THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The L. Casey Manning, Circuit Court Judge

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**Appellate Case No. 2016-001494**

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Theodore P. Polansky, Employee, Respondent,

v.

SC Office of Attorney General, employer,
And State Accident Fund, carrier, Appellants.

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# BRIEF OF APPELLANT

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

v.

SC Office of Attorney General, employer,
and State Accident Fund, carrier.....Appellants.

## STATEMENT OF THE CASE

The Respondent, Theodore Polansky, a workers' compensation claimant, suffered from two separate work related injuries in 1999 and 2000. These claims were admitted for the Respondent's back, left knee (resulting in RSD/Complex Regional Pain Syndrome), and psychological injuries. Since 2002, the Respondent has been paid weekly benefits at the maximum compensation, which ceased after payment of 500 weeks of benefits (the maximum non-lifetime award available under the S.C. Workers' Compensation scheme), pursuant to §42-9-10.

Following the granting of the 500 week award, the Respondent filed a Form 50 hearing request, seeking a lifetime award, which was ultimately heard at proceedings before the single Commissioner on March 6, 2015. This is the claim that gave rise to this current appeal. This claim was based on an incident that allegedly occurred when the Respondent was taking the

prescription drug Seroquel as part of his treatment for his admitted psychological injury. In February of 2002, the Respondent had to be hospitalized, purportedly due to a drug-drug interaction between the prescription drug Seroquel, and some other prescription medication the Respondent was taking at that time.

Among other things in dispute at the March 6, 2015 hearing were: a) Whether or not the Respondent had suffered permanent physical brain injury; b) Even if the Respondent had otherwise suffered a permanent physical brain injury, if such injury rose to the level of physical brain injury for permanent life time indemnity benefits as envisioned by the General Assembly in promulgating S.C. Code Ann. §42-9-10, and related case law from the S.C. Supreme Court; c) Even if otherwise compensable, if such benefits of lifetime indemnity proceeds would be barred by the equitable doctrine of *laches*, due to the ten years' long intervening delay in requesting such benefits after the date of the alleged brain injury, resulting in material prejudice to these Appellants; and d) Certain procedural and evidentiary issues as to the admission of the reports of Dr. Avie Rainwater into evidence and the setting of the hearing on a Form 50 hearing request made approximately three years prior to the date of the March 2015 proceedings in this matter. In addition to these issues, the Respondent requested that the single Commissioner raise the compensation rate of the Respondent above the maximum compensation rate for his 2000 date of injury.

In a June 1, 2015 Order (addressing the March 6, 2015 hearing), the Respondent was awarded life time indemnity benefits under S.C. Code Ann. §42-9-10 subsection (C) for an alleged physical brain injury. The single Commissioner overruled any objection by the Appellants to the reports of Dr. Avie Rainwater, and as to the procedural flaw of holding the hearing on a Form 50 Hearing Request/Complaint originally filed requesting a hearing several

years prior. The single Commissioner also ruled that the Respondent had indeed suffered a physical brain injury in this matter, which entitled him to life time benefits, and which was not barred by the equitable doctrine of *laches*, nor any other reason. The hearing Commissioner denied the request for a higher compensation rate above that of the maximum compensation rate for the Respondent's date of injury.

The Appellants appealed the findings and conclusions of the single Commissioner to the Appellate Panel of the Full Commission of the Workers' Compensation Commission on multiple grounds, including, but not limited to certain evidentiary rulings and the compensation award of life time benefits, and the compensability of a permanent physical brain injury. The Respondent filed a cross appeal on the issue of whether or not the compensation rate in this matter should be raised above the maximum compensation rate for the year 2000. The Appellate Panel of the Workers' Compensation Commission issued an Order on November 10, 2015 fully affirming the prior Order of the single Commissioner.

