

5

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Casey Manning

Appellate Case No. 2016-001494

RECEIVED
OCT 28 2017
SC COURT OF APPEALS

Theodore P. Polansky, Employee,

.....Respondent.

v.

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

.....Appellants.

RECORD ON APPEAL

Volume 1 of 3

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Attorney for Appellants

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

SC Attorney General

PLAINTIFF(S)

South Carolina State Accident Fund

DEFENDANT(S)

Submitted by: Toal

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Order of Supercedens Attached

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

[Signature]

Judge Code

2758

Date

Oct. 10, 2016

For Clerk of Court Office Use Only

This judgment was entered on the 14 day of Oct, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of Oct, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

[Signature]

THE STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Theodore Polansky,

Employee

Respondent/Cross Appellant,

vs.

SC Office of Attorney General,

Employer,

and

South Carolina State Accident Fund,

Carrier

Appellants/Cross Respondents.

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-07380

ORDER OF SUPERSEDEAS

RICHLAND COUNTY
FILED
2016 OCT 10 PM 4:45
JEANETTE W. HIGBIE
CLERK, P. & G.S.

The Employer/Carrier moved this Court for an Order of Supersedeas over Orders in this matter signed by the Honorable L. Casey Manning on July 5, 2016 and July 28, 2016, pursuant to Rule 241, S.C.A.C.R., Rule 65, S.C.R.C.P. and the Court's inherent authority to enforce its own ruling. The Employer/Carrier sought an Order of Supersedeas holding all further proceedings, expressly including Rule to Show Cause and Enforcement proceedings, in relation to the above referenced Orders in abeyance pending the outcome of the Appeals in this civil action now pending at the South Carolina Court of Appeals. This matter was assigned to me for a hearing on September 28, 2016.

Having reviewed the Employer/Carrier's Motion for Order Of Supersedeas and all related pleadings and filings, the Order and Rule to Show Cause, dated September 20, 2016, and hearing arguments of counsel on both matters, I find that an Order of Superseadeas is required to

"prevent a contested issue from becoming moot" (as contemplated by Rule 241(c)(2), S.C.A.C.R.) as the underlying entitlement to the back due award as part of the challenged award of lifetime benefits is an issue contested in the Appeals now pending in the Court of Appeals and that the Employer/Carrier's refusal to make payment of the accrued benefits was justified.

BACKGROUND

#2
8/18/15
On July 1, 2015, the Claimant was awarded lifetime benefits in relation to an alleged compensable physical brain injury that Claimant asserts rendered him permanently and totally disabled under the South Carolina Workers' Compensation Act. This alleged physical brain injury is an alleged exacerbation of an earlier workers' compensation claim ("the Original Comp Claim") and is alleged to have resulted from a drug-drug interaction suffered during treatment provide as part of the Original Comp Claim. The Employer/Carrier has consistently denied that the Claimant has suffered a physical brain injury that rendered him permanently and totally disabled or that he is entitled to any indemnity benefits beyond 500 weeks previously paid.

The Hearing Commissioner Order, dated July 1, 2015, found for the Claimant and required payment of lifetime benefits to commence on March 8, 2011. This was the date of the last payment of compensation made to Claimant by Employer/Carrier under the 500 week award for the Original Comp Claim. Of note, 500 weeks is the maximum award payable under the S.C. Workers' Compensation Act, up to including death, *except* for awards of life time indemnity benefits associated with permanent physical brain injury or other injuries expressly identified by statute.

Employer/Carrier appealed the decision of the single Commissioner to the Appellate Panel of the Full Commission. The Full Commission ultimately affirmed the "findings of fact" and "conclusions of law" of the single Commissioner's Order. Subsequently, Employer/Carrier

SCANNED

appealed the Appellate Panel's Order. It is undisputed that the Employer/Carrier has made weekly payments to the Claimant beginning 30 days after the Order of the Full Workers' Compensation Commission, dated November 10, 2015 and that the appeal of the underlying award continues to this day.

#3
JVS

Because the alleged date of injury in this case occurred prior to July 1, 2007, the amendments set forth in Act 111 do not apply, and jurisdiction over the appeal was in the Court of Common Pleas pursuant to the former version of S.C. Code Ann. § 42-17-60. (See Generally, S.C. Code Ann. § 42-17-60 (Supp. 2006), and specifically *Pee Dee Regional v. S.C. Second Injury Fund* 375 S.C. 60, 650 S.E.2d 464 (S.C. Sup. Ct. 2007)), holding in part that appeals from the Workers' Compensation Commission to the Court of Common Pleas were procedurally appropriate when the injury *sub judice* took place prior to July 1, 2007.). Accordingly, the Appeal of the Full Workers' Compensation Commission's Order was filed in the Court of Common Pleas for Richland County, South Carolina.

On February 8, 2016, the Honorable L. Casey Manning heard Respondent/Cross Appellant, Theodore Polansky's, Motion for payment of accrued Worker's Compensation benefits. By an Order dated July 5, 2016, the Circuit Court ordered that the Employer/Carrier "shall make immediate payment to the Claimant in a lump sum of all accrued weekly compensation payment" dating back to the date of last payment (March 8, 2011). The Employer/Carrier filed a timely Motion for Reconsideration. The Circuit Court denied the Motion for Reconsideration by Order dated July 28, 2016. Thereafter, the Employer/Carrier served a Notice of Appeal to the South Carolina Court of Appeals on August 29, 2016. Additionally, the Employer/Carrier previously filed a Notice of Appeal on the Order of the Circuit Court affirming the lifetime award of indemnity benefits. The Employer/Carrier has

SCANNED 3

worked continuously to perfect the numerous Appeals in these cases since their filings.

The Claimant moved for a Rule to Show regarding the Employer/Carrier's refusal to make payment under these Orders and, in response, the Employer/Carrier filed its Motion for Supersedeas. By Order of The Honorable L. Casey Manning, dated September 20, 2016, the Executive Director of the State Accident Fund was Order to come before the Court "to show just cause or excuse, if any he has, for failure to comply with the Orders of this Court dated and filed July 7, 2016 and August 16, 2016." These matters were set for hearing, and heard, before me on September 28, 2016. At the hearing, I excused the Executive Director of the State Accident Fund from appearing as all issues before the court were questions of law and factual consideration were not necessary. This order arises from the September 28, 2016 Hearing.

ANALYSIS

8/28/16
The Orders of the Circuit Court at issue here require the Employer/Carrier to make payment of back due weekly compensation benefits that have accrued from the date compensation was to be reinstated (March 8, 2011) through the date that Employer/Carrier resumed making weekly payments and payment of a 10% penalty on all unpaid compensation to the Claimant within 14 days of the payment becoming due, pursuant to S.C. Code Ann. §42-9-90. Employer/Carrier contests the enforceability of the Circuit Court's Orders on the basis of the Supreme Court's decision in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960) and the language of S.C Code §§42-17-60 and 42-9-90. Employer/Carrier believes it is required to make only *weekly* payments of compensation while the matter is pending on appeal, with such payments not to include payment of back due accrued benefits until after the appeals are finally resolved.

The orders at issue place the Employer/Carrier in the position of having to make

SCANNED

payments that may be determined not to have been owed if the appeal of the lifetime award results in a reversal and would leave the Employer/Carrier with no practical means to recovery the excessive payments made pursuant to the challenged Order. In the event that the Orders are given effect before the Appeals are fully decided, the rights the Defendant to make only legally due payments will be rendered moot as there will be no means to recover the undue payments made pursuant to the challenged orders. This Order of Supersedeas is necessary to "prevent a contested issue from becoming moot" (as contemplated by Rule 241(c)(2), S.C.A.C.R.).

#5
8/18/11

The issue of payment of a lump sum award during the pendency of an appeal was previously addressed in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960). The Supreme Court interpreted Section 72-356, the earlier version of what became S.C. Code Ann. 42-17-60, to require "payment, after the expiration of the thirty-day supersedeas period and during the pendency of the employer's appeal...only of the weekly compensation accruing after the date of the Commission's Award." Id., 533. Accordingly, the Employer/Carrier has made all payments that are due as the appeal of this award continues and the Orders of the Circuit Court on payment of accrued benefits should be given no further effect until the appeals are finally decided.

Under the reasoning of the Case Court, during the pendency of an appeal by an employer of an Order which provided benefits to a claimant, the injured worker is entitled to be provided weekly benefits to sustain him while that appeal is under review. However, the claimant is not entitled to any additional monies or award, above and beyond the weekly benefits the Claimant is presently receiving, until the appeal is adjudicated. Payment of indemnity benefits "calculated retroactively from the date of the commission's order" are expressly included in the benefits that are not payable during the appeal. *Case*, at 533. Consistency requires this exception to be

SCANNED

applied to a lump-sum payment of indemnity benefits calculated from a date prior to Order, as we have in this case.

Furthermore, the amendments to § 42-17-60 of the South Carolina Code Ann. (Supp 2008), have codified the ruling in the *Case* decision and specifically provides that the employer is required to make only weekly payments of compensation following the date of appeal to the Court of Appeals. The newly amended version of this statute clearly states that *weekly* benefits are payable, but makes no mention of paying the balance of an award or payments for a back due accrued award. Thus, pursuant to the Supreme Court's ruling in *Case v. Hermitage Cotton Mills* and S.C. Code § 42-17-60, Employer/Carrier are responsible for making only weekly payments of compensation only while the matter is pending on appeal.

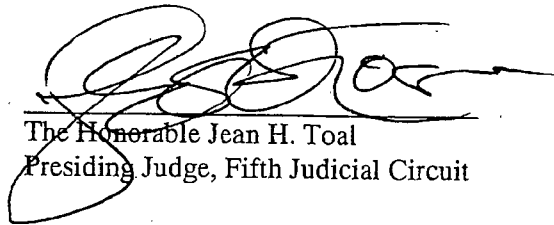
#6
885
Similarly, there is no basis for the Claimant's request that Employer/Carrier pay a 10% penalty on monies/awards not paid to the Claimant within 14 days of becoming due, as the award is not due and owed by Employer/Carrier at this time, as the Order of the Commission is presently on appeal to this Circuit Court and is therefore not a *final* Order to which payment would be required under S.C. Code Ann. §42-9-90. It is undisputed that the Employer/Carrier is currently providing medical benefits and prospective weekly indemnity benefits during the pendency of this appeal, which is all that is required.

CONCLUSION

For the reasons stated above, I hereby enter and Orders of Supersedeas with reference to the Orders in these matters signed by the Honorable L. Casey Manning on July 5, 2016 and July 28, 2016 and hold all further proceedings in relation to the above referenced Orders in abeyance pending the final outcome of the Appeal of the award of Lifetime Benefits as no benefits beyond those currently being paid will be due until such time.

SCANNED

IT IS SO ORDERED.



The Honorable Jean H. Toal
Presiding Judge, Fifth Judicial Circuit

October 10, 2016
Columbia, South Carolina

#7

SCANNED

7

0008

Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4007468**

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____

Judge Code **2161**

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 23 day of Sept, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 23 day of Sept, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,

Employee,

Cross Appellant

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

Employer, and

STATE ACCIDENT FUND,

Carrier,

Cross Respondents

Case No: 2015-CP-4046

ORDER OF DISMISSAL
OF CROSS APPEAL

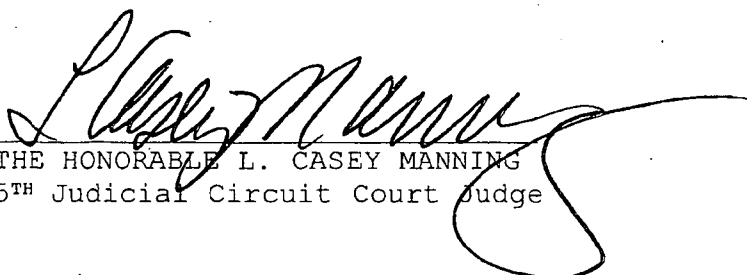
JEANETTE W. MCBRIDE
C.C.P. & G.S.

2016 SEP 22 AM 10:24

RICHLAND COUNTY
FILED

The Employee Claimant filed a Cross Appeal to the appeal filed by the Employer/Carrier in the above-referenced matter and has filed a request for this Court to be allowed to dismiss that cross-appeal pursuant to Order of the Court under the authority of Rule 74 and Rule 41(a)(2). After due and proper consideration of a Motion that this matter be dismissed without prejudice and the response, the above-referenced appeal is dismissed without prejudice.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
5TH Judicial Circuit Court Judge

 2016

SCANNED

JM
9.21.16

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Telephone (803) 771-7211

Matthew Robertson

Facsimile (803) 252-0709

September 9, 2016

Ms. Jeanette McBride
Clerk of Court
Richland County
Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202-0192

THERE ARE TWO ACTIONS
PLEASE NOTE THIS CONCERNS
DOC. #: 07468

**RE: Theodore P. Polansky v. SC Office of the Attorney General
Case No. 2015-CP-40-07468**

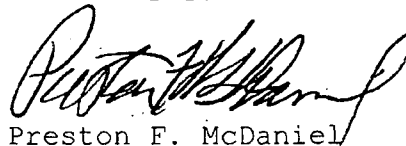
(Cross-Appeal of the Respondent)

Dear Madame Clerk:

Please find attached a Motion, and the required filing fee, which I am forwarding a copy of to Judge Manning for his consideration who is the Judge that had held the hearings in this matter and before whom the cross-appeal is still pending at this time. By copy of this letter I am notifying and serving Counsel for the Respondents of the filing of this Motion and also would request whether or not he has any objection to this Motion being granted without further response from his client.

As always, I appreciate all the courtesies and kindnesses shown to me by the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth/abh
Enclosures

cc: Honorable L. Casey Manning
(via email cmanninglc@sccourts.org, cmanningj@sccourts.org and US Mail)
Temus C. Miles, Esquire
(via email: tmiles@mckayfirm.com and US Mail)

SCANNED

Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202

CP14

SCANNED

0013

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

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		\$

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

Circuit Court Judge _____ Judge Code 2061 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 17 day of August, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W McBride

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,
Employee,
Claimant/Respondent/
Appellant,

Case Nos: 2015-CP-40-07380

&
2015-CP-40-07468

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

Employer, and
STATE ACCIDENT FUND,
Carrier,
Defendants/Appellants/
Respondents.

ORDER DENYING APPELLANTS'
RULE 59(E) MOTION AS TO
THE ORDER ORDERING
PAYMENT OF ACCRUED AWARD
PURSUANT TO SC CODE §42-
17-60 FILED JULY 7, 2016

RICHLAND COUNTY
FILED
2016 AUG 16 AM 10:04
JENNIFER W. HARRIS
C.C.P. & G.D.

After careful review of the Rule 59(e) Motion and the Response filed by the Respondent and after careful review of this Court's Order filed July 7th, the Court finds that this Court reviewed and considered the extensive argument made before the Court in addition to reviewing the Briefs that were filed with the Court concerning the Motion to require payment of the accrued weekly compensation pursuant to the Award of the SC Workers' Compensation Commission.

Upon review, the Court further finds that the actual quotation in and the basis for the Rule 59(e) was not only extensively argued to the Court and Briefed before the Court, but this Court in its Order specifically quoted that same language and cited to both the Decision of the SC Supreme Court in the

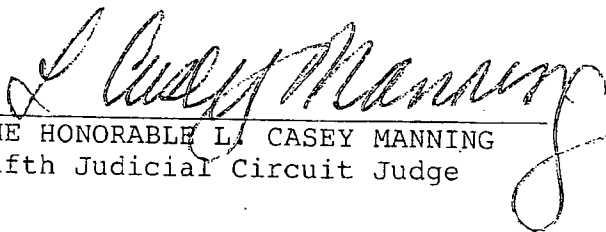
SCANNED

matter of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) and in Godfrey v. Mill's Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959) as the basis for the Court's Decision. Thus the language from and the basis for each decision was specifically detailed as part of the Court's original Order. Therefore after careful review, the Rule 59(e) Motion is DENIED.

Further, Rule 62, SCRCF, provides for only a ten (10) day Stay on enforcement of a Judgment after the entry of the Judgment which was entered July 7th, and Rule 241(b)(7), SCACR, and allows for no further Stay. Therefore, pursuant to SC Code §42-9-90 and §42-9-240, if payment is not made on the Judgment ordering payment of accrued weekly compensation benefits in the lump sum amount as set forth in the Order of the Court within fourteen (14) days of the Judgment and Stay, making payment due July 31, 2016 there shall be added to such payment the penalty and interest as provided for under those Rules and statutes.

Upon notice from the Respondent/Movant that payment has not been timely made, this Court will issue a Rule to Show Cause to enforce payment of the judgment.

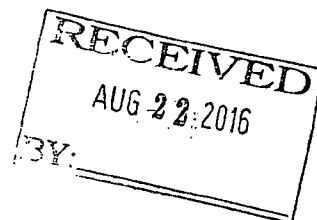
AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

August 10, 2016

SCANNED

Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07380

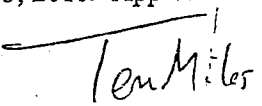
Theodore P. Polansky,.....Respondent

v.

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

NOTICE OF APPEAL

SC Office of Attorney General and the State Accident Fund appeal the order of the Honorable L. Casey Manning dated June 3, 2016. Appellants received written notice of entry of this order on June 9, 2016.


Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

July 8, 2016

Other Counsel of Record:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent

RICHLAND COUNTY
FILED
2016 JUL 15 AM 10:11
JEANNETTE W. MORRIS
C.C.P. & G.S.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07380

RICHLAND COUNTY
FILED
2016 JUL 15 AM 10:11
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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

v.

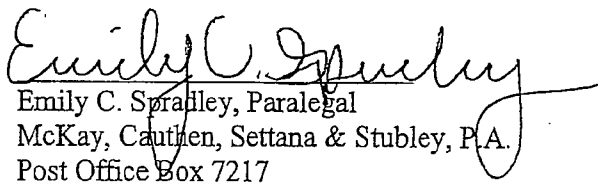
SC Office of Attorney General, employer,
and State Accident Fund, carrier.....Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the attorney of record for Theodore Polansky by depositing a copy of it in the United States Mail, postage prepaid, on July 8, 2016, addressed as follows:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

July 8, 2016


Emily C. Spradley, Paralegal
McKay, Cauthen, Settana & Stuble, P.A.
Post Office Box 7217
Columbia, South Carolina 29202
(803) 256-4645

Attorney for Appellants

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4007468**

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. No. suit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Aug, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

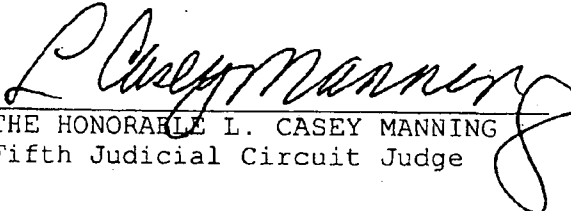
Jeanette W. McBride

this Court in its Order specifically quoted that same language and cited to both the Decision of the SC Supreme Court in the matter of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) and in Godfrey v. Mill's Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959) and that the language from and basis for each decision was specifically detailed as part of the Court's original Order. Therefore, after careful review the Rule 59(e) Motion is DENIED.

Further, pursuant to Rule 62, SCRCF which provides for a ten (10) day Stay on enforcement after the entry of the Judgment which was entered on July 7, 2016), and Rule 241(b)(7), SCACR, there is no further Stay. Therefore, pursuant to SC Code §42-9-90 and §42-9-240, if payment is not made on the Judgment of this Court ordering the payment of accrued weekly compensation benefits in the lump sum amount as set forth in the Order of the Court within fourteen (14) days, making payment due July 31, 2016 there shall be added to such payment the penalty and interest as provided for under those Rules and statutes.

Upon notice from the Respondent that payment has not been timely made, this Court will issue a Rule to Show Cause to enforce payment of the judgment.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

July 28, 2016

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

SC Attorney General

PLAINTIFF(S)

South Carolina State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. No. suit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of July, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeannette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,
Employee,
Respondent/Cross-Appellant

Docket No: 2015-CP-40-07468
&
2015-CP-40-07380 •

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

ORDER DENYING
RULE 59(e) MOTION
IN CASE NO. 2015-CP-40-07380

Employer, and

STATE ACCIDENT FUND,

Carrier,
Appellants/Cross-Respondents

RICHLAND COUNTY
FILED
2016 JUL 22 AM 9:41
JEANETTE W. MCBRIDE
C.C.P. & G.S.

After due and proper consideration of the Rule 59(e) Motion filed by the Appellants and review of the Return to that Motion, the Motion is denied.

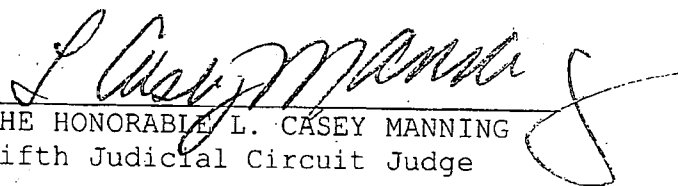
After review of the caption of the Motion and the Return, the jurisdictional caption of the Motion is improper and the Motion was not filed in reference to the Appellants' appeal filed with this Court as Case No. 2015-CP-40-07380. Further, and more importantly, after review of the Motion and Return, the two (2) Exceptions in question, that being Exceptions #11 and #12 were properly considered by and are addressed in this Court's Order in reference to the context in which those issues were argued and presented to this Court.

SCANNED

In addition, based on a review of the Record, the Motion and the Return, these issues were not presented to the Commission nor to this Court in the context and for the reasons as set out in the Exceptions. Also, I find Exception #12 to be without merit based specifically upon a review of the Consent Agreement and the Motion filed by the Claimant before the Commission for the failure of the Defendants to proceed with the Independent Medical Evaluation as agreed to by the Claimant with Dr. Frierson.

