185, 714 S.E.2d 547 (2011), which is jurisdictional?

STATEMENT OF THE CASE

[Due to the inaccurate Statement by Appellants and their position, a lengthy procedural history is necessary.]

This appeal arises out of two accepted work-related injuries; one occurring in 1999 and the second occurring in 2000, for which compensation benefits had been paid by the State Accident Fund ever since the Claimant went out of work in 2001, and for which the State Accident Fund has paid for all medical care related to those injuries; and specifically including treatment for injury to the brain ever since 2002. (APPXR, pp. 37-42; 134; 135; 641-644; 650; 669, 685-687; 699-701; 704; 707-709; 714). After Appellants requested assistance from Respondent in obtaining Second Injury Fund ("SIF") protection, specifically on May 11, 2009 the Respondent placed the State Accident Fund and its Attorney Ms. Mary League on notice that he was claiming entitlement to lifetime compensation benefits due to physical brain damage. (APPXR., pp. 715-716).

As is more fully set out in the Statement of Facts contained in this Brief, due mainly to the delay caused by the Appellants' failure to adequately and timely provide all medical testing and evaluation as recommended by all of the treating doctors, (including the pain management doctor, both psychiatrists and an evaluating neurologist from 2004 through 2011, on May 5, 2011) the treating psychiatrist, Dr. Frank

Forsthoefel, issued the first definitive medical Opinion that the Claimant was totally and permanently disabled due to physical brain damage. Eleven (11) days later on May 16th, the Claimant filed a Form 50 requesting an Award for total and permanent disability and lifetime compensation benefits due to physical brain damage with the Commission. (R., pp. 1222-1224). Responsive Form 51s were filed and in those Form 51s there was no affirmative defense of laches raised by then Defense Counsel, the Danley Law Firm. (R., p. 1221). A Hearing was continued by agreement in September of 2011 due to the Respondent recovering from surgery for the re-implantation of a spinal cord stimulator. At that time, the Appellants did notify the Respondent of a referral for testing by a psychologist to which Respondent objected but notified Appellants' Counsel, that he had no objection to any evaluation by a local licensed physician or surgeon and testing ordered by that physician which is their right per the Act.

A renewed Request for Hearing was refiled on March 2, 2012. (R., pp. 1217-1220). The matter was set for hearing on June 5, 2012 but following a belated Motion by Defendants/Appellants heard May 16th for an improper evaluation by a psychologist, which the Commissioner denied by Order as being improper, but also by Order continued the hearing on the claims "indefinitely" for an evaluation by a physician in Charlotte that had not been

requested. Trying to get a hearing, Respondent appealed to the Full Commission, which appeal after being briefed and set for hearing was dismissed at the call of the case without hearing. After written Order on November 14, 2012 Respondent filed a Writ of Mandamus and Writ of Prohibition in the Circuit Court. (R., pp. 1193-1211). The parties reached an Agreement in the Circuit Court which was filed with and approved by the Circuit Court on April 22, 2013 providing for an evaluation by a local physician. (R., p. 1175-1178). Due to the failure of the State Accident Fund and then Defense Counsel (Ellen Goodwin - third Defense Counsel of Record) to execute the Agreement for approval by the Commission, Counsel for the Claimant/Respondent forwarded a request that the matter be set for hearing on May 1, 2013 and thereafter on June 13, 2013, Respondent served Appellants with a draft Motion requesting a hearing. Finally, in September of 2013, third Counsel for the Appellants signed the Agreement and on September 5, 2013 per the direction of the Commission, the Agreement was submitted to a Commissioner for signature as a Consent Order which was signed on November 7, 2013. (R., pp. 1360-1366). Per the Circuit Court Agreement originally entered **April 22, 2013**, the Claimant/Respondent again agreed to submit to an independent medical evaluation by a local treating psychiatrist chosen by the Appellants, Dr. Frierson, to include any and all testing and evaluation that the doctor

determined necessary as part of his independent medical evaluation. Between April of **2013** and **April 16, 2014** when Respondent's Counsel filed the Motion for an Order setting the matter for hearing, the Defendants/Appellants never requested nor scheduled the independent medical evaluation or any other evaluation or testing. The Motion was granted and the matter was set for Hearing on September 3, 2014. Nine (9) days before the matter was set for Hearing, Respondent received Appellants' responsive Pre-Hearing Brief from Peter P. Leventis, IV, Esquire (fourth Defense Counsel) who was assigned to the file by the McKay Law Firm. (R., p. 1358). New Appellants' Counsel then filed a belated request for this matter to be submitted to mediation on September 15th, and the matter was again continued due to that request. (R., pp. 559-569; pp. 1355-1356; p. 1357).

The case was then mediated on November 12, 2014 and subsequent thereto, the matter was set for hearing on January 7, 2015 for March 6, 2015 on the one remaining issue that was left unresolved following the mediation. (R., p. 192).

[The above-referenced accurate Statement of the Case is submitted due to the blanket Statement in Appellants' Statement of the Case that no hearing was held on the Claimant's Request for benefits from 2012 (which is inaccurate since it was filed in May 2011) through 2015 over three years later.]

Pre-Hearing Briefs, APA Submissions and Exhibits were filed and a hearing was held on March 7, 2015. (R., pp. 1023-1027; pp. 1017-1022). The Hearing Commissioner thereafter filed her Order which was served on June 1st by email pursuant to statute and Commission Regulation. (R., pp. 141-191). Fifteen (15) days later on June 15th, the Appellants untimely filed a Form 30 Request for Review which was served by regular US Mail on both the Commission and Counsel for the Respondent. Although notification was requested by Respondent's Counsel as to whether Appellants would appeal to the Full Commission, notification was not received and a cross-appeal was filed on that same date with the Full Commission. After Briefing and oral argument, the Full Commission issued its Decision affirming the Decision of the Hearing Commissioner awarding benefits on November 10, 2015. (R., pp. 104-140; pp. 861-882; pp. 934-962; p. 1231). The Appellants appealed that Order to the Circuit Court, since this is a pre-2007 case, on December 9, 2015. (R., pp. 790-791). On December 11, 2015, the Respondent filed a Motion to Require Payment pursuant to SC Code §42-17-60 (as amended through June 30th) and to dismiss the appeal of the Appellants with a Memorandum in Support. (R., pp. 792-799). The Respondent also requested an expedited Hearing pursuant to the Circuit Court Rules and based on hearings set for January 29, 2016 on the Motion to Dismiss, and on February 8th on the Motion for Payment,

the Appellants agreed to start making payments of weekly temporary total disability benefits and the parties agreed to cancel the Hearing set for January 29th and agreed that all appeals would be reset for Hearing during the week of February 8th thru the 12th. It was agreed that the Motion for Payment of all accrued benefits would go forward on February 8th and that the appeal and cross-appeal would be set for February 12, 2016 at 11:00 o'clock a.m.