The Appellants appealed the Order of the full Commission Workers' Compensation Commission to the Circuit Court, as the date of the accident giving rise to this claim occurred prior to July 1, 2007 and previous appellate jurisdiction rules applied. (Civil Action Case No. 2015-CP-40-07380). The Appellants appeal to the Circuit Court was based upon the same grounds asserted in the Appeal to the full Commission. The Respondent also filed a cross appeal of the full Commission's ruling on the compensation rate to the Circuit Court. (Civil Action Case No. 2015-CP-40-07468). The Respondent dismissed this Appeal prior to the circuit Court ruling upon it. (R. p. 527). The matter was set for a Hearing before the Honorable L. Casey Manning on May 20, 2016. At the time the matter was called, the hearing was deferred in favor of a ruling based on the briefs and the Record. (R. pp. 1225-30). The Circuit Court issued an

Order on June 3, 2016 fully affirming the prior Order of the single Commissioner. (R. pp. 48-60). This Appeal follows.

## STANDARD OF REVIEW

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). 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).

However, 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 S.C. 201, 143 S.E.2d 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). "Although medical evidence is entitled to great respect, the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record." *Potter v. Spartanburg Sch. Dist. 7,* 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct.App.2011). However, "[w]hile a finding of fact of the [C]ommission will normally be upheld, 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." *Edwards v. Pettit Constr. Co., Inc.,* 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979); *see also Grayson v. Carter Rhoad Furniture,* 317 S.C. 306, 309–10, 454 S.E.2d 320, 322 (1995) (affirming reversal of Commission's decision, which was supported by no evidence in the record).

## ARGUMENT

**1) Did the Circuit Court err in failing to reverse the Commission's allowance of the updated medical reports of Dr. Avie Rainwater in the record, holding that Dr. Rainwater was "an authorized treating physician," and concluding that Dr. Rainwater's medical opinions were not pivotal or necessary to the determination of permanent physical brain damage?**

The record of the parties and APA submissions include medical reports spanning over 15 years due to the initial date of injury in this matter (1999), and the date of the proceedings which give rise to this appeal, in March of 2015. (See Generally the APA submission No. 4 of the Claimant at pp. 20-30, of Dr. A. Rainwater from October 10, 2001 to July 24, 2014) (APPXR. pp. 26-36). Appellants raised objection at the hearing before Commissioner Barden as to the inclusion of the updated records of Dr. Rainwater from 2011 forward, and specifically APA p.

20-23, with updated reports and opinions of the Respondent's condition pursuant to the medical reasoning of Dr. Rainwater.

The objection to the updated medical reports of Dr. Rainwater being allowed into the record was based on the fact that Dr. Rainwater and the Appellant Carrier in this matter are adverse litigants in a separate contested civil action related to charges in excess of $75,000.00 for services provided by Dr. Rainwater's group. (See Defendant's Exhibit 44, a copy of certain pleadings filed between Dr. Avie Rainwater and the S.C. State Accident Fund) (R. p. 409). On this point, the single Commissioner held, and the full Commission affirmed, that, "the Defendants alleged as the basis for the objection that there was some type of conflict as to his latest report because there existed a dispute between the Defendant State Accident Fund and Dr. Rainwater over the payment for his services in other cases unrelated to this one. I specifically note from the Record not only was Dr. Rainwater involved in this case beginning in 2001 but that his evaluation and testing of which the Defendants complain was in fact conducted on March 22, 2011. Whereas the earliest pleading that was filed in that matter concerning the dispute between the Fund and Dr. Rainwater was filed on October 10, 2011. It would be patently unfair to the Claimant to disregard this authorized treating medical provider's opinion particularly where there is no evidence of any bias or prejudice or that any payments due to Dr. Rainwater were at issue in this case."

First, the Appellants refute the assertion by the Commission and the Circuit Court that Dr. Rainwater is an authorized medical provider in this matter. The use of the term "authorized treating medical provider" in the workers' compensation context indicates that the carrier selected or authorized the provider for the service at issue and tends to imply that the provider

and carrier are in agreement as to the treatment and opinions provided. This is not the case for carrier and Dr. Rainwater in the current case.