For all the foregoing reasons, the Rule 59(e) Motion as filed by the Appellants be and hereby is DENIED.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: July 12, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,
Employee,
Respondent/Cross-Appellant
And As Movant,

Docket No: 2015-CP-40-07468
&
2015-CP-40-07380 ✓

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

Employer, and

STATE ACCIDENT FUND,

Carrier,
Appellants/Cross-Respondents
And As Motion-Respondents

ORDER ORDERING PAYMENT OF
ACCRUED AWARD PURSUANT TO
S.C. CODE §42-17-60

2016 JUL -7 PM 12:34
JEANETTE W. MCBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

This matter came to be heard by me on February 8, 2016 based on a Motion filed by the Employee/Claimant for payment of the accrued Award of the South Carolina Workers' Compensation Commission pursuant to SC Code §42-17-60. The Commission made an Award to Mr. Polansky of lifetime weekly compensation benefits reinstated as of March 8, 2011 under the Award. The Movant was represented by Preston F. McDaniel of the Richland County Bar and the Respondents to the Motion, and Appellants in this Court were represented by Peter J. Leventis, IV, also the Richland County Bar.

The Award made in this matter arose out of and as a result of two accepted injuries by accident that occurred in 1999 and 2000 and thus the provisions of SC Code §42-17-60 as amended,

SCANNED

through July 1, 2007, apply to these pre-2007 claims. Prior to July 1, 2007, SC Code §42-17-60 in reference to the issue before the Court provided that:

"In the case of an appeal from the Decision of the Commission on questions of law, the appeal does not operate as a supersedes and thereafter the employer is required to make payment of the Award involved in the appeal . . . until the questions at issue have been fully determined . . ." (Emphasis added).

In this case, the Hearing Commissioner Awarded the Claimant lifetime benefits on July 1, 2015 and specifically provided in her Award that:

"THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume (sic, with) the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed." (Emphasis added).

That Award was appealed to the SC Workers' Compensation Commission and Full Commission by Order dated and filed November 10, 2015, affirmed that Award. Subsequent to the Decision of the Full Commission, on December 9th, the Award was appealed to this Court by the Defendants.

Based on the arguments presented to the Court and the Record at the Motion hearing, the parties agree that after filing the Appeal, even after request, the Defendants did not make any payment either as to the accrued Award nor did they

SCANNED

restart weekly payments and as a result, the Claimant filed the Motion for Payment pursuant to the Act. Subsequently the Defendants agreed to and have resumed weekly payments of compensation but only beginning thirty (30) days after the Decision of the Full Commission but have continued to refuse to make payment of the accrued Award.

After review of the arguments, the statutes and the case law it is the finding of the Court that the Defendants shall make payment of the weekly compensation Award that has accrued from the date compensation was reinstated on March 8,, 2011 through the date that the Defendants resumed payments of weekly payments pursuant to the Award. The Supreme Court has repeatedly held and reaffirmed that in this factual scenario where a Hearing Commissioner has made an Award and that Award is affirmed on appeal by the Full Commission, that the Defendants are required to make full payment under the Award of all accrued compensation through the time that weekly compensation payments are resumed; and are required to make continuing payments of weekly compensation until the appeal is resolved. This is especially true in a case that has been accepted; weekly benefits are then stopped; and then the Commission reinstates benefits back to the date they were stopped as in this case. The Court takes note of the facts that this was an accepted case and that the parties agree the claimant is totally and permanently disabled and only disagree as to his entitlement to lifetime compensation benefits.

SCANNED

The Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) went over its previous decisions concerning various fact scenarios and from what date in each of those fact situations, payment of an Award was due under S42-17-60. In the Case, Decision, supra, the Supreme Court reaffirmed its previous four (4) decisions concerning those various factual scenarios concerning payment of the Commission, "Award". As part of that confirmation, the Court reaffirmed its Decision in Godfrey v. Mills Mill No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959). In Godfrey, the Supreme Court held that in the fact scenario where payment of weekly compensation benefits was ordered to be reinstated (as here) and where that Award was affirmed by the Full Commission on Appeal (as here), full payment of accrued Award back to the date of reinstatement was required under the "Award" of the Commission. This Court has read the paragraph from Case vs. Hermitage, supra, that is actually dicta to its decision, but which was cited by both parties in support of their positions and agrees with the Claimant's reading of the decision. In the first part of that paragraph, the Court makes it clear that the Court and statute require payment, "after the date" of the, "Commission's Award" of, "weekly benefits" and that it is such, "additional amounts" in, "Addition to weekly benefits" that are not required to be paid. When read in conjunction with the last two sentences of that paragraph, it is clear that the weekly compensation required to be paid is all compensation "accruing" after the

CONFIDENTIAL

Award. In this case the date of the "Commission's Award" was all compensation, "accruing" after March 8, 2011.

In further confirmation of this interpretation of the Act, in 2007 the language of §42-17-60 was changed to specifically require payment of only weekly payments after the date of appeal to the Court of Appeals and a specific provision was added to provide that any unpaid portion of an Award would accrue interest. The provision of §42-17-60 in the last paragraph prior to July 1, 2007 concerning payment stated that the appeal does not operate as a supersedes and

"thereafter the employer is required to make payment of the Award involved in the appeal . . ."

And after July 1, 2007, it was changed to read,

"the appeal does not operate as a supersedes and, after that time, the employer is required to make weekly payments of compensation . . . until the questions have been fully determined."

And to that, a sentence was added that, "interest accrues on any unpaid portion of the Award . . ." Therefore the Legislature amended the Statute to provide that the employer was only responsible for payment of weekly payments after the appeal and interest accrued on the unpaid portion. There is no reference to "payment of the Award". The Legislature therefore clearly changed but also reaffirmed the intent and meaning of the pre-2007 language and requirement of the Act.

Thus, defendants are required to make payment of the weekly compensation benefits under the Award that have accrued from

SEARCHED

March 8, 2011 through the date that benefits were restarted in this matter. The Act under SC Code §42-9-240 requires that payment under an Award is to be paid within fourteen (14) days which this Court finds to be reasonable as to payment of the accrued Award in this case. The Act also provides that if payment is not made within that time period pursuant to SC Code §42-9-90 a 10% penalty is to be added to the amount due under §42-9-240 plus interest shall accrue at the legal rate of interest after that date. This Court finds both of those sections to be appropriate and reasonable.

Further, SCACR Rule 241(a) and (b) reaffirms that payment is not stayed by an appeal of the Order of this Court ordering payment and that this Court retains jurisdiction and, "the authority to enforce" its Order.

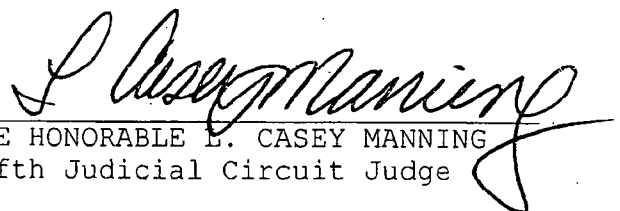
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart weekly compensation benefits until thirty (30) days after that date, meaning December 10th and therefore a period of thirty (30) days should be added to that figure as being due and payable to the claimant at this time. The defendants shall therefore pursuant to this Order calculate the amount that is to be paid to the claimant as accrued compensation under the Award of the Commission including this thirty (30) day period.

SCANNED

THEREFORE IT IS ORDERED THAT the motion is granted and the defendants shall make immediate payment to the claimant in a lump sum of all accrued weekly compensation payments that have accrued under the Award of the Commission which awarded reinstatement of weekly compensation benefits as of March 8, 2011 and before weekly compensation payments were reinstated.

IT IS FURTHER ORDERED THAT pursuant to the authority vested in the Executive Director of the State Accident Fund under SC Code §42-7-20, the Executive Director shall direct that this payment of the Award be made and that such payment shall be made within fourteen (14) days of the date of this order. If payment pursuant to this Order is not made within fourteen (14) days, upon notice, pursuant to SC Code §42-17-60 (as amended through 2007) and SCACR, Rule 241(a) and (b) this Court will issue a Rule to Show Cause to enforce the Order of this Court.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: July 5, 2016

RECEIVED
7

CERTIFICATE OF SERVICE

C/A NOS.: 2015-CP-40-07468

&

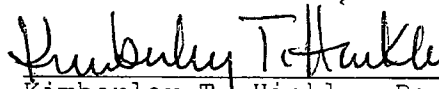
2015-CP-40-07380

I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the and Proposed **Order Ordering Payment of Accrued Award Pursuant to SC Code §42-17-60** addressed as follows:

VIA EMAIL - tmiles@mckayfirm.com

AND US MAIL

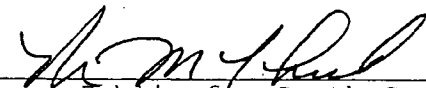
Temus C. Miles, Jr., Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

28 day of June, 2016.



Notary Public for South Carolina (L.S.)

My Commission Expires: 2/4/24

SCANNED

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P. Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____

Judge Code 2061

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of July, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of July, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

sc attorney general

PLAINTIFF(S)

South Carolina State Accident Fund
DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : affirmed. formal order attached

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge Preston F. McDaniel

Judge Code 2061

Date 6-3-16

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 day of June, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
Respondent/Cross-Appellant,)

Docket Nos: 2015-CP-40-07380
(Appeal);
2015-CP-40-07468
(Cross-Appeal)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ORDER AFFIRMING THE
SC WORKERS' COMPENSATION
COMMISSION AS TO THE ISSUES
RAISED ON APPEAL BY THE
APPELLANTS

Employer, and)
)
STATE ACCIDENT FUND,)

DOCKET NO.: 2015-CP-40-07380
(APPEAL)

Carrier,)
Appellants/Cross-Respondents,)

This matter came to be heard by me on May 20, 2016, as
on an appeal and a cross-appeal filed by the parties in the
above-referenced matter. This Order applies to the appeal
(Docket No. 2015-CP-40-07380) filed by the Appellants, the
Defendants, (the employer and the workers' compensation
insurance carrier), below. The Appellants were represented by
Temus C. Miles, Jr., of the McKay Law Firm, a member of the
Richland County Bar. The Respondent, the Claimant below, was
represented by Preston F. McDaniel, also of the Richland County
Bar.

SCANNED

After review of the Record, the Briefs, the arguments of counsel and the issues raised by the Appellants in their Appeal to this Court, I affirm the Decision of the Commission.

STANDARD OF REVIEW

The SC Administrative Procedures Act (APA) establishes the standard for judicial review of Decisions by the S.C. Workers' Compensation. Under the scope of review established in the APA, this Court may not substitute its judgment for the Commission as to the weight of the evidence on questions of fact, and may only reverse or modify the Decision if the Appellants' substantial rights have been prejudiced because the Decision is effected by an error of law or is clearly erroneous in review of the reliable, probative, and substantial evidence on the whole Record. See: SC Code §1-23-380(5)(e) (Supp. 2015). Our Supreme Court has defined substantial evidence as evidence that, "in viewing the Record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1976). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's Findings from being supported by substantial evidence. Palmetto Alliance, Inc. v. SC Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Where there is a conflict in the evidence, the Commission's Findings of Fact are conclusive. The final determination of witness credibility and the weight to the

SCANNER

accorded evidence is reserved to the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Brown v. Peoplease, 402 S.C. 476, 741 S.E.2d 761 (SC App. 2013) (emp. added).

REVIEW AND DECISION OF THE ISSUES ON APPEAL

By way of appeal, the Defendants raised twelve (12) Exceptions which were combined into three (3) arguments for decision by the Court. The first centers around the "inclusion" of, but yet in the same argument the lack of weight given to, reports, referred to as "updated", medical reports of Dr. Avie Rainwater, Ph.D; and to the reference to Dr. Rainwater as an authorized medical provider. The second argument is whether the Commission erred as a matter of fact and/or concluding as a matter of law that the Claimant suffered physical brain damage and by finding such brain damage compensable under the standard established by the Supreme Court. The third argument is whether the Commission erred as a matter of fact by finding that the Defendants should have had notice of physical brain injury; and whether the Claimant's request for benefits should be barred under the equitable doctrine of laches.

As to the first issue, the Court finds no error of law or fact. The Court would note that Defendants sought to exclude the report of Dr. Rainwater based simply and only on a set of pleadings put into evidence over objection filed in an unrelated matter after the date of the report sought to be excluded. Those

SCANNED

pleadings establish only that Dr. Rainwater's group filed a Complaint against the State Accident Fund, months after the challenged report, over non-payment of medical bills in totally unrelated matters. The Court would also note that such evidence is in the nature of impeachment evidence which does not go to admissibility but goes to the weight to be given such evidence. As noted in the Standard of Review and specifically as to expert evidence, the weight and credit to be given any expert testimony or evidence is for the Commission as the factfinder. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999); "Impeachment by Proof of Bias", Sanders and Nichols, Trial Handbook for S.C. Lawyers, §25:7, 5th Edition (2015). The final determination of witness credibility and the weight to be afforded evidence is reserved to the Workers' Compensation Commission, and it is not the task of the Court to weight the evidence as found by the Commission. Sharpe v. Case Produce, Inc., supra.

Also as to the report of Dr. Avie Rainwater, the Defendants take exception to the Commissioner's reference to him as an authorized treating provider. In Brief, in argument, and in the Record they do not question that he was an authorized treating medical provider, at least during some period of the time during the course of this claim between 1999 and the date of the hearing. The Record reveals specifically; that he was an authorized provider to perform psychological tests and paid for performing those tests in 2001. Clearly he was an authorized provider and there is no problem with the reference to him as being an authorized medical provider.

SCANNED

Also as to these reports, while the Defendants challenged their admissibility and the reference of Dr. Rainwater as being an authorized medical provider, the Defendants then conversely challenge the fact that the Hearing Commissioner gave his reports little weight. After making numerous detailed Findings of Fact in her Award including citation to pages and pages of testimony and evidence from Dr. Frank Forsthoefel; Dr. Jean Jonet, Ph.D.; Dr. Ezra Riber, MD; Dr. Marturano; Dr. Krebs; and Dr. Adams, the Commissioner then found as a fact that she would have made the same decision regardless of Dr. Rainwater's Opinion and report and made a finding that she gave those little weight. The weight and credibility to be given to any evidence as noted above, is for the Commission. There is no merit to this argument or issue.

As to the second argument for review whether the Claimant sustained physical brain damage and whether it met the compensability standard, the Court finds no error of law or fact in the decision by the Workers' Compensation Commission and the same is hereby affirmed as to this basis for review. Without citation, where there is substantial evidence in the Record from a factual standpoint, the Decision of the Commission must be affirmed. The Defendants admit and it is agreed that the Claimant sustained a chemical encephalopathy, drug-drug interaction in 2002. Encephalopathy by its very definition is a disease of the brain, especially one involving alterations of brain structure. Merriam Webster Dictionary, URL [http: "www.merriam-webster.com"](http://www.merriam-webster.com). That condition is specifically addressed in the hospital records as occurring during and as being one of the reasons for the hospitalization in the 2002. It

SCANNED

is then regularly and consistently referred to throughout the medical records thereafter; see for example, the letter of the treating psychiatrist, Dr. Frank Forsthoefel of July 29, 2004 referring to the, "allergic encephalopathy to Seroquel". (APA Submissions, p. 11). During this time, 2002 to 2005, not only does Dr. Ezra Riber, the authorized chronic pain medicine specialist refer to the encephalopathy and make a specific request for referral to a neurologist for evaluation due to the cognitive problems that this man was having but as noted by this Court he specifically forwarded a copy of all of his treatment notes to the State Accident Fund assigned adjuster, Ms. Mee-Ling Khor-Ghould. There is repeated reference to problems with memory, concentration, and requests for neuropsychological testing, and neurological evaluation throughout the medical records. By 2009, the Claimant specifically placed the Defendants on notice of his specific request for compensation benefits for permanent residual brain damage due to his encephalopathy that occurred in 2002. (APA Submissions, p. 699). There are not only numerous opinions that the Claimant sustained physical brain damage that was severe, Dr. Forsthoefel testified extensively as to the Claimant's brain damage and as to its severity. There is clearly substantial evidence that the Claimant sustained physical brain damage that it was severe and also that the Defendants were placed on notice of the Claimant's injury to the brain.

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Next, there is not only uncontradicted medical opinion testimony but numerous medical and psychological opinions in evidence that the Claimant sustained physical brain damage and that it was severe and that it is compensable under the criteria established by the SC Supreme Court. Again, the Commission is the factfinder and the report from Dr. Frank Forsthoefel, the authorized treating psychiatrist, found at the Claimant's APA Submissions, pp. 2-3, is more than sufficient evidence to meet the criteria compensability of severe brain damage as established by the Supreme Court in 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). Dr. Forsthoefel at that point specifically states that the Claimant has physical brain damage and that it is severe enough to constitute a hindrance or obstacle to employment and that it is permanent. On pp. 6 and 8, again Dr. Forsthoefel specifically states that the Claimant is totally and permanently disabled, and specifically that he is totally and permanently disabled due to the physical brain damage that he sustained as a result of the encephalopathy. The authorized treating chronic pain medicine specialist, Dr. Ezra Riber, MD, states the same opinion on pp. 12, 13 and 14 of the Claimant's APA Submissions. Finally, the Hearing Commissioner sets out repeated quotes in her Order from the testimony of Dr. Forsthoefel and in fact appointed a Guardian ad litem from the bench during the hearing due to the

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severity of the Claimant's condition. The Decision of the Workers' Compensation Commission is therefore affirmed as to this issue and these issues raised on appeal.

As to the third argument and as to the issues raised, first there is substantial evidence to support the Commission's Decision as to notice of the physical brain injury and therefore the Decision must be affirmed by this Court. For the reasons set forth hereinbefore in reference to the second argument and the group of issues raised as to whether or not there was sufficient evidence of brain damage and whether that brain damage met the criteria for an Award for compensable brain damage entitling the Claimant to lifetime benefits, that same evidence clearly establishes that from 2002 forward that the Defendants were placed on notice of the Claimant's physical brain injury. As noted throughout the Decision on that argument, the Defendants were placed on notice in 2002 of a brain injury and from 2002 until the very date of the hearing continued to pay for all medical care related to the brain injury.

The Defendants also raise the issue of *laches* and based upon the Briefs of the parties and review of the Decisions of our SC Supreme Court and Court of Appeals, the issue of *laches* simply does not apply.¹ Under the doctrine of *laches*, the

¹ The Court notes that it is doubtful whether or not this issue was preserved for appeal as to the doctrine of *laches*. While not only was it not raised in the first Form 51 and was not set out and detailed as a specific defense until the Form 58 filed by present Counsel who was not substituted as Counsel until less than fifteen (15) days prior to the scheduled hearing, the Mediation Agreement specifically provides that the Claimant is totally and permanently disabled by agreement, and that the only

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doctrine only applies if a party: 1) knowing of his rights; 2) does not timely assert them; and 3) by any unreasonable delay causes his adversary to occur expenses or otherwise detrimentally change his position and also 4) the affected party must affirmatively prove material prejudice. Only when all four elements are met will equity bar the enforcement of those known rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999). The concept of *laches* only applies in a very limited set of circumstances and applies equally to both of the parties, that being the Claimant and the Defendants in this case. While the Claimant has the responsibility to raise issues and claims in a timely manner, the Defendants have the same responsibility to assert any defenses that they claim. This Court agrees with the Commissioner and the Commission that the doctrine of *laches* simply does not apply. Both parties had access to the same medical records from 2002 through the date that a claim was filed in 2011. Both parties knew that the Claimant suffered a physical brain injury in 2002 as a result of the encephalopathy and knew that by 2004 the treating psychiatrist, and in fact three (3) other and different authorized treating and/or evaluation physicians in 2004 and 2005 recommended a complete neurological workup to include

issue left open is the, "compensability" of the physical brain damage that the Claimant incurred. In that same Mediation Agreement, the Defendants admit that they had always authorized all of the treatment for and by the treating physicians that have expressed the opinions concerning the brain damage and agreed to provide their continuing medical care for life.

SCANNED,

neuropsychological testing. Neuropsychological testing was not authorized and provided by the Defendants and were not performed until 2008. That testing in 2008 recorded severe cognitive deficits. The neuropsychologist who performed those tests in 2008, Dr. Nicholas Lind, Ph.D., subsequently in 2012 concurred in the opinion that the Claimant had sustained physical brain damage and that it was severe. In 2009 the Claimant wrote the Defendants and specifically placed them on notice that he was claiming severe physical brain damage and an entitlement to lifetime compensation due to that brain damage. In 2011, within one (1) week of the date that the authorized treating psychiatrist issued his opinion that the Claimant had sustained physical brain damage and that he was totally and permanently disabled from all work due to that brain damage, the Claimant filed a claim for lifetime compensation benefits due to that severe, permanent physical brain damage. In addition, the Commission, as is recorded in the Hearing Commissioner's Order found that the Defendants had paid for all medical care and specifically all of this care and had the same access to all of the medical records as did the Claimant. The doctrine of laches simply does not apply.

Also, as noted above, there was no definitive diagnosis until 2011 of physical brain damage that was permanent and severe and within one (1) week of that diagnosis the Claimant filed.

SCANNED 10

Finally, even if the other elements were in existence, which they are not in the opinion of this Court, there is no prejudice to the Defendants because the Defendants had total access to all the medical records. There is simply no material prejudice to the Defendants in not moving forward with the defense since they had access to the same exact medical evidence as did the Claimant. In addition, while the Court is of the opinion that the doctrine of laches does not apply, it was not raised as a defense in the initial response to the Form 50 that was filed by the Claimant seeking compensation for compensable brain damage and an entitlement to lifetime compensation benefits. Also, in the mediation, simply the compensability of the brain injury was left open for decision. It was agreed that the Claimant was totally and permanent disabled.

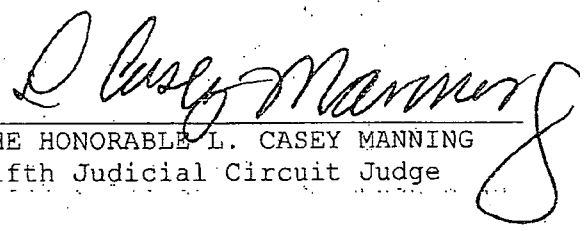
Finally, the Court would note that if it did apply it would apply to the Defendants failure to timely raise the defense. Both parties had the same notice from 2002 through 2011 concerning the Claimant's injury to his brain. Further, it was the Defendants and not the Claimant that did not provide the neuropsychological testing for a period of over four (4) years from the date it was requested. The Defendants were placed on notice of the claim no later than 2009. For all these reasons as to these bases for the appeal in the third argument, the Decision of the SC Workers' Compensation Commission is hereby affirmed.