Due to the failure of the Workers' Compensation Commission to file the Record pursuant to Rule 75, SCRCP, the presiding Circuit Court Judge Manning issued an Order ordering the Commission to file the Record on or before February 22nd at 5:00 o'clock p.m. (R., pp. 64-65). A second Order of Continuance was issued on February 17, 2016. (R., pp. 61-63).

Thereafter on April 12, 2016, the Appellants filed for a Status Conference and to postpone the Hearing and filed a Motion for Substitution of Counsel with Peter Leventis, Esquire being replaced by Temus C. Miles, Jr., Esquire, both of the law firm of McKay, McCauthen, Settana & Stubley, PA (fifth Counsel of Record for the Appellants). (R., pp. 748-755). The Respondent filed a Return to the Motion agreeing to and requesting a Status Conference but requesting no further delay in the hearings on either the appeals or the Motion to Dismiss concerning both of which the Respondent noted he had requested for months and

months a hearing on those; and noting that the Appellants had presented only three (3) issues to the Full Commission and that based upon the undisputed case law precedents, that they waived any other issues being heard by the Court on appeal. (R., pp. 421-474).

The Respondent before this Court and the Claimant/ Respondent below, on May 11, 2016, when no Brief had been filed by the Appellants, filed a Brief to the Circuit Court on the issues that had been presented to the Full Commission. (R., pp. 694-720). On May 13th after the filing of the Brief of the Respondent, the Appellants then filed a Brief as to both their appeal, addressing the same three (3) issues in the Brief that had been addressed before the Full Commission, and as to the cross-appeal. (R., pp. 600-629).

Subsequently the Court issued orders in both the appeal and cross-appeal on June 9, 2016. (R., pp. 34-60). The Appellants filed a Motion to Alter or Amend the Judgment as to their appeal but which was improperly captioned and fatally defective as it improperly designated the parties and as being a Rule 59 Motion to the wrong action, the cross-appeal. The Memorandum attached thereto did address the issues of the appeal of the Appellants. (R., pp. 559-569). The Respondent filed a Return to the Motion noting it was fatally defective because Rule 10, SCRCP, specifically requires that the pleadings must properly set forth

the parties and the Circuit Court case number whereas in the caption of the document it listed the employee/claimant as the Appellant and the Appellants, the employer and carrier, as the Respondents and set out the wrong case number. The Return also replied to the allegations contained in the Motion.

Thereafter, on July 8, 2016, the Court issued a separate Order ordering payment of all accrued payments of weekly compensation from the date that payment was ordered by the Commission through the date that payment was reinstated after the Motion demanding payment and the resumption of weekly temporary total disability benefits had been filed. (R., pp. 33-46). On July 25, 2016, an Order was issued denying the Rule 59(e) Motion as to the Appellants' appeal. (R., pp. 22-24).

On July 22, 2016, the Appellants filed a Rule 59 Motion to the Order of Judge Manning which ordered the payment of all back due benefits which Motion was denied by Order served on August 17, 2016. In his Order, Judge Manning had ordered immediate payment of all back due compensation benefits and upon notice that payment had not been made, Judge Manning issued a Rule to Show Cause. During this time, as is reflected in the Records of the Court of Appeals, even though there were only two appeals, Appellants' appeal and Respondent's cross-appeal, Appellants filed four (4) separate Notices of Appeal to this Court. In addition, they filed a Writ of Supersedeas in the Circuit Court

to block the payment of past due benefits under the prior Orders of the Circuit Court. That Supersedeas was granted and subsequently as is reflected in the Records of this Court, the Appellants also filed a Motion to Stay their appeals. As is reflected in the Motion filed with the Circuit Court to dismiss Respondent's cross-appeal, that appeal was dismissed without prejudice by Respondent in an effort to simplify and to finally get Appellants' appeal before the Court briefed and heard. As is reflected by the Records of this Court, it took from September until May of 2017 and a Motion to Dismiss being filed by the Respondent to proceed with Briefing. After that Order of this Court, ordering and establishing the Briefing Schedule, again Appellants sought an additional extension to file their Initial Brief and then filed an almost identical Brief addressing only the same three (3) issues that were raised before the Single Commissioner, Full Commission, and Circuit Court (repeatedly) and then now before this Court as is reflected in their Brief.

Wherefore, over six (6) years from when the Claimant first requested a Hearing on his request for benefits in May of 2011 (which was two (2) years after he had placed the Appellants on Notice of his claim - 2009), and five (5) years after a hearing (June 2012), was continued due to a last minute Motion filed by the Appellants; and over three (3) years after the Respondent filed a Motion (April 2014) and the Commission ordered that a

Hearing proceed due to the failure of the Appellants to obtain the independent medical evaluation which they had requested by a local physician; and almost three (3) years after a hearing was set and fourth Defense Counsel of Record, less than ten (10) days before that Hearing, requested mediation; and after over two (2) years from the date of the Hearing Commissioner's Decision awarding benefits; and over a year and a half (1 ½) from the date that the Respondent filed a request in the Circuit Court for an expedited hearing in November of 2015, and after numerous agreements as is reflected in the Record as set forth above in the Circuit Court of continuances, agreements and procedural efforts on the behalf of the Appellants to avoid payment which resulted in the delay of this matter being decided by the Circuit Court; and some ten (10) months after the date of the appeal of the final decision of the Circuit Court; and after the Order of this Court dated April 15, 2017, this matter is finally being Briefed and presented to the Court for final resolution.

STATEMENT OF FACTS

From the first injury in 1999 and through Commissioner Barden's Order in 2015 and continuing at this time, the Defendants/Appellants have provided without question (although delayed for long periods many times) all treatment, evaluation and care for all problems related to his injuries specifically

including: the brain; back; legs; RDS; sexual, urinary and bowel dysfunctions and psychological. Since 2002 when Mr. Polansky suffered a major encephalopathy, severe swelling of the brain, requiring hospitalization for 25 days, **paid for by the Appellants**, the Appellants have known, accepted, and paid for treatment, evaluation and care for that brain, "injury".