The first evaluation of the Claimant by Dr. Rainwater was in October of 2001. The only purpose for this evaluation was a referral by the treating pain management physician to Dr. Rainwater for his determination if the Respondent was, psychologically, an appropriate candidate for a spinal cord stimulator. The Appellants have no objection to this prior report. (APPXR. p.31-36). The next report was in March 2011, starting with the opening line that the Respondent is a 53 year-old male "kindly referred by his attorney..." (APPXR. p. 27). This sequence of evaluations does not make Dr. Rainwater an authorized treating physician in this matter, and particularly for any treatment or opinion after the spinal cord stimulator evaluation. If anything, he was a onetime evaluator for the limited purpose of determining if a spinal cord stimulator was appropriate back in 2001, and subsequently, upon referral by his own attorney in 2011, would have been considered an independent medical evaluator. Of note, he never truly really treated the Respondent.

Furthermore, Appellants contend that the objection to the updated records should have been sustained. Per the objection, and as substantiated by Exhibit 44, the Appellant Carrier in this matter, and Dr. Rainwater are adverse parties in a lawsuit relating to another matter. Appellants assert this would *per se* cause Dr. Rainwater's opinion to be tainted as to the Appellants in this matter. To presume that one person or entity would be in pitched litigation with, or considering filing legal action against, another person or entity, but would at the same time be fair and unbiased in rendering opinions directly affecting that adverse person or entity in other matters strains credulity. By counter example, Appellants contend that no Judge or Commissioner would purport to be able to rule fairly and objectively in a lawsuit between two

parties, if that Judge or Commissioner was being sued by or contemplating suing one of the parties to the action before him or her. The appearance of a conflict is so apparent in such an example that the Appellants believe it would warrant recusal. Similarly, it should have warranted in this same situation, the sustaining of the objection and exclusion of the updated records of Dr. Rainwater from the record. To simply give Dr. Rainwater's professional ethics 'the benefits of the doubt' is to alternatively give the detriment of the issues to the Appellants.

The Commission also indicated that because the date of the civil Complaint of Dr. Rainwater against the Appellant Carrier in this matter was in October of 2011, and the date of the report of Dr. Rainwater objected to by these Appellant was in March of 2011, the lawsuit was not material to any prejudice Dr. Rainwater may have had at that time, March 2011. However, the issues giving rise the civil action between Dr. Rainwater and the Appellant Carrier in this case existed long before then. The exhibits to that Civil Action show that it includes allegations of breached contracts from 2005 forward. In light of the conflict between Dr. Rainwater and the Appellant Carrier, the Circuit Court should have reversed the Commission's allowance of the updated reports into the record as a matter of law. Dr. Rainwater's updated reports were crucial to the Respondent's award despite the Commission's finding to the contrary and the Circuit Court's characterization of such importance. The Commission indicated on this point, in finding numbered "23" and "24", that:

> 23. []...Notwithstanding any dispute between Dr. Rainwater and the carrier, I find the opinions of Dr. Forsthoefel to be the most compelling of all the evidence. (See Defendants' APA #44; Claimant's APA #1, page 7).
>
> 24. Dr. Rainwater's opinion is not pivotal or necessary in this case, and I can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

This finding is simply not consistent with the record, which shows Dr. Forsthoefel actually relied on the reports and testing results of Dr. Rainwater in coming to his opinion that the Respondent's cognitive decline was purportedly related to the alleged 2002 drug-drug interaction, and not to the Respondent's own, very significant pre-existing depression, obsessive compulsive disorder, bi-polar disorder and schizoaffective disorder, or some other degenerative disorder (such as Alzheimer's) unrelated to any drug-drug interaction of the Respondent in 2002. (R. pp. 1290-1) (Also references to Dr. Forsthoefel's review and reliance on Dr. A. Rainwaters records at APA 1 p. 3 and APA 1 p. 7) (R. p 9 & 3).