SCANNED

For all the foregoing reasons, after due and proper consideration of the Record, the Briefs and arguments of the parties, the Decision of the SC Workers' Compensation Commission is hereby affirmed as to the appeal filed by the Defendants as Appellants in this Court.

THEREFORE, IT IS ORDERED that the Decision of the SC Workers' Compensation Commission as to the appeal filed by the Defendants as Appellants before this Court be and hereby is AFFIRMED.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: June 3, 2016

SCANNED₁₂

Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P Polansky

SC Office Of Attorney General

State Accident Fund

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Affirmed. Formal order attached

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
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If applicable, describe the property, including tax map information and address, referenced in the order.		

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

Circuit Court Judge J. Craig Manning Judge Code 2061 Date 6-3-16

For Clerk of Court Office Use Only

This judgment was entered on the 9 day of June, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 9 day of June, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

SCANNED

SCRPC Form 4C (10/2011)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
Respondent/Cross-Appellant,)

Docket Nos: 2015-CP-40-07380
(Appeal);
2015-CP-40-07468
(Cross-Appeal)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ORDER AFFIRMING THE
SC WORKERS' COMPENSATION
COMMISSION AS TO THE ISSUES
RAISED ON APPEAL BY THE
APPELLANTS

Employer, and)

STATE ACCIDENT FUND,)

DOCKET NO.: 2015-CP-40-07380
(APPEAL)

Carrier,)
Appellants/Cross-Respondents,)

This matter came to be heard by me on May 20, 2016, as
on an appeal and a cross-appeal filed by the parties in the
above-referenced matter. This Order applies to the appeal
(Docket No. 2015-CP-40-07380) filed by the Appellants, the
Defendants, (the employer and the workers' compensation
insurance carrier), below. The Appellants were represented by
Temus C. Miles, Jr., of the McKay Law Firm, a member of the
Richland County Bar. The Respondent, the Claimant below, was
represented by Preston F. McDaniel, also of the Richland County
Bar.

SCANNED

After review of the Record, the Briefs, the arguments of counsel and the issues raised by the Appellants in their Appeal to this Court, I affirm the Decision of the Commission.

STANDARD OF REVIEW

The SC Administrative Procedures Act (APA) establishes the standard for judicial review of Decisions by the S.C. Workers' Compensation. Under the scope of review established in the APA, this Court may not substitute its judgment for the Commission as to the weight of the evidence on questions of fact, and may only reverse or modify the Decision if the Appellants' substantial rights have been prejudiced because the Decision is effected by an error of law or is clearly erroneous in review of the reliable, probative, and substantial evidence on the whole Record. See: SC Code §1-23-380(5) (e) (Supp. 2015). Our Supreme Court has defined substantial evidence as evidence that, "in viewing the Record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1976). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's Findings from being supported by substantial evidence. Palmetto Alliance, Inc. v. SC Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Where there is a conflict in the evidence, the Commission's Findings of Fact are conclusive. The final determination of witness credibility and the weight to the

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REVIEW AND DECISION OF THE ISSUES ON APPEAL

By way of appeal, the Defendants raised twelve (12) Exceptions which were combined into three (3) arguments for decision by the Court. The first centers around the "inclusion" of, but yet in the same argument the lack of weight given to, reports, referred to as "updated", medical reports of Dr. Avie Rainwater, Ph.D; and to the reference to Dr. Rainwater as an authorized medical provider. The second argument is whether the Commission erred as a matter of fact and/or concluding as a matter of law that the Claimant suffered physical brain damage and by finding such brain damage compensable under the standard established by the Supreme Court. The third argument is whether the Commission erred as a matter of fact by finding that the Defendants should have had notice of physical brain injury; and whether the Claimant's request for benefits should be barred under the equitable doctrine of laches.

As to the first issue, the Court finds no error of law or fact. The Court would note that Defendants sought to exclude the report of Dr. Rainwater based simply and only on a set of pleadings put into evidence over objection filed in an unrelated matter after the date of the report sought to be excluded. Those

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SCANNED

pleadings establish only that Dr. Rainwater's group filed a Complaint against the State Accident Fund, months after the challenged report, over non-payment of medical bills in totally unrelated matters. The Court would also note that such evidence is in the nature of impeachment evidence which does not go to admissibility but goes to the weight to be given such evidence. As noted in the Standard of Review and specifically as to expert evidence, the weight and credit to be given any expert testimony or evidence is for the Commission as the factfinder. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999); "Impeachment by Proof of Bias", Sanders and Nichols, Trial Handbook for S.C. Lawyers, §25:7, 5th Edition (2015). The final determination of witness credibility and the weight to be afforded evidence is reserved to the Workers' Compensation Commission, and it is not the task of the Court to weight the evidence as found by the Commission. Sharpe v. Case Produce, Inc., supra.

Also as to the report of Dr. Avie Rainwater, the Defendants take exception to the Commissioner's reference to him as an authorized treating provider. In Brief, in argument, and in the Record they do not question that he was an authorized treating medical provider, at least during some period of the time during the course of this claim between 1999 and the date of the hearing. The Record reveals specifically, that he was an authorized provider to perform psychological tests and paid for performing those tests in 2001. Clearly he was an authorized provider and there is no problem with the reference to him as being an authorized medical provider.

SCANNED

Also as to these reports, while the Defendants challenged their admissibility and the reference of Dr. Rainwater as being an authorized medical provider, the Defendants then conversely challenge the fact that the Hearing Commissioner gave his reports little weight. After making numerous detailed Findings of Fact in her Award including citation to pages and pages of testimony and evidence from Dr. Frank Forsthoefel; Dr. Jean Jonet, Ph.D.; Dr. Ezra Riber, MD; Dr. Marturano; Dr. Krebs; and Dr. Adams, the Commissioner then found as a fact that she would have made the same decision regardless of Dr. Rainwater's Opinion and report and made a finding that she gave those little weight. The weight and credibility to be given to any evidence as noted above, is for the Commission. There is no merit to this argument or issue.

As to the second argument for review whether the Claimant sustained physical brain damage and whether it met the compensability standard, the Court finds no error of law or fact in the decision by the Workers' Compensation Commission and the same is hereby affirmed as to this basis for review. Without citation, where there is substantial evidence in the Record from a factual standpoint, the Decision of the Commission must be affirmed. The Defendants admit and it is agreed that the Claimant sustained a chemical encephalopathy, drug-drug interaction in 2002. Encephalopathy by its very definition is a disease of the brain, especially one involving alterations of brain structure. Merriam Webster Dictionary, URL [http: "www.merriam-webster.com"](http://www.merriam-webster.com). That condition is specifically addressed in the hospital records as occurring during and as being one of the reasons for the hospitalization in the 2002. It

SCANNED

is then regularly and consistently referred to throughout the medical records thereafter; see for example, the letter of the treating psychiatrist, Dr. Frank Forsthoefel of July 29, 2004 referring to the, "allergic encephalopathy to Seroquel". (APA Submissions, p. 11). During this time, 2002 to 2005, not only does Dr. Ezra Riber, the authorized chronic pain medicine specialist refer to the encephalopathy and make a specific request for referral to a neurologist for evaluation due to the cognitive problems that this man was having but as noted by this Court he specifically forwarded a copy of all of his treatment notes to the State Accident Fund assigned adjuster, Ms. Mee-Ling Khor-Ghould. There is repeated reference to problems with memory, concentration, and requests for neuropsychological testing, and neurological evaluation throughout the medical records. By 2009, the Claimant specifically placed the Defendants on notice of his specific request for compensation benefits for permanent residual brain damage due to his encephalopathy that occurred in 2002. (APA Submissions, p. 699). There are not only numerous opinions that the Claimant sustained physical brain damage that was severe, Dr. Forsthoefel testified extensively as to the Claimant's brain damage and as to its severity. There is clearly substantial evidence that the Claimant sustained physical brain damage that it was severe and also that the Defendants were placed on notice of the Claimant's injury to the brain.

SCANNED

Next, there is not only uncontradicted medical opinion testimony but numerous medical and psychological opinions in evidence that the Claimant sustained physical brain damage and that it was severe and that it is compensable under the criteria established by the SC Supreme Court. Again, the Commission is the factfinder and the report from Dr. Frank Forsthoefel, the authorized treating psychiatrist, found at the Claimant's APA Submissions, pp. 2-3, is more than sufficient evidence to meet the criteria compensability of severe brain damage as established by the Supreme Court in 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). Dr. Forsthoefel at that point specifically states that the Claimant has physical brain damage and that it is severe enough to constitute a hindrance or obstacle to employment and that it is permanent. On pp. 6 and 8, again Dr. Forsthoefel specifically states that the Claimant is totally and permanently disabled, and specifically that he is totally and permanently disabled due to the physical brain damage that he sustained as a result of the encephalopathy. The authorized treating chronic pain medicine specialist, Dr. Ezra Riber, MD, states the same opinion on pp. 12, 13 and 14 of the Claimant's APA Submissions. Finally, the Hearing Commissioner sets out repeated quotes in her Order from the testimony of Dr. Forsthoefel and in fact appointed a Guardian ad litem from the bench during the hearing due to the

SCANNED

severity of the Claimant's condition. The Decision of the Workers' Compensation Commission is therefore affirmed as to this issue and these issues raised on appeal.

As to the third argument and as to the issues raised, first there is substantial evidence to support the Commission's Decision as to notice of the physical brain injury and therefore the Decision must be affirmed by this Court. For the reasons set forth hereinbefore in reference to the second argument and the group of issues raised as to whether or not there was sufficient evidence of brain damage and whether that brain damage met the criteria for an Award for compensable brain damage entitling the Claimant to lifetime benefits, that same evidence clearly establishes that from 2002 forward that the Defendants were placed on notice of the Claimant's physical brain injury. As noted throughout the Decision on that argument, the Defendants were placed on notice in 2002 of a brain injury and from 2002 until the very date of the hearing continued to pay for all medical care related to the brain injury.

The Defendants also raise the issue of laches and based upon the Briefs of the parties and review of the Decisions of our SC Supreme Court and Court of Appeals, the issue of laches simply does not apply.¹ Under the doctrine of laches, the

¹ The Court notes that it is doubtful whether or not this issue was preserved for appeal as to the doctrine of laches. While not only was it not raised in the first Form 51 and was not set out and detailed as a specific defense until the Form 58 filed by present Counsel who was not substituted as Counsel until less than fifteen (15) days prior to the scheduled hearing, the Mediation Agreement specifically provides that the Claimant is totally and permanently disabled by agreement, and that the only

SCANNED

doctrine only applies if a party: 1) knowing of his rights; 2) does not timely assert them; and 3) by any unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position and also 4) the affected party must affirmatively prove material prejudice. Only when all four elements are met will equity bar the enforcement of those known rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999). The concept of laches only applies in a very limited set of circumstances and applies equally to both of the parties, that being the Claimant and the Defendants in this case. While the Claimant has the responsibility to raise issues and claims in a timely manner, the Defendants have the same responsibility to assert any defenses that they claim. This Court agrees with the Commissioner and the Commission that the doctrine of laches simply does not apply. Both parties had access to the same medical records from 2002 through the date that a claim was filed in 2011. Both parties knew that the Claimant suffered a physical brain injury in 2002 as a result of the encephalopathy and knew that by 2004 the treating psychiatrist, and in fact three (3) other and different authorized treating and/or evaluation physicians in 2004 and 2005 recommended a complete neurological workup to include

issue left open is the, "compensability" of the physical brain damage that the Claimant incurred. In that same Mediation Agreement, the Defendants admit that they had always authorized all of the treatment for and by the treating physicians that have expressed the opinions concerning the brain damage and agreed to provide their continuing medical care for life.

SCANNED

neuropsychological testing. Neuropsychological testing was not authorized and provided by the Defendants and were not performed until 2008. That testing in 2008 recorded severe cognitive deficits. The neuropsychologist who performed those tests in 2008, Dr. Nicholas Lind, Ph.D., subsequently in 2012 concurred in the opinion that the Claimant had sustained physical brain damage and that it was severe. In 2009 the Claimant wrote the Defendants and specifically placed them on notice that he was claiming severe physical brain damage and an entitlement to lifetime compensation due to that brain damage. In 2011, within one (1) week of the date that the authorized treating psychiatrist issued his opinion that the Claimant had sustained physical brain damage and that he was totally and permanently disabled from all work due to that brain damage, the Claimant filed a claim for lifetime compensation benefits due to that severe, permanent physical brain damage. In addition, the Commission, as is recorded in the Hearing Commissioner's Order found that the Defendants had paid for all medical care and specifically all of this care and had the same access to all of the medical records as did the Claimant. The doctrine of laches simply does not apply.

Also, as noted above, there was no definitive diagnosis until 2011 of physical brain damage that was permanent and severe and within one (1) week of that diagnosis the Claimant filed.

SCANNED

Finally, even if the other elements were in existence, which they are not in the opinion of this Court, there is no prejudice to the Defendants because the Defendants had total access to all the medical records. There is simply no material prejudice to the Defendants in not moving forward with the defense since they had access to the same exact medical evidence as did the Claimant. In addition, while the Court is of the opinion that the doctrine of *laches* does not apply, it was not raised as a defense in the initial response to the Form 50 that was filed by the Claimant seeking compensation for compensable brain damage and an entitlement to lifetime compensation benefits. Also, in the mediation, simply the compensability of the brain injury was left open for decision. It was agreed that the Claimant was totally and permanent disabled.

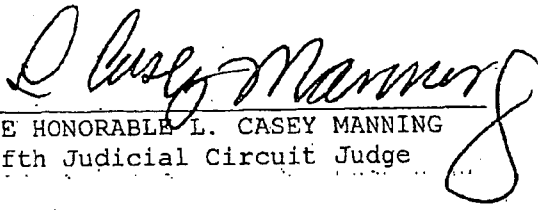
Finally, the Court would note that if it did apply it would apply to the Defendants failure to timely raise the defense. Both parties had the same notice from 2002 through 2011 concerning the Claimant's injury to his brain. Further, it was the Defendants and not the Claimant that did not provide the neuropsychological testing for a period of over four (4) years from the date it was requested. The Defendants were placed on notice of the claim no later than 2009. For all these reasons as to these bases for the appeal in the third argument, the Decision of the SC Workers' Compensation Commission is hereby affirmed.

SCANNED

For all the foregoing reasons, after due and proper consideration of the Record, the Briefs and arguments of the parties, the Decision of the SC Workers' Compensation Commission is hereby affirmed as to the appeal filed by the Defendants as Appellants in this Court.

THEREFORE, IT IS ORDERED that the Decision of the SC Workers' Compensation Commission as to the appeal filed by the Defendants as Appellants before this Court be and hereby is AFFIRMED.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: June 3, 2016

SCANNED

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

sc attorney general

PLAINTIFF(S)

South Carolina State Accident Fund
DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Consult);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

Continued

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge _____

Judge Code 2061

Date 2-12-16

For Clerk of Court Office Use Only

This judgment was entered on the 18 day of Feb, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 18 day of Feb, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Peter P. Leventis IV

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Janette W.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
Employee,)
Respondent/Cross-Appellant)

Docket No: 2015-CP-40-07468
&
2015-CP-40-07380

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ORDER OF CONTINUANCE AND
APPEALS TO BE RESET UPON
COMPLIANCE WITH SCRCP RULE 75

Employer, and)
STATE ACCIDENT FUND,)
Carrier,)
Appellants/Cross-Respondents)

RICHLAND COUNTY
FILED
JANETTE W. McBRIDE
C.C.P. & G.S.
2016 FEB 17 PM 1:56

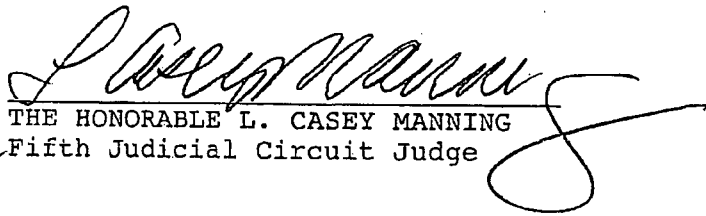
This matter was set before me on February 12, 2016 to hear the Appeal and the Cross-Appeal in the above-referenced matter. At a Motion hearing held in this matter on February 8, 2016, the Court was advised that the South Carolina Workers' Compensation Commission had not forwarded the Commission Record to the Court for hearing the Appeals pursuant to SCRCP Rule 75. This Court issued an Order that same day ordering the Commission to forward either the original Record or a certified copy of the Record before the Commission within fourteen (14) days of the date of the Order. Based on the above

IT IS ORDERED THAT the hearing set before me on February 12, 2016 for hearing the Appeal and Cross-Appeal is hereby continued.

IT IS FURTHER ORDERED THAT the Clerk shall notify my office

upon the receipt of the Commission Record. Once the Commission Record has been filed, this matter shall be reset before me for hearing of the Appeal and Cross-Appeal as soon as my schedule will allow for the Appeal and Cross-Appeal to be heard.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: Feb. 12, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
)
Claimant/Respondent/)
Appellant,)

C/A: 2015-CP-40-07380
&
2015-CP-40-07468

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ADMINISTRATIVE ORDER ORDERING
THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION TO
COMPLY WITH SCRCP RULE 75 AND
FILE THE ORIGINAL OR CERTIFIED
COPY OF THE RECORD WITH THE COURT

Employer, and)
)
STATE ACCIDENT FUND,)

Carrier,)

Defendants/Appellants/)
Respondents.)

It appears that an Appeal and a Cross-Appeal were filed with the Court on December 9TH and 11th, 2015 and were assigned Docket Nos. 2015-CP-40-07380 and 2015-CP-40-07468 in the above referenced matter. Since that time, both parties have made specific requests for the Commission to transmit the original Record or a certified copy of the Record to the Clerk of Court pursuant to S.C.R.C.P. Rule 75. The parties certify that as of February 2, 2016, the Record has not been filed with the Clerk's office.

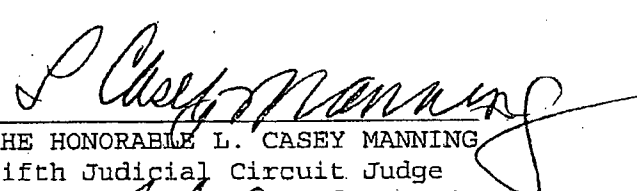
This matter is set for hearing on Motions on these two Appeals on February 8th and is set for hearing on both Appeals on

February 12th. WHEREFORE based upon review of this situation,

IT IS THEREFORE ORDERED THAT the South Carolina Workers' Compensation Commission shall immediately comply with Rule 75 and file the original Commission Record or a certified copy of that Record with the Clerk of Court on or before 5:00 p.m. on February 22nd. The Clerk shall immediately notify the Court upon the filing of the Record.

The parties shall hand-deliver a copy of this Order to the Commission, attention Judicial Director.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Feb 8, 2016

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P. Polansky

SC Office of Attorney General

State Accident Fund

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : Continued

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge W.B. Judge Code 2161 Date 2-1-16

For Clerk of Court Office Use Only

This judgment was entered on the 5 day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 5 day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

ATTORNEY(S) FOR THE PLAINTIFF(S)

Peter P. Leventis IV

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Janette W. White

SCANNED

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NOS. 9922954 & 0024408

THEODORE P. POLANSKY,

EMPLOYEE/CLAIMANT,
RESPONDENT/APPELLANT,

v.

SC OFFICE OF ATTORNEY GENERAL,

EMPLOYER,

AND

STATE ACCIDENT FUND,

CARRIER,
DEFENDANTS,
APPELLANTS/RESPONDENTS

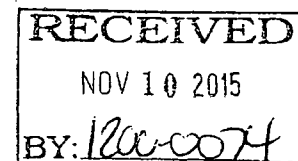
Appellate Panel Review held in Columbia,
South Carolina on September 21, 2015 per
notices timely and properly served on all
parties of interest

Appellate Panel Decision and Order filed
November 10th, 2015.

APPEARANCES:

Claimant/2nd Appellant represented by
Preston F. McDaniel, Esquire of
Columbia, South Carolina.

Defendants/Respondents/1st Appellant represented by
Peter P. Leventis, Esquire of
Columbia, South Carolina.



This matter was before the Full Commission based on a Request for Review (appeal) filed by the Defendants and on a cross-appeal filed by the Employee/Claimant, filed the last day for review and filed a provisional appeal in the event that the Defendants in fact appealed the Decision of the Hearing Commissioner. The appeal by the Defendants and the cross-appeal filed by the Employee-Claimant is from the Order of Commissioner Susan S. Barden filed on June 1st, 2015. In her Order, Commissioner Barden made the following Findings of Fact, Conclusions of Law, and issued the following Order and Award:

FINDINGS OF FACT

1. A Guardian Ad Litem was appointed by the undersigned at the hearing, based upon (a) my observations of Claimant, and (b) the testimony of Dr. Forsthoefel. The person appointed has been in a 20+ year relationship with Claimant, and in at least one record is referred to as Claimant's common law wife (e.g., Defendants APA #20, page 715; Defendants' APA #21, page 718).

2. Claimant sustained admitted accidents on October 19, 1999, and May 30, 2000, and Defendants paid Claimant 500 weeks of temporary compensation for these claims. The 500-week period ended in March 2011 (Commission's file; Defendants' APA #26, page 738; Defendants' APA #28, page 743).

3. The admitted body parts/conditions are (a) the back (for which Claimant underwent spinal cord stimulator implantation, and

re-implantation in Colorado), and psychological (2000); and (b) the left knee (1999). See e.g., Claimant's APA #7, page 250.

4. The parties mediated the claims in November 2014, and agreed that Claimant was permanently and totally disabled, and is entitled to receive lifetime causally-related treatment per the agreement. The parties did not reach the issue of whether Claimant had sustained an alleged brain injury or physical brain damage after a drug-drug interaction (Claimant's APA #15).

5. Prior to the mediation, there was no (a) Order from the Commission setting forth the compensable body parts/conditions; or (b) agreement by the parties setting forth the compensable body parts/conditions.