All of the **authorized treating** physicians and psychological professionals, Dr. Frank Forsthoefel, M.D., treating psychiatrist, (2001 to present[1]) (APPXR., p); Dr. C. Jean Jonet, Ph.D., treating psychologist, (2004 to present) (APPXR., pp. 42-187; p. 340); and Dr. Ezra Riber, M.D., chronic pain specialist, (2001 to present), (APPXR., pp. 188-346 and R., pp. 1067-1131), have all beginning in 2011 stated the opinion Mr. Polansky has severe **permanent brain "damage"** stemming from the **2002 brain "injury"**.[2] In addition, Dr. Nicholas Lind, Ph.D. authorized to perform neuropsychological tests in 2008 (APPXR., pp. 37-47) has also stated that same opinion. (APPXR., pp. 37-38). Dr. Avie Rainwater, Ph.D. authorized, specifically in 2001, who performed the same neuropsychological testing in 2011 that he had performed in 2001 before the 2002 brain "injury", stated this same opinion. (APPXR., pp. 26-36).

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[1] 2005 to 2009 Mr. Polansky was treated by Dr. Marturano, M.D. when Dr. Forsthoefel had left private practice. (APPXR., p. 699).
[2] Dr. Beasley has also been an authorized treating doctor for Mr. Polansky for sexual, bladder, and bowel dysfunctions since 2002.

In addition to the specific authorized treatment in and after 2002 for organic brain injury and the numerous opinions and evaluations concerning and confirming "organic" brain problems,[3] between 2004 and 2009[4], in 2009 Claimant's Counsel in a letter to the State Accident Fund Attorney Mary Sowell, dated May 11, 2009, stated (quoting in pertinent part):

> "Back in 2002 ..., Ted was hospitalized due to a reaction from a prescribed psychological prescription that resulted in a chemical encephalopathy of the brain. He was hospitalized and the doctors have said that he has suffered physical brain **injury** as a result of that chemical encephalopathy. I would appreciate it if you would let me know or if you could check with them and see if we are going to have any problems with Ted receiving lifetime disability benefits due to this physical BRAIN **injury**..." (APPXR., p).

There IS NOTHING in the Record from 2009 until after the Form 50 was filed in May, 2011 advising the Claimant that a request for an Award for permanent, physical brain damage stemming from his physical brain injury would be denied.

In the Mediation Agreement signed November 12, 2014 it was agreed that:

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[3] Organic - of or relating to the physiological structure of an organ. Stedman's and Dorland Medical Dictionaries.

[4] In 2004 and 2005, treating psychiatrists Dr. Forsthoefel and Dr. Marturano requested neurological evaluation and neuropsychological testing. Dr. Riber (knowing Mr. Polansky is treating with a psychiatrist) recommends neurological examination/testing. Dr. Adams, knowing he is seeing a psychiatrist, recommends neuropsychological testing for memory. Dr. Lind without brain injury records in 2008 finds severe cognitive problems. Counsel for Respondent hates to be flippant but why are psychiatrists (specialty-treatment of psychological disorders) and doctors who knew Mr. Polansky was seeing a psychiatrist requesting neurological evaluation and testing? Reasonable explanation: Neurological (physical/organic) vs. psychological.

"1. Claimant is permanently and totally disabled" and the **only issue** left open as to the brain injury was:

"2. The issue as to the compensability of the alleged brain injury remains in dispute."

There was no reservation of any affirmative defenses or procedural defenses listed in the Agreement. (APPXR., pp. 697-698).

PRELUDE TO ARGUMENTS ON THE ISSUES RAISED

As a prelude to the Arguments on the issues raised by the Appellants, the Respondent would submit that a large majority of the Record that this Court will be called upon to review actually deals with delays, dilatory tactics, and/or the lack of due diligence on behalf of the Appellants in reference to this accepted claim for benefits. The first major delay caused by the Appellants was between 2004 and 2008. In 2004 as set forth in the Statement of Facts, three (3) separate specialists, two (2) psychiatrists, and one (1) neurologist stated either and/or that Mr. Polansky's problems were not explained by his psychological problems but were in the nature of cognitive problems that are related to physical injury to the brain. In addition, in 2004 the treating chronic pain medicine specialist and rehabilitation expert, Dr. Riber, requested neuropsychological testing. The State Accident Fund did not authorize neuropsychological testing until 2008, and when they

did, they did nothing more than schedule the testing and did not provide the neuropsychologist that performed that testing with any of the medical records concerning the encephalopathy or any of the medical treatment that the Claimant had had through that date. As is reflected in his (2012) report, Dr. Lind, Ph.D. spent months trying to gain additional information that would allow him to address, or maybe better put explain, his findings during the testing. As is reflected in his report, it was not until 2012 when he was given that information that he could express an opinion. From 2008 through 2011 there is repeated references to medications being provided for the Claimant/ Respondent's cognitive problems that are prescribed for "physical" brain damage issues and cognitive problems, not psychological problems. Although placed on notice by Respondent's Counsel in 2009, when the Respondent helped the State Accident Fund obtain Second Injury Fund coverage and protection, that he was alleging and inquired could they simply agree on the provision of lifetime compensation benefits for brain damage, the State Accident Fund did nothing to deny that request and then after being provided with a copy of the authorized treating physician's and psychiatrist's Opinion, who had treated the Claimant beginning in 2001 and continuing as of the filing of the Form 50, never challenged nor even took his deposition. They did not take the deposition of Dr. Jean Jonet,

Ph.D., the treating authorized psychologist nor of the authorized treating chronic pain medicine specialist, Dr. Ezra Riber, who had been treating the Claimant since 2001; nor any other doctor including Dr. Avie Rainwater, Ph.D. (who had been authorized to perform testing in 2001, and whose opinion they knew in 2012), all of whom stated the same exact opinion that Mr. Polansky was permanently and totally disabled from severe permanent brain damage. No depositions were taken in 2011, 2012, 2013, 2014, or 2015.

Although the Claimant agreed to submit to an Independent Medical Evaluation by the State Accident Fund's designated local specialist, Dr. Frierson, the State Accident Fund did not schedule nor have an evaluation performed that they had requested for well over a year after a specific agreement/ consent resulting in the Claimant having to file a Motion to have a Hearing ordered due to the failure of the Appellants to proceed with the requested independent medical evaluation. Even after that Hearing was scheduled, the Appellants still took no depositions in May, June, July, nor August of 2014, nor then through the rescheduled hearing held in March 2015. It is repeatedly stated, which is not totally accurate, by every insurance company including the State Accident Fund, and they take the position that they have the right to control the medical care in a workers' compensation case. It was due to

their failure to timely provide medical care and evaluation that a final determination was not made until May of 2011 when a definitive diagnosis of physical brain damage resulting in total and permanent disability was made by the authorized attending psychiatrist.