One of the most crucial determinations in this matter is determining if the Respondent's current condition is from his pre-existing psychological conditions or arose as an alleged result of the physical brain injury. Dr. Forshoefel points out in his testimony that the he believes the fact that it is related to a brain injury is validated "with his [Dr. Rainwater's] testing..." (R. p. 1292). The Appellants assert that Dr. Rainwaters testing in 2011 was used by Dr. Forsthoefel, and perhaps others, to substantiate the medical opinion that the Respondent had a permanent physical brain injury – allegedly separate and apart from – his ongoing pre-existing mental and psychological conditions. The Appellant contend it was reversible error to permit the 2011 opinions of Dr. Rainwater into the record. The conflict between Dr. Rainwater and the Appellant Carrier tainted his reports and opinion, which were relied on at least Dr. Forshoefel, who the Commission found to have provided the "most compelling of all the evidence". For these reasons, the Circuit Court should have reversed the Commission's allowance of the 2011 Report in the record as a matter of law.

Of note, these Appellants further objected to the inclusion of the Dr. Rainwater testing because Respondent refused to undergo evaluation or testing by any non-physician of the

Appellants. It would cause inherent unfairness and inequity to the Appellants to permit the Respondent to use the sword and the shield in successfully keeping out any evaluation or opinion of non-physician evaluators of the Respondent, while at the same time permitting the Respondent to put forth such evidence, where the Respondent has failed to submit to the neuropsychological testing and evaluation agreed up in the prior Consent Order in this claim. (See Generally Exhibits Tabs 36, 39 and 40 of the Defendants) (R. pp. 370; 387; & 390) This should have been an additional ground for sustaining the objection to the 2011 report of Dr. Avie Rainwater and is an additional reason why the Circuit Court should have reversed the Commission's allowance of the 2011 report in the record as a matter of law.

**2) Did the Circuit Court err in failing to reverse the Commission's holding that the Respondent suffered a 'serious' and 'severe' physical brain injury thereby entitling the Respondent to life time indemnity benefits.**

First and foremost, these Appellants contend that the Respondent's alleged brain injury is not one that rises to the level of severity contemplated by the General Assembly in promulgating the potential benefits of life time awards pursuant to S.C. Code Ann. §42-9-10 (c), and as interpreted by the South Carolina Supreme Court in the cases of *Crisp v. SouthCo. Inc.* 401 S.C. 627, 738 S.E.2d 835 (2013) and *Sparks v. Palmetto Hardwood Inc.* 406 S.C. 124, 750 S.E.2d 61 (2013). ""[P]hysical brain damage" as contemplated in S.C. Code Ann. § 42–9–10 requires *severe and permanent* physical brain damage as a result of a compensable injury." *Id.* At 131, 64-5 (emphasis added) (upholding a finding of no basis of lifetime award based on lack of severe brain damage where the Claimant was permanently and totally disabled and had suffered a brain injury).

The Respondent's contention is that he suffered a significant and severe, and ultimately permanent, physical brain injury from his drug-drug interaction and hospitalization in February

of 2002, and he has had several psychologists and psychiatrists opine that this is the case over a decade later. The fact of the matter is, however, that after the alleged injury to the brain from the drug-drug interaction had subsided - the presumed problematic medication was removed from the Respondent's system - and the Respondent went back to his pre-incident baseline.

Prior to the 2002 drug-drug interaction, the Respondent had admittedly suffered from very significant and severe psychological conditions and mental disorders. Just months prior to the February 2002 hospitalization, these pre-existing conditions had led him to be treated both as an inpatient and monitored outpatient in relation to psychological breaks, hallucination and hearing voices in relation to his significant pre-existing depression, bi-polar disorder, schizoaeffective disorder, anxiety, oppressive compulsive disorder, memory loss/aphasia and other disorders. Again, prior to the 2002 accident, Dr. Forsthoefel notes that "dynamically it may be that Ted's earlier sexual abuse laid the groundwork for his future psychotic decompensation with stress." (APPXR. p. 16). Again prior to the 2002 hospitalization, Dr. Forsthoefel's March 3, 2011 letter references that in October of 2001 even Dr. Rainwater documented "Ted's concentration as 'grossly disruptive, loses his train of thought readily. Tangential thinking.' And Ted's memory as 'impaired.'" (at *Id.*).