6. Claimant contends that he sustained physical brain damage pursuant to Section 42-9-10(C), after a drug-drug interaction in 2002 caused encephalopathy, and therefore is entitled to receive lifetime compensation. Procedurally, Claimant contends that Defendants are estopped from denying physical brain damage as Defendants (a) have paid for all of Claimant's treatment, (b) had knowledge of Claimant's cognitive condition and decline, and (C) impliedly accepted physical brain damage (or at least a brain injury) through the provision of treatment. Claimant filed a Form 50 (including the brain) in May 2011, and re-filed a Form 50 in March 2012 (Commission's file; Defendants' APA #27, page 740).

7. Defendants contend that Laches, waiver, and estoppel, whether separately or collectively, apply and bar any claim of physical brain damage. Regardless, Defendants contend that, at most, Claimant sustained a brain injury pursuant to Regulation 67-1101. Defendants maintain that Claimant's cognitive problems are more the result of Claimant's psychological/psychiatric issues than organic damage.

8. Claimant was hospitalized in February 2002 after a drug reaction to Seroquel which had been prescribed to treat his admitted injuries (Claimant's APA #11).

9. Claimant has a preponderance standard to meet, and I find that he meets it: Claimant has been diagnosed with physical brain damage resulting from Claimant's drug-drug chemical encephalopathy by more than one authorized physician and all of his current treating physicians, Dr. Frank Forsthoefel, M.D. (authorized treating psychiatrist since 2001) and Dr. Ezra Riber (chronic pain specialist since 2000). (Claimant's APA #1, pages 2, 6-8, and 10; Claimant's #2, page 12).

10. Claimant's condition since the 2002 hospitalization has deteriorated. Medical evidence from 2007 notes that Claimant reported concerns with increasing cognitive difficulties. After administering a battery of tests, Dr. Lind found that "the feigning of memory difficulties is not likely," and is "suggestive of dementia." I give great weight to this evidence, and find that

it dovetails with Dr. Forsthoefel's testimony that Claimant has experienced a severe cognitive decline independent of Claimant's psychiatric condition/mood. (Defendants' APA #23, pages 723 and 725-727; testimony of Dr. Forsthoefel; Claimant's APA #1, pages 5 and 9; Claimant's APA #8, pages 341-343).

11. Dr. Jonet, Ph.D., the authorized treating clinical psychologist since 2004, also opines that Claimant has brain damage. Dr. Jonet's treatment records from 2004 - 2015 speak to Claimant's cognitive impairment and decline, memory problems, and forgetfulness. In 2005, because of Claimant's cognitive decline, Dr. Jonet stated that Claimant "needs neuro referral". (Claimant's APA #3, pages 15-19; Claimant's APA #8, e.g., pages 341-362, 368-369, 371, 374-376, 378-379, 382, 384-389, 393, 406, 415, 417, 420, 432-433, 437-439, 453, 463-464, 471-472, 482, 484, 501, 505, 507, 516-517, 520, 553, 561, 564-565, 563, 577, 582, 600, and 603-606).

12. Dr. Jonet met with Carrier's case manager regarding Claimant's cognitive impairment (Claimant's APA #8, page 589, dated 2005).

13. Dr. Marturano (treating psychiatrist) also documented Claimant's poor memory, at one point believed to be attributable to chronic narcotic use. In 2009, Dr. Marturano noted that he needed to discuss Claimant's memory issues with Dr. Jonet. Dr. Marturano also documented Claimant's (a) inability to comprehend the newspaper or to figure out "brain teasers" anymore; (b)

inability to remember his zip code and his PIN for ATM machines,
(c) forgetfulness while driving (missing turns, etc.), and (d)
going to the "wrong appointment location" to see Dr. Marturano,
among other difficulties. Because of Claimant's presentation, Dr.
Marturano also recommended and requested neuro-psych testing for
Claimant's memory issues throughout his records from 2005 to 2009.
(Claimant's APA #9, pages 608-616, 619-624, 626, 628-629, 632,
634, 642, 653-654, 656, and 661).

14. Dr. Krebs also documented Claimant's forgetfulness
(Claimant's APA #10, page 667).

15. Rehabilitation Consultant Fi-Fi Jubran found Claimant
"to be sincere and to want to help himself get better."
(Claimant's APA #17, page 704).

16. Of all the evidence submitted by the parties, by far the
most compelling is the testimony of Claimant's treating
psychiatrist (Dr. Forsthoefel), who treated Claimant from 2001-
2004, and again from 2009 to the present (i.e., as of the date of
the hearing). I give this testimony great weight because despite
Defendants' counsel's skillful and thorough cross examination, Dr.
Forsthoefel does not retreat from his opinions that (a) Claimant
has suffered a physical, organic alteration to the brain-physical
damage to the "structure of the brain;" (b) Claimant's brain has
been "terribly compromised," "very seriously impaired," "severely
impaired," and "very, very impaired;" (c) Claimant's brain injury

alone renders Claimant unemployable; and (d) Claimant's increasing cognitive deficits are not mood congruent, i.e., Claimant developed cognitive problems unrelated to his psychiatric condition. Dr. Forsthoefel considered the records/opinions of other experts, yet still maintains the opinions he holds (Claimant's APA #1, pages 1-3; testimony of Dr. Forsthoefel; Claimant's APA #6 in its entirety; Claimant's APA #16, pages 683-685).

17. The greater weight of the evidence shows that Claimant's physical brain damage is permanent in nature (Claimant's APA #2, pages 13-14; See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Crisp v. Southco, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)).

18. The greater weight of the evidence shows that Claimant's brain injuries is one of those "most serious" and "severe" cases contemplated by Crisp and Sparks; therefore, Claimant meets his burden of establishing by the preponderance of the evidence that he has sustained physical brain damage. Claimant is not required to prove physical brain damage by objective diagnostic tests or by clear and convincing evidence.

19. At the hearing, Defendants' counsel highlighted and emphasized records which by all appearances would be favorable to the Defendants. However, Dr. Forsthoefel explained to my satisfaction that Claimant has physical brain damage. Given Dr.

Forsthoefel's continuum of treatment from 2001 to the present—except for the break in the treating relationship from 2004-2008—I find that Dr. Forsthoefel is in the best position to render this opinion as Dr. Forsthoefel has observed the cognitive changes himself.

20. I considered Dr. Adams' opinion from his report of August 23, 2004 (in which he recommended that if "memory" was the issue that Claimant undergo psychological testing (Defendants' APA #20, pages 715-716), but Dr. Forsthoefel's opinion is the more persuasive of the two.

21. I considered the fact that Claimant can drive some, but Dr. Forsthoefel testified that it is limited to familiar places. Further, various treatment notes chronicle Claimant's difficulty driving. Finally, Claimant's license was last renewed in 2006 and does not expire until 2016. (testimony of Dr. Forsthoefel; Defendants' APA #43, page 849; See also Defendants' APA #31, page 808).

22. Defendants' defense of Laches is not persuasive. If Defendants had never paid for any of Claimant's treatment, had no knowledge of the encephalopathy or Claimant's cognitive decline, and were just now or recently being asked to assume the treatment for the organic brain injury/damage, the result in this case might be vastly different. However, Defendants had access to Claimant's medical records and provided benefits for his treatment. Further,

the extent of Claimant's condition was not wholly apparent or fully appreciated after the diagnosis of encephalopathy, but rather has continued to decline since 2002.

23. As to Defendants' objections concerning Dr. Rainwater's records, the conclusion (regarding mail order prescriptions) in Claimant's APA #4, page 20, is the same conclusion as reached by Dr. Jonet in Claimant's APA #3, page 15. I can therefore discount or even disregard that e-mail objected to by Defendants in Claimant's APA #4. 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.

25. Although Claimant's APA #9, page 664 is part of the treatment records, I find them wholly unnecessary to my conclusions herein. I can also similarly disregard pages 633, 637, and 662, although these submissions were not objected to.

26. I can (and do) completely disregard Claimant's APA #9, page 663, and reach the same conclusions I reach herein. This document is wholly unnecessary to my decision.

27. Claimant's average weekly wage is \$877.01, yielding a compensation rate of \$507.34, the maximum for 2000. I do not find

persuasive Claimant's argument that exceptional circumstances exist to change the compensation rate (paid over the 500-week period), and that Claimant's compensation rate should be based upon that of 2015 or any date other than that of the later accident date. Although I considered it, the Circuit Court Order submitted by Claimant is not binding or of precedential value.

28. Claimant is entitled to lifetime benefits.

29. The Commission Record reflects that the State Accident Fund filed for benefits and was awarded coverage under the Second Injury Fund based on pre-existing psychological problems and pre-existing conditions in the Claimant's back which combined with the effects of the injury to the Claimant's psychological condition and back injury stemming from the accident to result in a greater disability and greater degree of medical care than would have resulted from the injuries from the accident alone. The combination of the Claimant's pre-existing conditions and the injuries from the accidents and the treatment necessary to treat those problems caused and resulted in the Claimant's serious, severe and permanent physical brain damage. In 2009 the State Accident Fund as is reflected in the Record sought assistance of the Claimant in obtaining Second Injury Fund coverage for these problems. It is also clear that in 2009 the Claimant placed the State Accident Fund on notice of this claim for lifetime benefits due to physical brain damage and the desire to resolve that issue

by agreement without the need for further litigation expense.

30. Based on the Record, the Claimant's pre-existing psychological and back problems combined with the effects on the injuries including chronic pain, RSD, and depression to cause greater psychological problems, diagnosed as schizoaffective disorder and bi-polar disorder which necessitated the administration of such drugs as Seroquel. The administration of Seroquel resulted in a drug-drug reaction that caused the encephalopathy. Therefore the reaction to the medications needed to treat the conditions stemming from the combination of the pre-existing conditions and the injuries stemming from the accidents resulted in the Claimant's physical brain damage and the tremendous increase in benefits, lifetime compensation, stemming from the accidents.

CONCLUSIONS OF LAW

Under S.C. Code §42-17-40 the following Conclusions of Law apply in this case to the issues presented for decision:

1. Under S.C. Code §42-1-40 and S.C. Code §42-9-10, the Decision is made as to the applicable compensation rate in this matter. All cases, decisions and legal memorandum as to exceptional circumstances and the wording and meaning of S.C. Code §42-9-10 have been taken into consideration as the issue of the applicable average weekly wage and compensation rate that applies. The provisions and requirements of S.C. Code §42-17-10 were taken

into consideration in making this decision since no prior decision has been made by the Commission on that issue and it is appropriate that a decision be made at this time.

2. Under S.C. Code §42-9-10(C), the determination is made as to the Claimant's entitlement to lifetime weekly compensation benefits due to having sustained physical brain damage resulting from the encephalopathy which resulted from a drug-drug interaction from drugs necessary to treat the Claimant's disabling symptoms and conditions stemming from the work-related injuries. The South Carolina Supreme Court Decision in the cases of Sparks v. Palmetto Hardwood, Inc., 406 SC 124, 750 Southeastern 2d 61 (2013) and Crisp v. Southco, Inc., 401 SC 627, 738 Southeastern 2d 835 (2013) were taken into consideration in determining whether or not the Claimant has met his burden of proof in establishing that he has sustained physical brain damage severe enough to establish his entitlement to an Award for lifetime compensation benefits under S.C. Code § 42-9-10(C). The evidence establishes in accordance with those decisions that the Claimant has sustained severe permanent impairment of the normal functioning of the brain and has sustained physical brain damage that is both serious and severe. In fact, based on the undisputed testimony of the Claimant's treating psychiatrist, Mr. Polansky's physical brain damage is so severe that he is unemployable due to his physical brain damage alone regardless of any other physical or

psychological impairments.

3. Under the Mediated Settlement Agreement, the Claimant is entitled to lifetime medical care under SC Code §42-15-60(C) as set out in that Agreement which Agreement is incorporated herein as part of this Order and that his physical brain damage is causally related to the injuries sustained in the accident for which he is entitled to lifetime medical care.

4. Under the stipulations of the parties, the parties stipulated to jurisdiction and venue and to the other issues as reflected in the stipulations.

5. Under the Defendants' defense listed in their Pre-Hearing Brief of Laches, waiver, and estoppel, based on a review of the evidence, their argument and cases cited, I do not find their argument persuasive or in fact supported by fact or law. The Claimant in reply to this defense cited the case of Jervay v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2011) and asserted the concept of Laches waiver and estoppel should be applied to the Defendants.

The State Accident Fund paid for the hospitalization for the encephalopathy (brain injury) in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive dysfunction. In 2004 at the request of the authorized treating psychiatrist for neurologic examination by Dr. Ngo for cognitive dysfunction believed to be in

part due to the encephalopathy, the assigned rehab nurse scheduled and a neurological evaluation was performed by Dr. Julian Adams who noted that, "if memory loss" is the important factor in your investigation that Mr. Polansky should have "psychological testing". At the recommendation of treating doctors, Dr. Forsthoefel, Dr. Marturano, Dr. Jonet, Ph.D. and Dr. Riber and at the continual request of the Claimant between 2004 -2007, in late 2007 and 2008, the State Accident Fund had neuropsychological testing performed by Dr. Nicholas Lind, Ph.D. (but did not provide him with treatment records) who found severe cognitive impairment and recommended further testing concerning, "possible dementia", a physical brain damage condition. In 2009, the Claimant placed the State Accident Fund on notice that he believed he had suffered physical brain damage and requested discussion to resolve that by agreement without litigation. Between 2009 and 2011 the State Accident Fund paid for treatment which noted continual decline in cognitive function and paid for medications specifically for the treatment of physical brain conditions. Then in 2011 within three months of the opinions of Dr. Rainwater, Ph.D. and Dr. Forsthoefel and within one week of Dr. Forsthoefel's opinion that Mr. Polansky was suffering from physical brain damage, the Claimant filed for a hearing.

Based on this evidence I do not find the Defendants' position to be persuasive but I do find the argument persuasive that laches

should apply as to the Defendants. In this case the Defendants paid for all treatment and evaluations requested for brain injury between 2002 and 2011. In Jervey the Court of Appeals applied laches to hold that the Defendants acceptance of the claim including the payment of medicals and compensation for a period of 455 days barred the Defendants from raising a denial to the claim. In this case the Defendants paid medical care for brain injury for nine years at the time of the first definitive medical opinion that the Claimant had sustained permanent brain damage.

Even applying Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), upon which the defense relies on the elements required to establish laches and estoppel is that only where there is the relinquishment of a, "known right" for an unreasonable length of time so these concepts apply. There is no evidence that before the opinion of Dr. Forsthoefel in 2011 that there was medical opinion evidence stating to a reasonable degree of medical certainty that Mr. Polansky had sustained permanent physical brain damage that was causing his severe cognitive dysfunction. Within one week of that opinion being given by of the authorized treating psychiatrist, the Claimant filed for an Award. Further, the party asserting these affirmative defenses has the burden of proof to prove prejudice, and opportunity to have acted sooner and material prejudice. I do not find any evidence that the Defendants have met that burden of proof.

ORDER AND AWARD

THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed.

IT IS FURTHER ORDERED that the Claimant is entitled to lifetime medical care pursuant to the mediated Settlement Agreement through the authorized treating physicians Dr. Forsthoefel, Dr. Jonet, Dr. Riber and Dr. Beasley and such other medical providers as those physicians deem necessary and to include lifetime medical care for the physical brain damage and all causally related medical conditions, pursuant to SC Code §42-15-60(C).

IT IS FURTHER ORDERED that the previous decision by this Commission on Second Injury Fund coverage is incorporated hereby by reference as to the Findings of Fact and Conclusions of Law made on the Award for physical brain damage.

No hearing costs are assessed in this matter.

AND IT IS SO AWARDED AND ORDERED.

REQUESTS FOR REVIEW

The Request for Review (appeal), filed by the Defendants requested review based on the following grounds:

1. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, to overrule the Defendants objection to the include the updated medical reports of Dr. Avie Rainwater, and referring to Dr. Rainwater as "an authorized treating physician" (See Barden Order at P. 5-6), when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law, and/or an abuse of discretion?

2. Did the Single Commissioner err in finding as an issue of fact, and/or including as a matter of law, that the Claimant suffered physical brain damage in relation to his two work related injuries in 1999 and 2000 respectively, whether from a drug-drug interaction or otherwise, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law?

3. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Defendants should have been on notice of a physical brain injury - related to these accidents and subsequent treatments prefaced upon references to the references made to the record in Findings of Fact No's 10-16, when such a finding was against the greater weight of the

evidence and/or contrary to South Carolina law? (Barden Order at pp. 39-41).

4. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered permanent physical brain injury in relation to the 1999 and 2000 dates of accident, or resulting treatment therefrom, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order, Finding of Fact No. 17, at p. 41).

5. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered permanent physical brain injury in relation to the 1999 and 2000 dates of accident, or resulting treatment therefrom, which was one of "those 'serious' and 'severe' cases contemplated by Crisp and Sparks [Supreme Court Decisions], and that such was proven by the preponderance of the evidence, an per the testimony of Dr. Forsthoefel, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order, Findings of Fact No. 18-19, at pp. 41-42).

6. Did the Single Commissioner err in failing to find as an issue of fact, and/or failing to conclude as a matter of law, that the Claimant's request for benefits for a permanent physical brain injury, was barred under the equitable doctrine of laches, when failing to do so, was against the greater weight of the evidence

and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 23 at p. 43; Conclusion of Law No. 5, at pp. 47-50).

7. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that Dr. Rainwater's opinion was not pivotal or necessary to the determination of permanent physical brain damage, its severity, its medication causation and relation to the 1999 and 2000 date of accident, and resulting treatment therefrom, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 24, at p. 43).

8. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant is entitled to "lifetime [indemnity] benefits," when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 28, at p. 44; Conclusion of Law No. 2 at pp. 46-47; Award at pp. 50-51).

9. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant has suffered a physical brain injury, which was both permanent, as well as serious and serve within the context of S.C. Code Ann. §42-9-10 and Sparks v. Palmetto Hardwood, Inc. (S.C. Sup. Ct. 2013) and Crisp v. Southco, Inc. (S.C. Sup. Ct. 2013), thereby entitling him to lifetime medical and indemnity benefits, for permanent and total disability, when such a finding was against

the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Conclusion of Law No. 2, at pp. 46-47, Award at pp. 50-51).

10. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant is entitled to lifetime medical care and indemnity benefits in conjunction with an awarded permanent physical brain injury, and resulting permanent total disability, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Award at pp. 50-51).

11. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, or an abuse of discretion, that such hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, and/or otherwise violate of the substance and procedural due process rights of the Defendants; when the hearing was set based on a Form 50 hearing request filed by the Claimant in the year 2012, and when such hearing request was previously disposed of - by prior Consent Order of the parties on remand from an appeal of the prior Orders resulting from that Form 50 hearing request - after a remand from the Circuit Court? (Despite the purported stipulation in the rulings of the Single Commissioner that only two issues were before the Commission in this matter, Defendants did not withdraw any of the grounds for relief raised

in their Form 58 pre-hearing filings, and such was raised in that filing).

12. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, or as an abuse of discretion, that such hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, and/or otherwise violate of the substance and procedural due process rights of the Defendants; when the Claimant was permitted to effectively use the sword and shield of both obtaining and submitted updated psychiatric testing results and reports, but failed to either - a) voluntarily permit the Defendants to obtain any updated psychological evaluations of their own, due to the fact that such evaluators were not physicians, nor b) comply with the Consent Order to permit neuropsychological testing? (Despite the purported stipulation in the rulings of the Single Commissioner that only two issues were before the Commission in this matter, Defendants did not withdraw any of the grounds for relief raised in their Form 58 pre-hearing filings, and this issue was raised in that filing).

The Request for Review (appeal), filed by the Claimant/
Employee requested review based on the following grounds:

1. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate to fairly compensate this high wage earner, under the second paragraph of SC Code Section 42-1-40

and SC Code Section 42-9-10 and the decisions of the Supreme Court and Court of Appeals under those sections.

2. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate based on the decisions of the SC Supreme Court and the Court of Appeals under the exceptional circumstances paragraph of Section 42-1-40.

3. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate of this high wage earner based on the language of 42-9-10, which is meant to allow the Commission ability to compensate high wage earners by allowing the Commission to increase their compensation rate each year up to the maximum compensation rate for that year to partially compensate their loss of income under the decisions of the Supreme Court which hold that the purpose in determining the compensation rate is to compensate the injured worker for his loss of earning capacity into the future.

4. The Hearing Commissioner erred as a matter of law by determining that a decision of the Circuit Court has no precedential value and is not binding on the Commission. A Circuit Court is a higher court whose opinions must be followed until overturned and has value to that extent. The only opinions that do not have precedential value are Unpublished Opinions by the Court of Appeals which is specifically mandated by statute and Court Rules.

Copies of the above Grounds for Review were furnished to all interested parties prior to the oral arguments scheduled before the Appellate Panel on September 21, 2015.

Pursuant to SC Code §42-17-50 (1985), the Appellate Panel reviewed the Award and considered all of the issues raised by the Briefs of the Appellants and Respondents.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has considered the matter and find a FULL AFFIRMATION of the Hearing Commissioner's Decision and Order. The Findings of Fact and Conclusions of Law found in the Hearing Commissioner's Decision and Order, and as specified above, are hereby affirmed in full, and are set forth hereinafter as the Findings of Fact and Conclusions of Law of the Commission:

FINDINGS OF FACT

1. A Guardian Ad Litem was appointed by the undersigned at the hearing, based upon (a) my observations of Claimant, and (b) the testimony of Dr. Forsthoefer. The person appointed has been in a 20+ year relationship with Claimant, and in at least one record is referred to as Claimant's common law wife (e.g., Defendants APA #20, page 715; Defendants' APA #21, page 718).

2. Claimant sustained admitted accidents on October 19, 1999, and May 30, 2000, and Defendants paid Claimant 500 weeks of temporary compensation for these claims. The 500-week period

ended in March 2011 (Commission's file; Defendants' APA #26, page 738; Defendants' APA #28, page 743).