ARGUMENTS

I. THE COMMISSION DID NOT ERR BY: (A) ADMITTING OVER AN OBJECTION OF BIAS ONE REPORT OF DR. AVIE RAINWATER; (B) BY REFERRING TO DR. RAINWATER AS AN AUTHORIZED TREATING PHYSICIAN; AND/OR (C) BY CONCLUDING THAT DR. RAINWATER'S MEDICAL OPINIONS WERE NOT PIVOTAL AND NECESSARY TO THE COMMISSION'S DETERMINATION OF PERMANENT BRAIN DAMAGE.

Great liberality is to be exercised in allowing the introduction of evidence in a workers' compensation proceeding. Trotter v. Trane Coil Facility, 384 S.C. 109, 681 S.E.2d 36 (SC App. 2009). In all workers' compensation proceedings, the Workers' Compensation Commission is the fact-finding body and our Courts will not disturb its findings if supported by reasonable inferences drawn from the evidence. Compton v. Town of Ivey, 256 S.C. 35, 180 S.E.2d 645 (1971). Further, a party may not complain about the admission of a report where the party has had ample time to depose a witness and/or failed to call the witness; and especially where the evidence is cumulative to other evidence in the Record. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999). The only evidence introduced by the Appellants, written Civil action pleadings, as a basis

for exclusion of the report was actually evidence to establish bias which is evidence introduced for purposes of impeachment, and which goes to the weight of the evidence not the admissibility of the evidence.

Before the physical brain injury (encephalopathy) in February of 2002, on October 10th and 15th of 2001, Dr. Avie Rainwater, Ph.D. performed neuropsychological testing on Mr. Polansky which was, "authorized" and paid for by the State Accident Fund as part of authorized treatment for Mr. Polansky. On March 22, 2011, Dr. Rainwater performed a re-evaluation performing the same neuropsychological testing on Mr. Polansky. (APPXR., pp. 27-36). Further, any opinions in the 2011 report, outside of the tests results, were merely cumulative to the other medical and professional opinion evidence including not only Dr. Forsthoefel, M.D., but also Dr. Riber, M.D. and Dr. Jonet, Ph.D., and Dr. Lind, Ph.D.

IA. Admission of Report. First, although knowing about Dr. Rainwater's testing and opinion in 2011, in 2011, 2012, 2013, 2014 and 2015, the Appellants never took Dr. Rainwater's deposition.

At the hearing, the only basis cited for excluding the report was bias by Dr. Rainwater. The Appellants, over objection, were allowed to place into the Record pleadings concerning litigation between the State Accident Fund and Dr.

Rainwater's group, totally unrelated to this claim, and with the earliest pleading being filed on October 10, 2011; over seven (7) months after the re-testing. Besides the fact that the objection to these pleadings being admitted (that they are rank hearsay which do not fit under any of the exceptions for admissibility of documents such as the Business Records Act), should have been sustained, the only possible basis for their consideration as evidence and the basis argued for excluding the 2011 testing of Dr. Rainwater that he was biased, would be as impeachment evidence to establish bias which does not go to admissibility but instead goes to the weight that should be given the doctor's 2011 report. Again, assuming the pleadings should have been admitted. Trial Handbook S.C. Lawyers 5th Edition §25:7 "Impeachment By Proof of Bias ..."

The purpose of any expert or medical evidence is to aid the Commission in coming to the correct conclusion and the Commission determines the weight and credibility to be given to any expert testimony once admitted. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). The Commission properly admitted the 2011 report and as the fact-finder assigned it the appropriate weight. Finally, the Respondent would ask the Court to note that the Appellants do not cite any authority for the proposition that this written evidence, Dr. Rainwater's 2011 report, should not have been

submitted into evidence, on any basis, nor even any authority on the issue of its weight.

Also under this part of the argument, the Appellants argue that because there was litigation going on between Dr. Rainwater and the State Accident Fund, or at least there was at some point in time in 2011 seven (7) months after the re-testing and report, that this would skew Dr. Rainwater's opinion in this case. Outside of that assertion being outrageous, it is not supported by any evidence and calls for rank speculation and an assumption by the Commission that would make the Commission's decision the subject of speculation and innuendo. Again, this issue was first raised in August 2014, nine (9) days before a scheduled hearing[5] and six (6) months before the hearing in February 2015. The Appellants had every right to take Dr. Rainwater's deposition since 2011 and also for the six (6) months before the case was reset for hearing and did not do so and this argument is patently without merit.

[5] Mr. Leventis who was Trial Counsel at the hearing was the first Counsel of Record to raise this issue who raised it in August of 2014. Apparently, and Counsel for the Respondent must state it that way, Mr. Leventis was hired on or about August 20, 2014 to file the Pre-Hearing Brief and to take over representation at the hearing that was set September 3, 2014. The way that the Respondent became aware that Mr. Leventis was involved, as the Commission Record will show, is that when the Respondent served his Pre-Hearing Brief and APA Submissions fifteen (15) days before the hearing, Counsel was advised to forward a copy to Mr. Leventis who had been retained. (Notice of Hearing, 7/7/14). The first mention of any challenge to the report of Dr. Avie Rainwater on any basis was in the Pre-Hearing Brief filed at that time, which as the Commission Record will show, was late filed by agreement from Respondent's Counsel.