After the 2002 drug-drug interaction, the Claimant made a full recovery back to his pre-incident baseline. (See Defendants APA 19, at p. 713 normal EEG testing) (R. p. 238). In a letter to Jeanne Beard in March of 2002, only weeks after the hospitalization, Dr. Forsthoefel references the fact that the Respondent's "Clinical and cognitive deterioration has fully remitted[,]" and "[h]is neuropsychological testing after this remission [from the Seroquel reaction] is entirely within normal limits as is hi EEG and brain scan." (R. p. 261). Dr. Forsthoefel also indicates that the Respondent's reading skills, comprehension, and memory

retention have all returned to normal limits from its deterioration prior to the hospital use of Seroquel. "It is clear to me that this earlier two month deterioration, prior to the hospitalization, was caused by his own confusion due to problems with compliance and probably over medication." *Id.*

In 2004, Dr. Julian Adam, MD, evaluated the psychological and neurological complaints of the Respondent. In addition to "probably malingering" Dr. Adams found that since the 2002 drug-drug interaction the Respondent had had "multiple tests on his head in the past such as MRI scans, EEGs, etc. All of them have been normal. I do not think they need repeating at the present time." (R. p. 242).

At the hearing, Dr. Forsthoefel testified on behalf of the Respondent, and rather than point to a specific diagnostic test, or a specific battery of psychological tests, he indicated that the Respondent had very severe cognitive deficits prefaced on a mood disorder rating scale from the DSM. When asked about the fact that the Respondent also suffered from depression and other pre-existing mood disorders, which could also affect and/or contribute to the DSM's rating, and put the Respondent at between a "30-40", the same DSM score, Dr. Forsthoefel indicated he knew the 30-40 score was for brain injury because, "that's a clinical finding. Those are based upon my clinical background." (R. p. 1326). Dr. Forsthoefel's opinion was also that this physical brain injury in 2002 resulted in dementia, when asked his basis for this, he indicated "clinical findings, supported by the testing findings of Dr. Rainwater...so my reasoning is firmly grounded in other -- with other consultant's opinions as well." (R. p. 1323). The Appellants take this opportunity to note the issues related to Dr. Rainwater's opinions and reports and their use by Dr. Forsthoefel as covered in Appellant's First Argument herein. Contrary to that testimony, Dr. Forsthoefel also indicated that the Respondent's cognitive decline took place over

many years and began *before* the 2002 drug-drug interaction. Attorney Leventis, "Is that -- you say a pre-existing cognitive decline. Do you mean prior to the 2002 drug-drug interaction?" Dr. Forsthoefel, "Right, yeah." (R. p. 1323, lines 22-24). Dr. Forsthoefel also conceded that the Respondent "had a lot of short term memor[y]" and functional problems prior to 2002. (R. p. 1331, lines 6-10). When pressed again on page 69 and 70 of the Hearing Transcript about how Dr. Forsthoefel could fetter out the pre-and post-2002 disability and cognitive functioning deficits, he continually indicated "those are clinical findings."

Appellants contend that the greater weight of the evidence does not support the findings of the Commission that the Respondent's dementia and diagnosis of degenerating brain function, which was definitively diagnosed nine years after the 2002 drug interaction, are sufficient to support a finding of permanent physical brain injury – causally relating back to the original 1999 and 2000 injuries. Moreover, even if otherwise supported, Appellants further assert that such a brain injury, if compensable, is not of such severity as to rise to the level of entitling the Respondent to a life time indemnity award under S.C. Code Ann. §42-9-10(c).

For the reason set forth above, the findings and conclusions of the Commission on these issues should have been reversed by the Circuit Court as a matter of law.