3. The admitted body parts/conditions are (a) the back (for which Claimant underwent spinal cord stimulator implantation, and re-implantation in Colorado), and psychological (2000); and (b) the left knee (1999). See e.g., Claimant's APA #7, page 250.

4. The parties mediated the claims in November 2014, and agreed that Claimant was permanently and totally disabled, and is entitled to receive lifetime causally-related treatment per the agreement. The parties did not reach the issue of whether Claimant had sustained an alleged brain injury or physical brain damage after a drug-drug interaction (Claimant's APA #15).

5. Prior to the mediation, there was no (a) Order from the Commission setting forth the compensable body parts/conditions; or (b) agreement by the parties setting forth the compensable body parts/conditions.

6. Claimant contends that he sustained physical brain damage pursuant to Section 42-9-10(C), after a drug-drug interaction in 2002 caused encephalopathy, and therefore is entitled to receive lifetime compensation. Procedurally, Claimant contends that Defendants are estopped from denying physical brain damage as Defendants (a) have paid for all of Claimant's treatment, (b) had knowledge of Claimant's cognitive condition and decline, and (c) impliedly accepted physical brain damage (or at

least a brain injury) through the provision of treatment. Claimant filed a Form 50 (including the brain) in May 2011, and re-filed a Form 50 in March 2012 (Commission's file; Defendants' APA #27, page 740).

7. Defendants contend that Laches, waiver, and estoppel, whether separately or collectively, apply and bar any claim of physical brain damage. Regardless, Defendants contend that, at most, Claimant sustained a brain injury pursuant to Regulation 67-1101. Defendants maintain that Claimant's cognitive problems are more the result of Claimant's psychological/psychiatric issues than organic damage.

8. Claimant was hospitalized in February 2002 after a drug reaction to Seroquel which had been prescribed to treat his admitted injuries (Claimant's APA #11).

9. Claimant has a preponderance standard to meet, and I find that he meets it: Claimant has been diagnosed with physical brain damage resulting from Claimant's drug-drug chemical encephalopathy by more than one authorized physician and all of his current treating physicians, Dr. Frank Forsthoefer, M.D. (authorized treating psychiatrist since 2001) and Dr. Ezra Riber (chronic pain specialist since 2000). (Claimant's APA #1, pages 2, 6-8, and 10; Claimant's #2, page 12).

10. Claimant's condition since the 2002 hospitalization has deteriorated. Medical evidence from 2007 notes that Claimant

reported concerns with increasing cognitive difficulties. After administering a battery of tests, Dr. Lind found that "the feigning of memory difficulties is not likely," and is "suggestive of dementia." I give great weight to this evidence, and find that it dovetails with Dr. Forsthoefel's testimony that Claimant has experienced a severe cognitive decline independent of Claimant's psychiatric condition/mood. (Defendants' APA #23, pages 723 and 725-727; testimony of Dr. Forsthoefel; Claimant's APA #1, pages 5 and 9; Claimant's APA #8, pages 341-343).

11. Dr. Jonet, Ph.D., the authorized treating clinical psychologist since 2004, also opines that Claimant has brain damage. Dr. Jonet's treatment records from 2004 - 2015 speak to Claimant's cognitive impairment and decline, memory problems, and forgetfulness. In 2005, because of Claimant's cognitive decline, Dr. Jonet stated that Claimant "needs neuro referral". (Claimant's APA #3, pages 15-19; Claimant's APA #8, e.g., pages 341-362, 368-369, 371, 374-376, 378-379, 382, 384-389, 393, 406, 415, 417, 420, 432-433, 437-439, 453, 463-464, 471-472, 482, 484, 501, 505, 507, 516-517, 520, 553, 561, 564-565, 563, 577, 582, 600, and 603-606).

12. Dr. Jonet met with Carrier's case manager regarding Claimant's cognitive impairment (Claimant's APA #8, page 589, dated 2005).

13. Dr. Marturano (treating psychiatrist) also documented Claimant's poor memory, at one point believed to be attributable

to chronic narcotic use. In 2009, Dr. Marturano noted that he needed to discuss Claimant's memory issues with Dr. Jonet. Dr. Marturano also documented Claimant's (a) inability to comprehend the newspaper or to figure out "brain teasers" anymore; (b) inability to remember his zip code and his PIN for ATM machines, (c) forgetfulness while driving (missing turns, etc.), and (d) going to the "wrong appointment location" to see Dr. Marturano, among other difficulties. Because of Claimant's presentation, Dr. Marturano also recommended and requested neuro-psych testing for Claimant's memory issues throughout his records from 2005 to 2009. (Claimant's APA #9, pages 608-616, 619-624, 626, 628-629, 632, 634, 642, 653-654, 656, and 661).

14. Dr. Krebs also documented Claimant's forgetfulness (Claimant's APA #10, page 667).

15. Rehabilitation Consultant Fi-Fi Jubran found Claimant "to be sincere and to want to help himself get better." (Claimant's APA #17, page 704).

16. Of all the evidence submitted by the parties, by far the most compelling is the testimony of Claimant's treating psychiatrist (Dr. Forsthoefel), who treated Claimant from 2001-2004, and again from 2009 to the present (i.e., as of the date of the hearing). We give this testimony great weight because despite Defendants' counsel's skillful and thorough cross examination, Dr. Forsthoefel does not retreat from his opinions that (a) Claimant

has suffered a physical, organic alteration to the brain-physical damage to the "structure of the brain;" (b) Claimant's brain has been "terribly compromised," "very seriously impaired," "severely impaired," and "very, very impaired;" (c) Claimant's brain injury alone renders Claimant unemployable; and (d) Claimant's increasing cognitive deficits are not mood congruent, i.e., Claimant developed cognitive problems unrelated to his psychiatric condition. Dr. Forsthoefel considered the records/opinions of other experts, yet still maintains the opinions he holds (Claimant's APA #1, pages 1-3; testimony of Dr. Forsthoefel; Claimant's APA #6 in its entirety; Claimant's APA #16, pages 683-685).

17. The greater weight of the evidence shows that Claimant's physical brain damage is permanent in nature (Claimant's APA #2, pages 13-14; See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Crisp v. Southco, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)).

18. The greater weight of the evidence shows that Claimant's brain injuries is one of those "most serious" and "severe" cases contemplated by *Crisp* and *Sparks*; therefore, Claimant meets his burden of establishing by the preponderance of the evidence that he has sustained physical brain damage. Claimant is not required to prove physical brain damage by objective diagnostic tests or by clear and convincing evidence.

19. At the hearing, Defendants' counsel highlighted and emphasized records which by all appearances would be favorable to the Defendants. However, Dr. Forsthoefel explained to my satisfaction that Claimant has physical brain damage. Given Dr. Forsthoefel's continuum of treatment from 2001 to the present—except for the break in the treating relationship from 2004-2008—I find that Dr. Forsthoefel is in the best position to render this opinion as Dr. Forsthoefel has observed the cognitive changes himself.

20. We considered Dr. Adams' opinion from his report of August 23, 2004 (in which he recommended that if "memory" was the issue that Claimant undergo psychological testing (Defendants' APA #20, pages 715-716), but Dr. Forsthoefel's opinion is the more persuasive of the two.

21. We considered the fact that Claimant can drive some, but Dr. Forsthoefel testified that it is limited to familiar places. Further, various treatment notes chronicle Claimant's difficulty driving. Finally, Claimant's license was last renewed in 2006 and does not expire until 2016. (testimony of Dr. Forsthoefel; Defendants' APA #43, page 849; See also Defendants' APA #31, page 808).

22. Defendants' defense of Laches is not persuasive. If Defendants had never paid for any of Claimant's treatment, had no knowledge of the encephalopathy or Claimant's cognitive decline,

and were just now or recently being asked to assume the treatment for the organic brain injury/damage, the result in this case might be vastly different. However, Defendants had access to Claimant's medical records and provided benefits for his treatment. Further, the extent of Claimant's condition was not wholly apparent or fully appreciated after the diagnosis of encephalopathy, but rather has continued to decline since 2002.

23. As to Defendants' objections concerning Dr. Rainwater's records, the conclusion (regarding mail order prescriptions) in Claimant's APA #4, page 20, is the same conclusion as reached by Dr. Jonet in Claimant's APA #3, page 15. We can therefore discount or even disregard that e-mail objected to by Defendants in Claimant's APA #4. Notwithstanding any dispute between Dr. Rainwater and the carrier, we 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 we can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

25. Although Claimant's APA #9, page 664 is part of the treatment records, we find them wholly unnecessary to my conclusions herein. We can also similarly disregard pages 633, 637, and 662, although these submissions were not objected to.

26. We can (and do) completely disregard Claimant's APA #9,

page 663, and reach the same conclusions we reach herein. This document is wholly unnecessary to my decision.

27. Claimant's average weekly wage is \$877.01, yielding a compensation rate of \$507.34, the maximum for 2000. We do not find persuasive Claimant's argument that exceptional circumstances exist to change the compensation rate (paid over the 500-week period), and that Claimant's compensation rate should be based upon that of 2015 or any date other than that of the later accident date. Although we considered it, the Circuit Court Order submitted by Claimant is not binding or of precedential value.

28. Claimant is entitled to lifetime benefits.

29. The Commission Record reflects that the State Accident Fund filed for benefits and was awarded coverage under the Second Injury Fund based on pre-existing psychological problems and pre-existing conditions in the Claimant's back which combined with the effects of the injury to the Claimant's psychological condition and back injury stemming from the accident to result in a greater disability and greater degree of medical care than would have resulted from the injuries from the accident alone. The combination of the Claimant's pre-existing conditions and the injuries from the accidents and the treatment necessary to treat those problems caused and resulted in the Claimant's serious, severe and permanent physical brain damage. In 2009 the State Accident Fund as is reflected in the Record sought assistance of

the Claimant in obtaining Second Injury Fund coverage for these problems. It is also clear that in 2009 the Claimant placed the State Accident Fund on notice of this claim for lifetime benefits due to physical brain damage and the desire to resolve that issue by agreement without the need for further litigation expense.

30. Based on the Record, the Claimant's pre-existing psychological and back problems combined with the effects on the injuries including chronic pain, RSD, and depression to cause greater psychological problems, diagnosed as schizoaffective disorder and bi-polar disorder which necessitated the administration of such drugs as Seroquel. The administration of Seroquel resulted in a drug-drug reaction that caused the encephalopathy. Therefore the reaction to the medications needed to treat the conditions stemming from the combination of the pre-existing conditions and the injuries stemming from the accidents resulted in the Claimant's physical brain damage and the tremendous increase in benefits, lifetime compensation, stemming from the accidents.

CONCLUSIONS OF LAW

Under S.C. Code §42-17-40 the following Conclusions of Law apply in this case to the issues presented for decision:

1. Under S.C. Code §42-1-40 and S.C. Code §42-9-10, the Decision is made as to the applicable compensation rate in this matter. All cases, decisions and legal memorandum as to

exceptional circumstances and the wording and meaning of S.C. Code §42-9-10 have been taken into consideration as the issue of the applicable average weekly wage and compensation rate that applies. The provisions and requirements of S.C. Code §42-17-10 were taken into consideration in making this decision since no prior decision has been made by the Commission on that issue and it is appropriate that a decision be made at this time.

2. Under S.C. Code §42-9-10(C), the determination is made as to the Claimant's entitlement to lifetime weekly compensation benefits due to having sustained physical brain damage resulting from the encephalopathy which resulted from a drug-drug interaction from drugs necessary to treat the Claimant's disabling symptoms and conditions stemming from the work-related injuries. The South Carolina Supreme Court Decision in the cases of Sparks v. Palmetto Hardwood, Inc., 406 SC 124, 750 Southeastern 2d 61 (2013) and Crisp v. Southco, Inc., 401 SC 627, 738 Southeastern 2d 835 (2013) were taken into consideration in determining whether or not the Claimant has met his burden of proof in establishing that he has sustained physical brain damage severe enough to establish his entitlement to an Award for lifetime compensation benefits under S.C. Code § 42-9-10(C). The evidence establishes in accordance with those decisions that the Claimant has sustained severe permanent impairment of the normal functioning of the brain and has sustained physical brain damage that is both serious and

severe. In fact, based on the undisputed testimony of the Claimant's treating psychiatrist, Mr. Polansky's physical brain damage is so severe that he is unemployable due to his physical brain damage alone regardless of any other physical or psychological impairments.

3. Under the Mediated Settlement Agreement, the Claimant is entitled to lifetime medical care under SC Code §42-15-60(C) as set out in that Agreement which Agreement is incorporated herein as part of this Order and that his physical brain damage is causally related to the injuries sustained in the accident for which he is entitled to lifetime medical care.

4. Under the stipulations of the parties, the parties stipulated to jurisdiction and venue and to the other issues as reflected in the stipulations.

5. Under the Defendants' defense listed in their Pre-Hearing Brief of Laches, waiver, and estoppel, based on a review of the evidence, their argument and cases cited, we do not find their argument persuasive or in fact supported by fact or law. The Claimant in reply to this defense cited the case of Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2011) and asserted the concept of Laches waiver and estoppel should be applied to the Defendants.

The State Accident Fund paid for the hospitalization for the encephalopathy (brain injury) in 2002. From 2002 to 2004 they

paid for medical care which included constant reference to increasing problems with cognitive dysfunction. In 2004 at the request of the authorized treating psychiatrist for neurologic examination by Dr. Ngo for cognitive dysfunction believed to be in part due to the encephalopathy, the assigned rehab nurse scheduled and a neurological evaluation was performed by Dr. Julian Adams who noted that, "if memory loss" is the important factor in your investigation that Mr. Polansky should have "psychological testing". At the recommendation of treating doctors, Dr. Forsthoefel, Dr. Marturano, Dr. Jonet, Ph.D. and Dr. Riber and at the continual request of the Claimant between 2004 -2007, in late 2007 and 2008, the State Accident Fund had neuropsychological testing performed by Dr. Nicholas Lind, Ph.D. (but did not provide him with treatment records) who found severe cognitive impairment and recommended further testing concerning, "possible dementia", a physical brain damage condition. In 2009, the Claimant placed the State Accident Fund on notice that he believed he had suffered physical brain damage and requested discussion to resolve that by agreement without litigation. Between 2009 and 2011 the State Accident Fund paid for treatment which noted continual decline in cognitive function and paid for medications specifically for the treatment of physical brain conditions. Then in 2011 within three months of the opinions of Dr. Rainwater, Ph.D. and Dr. Forsthoefel and within one week of Dr. Forsthoefel's opinion that Mr. Polansky

was suffering from physical brain damage, the Claimant filed for a hearing.

Based on this evidence we do not find the Defendants' position to be persuasive but we do find the argument persuasive that laches should apply as to the Defendants. In this case the Defendants paid for all treatment and evaluations requested for brain injury between 2002 and 2011. In Jervy the Court of Appeals applied laches to hold that the Defendants acceptance of the claim including the payment of medicals and compensation for a period of 455 days barred the Defendants from raising a denial to the claim. In this case, the Defendants paid medical care for brain injury for nine years at the time of the first definitive medical opinion that the Claimant had sustained permanent brain damage.

Even applying Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), upon which the defense relies on the elements required to establish laches and estoppel is that only where there is the relinquishment of a, "known right" for an unreasonable length of time so these concepts apply. There is no evidence that before the opinion of Dr. Forsthoefel in 2011 that there was medical opinion evidence stating to a reasonable degree of medical certainty that Mr. Polansky had sustained permanent physical brain damage that was causing his severe cognitive dysfunction. Within one week of that opinion being given by of

the authorized treating psychiatrist, the Claimant filed for an Award. Further, the party asserting these affirmative defenses has the burden of proof to prove prejudice, and opportunity to have acted sooner and material prejudice. We do not find any evidence that the Defendants have met that burden of proof.

DECISION AND ORDER OF THE COMMISSION ON APPEAL

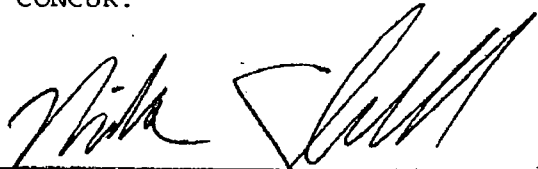
After due and proper consideration of the Requests for Review as filed by the parties, the Appellate Panel hereby finds and orders a FULL AFFIRMATION of the Hearing Commissioner's Decision and Order.

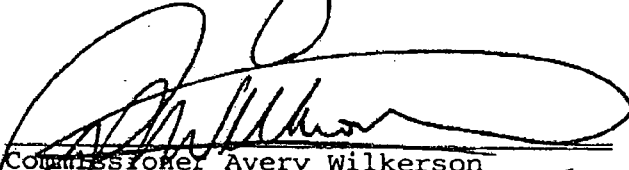
AND IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION


Commissioner Melody James

I CONCUR:


Commissioner Mike Campbell


Commissioner Avery Wilkerson

B. JR

CERTIFICATE OF SERVICE

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

By Kim Falls on November 10, 2015

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NOS. 9922954 & 0024408

THEODORE P. POLANSKY,

EMPLOYEE/CLAIMANT,
RESPONDENT/APPELLANT,

v.

SC OFFICE OF ATTORNEY GENERAL,

EMPLOYER,

AND

STATE ACCIDENT FUND,

CARRIER,

DEFENDANTS,
APPELLANTS/RESPONDENTS

Appellate Panel Review held in Columbia,
South Carolina on September 21, 2015 per
notices timely and properly served on all
parties of interest

Appellate Panel Decision and Order filed
November 10th 2015.

APPERANCES:

Claimant/2nd Appellant represented by
Preston F. McDaniel, Esquire of
Columbia, South Carolina.

Defendants/Respondents/1st Appellant represented by
Peter P. Leventis, Esquire of
Columbia, South Carolina.

This matter was before the Full Commission based on a Request for Review (appeal) filed by the Defendants and on a cross-appeal filed by the Employee/Claimant, filed the last day for review and filed a provisional appeal in the event that the Defendants in fact appealed the Decision of the Hearing Commissioner. The appeal by the Defendants and the cross-appeal filed by the Employee-Claimant is from the Order of Commissioner Susan S. Barden filed on June 1st, 2015. In her Order, Commissioner Barden made the following Findings of Fact, Conclusions of Law, and issued the following Order and Award:

FINDINGS OF FACT

1. A Guardian Ad Litem was appointed by the undersigned at the hearing, based upon (a) my observations of Claimant, and (b) the testimony of Dr. Forsthoefer. The person appointed has been in a 20+ year relationship with Claimant, and in at least one record is referred to as Claimant's common law wife (e.g., Defendants APA #20, page 715; Defendants' APA #21, page 718).

2. Claimant sustained admitted accidents on October 19, 1999, and May 30, 2000, and Defendants paid Claimant 500 weeks of temporary compensation for these claims. The 500-week period ended in March 2011 (Commission's file; Defendants' APA #26, page 738; Defendants' APA #28, page 743).

3. The admitted body parts/conditions are (a) the back (for which Claimant underwent spinal cord stimulator implantation, and

re-implantation in Colorado), and psychological (2000); and (b) the left knee (1999). See e.g., Claimant's APA #7, page 250.

4. The parties mediated the claims in November 2014, and agreed that Claimant was permanently and totally disabled, and is entitled to receive lifetime causally-related treatment per the agreement. The parties did not reach the issue of whether Claimant had sustained an alleged brain injury or physical brain damage after a drug-drug interaction (Claimant's APA #15).

5. Prior to the mediation, there was no (a) Order from the Commission setting forth the compensable body parts/conditions; or (b) agreement by the parties setting forth the compensable body parts/conditions.

6. Claimant contends that he sustained physical brain damage pursuant to Section 42-9-10(C), after a drug-drug interaction in 2002 caused encephalopathy, and therefore is entitled to receive lifetime compensation. Procedurally, Claimant contends that Defendants are estopped from denying physical brain damage as Defendants (a) have paid for all of Claimant's treatment, (b) had knowledge of Claimant's cognitive condition and decline, and (C) impliedly accepted physical brain damage (or at least a brain injury) through the provision of treatment. Claimant filed a Form 50 (including the brain) in May 2011, and re-filed a Form 50 in March 2012 (Commission's file; Defendants' APA #27, page 740).

7. Defendants contend that Laches, waiver, and estoppel, whether separately or collectively, apply and bar any claim of physical brain damage. Regardless, Defendants contend that, at most, Claimant sustained a brain injury pursuant to Regulation 67-1101. Defendants maintain that Claimant's cognitive problems are more the result of Claimant's psychological/psychiatric issues than organic damage.

8. Claimant was hospitalized in February 2002 after a drug reaction to Seroquel which had been prescribed to treat his admitted injuries (Claimant's APA #11).

9. Claimant has a preponderance standard to meet, and I find that he meets it: Claimant has been diagnosed with physical brain damage resulting from Claimant's drug-drug chemical encephalopathy by more than one authorized physician and all of his current treating physicians, Dr. Frank Forsthoefel, M.D. (authorized treating psychiatrist since 2001) and Dr. Ezra Riber (chronic pain specialist since 2000). (Claimant's APA #1, pages 2, 6-8, and 10; Claimant's #2, page 12).

10. Claimant's condition since the 2002 hospitalization has deteriorated. Medical evidence from 2007 notes that Claimant reported concerns with increasing cognitive difficulties. After administering a battery of tests, Dr. Lind found that "the feigning of memory difficulties is not likely," and is "suggestive of dementia." I give great weight to this evidence, and find that

it dovetails with Dr. Forsthoefel's testimony that Claimant has experienced a severe cognitive decline independent of Claimant's psychiatric condition/mood. (Defendants' APA #23, pages 723 and 725-727; testimony of Dr. Forsthoefel; Claimant's APA #1, pages 5 and 9; Claimant's APA #8, pages 341-343).

11. Dr. Jonet, Ph.D., the authorized treating clinical psychologist since 2004, also opines that Claimant has brain damage. Dr. Jonet's treatment records from 2004 - 2015 speak to Claimant's cognitive impairment and decline, memory problems, and forgetfulness. In 2005, because of Claimant's cognitive decline, Dr. Jonet stated that Claimant "needs neuro referral". (Claimant's APA #3, pages 15-19; Claimant's APA #8, e.g., pages 341-362, 368-369, 371, 374-376, 378-379, 382, 384-389, 393, 406, 415, 417, 420, 432-433, 437-439, 453, 463-464, 471-472, 482, 484, 501, 505, 507, 516-517, 520, 553, 561, 564-565, 563, 577, 582, 600, and 603-606).