The Appellants again resubmit in their Brief to this Court under this part of the argument, the allegation that the Respondent refused to submit to neuropsychological testing which is a bold-faced untruth. This allegation was first raised by present Appellants' Counsel in Appellants' Pre-Hearing Brief filed late by agreement of the Respondent nine (9) days before the hearing (actually the McKay Firm), who only became involved fourteen (14) days before this matter was set for hearing in September 2014. That hearing had been set pursuant to the Order of Commission, at the request of the Respondent, which Order was issued based on Appellants' failure to have an agreed upon (by Consent Agreement and Order), Independent Medical Examination performed and in which Agreement the Respondent had agreed to submit to any testing and/or evaluation ordered by their chosen physician. For present Appellants' Counsel to continue to raise this issue unsupported by fact is outrageous. Counsel will move for this argument not based on the Record to be stricken or for sanctions unless it is dropped in Reply. As is set out in the Record, based on the Circuit Court Agreement ending the Writs of Mandamus and Prohibition in 2013, an agreement and a draft Consent Agreement was entered into and submitted to Defense Counsel on April 16, **2013** agreeing to have the Claimant seen and evaluated by Dr. Richard Frierson at the USC School of Medicine Neurology Clinic which was finally signed and submitted on

September 5, 2013 and ordered by Commissioner Taylor on November 7, 2013. That Consent Order specifically provided:

> "Such examination shall include **any and all testing** and examination felt to be necessary by Dr. Frierson. . . ." (R., pp. 1360-1361).

Exactly one (1) year after the Agreement and with no examination having been set, the Respondent moved for a hearing which Motion was granted. Respondent's Counsel would beg the Court to read his letter to Defense Counsel found at Claimant's APA, 732-733 and question current Counsel at oral argument on the raising of this argument if it is not retracted in Reply.

IB. The second basis for the argument is that the Commission erred by referring to Dr. Rainwater as an authorized medical provider. Besides the fact that in the Order denying their Motion, the Order refers to Dr. Rainwater, Ph.D. as a previously authorized medical provider, the first and very simple answer to this argument is that the Appellants do not dispute that at one-point Dr. Rainwater was an authorized medical provider; thus, it is an undisputed fact and is accurate. Also, and very importantly at pages 7 and 8 of the Transcript of Hearing, the Hearing Commissioner in admitting the contested report specifically noted as to when Dr. Rainwater was an authorized medical provider and noted:

> "My response to that, based upon hearing the arguments of the parties, is that Dr. Rainwater, prior to any kind of dispute or

> claim or controversy between Dr. Rainwater and the Fund, Dr. Rainwater was, **in fact, involved in this case**, and I believe that in weighing the respected equities of the parties and the arguments, that it would be grossly unfair to the Claimant to have this expert or to be relying on this expert and then to be no longer able to use this expert. . . ." (Emphasis added). (R., pp. 1237-1238).

As stated in response to Argument I(A), this reference does not affect the admissibility but goes to the weight to be given the evidence. Tiller v. National Home Center of Sumter, supra.

IC. Finally, in the final argument on this issue the Appellants really argue again as to the weight that the Commission gave to Dr. Rainwater's test results. The Hearing Commissioner, as affirmed by the Commission, stated that in comparison to the other evidence and particularly the testimony, reports and evidence from Dr. Forsthoefel, the treating psychiatrist, from 2004 and continuing through the present, that she gave the report little weight. The Appellants do not point out the testimony on p. 1291 of Dr. Forsthoefel wherein he specifically states that the only effect the contested report had on his opinion was that Dr. Rainwater's retesting results in 2011 as compared to his 2001 testing results in reference to Dr. Forsthoefel's opinion did nothing more than confirm his independent opinions,

> "There were additional findings at that time **consistent with my additional findings after the hospitalization in 2002 for the drug-drug**

> **encephalopathy, that my findings became increasingly obvious to me** that there was something else going on in Ted's mind other than his psychiatric condition **and what became evident to me and to Dr. Rainwater as well, is that there was something organic, physical going on in his brain, and that is very well documented** ..." (Emphasis added). (R., p. 1259, ll. 9-19).

Dr. Forsthoefel referred specifically to his findings stretching all the way from 2002 through 2011. Also, his opinion that the brain injury in 2002 caused Mr. Polansky's organic physical brain damage was first stated in a report dated March 3, 2011 **before** Dr. Rainwater's testing on March 22, 2011. (APPXR, pp. 15-16).

On R., p. 1323, Dr. Forsthoefel in his testimony again stated specifically that his opinion was based on his findings and his treatment of Mr. Polansky and that after review of and considering the findings of Dr. Lind, and the opinions by Dr. Adams and Dr. Carnes, in addition to Dr. Rainwater, he noted that these opinions are all consistent with his, "reasoning" which is, "firmly grounded" based on his treatment and, "also" these other opinions. (R., p. 1323).

The issue is without merit and does not go to the admissibility but goes to the weight of the evidence and the Commission assigned all the evidence such weight as the Commission deemed appropriate.

II. **THE COMMISSION DID NOT ERR AS A MATTER OF FACT BASED ON THE FACTS BEFORE THE COMMISSION AND/OR CONCLUDING AS A MATTER OF LAW THAT THE RESPONDENT HAD SUFFERED PHYSICAL BRAIN DAMAGE THAT WAS BOTH SERIOUS AND SEVERE AS CONTEMPLATED BY *CRISP* AND *SPARKS*.**

Outside of the fact that there is absolutely no contradictory medical opinion evidence or other evidence in the Record to the evidence that the Claimant sustained serious and severe permanent physical brain damage, the assertion that Mr. Polansky's brain damage as was reviewed by the Hearing Commissioner and Commission, does not meet the standard of Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) quite frankly is beyond belief. The standard as set forth in Crisp and Sparks is simply and plainly that the physical brain damage as contemplated by those decisions and the Act is physical brain damage that is consonant with,

> "a meaning consonant with §42-9-400(d) of physical damage to the brain"

and that the brain damage is,

> "of such seriousness **as to constitute a hindrance or obstacle to employment or to obtaining re-employment**".

The uncontested medical and expert opinion evidence from all of Mr. Polansky's medical treatment doctors and providers is that Mr. Polansky is totally and permanently disabled from his physical brain damage and that his brain damage is severe and

serious enough to constitute an obstacle and hindrance to employment: Opinion of Dr. Forsthoefel, authorized treating psychiatrist beginning in 2001 and presently (APPXR., pp. 2-3); Dr. Riber, authorized chronic pain specialist, 2001 to the present and continuing (APPXR, pp. 18-19); Dr. C. Jean Jonet, Ph.D., authorized treating psychologist since 2004 and continuing (APPXR., pp. 22-23). In addition, Dr. Nicholas Lind, Ph.D., authorized clinical psychologist, found severe cognitive deficits in his evaluation and testing. (APPXR., pp. 37-47).

In addition to all of these findings and opinions, Dr. Jonet noted the following in her May 22, 2012 report concerning the severity or Mr. Polansky's condition:

> "Mr. Polansky is college educated yet he cannot write a check, cannot count change, cannot use tools or perform household chores or repairs. . . . He frequently becomes derailed while talking, requires re-direction and prompts. Sometimes he just stares off into space. He is enormously forgetful, takes notes and loses them. . . ." (APPXR., pp. 24-25).