**3) Did the Circuit Court err in failing to reverse the Commission's holdings that the Appellants should have been on notice of a physical brain injury and that the Respondent's request for benefits for a permanent physical brain injury was not barred under the equitable doctrine of *laches*.**

Appellants assert that this claim for benefits should be barred under the equitable doctrine of *laches*. Appellants respectfully submit that these rulings by the Commission misapprehended the appropriate application of the equitable doctrine of *laches* to this claim and should have been reversed by the Circuit Court as a matter of law. As an initial matter, the Circuit Court held:

> *laches*, does not apply, it was not raised as a defense in the initial response to the Form 50 that was filed by the Clamaint seeking compensation for compensable brain damage and entitlement to lifetime compensation benefits. Also, in mediation, simply the compensability of the brain injury was left open for a decision. It was agreed that the Claimant was totally and permanently disabled.

(See Order of The Hon. L. Casey Manning, dated June 3, 2016, P. 11) (R. p. 59). Despite this language in the Order, *Laches* was raised as a defense in the Form 51 response (See Form 51 dated March 30, 2012) (R. p. 1221) which was filed in response to the first Form 50 request (See Form 50 dated March 2, 2012) (R. p. 1218). Additionally, the issue of *Laches* is directed solely at the compensability of the brain injury, so it is in line with the stated resolution at mediation. Finally, there is no dispute as to if the Respondent is permanently and totally disabled. The Carrier has already paid the Respondent all benefits due for permanent and total disability (payment for 500 weeks). The Respondent's permanent and total disability is not determinative of the current claim for lifetime benefits where the Respondent must be permanently and totally disabled ***with a 'serious' and 'severe' physical brain injury***. In short, none of these issues justify failing to apply the doctrine of *Laches* in the current case.

"*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). Whether a claim is barred by *laches* is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute *laches*. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E. (2d) 357 (Ct. App. 1985). In sum, to prove *laches*, a party must show delay that was unreasonable, that resulted in prejudice to that parties' defense of the claim. *Hallums v.*

*Hallums* 296 S.C. 195, 71 S.E.2d 525 (1988). Appellants contend all of the aspects of *laches* are met in this claim, and should bar the Respondent's request for benefits at this time.

In relation to *laches*, the Commission found that the Appellants had paid for treatment for a hospital visit "for the encephalopathy (brain injury) [parenthesis in the original Order] in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive function." The Order goes on for several paragraphs explaining treatment needs of the Respondent that were paid for by the Appellants, which purportedly meant they knew or should have known all of this treatment was for a compensable physical brain injury. Importantly, it should be pointed out that even according to the Respondent's own testifying medical expert at the hearing, his treatment regimen stayed the same before and after the 2002 hospitalization, and not even Dr. Forsthoefel himself was aware when the exact same treatment – which had been for mood disorders – apparently became treatment for a permanent and severe physical brain injury.

Furthermore, despite the Commission's findings that the Appellants were on notice of the brain injury, and apparently were knowingly providing treatment for such since sometime after 2002, the Respondent himself only became aware of his brain injury approximately in 2009 and filed for a determination of the compensability of such in 2011 as soon as Dr. Forsthoefel and Dr. Rainwater became aware and opined about the physical brain injury. Instead the Commission found that the Appellants knowingly paid for all of the 'brain injury' related treatment from 2002-2011. If true, this showed great prescience on the part of Appellants who apparently paid for brain injury related treatment for the Respondent prior to the knowledge of such brain injury by the Respondent or his own doctors. Notably, the Respondent suffered from very significant pre-existing mood related disorders, and had been treated in 2001 both in-patient

and out-patient for similar psychological breaks and dysfunction, including but not limited to hearing voices and hallucinations. These issues made it impossible to distinguish any change of condition after the drug-drug interaction.