12. Dr. Jonet met with Carrier's case manager regarding Claimant's cognitive impairment (Claimant's APA #8, page 589, dated 2005).

13. Dr. Marturano (treating psychiatrist) also documented Claimant's poor memory, at one point believed to be attributable to chronic narcotic use. In 2009, Dr. Marturano noted that he needed to discuss Claimant's memory issues with Dr. Jonet. Dr. Marturano also documented Claimant's (a) inability to comprehend the newspaper or to figure out "brain teasers" anymore; (b)

inability to remember his zip code and his PIN for ATM machines,
(c) forgetfulness while driving (missing turns, etc.), and (d)
going to the "wrong appointment location" to see Dr. Marturano,
among other difficulties. Because of Claimant's presentation, Dr. Marturano also recommended and requested neuro-psych testing for Claimant's memory issues throughout his records from 2005 to 2009. (Claimant's APA #9, pages 608-616, 619-624, 626, 628-629, 632, 634, 642, 653-654, 656, and 661).

14. Dr. Krebs also documented Claimant's forgetfulness (Claimant's APA #10, page 667).

15. Rehabilitation Consultant Fi-Fi Jubran found Claimant "to be sincere and to want to help himself get better." (Claimant's APA #17, page 704).

16. Of all the evidence submitted by the parties, by far the most compelling is the testimony of Claimant's treating psychiatrist (Dr. Forsthoefel), who treated Claimant from 2001-2004, and again from 2009 to the present (i.e., as of the date of the hearing). I give this testimony great weight because despite Defendants' counsel's skillful and thorough cross examination, Dr. Forsthoefel does not retreat from his opinions that (a) Claimant has suffered a physical, organic alteration to the brain-physical damage to the "structure of the brain;" (b) Claimant's brain has been "terribly compromised," "very seriously impaired," "severely impaired," and "very, very impaired;" (c) Claimant's brain injury

alone renders Claimant unemployable; and (d) Claimant's increasing cognitive deficits are not mood congruent, i.e., Claimant developed cognitive problems unrelated to his psychiatric condition. Dr. Forsthoefel considered the records/opinions of other experts, yet still maintains the opinions he holds (Claimant's APA #1, pages 1-3; testimony of Dr. Forsthoefel; Claimant's APA #6 in its entirety; Claimant's APA #16, pages 683-685).

17. The greater weight of the evidence shows that Claimant's physical brain damage is permanent in nature (Claimant's APA #2, pages 13-14; See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Crisp v. Southco, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)).

18. The greater weight of the evidence shows that Claimant's brain injuries is one of those "most serious" and "severe" cases contemplated by Crisp and Sparks; therefore, Claimant meets his burden of establishing by the preponderance of the evidence that he has sustained physical brain damage. Claimant is not required to prove physical brain damage by objective diagnostic tests or by clear and convincing evidence.

19. At the hearing, Defendants' counsel highlighted and emphasized records which by all appearances would be favorable to the Defendants. However, Dr. Forsthoefel explained to my satisfaction that Claimant has physical brain damage. Given Dr.

Forsthoefel's continuum of treatment from 2001 to the present—except for the break in the treating relationship (from 2004-2008—I find that Dr. Forsthoefel is in the best position to render this opinion as Dr. Forsthoefel has observed the cognitive changes himself.

20. I considered Dr. Adams' opinion from his report of August 23, 2004 (in which he recommended that if "memory" was the issue that Claimant undergo psychological testing (Defendants' APA #20, pages 715-716), but Dr. Forsthoefel's opinion is the more persuasive of the two.

21. I considered the fact that Claimant can drive some, but Dr. Forsthoefel testified that it is limited to familiar places. Further, various treatment notes chronicle Claimant's difficulty driving. Finally, Claimant's license was last renewed in 2006 and does not expire until 2016. (testimony of Dr. Forsthoefel; Defendants' APA #43, page 849; See also Defendants' APA #31, page 808).

22. Defendants' defense of Laches is not persuasive. If Defendants had never paid for any of Claimant's treatment, had no knowledge of the encephalopathy or Claimant's cognitive decline, and were just now or recently being asked to assume the treatment for the organic brain injury/damage, the result in this case might be vastly different. However, Defendants had access to Claimant's medical records and provided benefits for his treatment. Further,

the extent of Claimant's condition was not wholly apparent or fully appreciated after the diagnosis of encephalopathy, but rather has continued to decline since 2002.

23. As to Defendants' objections concerning Dr. Rainwater's records, the conclusion (regarding mail order prescriptions) in Claimant's APA #4, page 20, is the same conclusion as reached by Dr. Jonet in Claimant's APA #3, page 15. I can therefore discount or even disregard that e-mail objected to by Defendants in Claimant's APA #4. 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.

25. Although Claimant's APA #9, page 664 is part of the treatment records, I find them wholly unnecessary to my conclusions herein. I can also similarly disregard pages 633, 637, and 662, although these submissions were not objected to.

26. I can (and do) completely disregard Claimant's APA #9, page 663, and reach the same conclusions I reach herein. This document is wholly unnecessary to my decision.

27. Claimant's average weekly wage is \$877.01, yielding a compensation rate of \$507.34, the maximum for 2000. I do not find

persuasive Claimant's argument that exceptional circumstances exist to change the compensation rate (paid over the 500-week period), and that Claimant's compensation rate should be based upon that of 2015 or any date other than that of the later accident date. Although I considered it, the Circuit Court Order submitted by Claimant is not binding or of precedential value.

28. Claimant is entitled to lifetime benefits.

29. The Commission Record reflects that the State Accident Fund filed for benefits and was awarded coverage under the Second Injury Fund based on pre-existing psychological problems and pre-existing conditions in the Claimant's back which combined with the effects of the injury to the Claimant's psychological condition and back injury stemming from the accident to result in a greater disability and greater degree of medical care than would have resulted from the injuries from the accident alone. The combination of the Claimant's pre-existing conditions and the injuries from the accidents and the treatment necessary to treat those problems caused and resulted in the Claimant's serious, severe and permanent physical brain damage. In 2009 the State Accident Fund as is reflected in the Record sought assistance of the Claimant in obtaining Second Injury Fund coverage for these problems. It is also clear that in 2009 the Claimant placed the State Accident Fund on notice of this claim for lifetime benefits due to physical brain damage and the desire to resolve that issue

by agreement without the need for further litigation expense.

30. Based on the Record, the Claimant's pre-existing psychological and back problems combined with the effects on the injuries including chronic pain, RSD, and depression to cause greater psychological problems, diagnosed as schizoaffective disorder and bi-polar disorder which necessitated the administration of such drugs as Seroquel. The administration of Seroquel resulted in a drug-drug reaction that caused the encephalopathy. Therefore the reaction to the medications needed to treat the conditions stemming from the combination of the pre-existing conditions and the injuries stemming from the accidents resulted in the Claimant's physical brain damage and the tremendous increase in benefits, lifetime compensation, stemming from the accidents.

CONCLUSIONS OF LAW

Under S.C. Code §42-17-40 the following Conclusions of Law apply in this case to the issues presented for decision:

1. Under S.C. Code §42-1-40 and S.C. Code §42-9-10, the Decision is made as to the applicable compensation rate in this matter. All cases, decisions and legal memorandum as to exceptional circumstances and the wording and meaning of S.C. Code §42-9-10 have been taken into consideration as the issue of the applicable average weekly wage and compensation rate that applies. The provisions and requirements of S.C. Code §42-17-10 were taken

into consideration in making this decision since no prior decision has been made by the Commission on that issue and it is appropriate that a decision be made at this time.

2. Under S.C. Code §42-9-10(C), the determination is made as to the Claimant's entitlement to lifetime weekly compensation benefits due to having sustained physical brain damage resulting from the encephalopathy which resulted from a drug-drug interaction from drugs necessary to treat the Claimant's disabling symptoms and conditions stemming from the work-related injuries. The South Carolina Supreme Court Decision in the cases of Sparks v. Palmetto Hardwood, Inc., 406 SC 124, 750 Southeastern 2d 61 (2013) and Crisp v. Southco, Inc., 401 SC 627, 738 Southeastern 2d 835 (2013) were taken into consideration in determining whether or not the Claimant has met his burden of proof in establishing that he has sustained physical brain damage severe enough to establish his entitlement to an Award for lifetime compensation benefits under S.C. Code § 42-9-10(C). The evidence establishes in accordance with those decisions that the Claimant has sustained severe permanent impairment of the normal functioning of the brain and has sustained physical brain damage that is both serious and severe. In fact, based on the undisputed testimony of the Claimant's treating psychiatrist, Mr. Polansky's physical brain damage is so severe that he is unemployable due to his physical brain damage alone regardless of any other physical or

psychological impairments.

3. Under the Mediated Settlement Agreement, the Claimant is entitled to lifetime medical care under SC Code §42-15-60(C) as set out in that Agreement which Agreement is incorporated herein as part of this Order and that his physical brain damage is causally related to the injuries sustained in the accident for which he is entitled to lifetime medical care.

4. Under the stipulations of the parties, the parties stipulated to jurisdiction and venue and to the other issues as reflected in the stipulations.

5. Under the Defendants' defense listed in their Pre-Hearing Brief of Laches, waiver, and estoppel, based on a review of the evidence, their argument and cases cited, I do not find their argument persuasive or in fact supported by fact or law. The Claimant in reply to this defense cited the case of Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2011) and asserted the concept of Laches waiver and estoppel should be applied to the Defendants.

The State Accident Fund paid for the hospitalization for the encephalopathy (brain injury) in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive dysfunction. In 2004 at the request of the authorized treating psychiatrist for neurologic examination by Dr. Ngo for cognitive dysfunction believed to be in

part due to the encephalopathy, the assigned rehab nurse scheduled and a neurological evaluation was performed by Dr. Julian Adams who noted that, "if memory loss" is the important factor in your investigation that Mr. Polansky should have "psychological testing". At the recommendation of treating doctors, Dr. Forsthoefel, Dr. Marturano, Dr. Jonet, Ph.D. and Dr. Riber and at the continual request of the Claimant between 2004 -2007, in late 2007 and 2008, the State Accident Fund had neuropsychological testing performed by Dr. Nicholas Lind, Ph.D. (but did not provide him with treatment records) who found severe cognitive impairment and recommended further testing concerning, "possible dementia", a physical brain damage condition. In 2009, the Claimant placed the State Accident Fund on notice that he believed he had suffered physical brain damage and requested discussion to resolve that by agreement without litigation. Between 2009 and 2011 the State Accident Fund paid for treatment which noted continual decline in cognitive function and paid for medications specifically for the treatment of physical brain conditions. Then in 2011 within three months of the opinions of Dr. Rainwater, Ph.D. and Dr. Forsthoefel and within one week of Dr. Forsthoefel's opinion that Mr. Polansky was suffering from physical brain damage, the Claimant filed for a hearing.

Based on this evidence I do not find the Defendants' position to be persuasive but I do find the argument persuasive that laches

should apply as to the Defendants. In this case the Defendants paid for all treatment and evaluations requested for brain injury between 2002 and 2011. In Jervey the Court of Appeals applied laches to hold that the Defendants acceptance of the claim including the payment of medicals and compensation for a period of 455 days barred the Defendants from raising a denial to the claim. In this case the Defendants paid medical care for brain injury for nine years at the time of the first definitive medical opinion that the Claimant had sustained permanent brain damage.

Even applying Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), upon which the defense relies on the elements required to establish laches and estoppel is that only where there is the relinquishment of a, "known right" for an unreasonable length of time so these concepts apply. There is no evidence that before the opinion of Dr. Forsthoefel in 2011 that there was medical opinion evidence stating to a reasonable degree of medical certainty that Mr. Polansky had sustained permanent physical brain damage that was causing his severe cognitive dysfunction. Within one week of that opinion being given by of the authorized treating psychiatrist, the Claimant filed for an Award. Further, the party asserting these affirmative defenses has the burden of proof to prove prejudice, and opportunity to have acted sooner and material prejudice. I do not find any evidence that the Defendants have met that burden of proof.

ORDER AND AWARD

THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed.

IT IS FURTHER ORDERED that the Claimant is entitled to lifetime medical care pursuant to the mediated Settlement Agreement through the authorized treating physicians Dr. Forsthoefel, Dr. Jonet, Dr. Riber and Dr. Beasley and such other medical providers as those physicians deem necessary and to include lifetime medical care for the physical brain damage and all causally related medical conditions, pursuant to SC Code §42-15-60(C).

IT IS FURTHER ORDERED that the previous decision by this Commission on Second Injury Fund coverage is incorporated hereby by reference as to the Findings of Fact and Conclusions of Law made on the Award for physical brain damage.

No hearing costs are assessed in this matter.

AND IT IS SO AWARDED AND ORDERED.

REQUESTS FOR REVIEW

The Request for Review (appeal), filed by the Defendants requested review based on the following grounds:

1. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, to overrule the Defendants objection to the include the updated medical reports of Dr. Avie Rainwater, and referring to Dr. Rainwater as "an authorized treating physician" (See Barden Order at P. 5-6), when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law, and/or an abuse of discretion?

2. Did the Single Commissioner err in finding as an issue of fact, and/or including as a matter of law, that the Claimant suffered physical brain damage in relation to his two work related injuries in 1999 and 2000 respectively, whether from a drug-drug interaction or otherwise, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law?

3. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Defendants should have been on notice of a physical brain injury - related to these accidents and subsequent treatments prefaced upon references to the references made to the record in Findings of Fact No's 10-16, when such a finding was against the greater weight of the

evidence and/or contrary to South Carolina law? (Barden Order at pp. 39-41).

4. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered permanent physical brain injury in relation to the 1999 and 2000 dates of accident, or resulting treatment therefrom, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order, Finding of Fact No. 17, at p. 41).

5. Did the Single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered permanent physical brain injury in relation to the 1999 and 2000 dates of accident, or resulting treatment therefrom, which was one of "those 'serious' and 'severe' cases contemplated by Crisp and Sparks [Supreme Court Decisions], and that such was proven by the preponderance of the evidence, an per the testimony of Dr. Forsthoefel, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order, Findings of Fact No. 18-19, at pp. 41-42).

6. Did the Single Commissioner err in failing to find as an issue of fact, and/or failing to conclude as a matter of law, that the Claimant's request for benefits for a permanent physical brain injury, was barred under the equitable doctrine of laches, when failing to do so, was against the greater weight of the evidence

and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 23 at p. 43; Conclusion of Law No. 5, at pp. 47-50).

7. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that Dr. Rainwater's opinion was not pivotal or necessary to the determination of permanent physical brain damage, its severity, its medication causation and relation to the 1999 and 2000 date of accident, and resulting treatment therefrom, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 24, at p. 43).

8. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant is entitled to "lifetime [indemnity] benefits," when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Fact No. 28, at p. 44; Conclusion of Law No. 2 at pp. 46-47; Award at pp. 50-51).

9. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant has suffered a physical brain injury, which was both permanent, as well as serious and serve within the context of S.C. Code Ann. §42-9-10 and Sparks v. Palmetto Hardwood, Inc. (S.C. Sup. Ct. 2013) and Crisp v. Southco, Inc. (S.C. Sup. Ct. 2013), thereby entitling him to lifetime medical and indemnity benefits, for permanent and total disability, when such a finding was against

the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Conclusion of Law No. 2, at pp. 46-47, Award at pp. 50-51).

10. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, that the Claimant is entitled to lifetime medical care and indemnity benefits in conjunction with an awarded permanent physical brain injury, and resulting permanent total disability, when such a finding was against the greater weight of the evidence and/or contrary to South Carolina law? (Barden Order Finding of Award at pp. 50-51).

11. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, or an abuse of discretion, that such hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, and/or otherwise violate of the substance and procedural due process rights of the Defendants; when the hearing was set based on a Form 50 hearing request filed by the Claimant in the year 2012, and when such hearing request was previously disposed of - by prior Consent Order of the parties on remand from an appeal of the prior Orders resulting from that Form 50 hearing request - after a remand from the Circuit Court? (Despite the purported stipulation in the rulings of the Single Commissioner that only two issues were before the Commission in this matter, Defendants did not withdraw any of the grounds for relief raised

in their Form 58 pre-hearing filings, and such was raised in that filing).

12. Did the Single Commissioner err in finding as a matter of fact and/or concluding as a matter of law, or as an abuse of discretion, that such hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, and/or otherwise violate of the substance and procedural due process rights of the Defendants; when the Claimant was permitted to effectively use the sword and shield of both obtaining and submitted updated psychiatric testing results and reports, but failed to either - a) voluntarily permit the Defendants to obtain any updated psychological evaluations of their own, due to the fact that such evaluators were not physicians, nor b) comply with the Consent Order to permit neuropsychological testing? (Despite the purported stipulation in the rulings of the Single Commissioner that only two issues were before the Commission in this matter, Defendants did not withdraw any of the grounds for relief raised in their Form 58 pre-hearing filings, and this issue was raised in that filing).

The Request for Review (appeal), filed by the Claimant/
Employee requested review based on the following grounds:

1. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate to fairly compensate this high wage earner, under the second paragraph of SC Code Section 42-1-40

and SC Code Section 42-9-10 and the decisions of the Supreme Court and Court of Appeals under those sections.

2. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate based on the decisions of the SC Supreme Court and the Court of Appeals under the exceptional circumstances paragraph of Section 42-1-40.

3. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate of this high wage earner based on the language of 42-9-10, which is meant to allow the Commission ability to compensate high wage earners by allowing the Commission to increase their compensation rate each year up to the maximum compensation rate for that year to partially compensate their loss of income under the decisions of the Supreme Court which hold that the purpose in determining the compensation rate is to compensate the injured worker for his loss of earning capacity into the future.

4. The Hearing Commissioner erred as a matter of law by determining that a decision of the Circuit Court has no precedential value and is not binding on the Commission. A Circuit Court is a higher court whose opinions must be followed until overturned and has value to that extent. The only opinions that do not have precedential value are Unpublished Opinions by the Court of Appeals which is specifically mandated by statute and Court Rules.

Copies of the above Grounds for Review were furnished to all interested parties prior to the oral arguments scheduled before the Appellate Panel on September 21, 2015.

Pursuant to SC Code §42-17-50 (1985), the Appellate Panel reviewed the Award and considered all of the issues raised by the Briefs of the Appellants and Respondents.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has considered the matter and find a FULL AFFIRMATION of the Hearing Commissioner's Decision and Order. The Findings of Fact and Conclusions of Law found in the Hearing Commissioner's Decision and Order, and as specified above, are hereby affirmed in full, and are set forth hereinafter as the Findings of Fact and Conclusions of Law of the Commission:

FINDINGS OF FACT

1. A Guardian Ad Litem was appointed by the undersigned at the hearing, based upon (a) my observations of Claimant, and (b) the testimony of Dr. Forsthöefel. The person appointed has been in a 20+ year relationship with Claimant, and in at least one record is referred to as Claimant's common law wife (e.g., Defendants APA #20, page 715; Defendants' APA #21, page 718).

2. Claimant sustained admitted accidents on October 19, 1999, and May 30, 2000, and Defendants paid Claimant 500 weeks of temporary compensation for these claims. The 500-week period

ended in March 2011 (Commission's file; Defendants' APA #26, page 738; Defendants' APA #28, page 743).

3. The admitted body parts/conditions are (a) the back (for which Claimant underwent spinal cord stimulator implantation, and re-implantation in Colorado), and psychological (2000); and (b) the left knee (1999). See e.g., Claimant's APA #7, page 250.

4. The parties mediated the claims in November 2014, and agreed that Claimant was permanently and totally disabled, and is entitled to receive lifetime causally-related treatment per the agreement. The parties did not reach the issue of whether Claimant had sustained an alleged brain injury or physical brain damage after a drug-drug interaction (Claimant's APA #15).

5. Prior to the mediation, there was no (a) Order from the Commission setting forth the compensable body parts/conditions; or (b) agreement by the parties setting forth the compensable body parts/conditions.

6. Claimant contends that he sustained physical brain damage pursuant to Section 42-9-10(C), after a drug-drug interaction in 2002 caused encephalopathy, and therefore is entitled to receive lifetime compensation. Procedurally, Claimant contends that Defendants are estopped from denying physical brain damage as Defendants (a) have paid for all of Claimant's treatment, (b) had knowledge of Claimant's cognitive condition and decline, and (C) impliedly accepted physical brain damage (or at

least a brain injury) through the provision of treatment. Claimant filed a Form 50 (including the brain) in May 2011, and re-filed a Form 50 in March 2012 (Commission's file; Defendants' APA #27, page 740).

7. Defendants contend that Laches, waiver, and estoppel, whether separately or collectively, apply and bar any claim of physical brain damage. Regardless, Defendants contend that, at most, Claimant sustained a brain injury pursuant to Regulation 67-1101. Defendants maintain that Claimant's cognitive problems are more the result of Claimant's psychological/psychiatric issues than organic damage.

8. Claimant was hospitalized in February 2002 after a drug reaction to Seroquel which had been prescribed to treat his admitted injuries (Claimant's APA #11).

9. Claimant has a preponderance standard to meet, and I find that he meets it: Claimant has been diagnosed with physical brain damage resulting from Claimant's drug-drug chemical encephalopathy by more than one authorized physician and all of his current treating physicians, Dr. Frank Forsthoefel, M.D. (authorized treating psychiatrist since 2001) and Dr. Ezra Riber (chronic pain specialist since 2000). (Claimant's APA #1, pages 2, 6-8, and 10; Claimant's #2, page 12).

10. Claimant's condition since the 2002 hospitalization has deteriorated. Medical evidence from 2007 notes that Claimant

reported concerns with increasing cognitive difficulties. After administering a battery of tests, Dr. Lind found that "the feigning of memory difficulties is not likely," and is "suggestive of dementia." I give great weight to this evidence, and find that it dovetails with Dr. Forsthoefel's testimony that Claimant has experienced a severe cognitive decline independent of Claimant's psychiatric condition/mood. (Defendants' APA #23, pages 723 and 725-727; testimony of Dr. Forsthoefel; Claimant's APA #1, pages 5 and 9; Claimant's APA #8, pages 341-343).