Dr. Forsthoefel gave numerous examples of how profoundly severe Mr. Polansky's cognitive dysfunctions are:

> "He cannot read and understand the newspaper. While he can read the paper wherein it will take him a day to completely read one article in the paper, he then cannot tell you what he read and he has so much trouble actually reading the article word for word, that he has to have somebody read an article that would take person, such as Ms. DuBose, a few minutes to read. However, he then does not understand what she has read to him. He can perform minimal,

simple, repetitive or pattern tasks such as driving from one specific place to another, or feed the dog daily, but if you give him directions to any other place or even tell him to go to a place where he has been before but a long time ago, there is no way he can accomplish that. He has no memory of trips and has no memory away from structured, patterned responses. Remote memories for trips and one thing to another are terrible. He cannot write or count; he is incompetent to handle his financial affairs." (R., pp. 1299-1307; pp. 1312-1318).

Then in relation to the severity of all of these problems and considering his severe problems in reference to memory and his severe problems due to his inability to read, write, and count (which is even to the point to where he cannot write a check), and based on her observations of Mr. Polansky in the Courtroom and after hearing Dr. Forsthoefel's testimony, Commissioner Barden, from the Bench, appointed Ms. DuBose as Mr. Polansky's Guardian ad litem because in her opinion his ability to testify was extremely compromised. (R., p. 1308). In addition, after explaining all these severe cognitive deficits, Dr. Forsthoefel stated the opinion in reference to how severe these deficits alone were as to Mr. Polansky's disability as follows:

"Q: Okay. Alright. Now let's say that Ted didn't have RSD, didn't have a spinal cord stimulator, and doesn't have the severe problems he has with his back and all of these other physical problems that he has, in your opinion based on purely his cognitive brain injury and the

cognitive deficits he has, is he employable or not employable?

A: Unemployable.

Q: So, simply based on his organic brain damage that you have testified in your opinion to a reasonable degree of medical certainty, he is incapable of employment?

A: **Totally** incapable."

(R., p. 1318). (Emphasis added).

Under the uncontested medical and expert opinion evidence in addition to all of the other testimony and evidence submitted, the Respondent's physical brain damage alone renders him totally disabled. There is no contrary evidence to this fact in the Record. Therefore, not only does the brain damage which Mr. Polansky has meet the standard of Crisp and Sparks, which is that his brain damage must be severe enough that in and of itself it would constitute a "hindrance or obstacle to employment" (that is the Crisp and Sparks standard and that is the wording and standard that the Supreme Court has stated is to be applied), in this case, not only is that standard met, but more importantly, the uncontested expert medical opinion evidence and all the evidence in the Record establishes that he is totally incapable of employment and is not even sufficiently competent enough to testify due purely and strictly to his brain damage. There is substantial evidence to support the

Commission's Finding and it must be affirmed. The issue is without merit.

III. THE COMMISSION DID NOT ERR BY FINDING THAT THE APPELLANTS HAD NOTICE OF PHYSICAL BRAIN, "INJURY" AND DID NOT ERR BY FAILING TO APPLY THE EQUITABLE DOCTRINE OF LACHES TO THE RESPONDENT'S REQUEST FOR LIFETIME COMPENSATION BENEFITS FOR, "PERMANENT" PHYSICAL BRAIN "DAMAGE".

While the Appellants couple two arguments together in the caption of this argument, they in fact are arguing one argument which is laches. While the Respondent is of the opinion that laches does not apply and should not be applied to either party, if it were to be applied, it should be applied to the Appellants. Further, the Appellants are being disingenuous in making this argument by failing to note that the only issue left open after the mediation and in the Mediation Agreement was whether or not the Respondent had sustained compensable physical brain damage entitling him to lifetime compensation. Thus, by making this argument, they are diverting this Court's attention away from the fact that the defense of laches was not preserved. As a side note, not only does the doctrine of laches not apply in this situation, but the statute of limitations would not even apply to this situation involving an undiagnosed condition, "physical brain damage", where a brain injury (2002 encephalopathy), had been accepted and paid for medically. See: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (involving an accepted knee injury and almost three (3)

years later Respondent was found to have a previously undiagnosed condition in the knee and the Court held that the statutory limitation for filing a claim ran from that point when the condition was found and diagnosed). In this claim, all medical care was paid for by the Appellants for both: 1) the 2002 hospitalization for a brain "injury"; and 2) all care and evaluation thereafter for the brain "injury". However, the Respondent was not definitively diagnosed with physical, "brain damage" until May 5th, 2011 and on May 16th, he filed a claim for permanent brain damage.

As to the first argument and the element of notice, both parties had the same notice from 2002 to 2011 concerning the Respondent's, "injury," to his brain. There is no question that in 2002 Mr. Polansky sustained a physical brain, "injury" in the form of an encephalopathy. In addition to the treatment records and the rehab nurse's notes which were being provided to the State Accident Fund, from 2002 before and after the hospitalization for the brain injury and through 2004, in 2004 and 2005 Dr. Forsthoefel (psychiatrist) and three (3) other doctors found that Mr. Polansky needed neurological evaluation and testing for:, "organic mental condition"; Dr. Ezra Riber, "comprehensive neurological evaluation" (APPXR., p. 289); Dr. Marturano (psychiatrist) on September 19, 2005, "complete neurological workup by a neurologist . . . neurological

evaluation should include EEG testing . . . also recommend neuropsychological testing of Mr. Polansky" (APPXR., p. 669); and Dr. Julian Adams, "if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing". In addition, there were numerous communications in 2004 and 2005 (APPXR., pp. 700-713) to the adjuster both from the Respondent and from, and with the concurrence of, the assigned State Fund rehab nurses requesting authorization for neuropsychological testing. That testing was delayed by the Appellants, not the Respondent, and was finally and only authorized and performed in late 2007 and was concluded in 2008; but again, those tests were delayed and then authorized by the Appellants. (APPXR., p. 714). Then in 2009, the Respondent contacted the Appellants stating the belief, and again the belief, that he had sustained, "permanent" physical brain injury as a result of the original brain "injury" in 2002 and that he was entitled to lifetime compensation. Therefore, both parties were on notice and had the same notice throughout this entire time of a brain, "injury," for which the Appellants were providing treatment and evaluation for that original physical brain "injury" with both parties trying to determine whether or not there was a physical brain problem, as compared to a psychological or functional problem causing the Respondent's problems.