In conjunction with the arguments as to the equitable defense of *laches*, argued herein below, Appellants assert the Commission's ruling that they were on notice of the brain injury claim as outlined in her Order findings, was in error. The Commission held in part that the Appellants were on notice of the Respondent's cognitive decline and increasing mental issues since the 2002 drug-drug interaction. The Commission also pointed out that the Appellant has been providing payment for treatment for the Respondent's physical brain injury for several years, and that medical records show the Respondent was suffering from significant memory complaints after the 2002 accident. (See Generally, Findings of Fact Numbered 10-16) (R. pp. 179-81). Notably, the Respondent had significant memory complaints even before the 2002 drug-drug interaction. In 2001 his memory was diagnosed as "impaired" and the Respondent had to "keep lists" of things that were important to him. Prior to 2002, the Respondent already had issues with remembering which medications to take, and which medication not to take and when to take them, these pre-existing memory deficits are admittedly what lead to the drug-drug interaction that put him in the hospital in 2002.

The Respondent argued that the Appellants should be estopped from asserting the Respondent did not suffer from a physical brain injury, or rather deny a physical brain injury, since they provided treatment for it. However, even Dr. Forsthoefel testified that the Respondent's treatment regime – other than taking out the Seroquel, which was the apparently the causative factor of the February 2002 hospitalization – essentially stayed the same after the 2002 hospitalization.

Attorney Leventis: "Okay. As far as – were you still treating him medication-wise, even though you changed the Seroquel, for the same symptoms after 2002 that you were treating him for before 2002?" Dr. Forsthoefel "Yes" (R. p. 1338, lines 19-23). This makes it very difficult for the Appellants to realize or have realized, that apparently the same medications and treatment regimen were being prescribed, but at some point in time, it was not longer for the very significant mood and psychological disorders of the Respondent, but rather for his 'permanent physical brain injury' instead.

When Dr. Forsthoefel was asked directly how a person would know which the Respondent was being treated for (a brain injury or his mood disorders) since the treatment was the same both before and after 2002 – save that Seroquel was taken away – even Dr. Forsthoefel seemed unclear. Attorney Leventis, "For me as a layperson, would there be any way to know if your treating him [before or after 2002] specifically for a physical brain injury versus mood disorders you were already providing similar or the same medication for?" (R. p. 1338-9). Dr. Forsthoefel, "Really I wasn't really – I wasn't really aware...[] But going back to your question - - I'm wondering myself." (R. p. 1339 lines 4, 18 - 19).

The Respondent was treating for mood disorder, and chronic pain and problems both before and after his February 2002 hospitalization. The treatment the Appellants were providing was the same treatment regimen the entire time (save the exclusion of Seroquel). Apparently, even the treating physicians were not clear at what point such treatment changed from being for the Respondent's mood disorder, and apparently became for treatment of the Respondent's brain injury instead of – or in addition to – treatment for his mood disorder. It is simply too much of a stretch to find that an Appellant Carrier is on notice of the difference between treatment for mood issue and a physical brain injury simply by reviewing and paying bills for treatment when

a licensed doctor who is providing the treatment is not even able to make such a distinction.

Appellants contend the Commissioner made incongruent findings, which should have been reversed by the Circuit Court as a matter of law, to hold that *laches* applied to the Appellants because they provided, and did not deny treatment for a physical brain injury back in 2002 and ongoing, but in the obverse, logically incongruently, that the Respondent only became aware of a brain injury in 2009 or 2011, and filed shortly thereafter for a hearing on the matter. Of note, on March 15, 2011, the Respondent filed a Form 40 with an attached motion for expedited care/treatment of the Respondent and does not reference – among all other referenced injuries/conditions – the fact that the Respondent has a brain injury. If the position is truly that the Appellants were providing/accepting and treating a physical brain injury since 2002, and certainly as of 2011, why would this not be referenced in the Respondent's own Form 40 filing and motion. (See Generally Def. Exhibits 25) (R. p. 263).