11. Dr. Jonet, Ph.D., the authorized treating clinical psychologist since 2004, also opines that Claimant has brain damage. Dr. Jonet's treatment records from 2004 - 2015 speak to Claimant's cognitive impairment and decline, memory problems, and forgetfulness. In 2005, because of Claimant's cognitive decline, Dr. Jonet stated that Claimant "needs neuro referral". (Claimant's APA #3, pages 15-19; Claimant's APA #8, e.g., pages 341-362, 368-369, 371, 374-376, 378-379, 382, 384-389, 393, 406, 415, 417, 420, 432-433, 437-439, 453, 463-464, 471-472, 482, 484, 501, 505, 507, 516-517, 520, 553, 561, 564-565, 563, 577, 582, 600, and 603-606).

12. Dr. Jonet met with Carrier's case manager regarding Claimant's cognitive impairment (Claimant's APA #8, page 589, dated 2005).

13. Dr. Marturano (treating psychiatrist) also documented Claimant's poor memory, at one point believed to be attributable

to chronic narcotic use. In 2009, Dr. Marturano noted that he needed to discuss Claimant's memory issues with Dr. Jonet. Dr. Marturano also documented Claimant's (a) inability to comprehend the newspaper or to figure out "brain teasers" anymore; (b) inability to remember his zip code and his PIN for ATM machines, (c) forgetfulness while driving (missing turns, etc.), and (d) going to the "wrong appointment location" to see Dr. Marturano, among other difficulties. Because of Claimant's presentation, Dr. Marturano also recommended and requested neuro-psych testing for Claimant's memory issues throughout his records from 2005 to 2009. (Claimant's APA #9, pages 608-616, 619-624, 626, 628-629, 632, 634, 642, 653-654, 656, and 661).

14. Dr. Krebs also documented Claimant's forgetfulness (Claimant's APA #10, page 667).

15. Rehabilitation Consultant Fi-Fi Jubran found Claimant "to be sincere and to want to help himself get better." (Claimant's APA #17, page 704).

16. Of all the evidence submitted by the parties, by far the most compelling is the testimony of Claimant's treating psychiatrist (Dr. Forsthoefel), who treated Claimant from 2001-2004, and again from 2009 to the present (i.e., as of the date of the hearing). We give this testimony great weight because despite Defendants' counsel's skillful and thorough cross examination, Dr. Forsthoefel does not retreat from his opinions that (a) Claimant

has suffered a physical, organic alteration to the brain—physical damage to the "structure of the brain;" (b) Claimant's brain has been "terribly compromised," "very seriously impaired," "severely impaired," and "very, very impaired;" (c) Claimant's brain injury alone renders Claimant unemployable; and (d) Claimant's increasing cognitive deficits are not mood congruent, i.e., Claimant developed cognitive problems unrelated to his psychiatric condition. Dr. Forsthoefel considered the records/opinions of other experts, yet still maintains the opinions he holds (Claimant's APA #1, pages 1-3; testimony of Dr. Forsthoefel; Claimant's APA #6 in its entirety; Claimant's APA #16, pages 683-685).

17. The greater weight of the evidence shows that Claimant's physical brain damage is permanent in nature (Claimant's APA #2, pages 13-14; See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Crisp v. Southco, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)).

18. The greater weight of the evidence shows that Claimant's brain injuries is one of those "most serious" and "severe" cases contemplated by *Crisp* and *Sparks*; therefore, Claimant meets his burden of establishing by the preponderance of the evidence that he has sustained physical brain damage. Claimant is not required to prove physical brain damage by objective diagnostic tests or by clear and convincing evidence.

19. At the hearing, Defendants' counsel highlighted and emphasized records which by all appearances would be favorable to the Defendants. However, Dr. Forsthoefel explained to my satisfaction that Claimant has physical brain damage. Given Dr. Forsthoefel's continuum of treatment from 2001 to the present--except for the break in the treating relationship from 2004-2008--I find that Dr. Forsthoefel is in the best position to render this opinion as Dr. Forsthoefel has observed the cognitive changes himself.

20. We considered Dr. Adams' opinion from his report of August 23, 2004 (in which he recommended that if "memory" was the issue that Claimant undergo psychological testing (Defendants' APA #20, pages 715-716), but Dr. Forsthoefel's opinion is the more persuasive of the two.

21. We considered the fact that Claimant can drive some, but Dr. Forsthoefel testified that it is limited to familiar places. Further, various treatment notes chronicle Claimant's difficulty driving. Finally, Claimant's license was last renewed in 2006 and does not expire until 2016. (testimony of Dr. Forsthoefel; Defendants' APA #43, page 849; See also Defendants' APA #31, page 808).

22. Defendants' defense of Laches is not persuasive. If Defendants had never paid for any of Claimant's treatment, had no knowledge of the encephalopathy or Claimant's cognitive decline,

and were just now or recently being asked to assume the treatment for the organic brain injury/damage, the result in this case might be vastly different. However, Defendants had access to Claimant's medical records and provided benefits for his treatment. Further, the extent of Claimant's condition was not wholly apparent or fully appreciated after the diagnosis of encephalopathy, but rather has continued to decline since 2002.

23. As to Defendants' objections concerning Dr. Rainwater's records, the conclusion (regarding mail order prescriptions) in Claimant's APA #4, page 20, is the same conclusion as reached by Dr. Jonet in Claimant's APA #3, page 15. We can therefore discount or even disregard that e-mail objected to by Defendants in Claimant's APA #4. Notwithstanding any dispute between Dr. Rainwater and the carrier, we 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 we can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

25. Although Claimant's APA #9, page 664 is part of the treatment records, we find them wholly unnecessary to my conclusions herein. We can also similarly disregard pages 633, 637, and 662, although these submissions were not objected to.

26. We can (and do) completely disregard Claimant's APA #9,

page 663, and reach the same conclusions we reach herein. This document is wholly unnecessary to my decision.

27. Claimant's average weekly wage is \$877.01, yielding a compensation rate of \$507.34, the maximum for 2000. We do not find persuasive Claimant's argument that exceptional circumstances exist to change the compensation rate (paid over the 500-week period), and that Claimant's compensation rate should be based upon that of 2015 or any date other than that of the later accident date. Although we considered it, the Circuit Court Order submitted by Claimant is not binding or of precedential value.

28. Claimant is entitled to lifetime benefits.

29. The Commission Record reflects that the State Accident Fund filed for benefits and was awarded coverage under the Second Injury Fund based on pre-existing psychological problems and pre-existing conditions in the Claimant's back which combined with the effects of the injury to the Claimant's psychological condition and back injury stemming from the accident to result in a greater disability and greater degree of medical care than would have resulted from the injuries from the accident alone. The combination of the Claimant's pre-existing conditions and the injuries from the accidents and the treatment necessary to treat those problems caused and resulted in the Claimant's serious, severe and permanent physical brain damage. In 2009 the State Accident Fund as is reflected in the Record sought assistance of

the Claimant in obtaining Second Injury Fund coverage for these problems. It is also clear that in 2009 the Claimant placed the State Accident Fund on notice of this claim for lifetime benefits due to physical brain damage and the desire to resolve that issue by agreement without the need for further litigation expense.

30. Based on the Record, the Claimant's pre-existing psychological and back problems combined with the effects on the injuries including chronic pain, RSD, and depression to cause greater psychological problems, diagnosed as schizoaffective disorder and bi-polar disorder which necessitated the administration of such drugs as Seroquel. The administration of Seroquel resulted in a drug-drug reaction that caused the encephalopathy. Therefore the reaction to the medications needed to treat the conditions stemming from the combination of the pre-existing conditions and the injuries stemming from the accidents resulted in the Claimant's physical brain damage and the tremendous increase in benefits, lifetime compensation, stemming from the accidents.

CONCLUSIONS OF LAW

Under S.C. Code §42-17-40 the following Conclusions of Law apply in this case to the issues presented for decision:

1. Under S.C. Code §42-1-40 and S.C. Code §42-9-10, the Decision is made as to the applicable compensation rate in this matter. All cases, decisions and legal memorandum as to

exceptional circumstances and the wording and meaning of S.C. Code §42-9-10 have been taken into consideration as the issue of the applicable average weekly wage and compensation rate that applies. The provisions and requirements of S.C. Code §42-17-10 were taken into consideration in making this decision since no prior decision has been made by the Commission on that issue and it is appropriate that a decision be made at this time.

2. Under S.C. Code §42-9-10(C), the determination is made as to the Claimant's entitlement to lifetime weekly compensation benefits due to having sustained physical brain damage resulting from the encephalopathy which resulted from a drug-drug interaction from drugs necessary to treat the Claimant's disabling symptoms and conditions stemming from the work-related injuries. The South Carolina Supreme Court Decision in the cases of Sparks v. Palmetto Hardwood, Inc., 406 SC 124, 750 Southeastern 2d 61 (2013) and Crisp v. Southco, Inc., 401 SC 627, 738 Southeastern 2d 835 (2013) were taken into consideration in determining whether or not the Claimant has met his burden of proof in establishing that he has sustained physical brain damage severe enough to establish his entitlement to an Award for lifetime compensation benefits under S.C. Code § 42-9-10(C). The evidence establishes in accordance with those decisions that the Claimant has sustained severe permanent impairment of the normal functioning of the brain and has sustained physical brain damage that is both serious and

severe. In fact, based on the undisputed testimony of the Claimant's treating psychiatrist, Mr. Polansky's physical brain damage is so severe that he is unemployable due to his physical brain damage alone regardless of any other physical or psychological impairments.

3. Under the Mediated Settlement Agreement, the Claimant is entitled to lifetime medical care under SC Code §42-15-60(C) as set out in that Agreement which Agreement is incorporated herein as part of this Order and that his physical brain damage is causally related to the injuries sustained in the accident for which he is entitled to lifetime medical care.

4. Under the stipulations of the parties, the parties stipulated to jurisdiction and venue and to the other issues as reflected in the stipulations.

5. Under the Defendants' defense listed in their Pre-Hearing Brief of Laches, waiver, and estoppel, based on a review of the evidence, their argument and cases cited, we do not find their argument persuasive or in fact supported by fact or law. The Claimant in reply to this defense cited the case of Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2011) and asserted the concept of Laches waiver and estoppel should be applied to the Defendants.

The State Accident Fund paid for the hospitalization for the encephalopathy (brain injury) in 2002. From 2002 to 2004 they

paid for medical care which included constant reference to increasing problems with cognitive dysfunction. In 2004 at the request of the authorized treating psychiatrist for neurologic examination by Dr. Ngo for cognitive dysfunction believed to be in part due to the encephalopathy, the assigned rehab nurse scheduled and a neurological evaluation was performed by Dr. Julian Adams who noted that, "if memory loss" is the important factor in your investigation that Mr. Polansky should have "psychological testing". At the recommendation of treating doctors, Dr. Forsthoefel, Dr. Marturano, Dr. Jonet, Ph.D. and Dr. Riber and at the continual request of the Claimant between 2004 -2007, in late 2007 and 2008, the State Accident Fund had neuropsychological testing performed by Dr. Nicholas Lind, Ph.D. (but did not provide him with treatment records) who found severe cognitive impairment and recommended further testing concerning, "possible dementia", a physical brain damage condition. In 2009, the Claimant placed the State Accident Fund on notice that he believed he had suffered physical brain damage and requested discussion to resolve that by agreement without litigation. Between 2009 and 2011 the State Accident Fund paid for treatment which noted continual decline in cognitive function and paid for medications specifically for the treatment of physical brain conditions. Then in 2011 within three months of the opinions of Dr. Rainwater, Ph.D. and Dr. Forsthoefel and within one week of Dr. Forsthoefel's opinion that Mr. Polansky

was suffering from physical brain damage, the Claimant filed for a hearing.

Based on this evidence we do not find the Defendants' position to be persuasive but we do find the argument persuasive that laches should apply as to the Defendants. In this case the Defendants paid for all treatment and evaluations requested for brain injury between 2002 and 2011. In Jervey the Court of Appeals applied laches to hold that the Defendants acceptance of the claim including the payment of medicals and compensation for a period of 455 days barred the Defendants from raising a denial to the claim. In this case, the Defendants paid medical care for brain injury for nine years at the time of the first definitive medical opinion that the Claimant had sustained permanent brain damage.

Even applying Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), upon which the defense relies on the elements required to establish laches and estoppel is that only where there is the relinquishment of a, "known right" for an unreasonable length of time so these concepts apply. There is no evidence that before the opinion of Dr. Forsthoefel in 2011 that there was medical opinion evidence stating to a reasonable degree of medical certainty that Mr. Polansky had sustained permanent physical brain damage that was causing his severe cognitive dysfunction. Within one week of that opinion being given by of

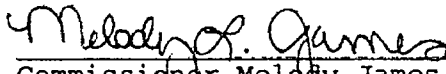
the authorized treating psychiatrist, the Claimant filed for an Award. Further, the party asserting these affirmative defenses has the burden of proof to prove prejudice, and opportunity to have acted sooner and material prejudice. We do not find any evidence that the Defendants have met that burden of proof.

DECISION AND ORDER OF THE COMMISSION ON APPEAL

After due and proper consideration of the Requests for Review as filed by the parties, the Appellate Panel hereby finds and orders a FULL AFFIRMATION of the Hearing Commissioner's Decision and Order.

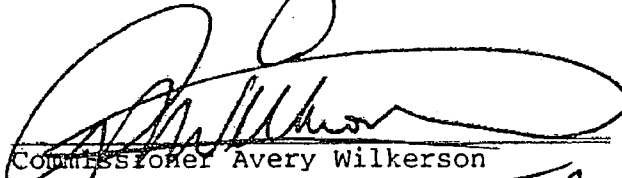
AND IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION


Commissioner Melody James

I CONCUR:


Commissioner Mike Campbell


Commissioner Avery Wilkerson

B. JR

CERTIFICATE OF SERVICE

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

By Kim Falls on November 10, 2015

ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NOS. 9922954 & 0024408

Ted Polansky,
By and through his Guardian ad Litem,
Gale DuBose,

Employee/Claimant,

v.

SC Office of Attorney General,

Employer,

and

State Accident Fund,

Carrier,

Defendant(s).

HEARING: Date: March 6, 2015
Location: Columbia, South Carolina

APPEARANCES: Claimant represented by
Preston F. McDaniel, Esquire

Defendants represented by
Peter P. Leventis, IV, Esquire

Gale Dubose, Guardian ad Litem

PURPOSE OF HEARING: This matter came before the Commissioner
on a Form 50 and 51, and by operation of
Mediation Regs. 67-1803(a), 67-1809
and WCC Form 70 directing a hearing be
set to determine the remaining issues.

COMMISSIONER: Susan S. Barden

FILED: June 1, 2015

STIPULATIONS

The parties stipulated to jurisdiction and venue and that the Commission File with the exception of self-serving declarations and unstipulated medicals be made a part of the Record.

The Claimant has asked for a review of the average weekly wage and compensation rate as one of the issues before the Commission for decision, but it is agreed that due to Mr. Polansky's income at the time of the 2000 accident wherein his average weekly wage was \$877.01 with a resulting compensation rate of \$589.70, that the maximum compensation rate for the year 2000 of \$507.34 would apply and that 500 weeks of compensation were paid.

This case was mediated pursuant to the Commission's Mediation Rules, which Mediation Agreement is part of the Commission file and it is stipulated to as being the agreements made by and between the parties based on that mediation. Those include that the Claimant is totally and permanently disabled and that he is entitled to lifetime medical care and that the, "carrier will provide lifetime medical care for all causally accepted medical conditions for which the State Accident Fund is currently paying under the care of the following authorized treating physicians and such other medical providers as those physicians deem necessary to treat the authorized conditions; those physicians include: Dr. Frank Forsthoefel, M.D., Dr. C.

Jean Jonet, Ph.D., Dr. Ezra B. Riber, M.D. and Dr. John Beasley, M.D." Mediation was conducted on November 14, 2014 and concluded with the agreements as reflected in the Mediation Agreement on file with the Commission and as referred to hereinabove, but without reaching the issue of lifetime compensation for physical brain damage. At the conclusion of mediation as reflected in the Mediation Agreement, that issue, "as to the compensability of the alleged brain injury remains in dispute."

The parties agree and stipulate that the only issues before this Commissioner therefore are the applicable average weekly wage and compensation rate and whether or not the Claimant is entitled to an award for lifetime compensation benefits for having sustained permanent physical brain damage based on the Forms 50/51 as detailed as the position of the parties at hearing.

APA SUBMISSIONS AND OBJECTIONS

At the time for the Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, records and reports from the following were made a part of the Record subject to the objections as set forth hereinafter:

Dr. Frank Forsthoefel, M.D.; Dr. Ezra B. Riber, M.D.; Dr. C. Jean Jonet, Ph.D.; Dr. Avie Rainwater, Ph.D.; Dr. Nicholas Lind, Ph.D.; Dr. Jo A. Marturano, M.D.; Dr. Krebs, M.D.; Palmetto

Baptist Hospital; Bowman-Grey Medical Center, Wake Forrest University, Dr. Gary G. Poehling, M.D.- RSD Specialist, Prof. & Chair Dept. of Orthopaedics, and Dr. Jeffrey Feldman, Ph.D.; 2001 Social Security and State Retirement Awards; SCWCC Form 20s 1999 and 2000; Mediation Agreement, 11/12/14; Correspondence regarding brain injury-evaluation/treatment (sealed records submitted for rebuttal); Lexington Open MRI; Dr. Julian Adams, M.D.; Columbia Counseling Center; Radiology Exam Report; Post-Trauma Resources (Dr. Nicholas Lind, Ph.D.); Form 40 filed by Claimant's Attorney; Correspondence - Ms. Mee Ling Khor-Gould; Form 50 filed by the Claimant; WCC Form 18; SCWCC Hearing Transcript, 05/16/12; Decision and Order of Commissioner Melody James, 06/27/12; SC Traffic Collision Report; Letter from Claimant's Attorney to Commissioner Beck; Decision and Order of SCWCC Appellate Panel, 02/17/13; Letter from Claimant's Attorney to Attorney Ellen Goodwin, 04/16/13; Letter from Claimant's Attorney to SCWCC, 05/01/13; Letter from Claimant's Attorney to Attorney Ellen Goodwin, 06/13/13; Motion to Set Hearing pursuant To Commission Regulations, 04/16/14; Administrative Order of Commissioner Wilkerson, 05/08/14; Letter from Claimant's Attorney to Ms. Mee Ling Khor-Gould, 06/06/14; Letter from Claimant's Attorney to Attorney Ellen Goodwin, 06/20/14; A.J. Harrison Investigations Report, 06/23/14; Letter from Claimant's Attorney to Ms. Mee Ling Khor-Gould, 06/26/14; Official 10 Year Driving Record of Claimant; and pleadings of proceedings between Dr. Avie

Rainwater, Ph.D. and SC State Accident Fund.

A pre-hearing conference was held and various objections were discussed. The following specific objections were made and were made a part of the Record and the following rulings were made thereon:

Claimant filed one (1) formal objection that being to Defendants' APA Tab 41, A.J. Harrison investigative report. That objection was sustained and the report and all documents were removed from the Record and not considered by this Commissioner.

The Defendants objected to the updated report and evaluation of Dr. Avie Rainwater conducted on March 22, 2011. For the reasons set forth in the Record, that objection was overruled but I would specifically note 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 that not only was Dr. Rainwater involved in this case beginning in 2001 but also 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. I believe that in weighing the arguments and respective equities of the parties that it would be grossly unfair to the Claimant to disregard this

authorized medical provider's opinion particularly where there is no evidence of any bias or prejudice or that any payments due to Dr. Rainwater in this case were at issue. The Defendants objected to a Circuit Court Order which was submitted to the Commissioner as part of the Claimant's argument concerning the average weekly wage and compensate rate. That objection was overruled and as I advised the parties, an opinion of Circuit Court in my opinion has no precedential value, but this Commission may certainly take judicial notice and should take judicial notice of any Order of any higher Court on the issues before it. Further the Order is in fact not evidence but is in fact an opinion of a higher Court being submitted in support of the argument of the Claimant. The Defendants also objected to the submission of the Decision of the Social Security Administration. That objection is sustained for the reason as set forth in the Record. While not noted in the Record, the objection was also as to the Decision of the SC Retirement System finding that the Claimant was totally and permanently disabled and entitled to benefits under the Retirement Act, and that Decision was also removed as well. As discussed, the criteria and basis under Social Security and the Retirement Act for total and permanent are different; since the parties both agree and it is stipulated that the Claimant is totally and permanently disabled, that is not an issue for decision and the only issue before the Commission in reference to total and permanent

disability is whether or not he is entitled to an Award for lifetime compensation benefits under SC Code § 42-9-10(C) due to having sustained physical brain damage. However again, both Decisions were removed from the Record and not considered by this Commissioner.

Next the Defendants object to a page in Dr. Marturano's file, p. 663 of the Claimant's APA Submissions. That objection is overruled for the reasons as set forth in the Record but basically is part of the doctor's medical records. The Defendants also objected to p. 664 which appears to be nothing but a list of prescribed medications. That objection was held in abeyance but it does not appear to be anything relevant to the issue before me for Decision and has no value on that issue before me, one way or the other. The Defendants also objected to p. 20 of the Claimant's APA Submissions which is a Memo from Dr. Rainwater, not really in reference to the issues before this Commissioner for a decision but dealing with his opinion on the Claimant being required to use a mail order pharmacy versus being allowed to continue to receive his medications locally. I held that objection in abeyance but again this does not deal with the central issue which is before this Commissioner for decision.

Finally the Defendants objected to p. 657 of the Claimant's APA Submissions which was sustained but that document had been removed by agreement in the pre-hearing conference.

STATEMENT OF THE CASE

There are two issues before this Commissioner for decision which will be addressed separately hereinafter in this Statement of the Case which lead to this Commissioner's Findings of Fact and Conclusions of Law and decision in this matter.