Again, the Appellants delayed providing neurological tests from 2004 to 2008, not the Respondent. Then in 2008 when they authorized testing they did not even send the medical records and Dr. Lind, Ph.D. stated in his 2012 report that at that time had he had those that he would have found that the Respondent was suffering from physical brain damage, which he did opine in 2012 after being provided the records of the 2002 brain injury (hospitalization for encephalopathy). (APPXR., pp. 37-38). Therefore, there is no question that the Appellants were on notice of a physical brain "injury" and the question for determination thereafter from 2002 until 2011 was whether there had been some permanent consequence (brain damage) from that physical brain injury in 2002. Thus, the Appellants had notice.

As to the defense of laches and the element of delay, it simply does not apply because there was no delay in filing a claim for physical brain damage. There was not a definitive diagnosis of permanent brain damage until May 5, 2011 based on a medical opinion [the Respondent would hope that the Appellants would agree that this is a medically complex issue requiring expert opinion evidence as the Commission found], and the Respondent filed his claim eleven (11) days after that diagnosis on May 16, 2011; there was no delay.

However, if one applies the doctrine of laches to this claim, the Court, as the Commission did, should apply that

doctrine to the actions of the Appellants. Appellants love to cite to the case of Muir v. C.R. Bard, Inc., supra, and while Respondent will set out hereinafter a later case which applied laches to the Defendants (employer/insurance carrier) in a less egregious case than this one as far as the provision of medical care and then a subsequent denial of benefits, let's apply the doctrine of laches as set out in the Muir case to this case.

Under the doctrine of laches, if a party knowing his rights, does not timely assert them and by an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position then equity will normally refuse to enforce those rights. That equitable principle applies to the rights of both sides; claims and defenses. (Emp. add.). In Muir, the Court specifically noted that delay alone (if that existed at all in this case) does not establish laches and that so long as there is no knowledge of the wrong committed and no refusal to embrace the opportunity to assert facts, there can be no laches. The Court specifically noted that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to have acted sooner, and also material prejudice. Not only are all of these elements not found in this case, but none of them are.

Both parties knew the Respondent had sustained physical brain, "injury" but neither until the opinion of Dr. Forsthoefel knew that he had sustained, in the opinion of a doctor, permanent physical, "brain damage". Both parties were investigating this; both parties were trying to find out if there was any damage from a physical standpoint, and if there was any delay in that process, it was from the Appellants not the Respondent. The Appellants were responsible to provide medical care and evaluation which was requested repeatedly all those years. Once Respondent knew of his right, or in other words, that he had permanent physical brain damage as definitively determined by his treating physician, eleven (11) days later he filed a claim for benefits. There has been no detrimental change in the Appellants' position, nor have the Appellants incurred any expenses as a result of any alleged delay. There was no refusal to embrace the opportunity to ascertain the facts as the Respondent, repeatedly from 2004 through 2011, was requesting evaluations concerning physical brain damage and also was receiving treatment specifically related to physical brain injury. Therefore, he was trying to, "ascertain the facts" throughout this entire time.

Again, laches does not even attach until there is a reason to assert a claim. There was no reason to assert a claim until

there was a definitive diagnosis that the Respondent had sustained permanent physical brain damage.

Further, there is absolutely no material prejudice. Appellants have known about the physical brain injury ever since 2002; have provided treatment and evaluation; have seen the same medical reports that the Respondent has seen; and have never questioned nor not paid for anything in reference to the Respondent's physical brain injury or requests concerning the cognitive dysfunctions that he is having. The Appellants since 2002; and specifically after 2009 when the Respondent placed them on notice that he thought he had sustained a permanent physical brain injury entitling him to lifetime benefits, never questioned the injury prior to the filing of the Form 50. Even in the Form 51 filed in 2011 the defense of laches was not raised and it was not raised until approximately a year later in the second Form 51 filed. Therefore, the Appellants in no way have been materially prejudiced. Further, this element is not even reached in reference to the laches doctrine if there is a failure as to any of the other elements that apply prior to that determination applying. As the Court said in Muir, you only reach the material prejudice element once you have reached and established all the other elements, which have not been established by the Appellants through the evidence and which do not apply in this case.

Further, the Appellants fail to note their responsibility and never cite to the case of Jervey v. Martinet Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2013). In that case the Supreme Court at 406 S.C. 210, 750 S.E.2nd 90 (2013) affirming this Court found the doctrine of laches applied to the defendants and that it was dispositive. In that case, the defendants paid benefits for 450 days before raising an issue/defense of compensability. In this case, **the Appellants paid benefits for physical brain injury from 2002 until 2009**. The reason the Respondent says 2009 is because in 2009 the Respondent specifically placed the Appellants on notice that based on the physical brain injury in 2002 and the evidence available at that time that he felt he was entitled to an award for permanent brain damage and wanted to know whether or not the Appellants would accept that without him having to prove that and litigate that issue. Thereafter, the Appellants continued to pay for all medical care in reference to the Respondent's physical brain injury and never questioned that issue until the Respondent filed a formal claim after receiving the opinion of the authorized treating psychiatrist in 2011. The Appellants therefore should be equitably estopped from asserting the doctrine of laches but should it be applied, as the Commission did, it should be applied to them in this case.

Applying the elements of laches to the Appellants, the Appellants, no later than 2009, were advised of the Respondent's claim for physical brain damage. At that point they had a, "known right" to assert the defense denying that claim and they "unreasonably delayed" in asserting that defense for over three (3) years. Their adversary, the Claimant in this matter, had to "incur additional expenses" and "detrimentally changed" his position due to that failure to notify him that they were in fact denying the claim. In addition, from 2004 until 2008 and really 2012, even though the authorized treating physicians were all requesting neuropsychological testing, the Appellants further caused the Respondent to expend money and detrimentally change his position by failing to provide the neuropsychological testing that was necessary and then when they did they did not provide the medical records so that the neuropsychologist, Dr. Nicholas Lind, Ph.D., could make a determination based on those tests. This further delayed the determination which Dr. Nicholas Lind stated he would have made at that time in 2008 had he been provided the medical records and particularly the medical records of the 2002 brain injury, encephalopathy. The Appellants thus failed to, "embrace the opportunity to ascertain facts" and there is no question that the Respondent was materially prejudiced by the Appellants failure to assert their defense. Therefore, if you apply the equitable doctrine of

laches to this situation, there is no question that the Commission could very well have found that the doctrine of laches should be applied to the Appellants in this case.