If indeed the Respondent had ongoing cognitive decline – purportedly related to his alleged brain injury in 2002, why did he choose to not bring or allege it prior to 2011. The Respondent alleges he suffered a permanent physical brain injury by accident in the form of drug interaction back in 2002 due to encephalopathy. He never raised this issues until 2011- that is, over nine years after the alleged physical brain injury took place. If the fact that there had been a physical brain injury had been known to the Respondent for nine years, his claim should be barred by *laches*.

*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). "The question of *laches* is largely a factual one, so each case must be judged on its own merits." *Mid-State Trust, II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423-24 (1996). "*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, or suffer material prejudice, then equity steps in and refuses to enforce those rights. *Id.* at 296, 519 S.E.2d at 599.

In the instant case, the Respondent delayed unreasonably. The Respondent, represented by able counsel the entire time, delayed well in excess of 9 years to even assert such injury, even though he concedes he knew of such injury for years prior to the allegation of a brain injury. Note: under S.C. Code Ann. §42-7-320 the notification and filing requirements for consideration of reimbursement by the Second Injury Fund by 2010. If the Respondent was in need of treatment for his brain, he could have similarly filed a Form 40 over a decade ago, or a From 50 on the merits of the alleged brain injury and its compensability back at that time.

Further, this unreasonable delay took place while the Respondent clearly had the ability and the opportunity to act sooner in asserting his rights, as noted the Respondent filed his own Form 40 hearing request for expedited consideration of medical treatment on other issues in March of 2011, for example, and was represented by legal counsel. Lastly, despite the holdings of the Commission and the Circuit Court to the contrary, this delay has resulted in material prejudice to the Appellants for inability to treat, assess, or deny and defend the request for further medical benefits several years prior to the allegation – and notably while the Respondent was still receiving ongoing medical management and diagnostics with other physicians. As to prejudice, the Respondent has also waited well beyond the statute of limitations for the Appellants to assert a third party medical malpractice suit against any medical provider (per S.C.

Code Ann. §42-15-70, and applicable statutes of limitations for various other third party causes of action under Title 15 of the S.C. Code Ann. – See Gen. §15-3-350), or providers who may have been at fault for the drug-drug interaction which took place.

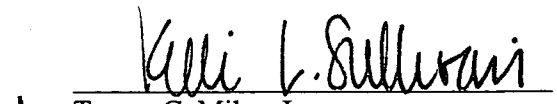
Furthermore, this time period is even beyond the statute of repose for the Appellants to file for indemnification, reimbursement or any other cause of action against the actual at fault medical provider, physician, pharmacist and/or drug manufacturer, pharmacist, or party(s) (See Gen. §15-3-454). Of note, in his March 2011 letter to opposing counsel, Dr. Forsthoefel indicated "having checked with the research division of Astra/Zeneca, I learned there has been no record of Seroquel alone causing encephalopathy." (APPXR. p. 15). More to the point, on the issue of prejudice, in addition to the inability of the Appellant to assess and investigate the medical condition of the Respondent for these alleged brain injuries back in 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011, and the Respondent's failure to previously raise this issue or prosecute this claim, may necessarily have damaged or foreclosed these Appellants' recovery rights this matter to the SC Second Injury Fund. Even if otherwise compensable, due to the Respondent's unreasonable delay, without excuse and the clear ability to act sooner, great material prejudice has and will inure to the Appellants. Therefore, under the doctrine of *laches*, waiver, and estoppel the Respondent should be barred from now successfully asserting any alleged brain injury, as well as the multitude of other injures he now asserts – some for the first time, almost a decade and a half after the date of the original accident. For the reasons set forth above, the Circuit Court erred in failing to reverse the Commission that the Carrier was on notice of the physical brain injury and the Respondent's claims were not barred by *laches*.

## CONCLUSION

For the reasons outlined hereinabove, and as to the specific points outlined herein above, these Appellants request that the Order of the Circuit Court affirming the Workers'

Compensation Commission's Order be reversed in full and the matter be remanded to the South Carolina Workers' Compensation Commission for a new hearing.

Respectfully Submitted,



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