On a final note, the Respondent finds it quite humorous in reading Appellants' Brief (and other Briefs) that the Appellants never seem to know about nor do they refer to the other equitable doctrines that apply to any individual seeking equity. Those are: "one who seeks equity must do equity" and if one seeks equity, one must come into Court with, "clean hands". Under those equitable principles which must be applied along with the equitable defense of laches, how in the world can the State Accident Fund come into Court and claim that it has, "done equity". knowing that: 1) the authorized treating physicians for years were requesting evaluation from neurologists and neurological testing; 2) they failed to provide those; 3) they failed to provide the records to the doctor who was finally authorized to perform those tests; 4) by then asserting that defense against the Respondent while paying for all of that treatment and evaluation; 5) by asking for the Respondent's help in obtaining Second Injury Fund assistance; and 6) then by coming into Court and claiming that the Respondent is barred? Fundamental principle of equity: One who seeks equity must do equity.

Next, how can the State Accident Fund even think that they can assert "clean hands" when they have caused all the delay in evaluation and at the same time provided all the years of care; never questioned the claim, and specifically after 2009; and then when the very doctors and medical providers that they have authorized to provide care for over ten (10) years state the opinion that this man is suffering from physical brain damage that is severe, outrageously severe, to the point that he cannot even write a check, have the audacity to come into Court and assert that their hands are clean in any respect? The argument is patently without merit.

ADDITIONAL SUSTAINING GROUND I:

IV. THE DEFENDANTS'/APPELLANTS' REQUEST FOR REVIEW (COMMONLY CALLED AN "APPEAL") OF THE AWARD MADE BY THE HEARING COMMISSIONER TO THE COMMISSION FOR REVIEW WAS NOT TIMELY FILED UNDER SC CODE §42-17-50 AND THE SUPREME COURT DECISION IN ALLISON V. W.L. GORE AND ASSOCIATES, 394 S.C. 185, 714 S.E.2D 547 (2011), WHICH IS JURISDICTIONAL AND THE APPEAL SHOULD BE DISMISSED.

SC Code §42-17-50 requires that a request for review, commonly referred to as an "appeal", to the Full Commission, must be made "within" fourteen (14) days of the notice of the Award. The statute specifically does not read fourteen (14) days, "after" the date of the Notice of Award. SC Code §42-17-50 specifically reads in pertinent part:

> "If an application for review is made to the Commission within fourteen (14) days from the date when notice of the Award shall have been

given, the Commission shall review the Award . . . .". (Emp. add.)

Black's Dictionary defines the word "within" to mean an inner or interior part of or no longer in time than, and in various cases has been referred to as "any time before, at or before, at the end of, before the expiration of, not beyond, not exceeding, or not later than". Black's Law Dictionary, 4th Edition, "within", 1968. The Supreme Court has already held that the time limitation is jurisdictional and that even an appeal filed two (2) days later on the 16th day is filed untimely. Allison v. W.L. Gore & Assoc., 294 S.C. 185, 714 S.E.2d 547 (2011). In support of the proposition that the day of the filing of Notice is to be included, the Respondent would submit to the Court that the Court should look to the wording of our Rules of Court. Rule 6, SCRCP, in computing the time period the day of the act or event is not included, "after which the designated period of time begins to run is not to be included". Under Rule 260, SCACR, the Rule uses the word "within" and states, "unless a Motion to Reinstate the appeal has been actually received by the Court within fifteen (15) days of filing of the Order of dismissal (the day of filing being excluded)". (Emp. add.). Under that Rule which requires filing "within" fifteen (15) days, the Rule specifically adds wording to make it clear that the day of filing is to be excluded. A similar exclusion is

found under Rule 221(b) in reference to the Remittitur. However, under subsection (d) of that same Rule, Rule 221, SCACR, in reference to a Motion for Costs, the exclusion of the day of the Remittitur is not added. Again, even under Rule 6 of the Circuit Court Rules where it provides that the time period begins to run after the date of the act, the Court has found it appropriate to specifically set out as part of the Rule that the date of the act is not included.

The statute specifically uses the term, "within fourteen (14) days from the notice" and not "within fourteen (14) days after the date of the notice". The notice of the Award was given to the parties on June 1st and the fourteenth (14th) day and last day "within" that "notice" period would be June 14th. The appeal was not filed until June 15th, one day after the jurisdictional provision. The Court will find, again, upon review of the Allison decision that even being two (2) days late resulted in a lack of jurisdiction to hear the appeal. The appeal should be dismissed on this basis.

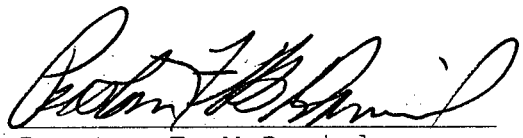
CONCLUSION

For all the foregoing reasons, the Award of the Commission and Opinion of the Circuit Court should be AFFIRMED. The objection to the evidence of Dr. Rainwater went to the weight, not to admissibility and the Commission assigned it such weight as was appropriate. The uncontradicted medical evidence

establishes not only that the Respondent sustained severe permanent brain damage that was sufficient enough to constitute a hindrance or obstacle to employment, but in fact establishes that he was totally and permanently unemployable due purely and only to his physical brain damage which prevents him from even being able to write a check or testify at his own hearing. There is no laches in this case because the Respondent applied for benefits eleven (11) days after he was notified definitively of the medical opinion that he had sustained permanent physical brain damage, and in addition the Appellants provided treatment for physical brain injury for ten (10) years without ever questioning that injury and by their own actions delayed the making of a determination concerning whether or not that physical brain injury had resulted in permanent physical brain damage. The doctrine of laches simply does not apply nor have any of the elements been met. In addition, if it is applied, it should be applied to the Appellants for their failure to raise this defense affirmatively to the Respondent for ten (10) years in reference to physical brain injury and at least three (3) years in reference to and after knowing of his position that he probably sustained physical brain damage and would be making a claim for that if the evidence supported it.

SIGNATURE TO FOLLOW ON PAGE 42

Respectfully submitted,



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December 20, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-001494

Theodore P. Polansky, Employee, Claimant,.....Respondent,

v.

SC Office of the Attorney General,
Employer, and State Accident Fund, Carrier,..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Dated: December 20, 2017

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