The first issue is the average weekly wage and compensation rate that should be applied in this matter. Since both of Mr. Polansky's injuries have always been accepted, there has never been a previous decision made as to the applicable average weekly wage and compensation rate by this Commission. The Claimant takes the position that because he was a high wage earner at the time of his injury wherein even his compensation rate based on his income far exceeded the maximum compensation rate for 1999 and 2000, that this Commission on the basis of exceptional circumstances, the decisions of the SC Supreme Court and on the basis of the Claimant's reading of SC Code §42-9-10, should increase the applicable compensation rate to fairly compensate him for his past and future loss of earnings and earning capacity. It is his position that his weekly benefits should be increased to the maximum compensation rate at this time and going forward or at least until the maximum compensation rate meets or exceeds his average weekly wage at the time of the accident. At the time of the 1999 accident, Mr. Polansky's salary was \$45,096.42, resulting in an average weekly wage of \$867.24 with

an applicable compensation rate of \$578.19. At the time of the 2000 injury, his income had increased to \$45,604.77, resulting in an average weekly wage of \$877.01 and a resulting compensation rate of \$589.70. Both of those far exceeded the maximum compensation rate for the years of injury in 1999 and 2000 with the maximum compensation rate in 1999 being \$483.47 and in 2000 being \$507.34. Therefore, there is no question that Mr. Polansky was a high wage earner and would have been entitled to a much greater compensation rate but for the maximum compensation rate applicable at that time.

He also argues that when one looks at the average weekly wage in the State of South Carolina and how it has increased, that comparison between the maximum compensation rate payable in 2000 with the maximum compensation rate payable in 2014, establishes that there has been a 150.99% total increase or approximately a 3-4% increase per year in the average weekly wage in the State of South Carolina at this time. If one applies that to the Claimant's average weekly wage in 2000 as compared to now, this would result in an average weekly wage at this time for Mr. Polansky of \$1,344.47 with a resulting compensation rate of \$896.36. This far exceeds the applicable maximum compensation rate at this time. Based on this, he argues that based on exceptional circumstances and the decisions of our Appellate Courts on the average weekly wage that this Commission should increase the average weekly wage applicable under an Award

because the average weekly wage and compensation rate is to compensate the injured worker for his, "loss of probable future earning capacity" and that our Courts have held that the average weekly wage must be thought of in these terms of its impact on his probable future earning capacity. In addition, Mr. Polansky argues that under a reading of SC Code §42-9-10 that the Legislature made allowances for compensating high wage earners just like it did for low wage earners. Under §42-9-10 where a worker's salary is very low to compensate that low wage worker, the General Assembly provided in the statutory language if his average weekly wage is less than \$75.00, that one does not apply 2/3rds of the average weekly wage but in fact applies the entire salary of the Claimant as being his applicable compensation rate. In addition, the minimum that can be paid is \$75.00 if the Claimant makes more than \$75.00 at the time of the injury. Just like low wage earners, to compensate workers on the high end, the Legislature in the language §42-9-10 did not tie the maximum compensation rate to the, "year" in which the accident occurred but to the "preceding fiscal year" and that under statutory construction principles this language is to be strictly construed. The claimant contends that the language of §42-9-10 only applies to paying a Claimant the maximum compensation rate for the preceding fiscal year, and there is no mention of nor tying that to the year in which the accident occurred; thus allowing for high wage earners to be compensated as the maximum

compensation rate increases each year.

The Defendants argue that the Claimant is limited to the maximum compensation rate payable at the time of the accident. After review of the arguments and the position of the parties while I fully understand the Claimant's argument, it is my decision that the compensation rate of \$507.34 which is the maximum compensation rate for 2000 applies. I base this decision in part on the basis that there would be no certainty as to the applicable average weekly wage in any case if I sustained the position of the Claimant.

Since it is agreed that the Claimant is totally and permanently disabled as a result of his injuries, the next issue and the primary issue before this Commissioner is whether or not he is entitled to lifetime compensation benefits for having sustained physical brain damage. As to the position of the parties, the Claimant takes the position that not only is he permanently and totally disabled but that he has suffered not only physical brain injury but physical brain damage that is most serious, severe, and permanent and entitles him to an award for lifetime benefits due to that serious, severe, and permanent physical brain damage. The Claimant takes the position that while the Defendants paid the full complement of 500 weeks of temporary total disability benefits, that prior to the mediation the Defendants never agreed or admitted that the Claimant was entitled to an award or was in fact totally and permanently

disabled due to the injuries and conditions resulting from his work-related injuries. Pursuant to the evidence, the claimant submits that the Defendants have paid for every bit of medical care that the Claimant has received as a result of his initial physical brain injury (encephalopathy) and has been aware since the hospitalization in 2002 that the Claimant suffered physical brain injury. They have paid for all medical care including medications, treatment, and evaluations in reference to that physical brain injury and that all of his treating physicians and psychologists have opined that that physical brain injury (encephalopathy) resulted in permanent, physical brain damage that is serious, severe, and permanent in nature. Because the Defendants were made aware and paid for the initial hospitalization in 2002 wherein the Claimant had a drug-drug interaction resulting in the encephalopathy, physical injury to his brain; and because after that they were made aware by his treating physicians not only that he was suffering from psychological consequences from the original injuries but that he was suffering cognitive dysfunction; and because the Defendants made and paid for numerous referrals to neurologists in reference to the physical brain problems that the Claimant was having and sent the Claimant for neuropsychological testing in 2007-2008 at the request of his authorized treating physicians and evaluating doctors between 2004 and 2008 (which without any prior medical reports) found him to have severe cognitive deficits with a

recommendation of a CT Scan to check for brain atrophy (i.e., physical brain damage); and because after that they were aware that the Claimant as early as 2009 was taking the position that he had sustained physical brain damage; and because the Defendants have authorized and provided the medical care and medications (ex., Aricept) for physical brain damage as recommended by the treating psychiatrist since 2001, Dr. Forsthoefel; the treating psychologist since 2004, Dr. C. Jean Jonet, and his treating chronic pain medicine specialist since 2001, Dr. Ezra B. Riber, that the Defendants are estopped from alleging that he is not entitled to an Award for lifetime benefits for permanent severe brain damage especially considering the undisputed opinions of all of his authorized treating physicians and psychologists that have seen him starting as early as 2000, including Dr. Ezra Riber, Dr. Frank Forsthoefel and Dr. C. Jean Jonet and the further supporting opinions of Dr. Nicholas Lind, Ph.D. and Dr. Avie Rainwater, Ph.D. The Defendants absolutely knew and provided treatment for the problems and the reactions that the Claimant had from the drug-drug interaction between 2002 and the present time.

The Defendants while they concede that he is entitled to lifetime medical causally related treatment and while they concede that they have paid for all of his treatment in reference to his conditions, the Defendants believe that there is no physical brain damage or that it is mild at best and that it does

not meet the threshold requirements of most serious and severe, and that the Claimant can therefore not meet his burden that it is a brain injury that merits and warrants an entitlement to lifetime compensation benefits. The Defendants also take the position that the Claimant is estopped from raising this issue because he has known about the physical brain injury as early as 2002 when he was hospitalized and diagnosed with a physical brain encephalopathy. The Claimant has waived and/or is estopped and/or based on the concept of Laches from now bringing up this request for an award. The Defendants take the position also that while they have paid for all of this medical care that the problems stem from the psychological consequences and psychological problems that the Claimant has instead of from physical brain damage. The Claimant in support of his position on the issue of estoppel as to the Defendants cites to the case of Jervey v. Martint Environmental, Inc., (Defendant accepted and paid for care for 455 days) whereas the Defendants point to the cases of Richey v. Dickinson and Muir v. C.R. Bard, Inc.

By way of brief history, as noted previously both of these injuries, that being in the injury that occurred on October 19, 1999 and the injury that occurred on May 30, 2000, have always been accepted cases for which compensation benefits and all causally related medical care has been authorized and paid for by the Defendants. It is not denied that this medical care has included treatment for organic injury to the brain

(encephalopathy) and medications to treat organic dysfunction such as severe headaches and memory loss. In the 1999 injury, Mr. Polansky while a Chief Investigator for the Attorney General's office fell while carrying boxes down steps and sustained severe injury to his left leg. While under continuing treatment for that problem, he sustained the injury in May of 2000 wherein he sustained injury to his back as a result of lifting boxes.

By the fall of 2000, on November 13, 2000, he was referred to Dr. Gary G. Poehling, M.D., by his treating orthopaedist, Dr. Robert Peele, wherein Dr. Poehling confirmed the diagnosis of Regional Pain Syndrome/RSD (Regional Sympathetic Dystrophy). By that time Mr. Polansky had already undergone multiple steroid injections due to the pain in his back, he was suffering from loss of bladder control, urinary urgency with difficulty with control and was on multiple medications to control severe pain in his back and legs and had been diagnosed and was being treated for psychological problems stemming from the injuries. However, Mr. Polansky continued to work and both Dr. Poehling and Dr. Feldman noted that despite all his problems that Mr. Polansky was working and was to be commended for continuing to work with all of those severe problems.

After completing a chronic pain management program at Baptist Medical Center at the recommendation of Dr. Poehling in May of 2001 Mr. Polansky was placed under the care of Dr. Ezra B.

Riber for chronic pain management; under whose care he has been since that time and continuing. In 2001 due to his psychological problems stemming from the accident he was referred to the Baptist Counseling Program where he came under the care of Dr. Frank Forsthoefel. He was on medications throughout 2001 for treatment of his chronic pain problems stemming from The Reflex Sympathetic Dystrophy, his back and his legs and due to his psychological problems stemming from these injuries. All of his medical care was paid for and was accepted by the State Accident Fund. As part of his care, Mr. Polansky was referred in 2001 by Dr. Riber for a psychological evaluation for a spinal cord stimulator trial which included a battery of neuropsychological testing which was performed by Dr. Avie Rainwater with the tests being performed on October 10th and 15th of 2001. He was diagnosed with agitated depression secondary to pain, bi-polar disorder, psychological factors affecting a physical condition and a fear of pain among others. He was psychologically cleared at that time for the spinal cord stimulator trial which subsequently resulted in the implantation of a spinal cord stimulator.

While under treatment for these psychological and physical problems on February 21, 2002, Mr. Polansky was hospitalized at Baptist Medical Center due to a severe deterioration in his, "cognitive functions":

"in the form of forgetfulness; inability to read, comprehend and retain information. His cognitive

decline has become more progressive and includes both visual and auditory hallucinations and paranoia upon admission." (APA, p. 669.)

This was determined during that hospitalization to be due to:

"confusion as to his medications and the timing of his medications"

and to a drug reaction to Seroquel prescribed to treat his medical condition stemming from the accident and which reaction resulted in a chemical encephalopathy of the brain with

"edema in all four extremities with swallowing difficulties and an edematous tongue. . . . In the hospital setting as part of the Seroquel reaction he had episodes of weakness as well as difficulty swallowing and enuresis. . . ."

* * *

"The patient was withdrawn from the Seroquel due to the medication encephalopathy. During the most severe aspects of the encephalopathy, due to the medication, he did not know the President before President George Bush, Jr. He could not do several subtractions and he could not quickly identify the particular day of the week." (APA, p. 669.)

Subsequent to hospitalization, he continued under the treatment of his treating psychiatrist for psychological and cognitive disorder and his other treating doctors for his physical problems.

Throughout his treatment notes in 2002 after the hospitalization for the chemical encephalopathy caused by the drug-drug interaction, Dr. Forsthoefel recorded repeatedly problems with cognitive function, particularly as to memory loss and problems with comprehension. He also began to record and

question whether or not these cognitive dysfunctions were coming from his psychological problems versus a physical brain problem. Then on July 29, 2004 Dr. Forsthoefel made a referral, which was authorized by the State Accident Fund, to a neurologist due to the cognitive problems. On July 29th Dr. Forsthoefel referred the Claimant to Dr. Ngo for problems with concentration and memory and noted that, "for no apparent reason, he has suffered a cognitive decline in which he cannot perform even simple calculation and in which confusion is such that he cannot drive." He then stated to the neurologist that, "I would appreciate your consideration of any organic mental condition." This evaluation was authorized as noted but instead of being referred to Dr. Ngo, State Accident Fund referred him to Dr. Julian Adams. While the change in the evaluation to Dr. Adams was objected to, Dr. Adams had been the neurologist that had seen the Claimant when he was admitted for the drug interaction at which time from a neurological standpoint he had diagnosed Mr. Polansky with a chemical encephalopathy with severe cognitive dysfunction. In his evaluation in 2004 among other things, Dr. Adams stated that if memory issues were the problem that was being investigated that he would recommend, "psychological testing."

Throughout 2005, the Claimant continued to request both a referral to another neurologist and to a psychologist for neuropsychological testing concerning the cognitive dysfunctions, in other words physical brain problems, that the Claimant was

having at that time. Also in 2005 due to the anticipated retirement by Dr. Forsthoefel, Mr. Polansky's psychological treatment from a psychiatrist standpoint was transferred to Dr. Krebbs briefly and then Dr. Jo A. Marturano, M.D. whose records just like Dr. Forsthoefel's are replete with cognitive dysfunction problems from 2005 through 2009. On September 19, 2005, Dr. Marturano issued a specific report stating that,

"based on my evaluation and treatment of Mr. Polansky, it is my opinion that he is in need to a complete neurological work-up, by a neurologist, for many of the problems he is having. The neurological evaluation should include EEG testing. I would also recommend neuropsychological testing of Mr. Polansky."

Repeated requests were then made for the neurological evaluation and neuropsychological testing by the Claimant through his attorney.

Between 2005 and 2009, the Claimant continued under the care of Dr. Marturano and Dr. Ezra Riber. Beginning on September 2, 2004 he came under the care for psychological counseling and treatment by Dr. C. Jean Jonet, Ph.D., who since then has seen Mr. Polansky multiple times per week and/or on a weekly basis from 2004 through the present time and continuing under the authorization by the State Accident Fund. In addition to the recommendations of Dr. Forsthoefel, Dr. Marturano, Dr. Adams, and Dr. Ezra Riber, the Claimant's treating chronic pain medicine specialist, on September 20, 2005 stated the opinion and issued a specific report that due to the chronic and current problems he

was experiencing from a neurological standpoint, that it was his recommendation and opinion that Mr. Polansky should have, "a comprehensive neurological evaluation." During this period of time he was receiving numerous authorized medications including Topamax that were being prescribed for the severe headaches that he was having. Finally after the referrals and recommendations of Dr. Forsthoefel, Dr. Marturano, Dr. Riber and even Dr. Adams, Mr. Polansky was finally referred for neuropsychological testing to Dr. Nicholas Lind in the Fall of 2007. He performed neuropsychological testing at that time but did not complete and submit the report of his results until February of 2008. In a later report of May 21, 2012 he specifically noted that the delay in issuing his findings in 2008 was due to the fact that when Mr. Polansky was referred to him by the State Accident Fund for neuropsychological testing and evaluation that he was not provided with any medical records and referred to his efforts in obtaining as much information as he could from Dr. Jonet and from Dr. Marturano. Based on his testing in 2007 and 2008, Dr. Lind found Mr. Polansky to be severely impaired with overall memory being severely impaired and delayed and retention memory being severely impaired in reference to his comprehensive testing. In reference to his memory scales: his auditory, visual immediate, immediate memory, auditory delayed memory, visual delayed memory, auditory recorded delayed memory, general memory and working memory were either extremely low or borderline. His adult

intelligence scale in reference to verbal intelligence was extremely low; his performance intelligence was extremely low and his full scale adult intelligence was extremely low. After testing on November 20, 2007 in his progress note of February 7, 2008, he confirmed that he had, "left messages for Dr. Jonet and Dr. Marturano (Mr. Polansky's psychologist and psychiatrist) in order to consult and share records. In his later report in 2012 when he was provided all of the records in reference to the 2002 hospitalization, encephalopathy, the pre-encephalopathy testing by Dr. Rainwater and the records from Dr. Forsthoefel, in his conclusions Dr. Lind stated that his initial impression back in 2007 without the records was that of a progressive dementia (physical condition of the physical brain) and that that was the reason for his suggestion of a brain scan to determine whether or not there was in fact any physical atrophy of the brain. However, after review of all those records, again which he did not have the benefit of in 2008, it was his opinion that Mr. Polansky had demonstrated physical brain dysfunction that was more than likely not at least aggravated by the drug-drug interaction triggered encephalopathy.

Throughout 2008, 2009 and 2010, Mr. Polansky continued under the care of Dr. Ezra Riber and Dr. Jonet and resumed treatment with Dr. Forsthoefel when he resumed his private practice in 2009. In 2009 and 2010, Mr. Polansky continued to receive treatment for his psychological and cognitive dysfunction

problems and severe headaches and for his severe physical problems which included his RSD condition and problems with his shoulders, his left and right legs, low back pain, sexual, bowel and bladder dysfunction.

He also developed and had recurrent problems with his spinal cord stimulator which had provided tremendous pain relief in reference to his back and his legs for a significant amount of time.

However, in 2010 because of problems with the stimulator, Dr.

Riber made a referral to Dr. Giancarlo Barolat in Colorado for re-implantation of a spinal cord stimulator. This referral was necessitated due to the fact that local orthopaedists due to the severe condition of the Claimant's back, the multiple implantations of the spinal cord stimulator and the previous failure of the spinal cord stimulator in reference to the pulse generator would not reimplant the stimulator. Dr. Barolat based on the Commission records, the medical records, and the requests for approval from Dr. Riber, is one of the foremost authorities on spinal cord stimulators. The referral was not authorized for approximately a year and ultimately resulted in an Order of the Commission ordering the referral of Mr. Polansky to Dr. Barolat for re-implantation of the spinal cord stimulator which was accomplished not in 2010, but in the fall of 2011. The Record of the Commission is clear that the focus of the Claimant and treatment throughout 2010 and through the time that the spinal cord stimulator re-implantation was ordered by the Commission was

on the physical problems that the Claimant was having.

However, it is also very apparent from the Record that during this time Counsel for the Claimant was working with the attorney who had been hired by the State Accident Fund to obtain Second Injury Fund benefits and was taking the position on behalf of the Claimant that due to the chemical encephalopathy that Mr. Polansky had sustained physical injury and damage to the brain and was trying to resolve this issue with the Fund without litigation expense and on May 11, 2009 stated and wrote specifically that,

"after the brain injury, he has had severe problems, not only of a psychological nature but of a physical nature stemming from this. . . . I hope that the State Accident Fund will also be cooperative in trying to see that Ted is fairly compensated for the remainder of his life." (APA, p. 699.)

Subsequent to that on May 14, 2009, Ms. Mary League, the contract attorney, responded that she was unable to give an answer as to position of the State Accident Fund on the brain injury but that she had, "forwarded a copy of your letter to the State Accident Fund adjuster requesting that she be contacted in regards thereto." According to the records of the Commission, the State Accident Fund did receive approval for Second Injury Fund protection for this claim.

As noted in 2010 and 2011, the Claimant was trying to obtain authorization for the re-implantation by Dr. Barolat of the spinal cord stimulator which resulted in a Motion being filed .

ordering that that be provided. It is also very clear from the Record wherein there is specific continual recordation by Dr. Riber of all the medications that the Claimant was taking which included multiple medications specifically for problems associated with cognitive dysfunction and physical injury to the brain including Topamax for migraine headaches; Galantamine ER, a medication prescribed for dementia and Alzheimer's (physical injury conditions of the brain); Donepezil which is prescribed for dementia and for Alzheimer's, again physical injury and conditions of the brain; and Imitrex (generic - Sumatriptan) which is prescribed for migraine headaches. In addition, the Claimant has been prescribed on a continual basis throughout this period of time Geodon, which is an anti-psychotic medication; and Provigil along with Ambien which are specific sleep disorder medications.

In a series of reports starting on March 3, 2011, Dr. Forsthoefel, the authorized treating psychiatrist, stated the opinion that the Claimant's cognitive decline since the drug-drug interaction in 2002 was related, "in a residual way to the encephalopathy triggered by the drug-drug interaction. Based on this report, the Claimant was sent to Dr. Avie Rainwater, Ph.D. for additional neuropsychological testing due to the fact that Dr. Rainwater had performed testing prior to the drug-drug interaction triggered encephalopathy. Based on his retesting performed on March 22, 2011, and comparison to his previous 2001

testing, Dr. Rainwater stated that, "it is my opinion, stated to a reasonable degree of psychological certainty that the absence of significant psychometric changes in the patient's tests-retest data logically supports the conclusion that the patient's current neurocognitive changes do represent a decline in brain functioning secondary to the drug-drug interaction encephalopathy." The Claimant's treating psychiatrist since 2001 in a report dated May 6, 2011 then stated the opinion to a reasonable degree of medical certainty that it was his opinion that "Mr. Polansky, did sustain a physical brain injury as a result of the encephalopathy" as explained in another report of June 28, 2011 this was a chemical encephalopathy that he had sustained due to the drug-drug interaction with residual features up to and including the date of his 6/28/11 report including continued neurocognitive deficits in the form of expressive and secondary aphasia, deficits in comprehension, attention span and recent memory.

Based on the opinions of Dr. Forsthoefel and Dr. Avie Rainwater, Ph.D., the Claimant on May 12, 2011 filed for a hearing for lifetime benefits due to physical brain damage suffered as a result of the 2002 drug-drug interaction which resulted in a chemical encephalopathy (physical damage to the brain) and that lifetime compensation benefits be resumed under that Award as of the date of the last payment of weekly compensation on March 8, 2011. Thus within two (2) months of the

report of Dr. Rainwater and one week after the opinion of the treating psychiatrist that the Claimant had sustained physical brain damage as a result of the drug-drug interaction resulting in the encephalopathy in 2002 which resulted in the Claimant's cognitive dysfunction, the Claimant filed for a hearing for an Award.

Since that time, and which I have taken into consideration in my Decision, the Claimant's authorized chronic pain medicine specialist (since 2001) expressed the opinion to a reasonable degree of medical certainty that Mr. Polansky based on his knowledge of Mr. Polansky as a result of the chemical encephalopathy had sustained organic brain damage and that that brain damage was severe enough to constitute a hindrance and obstacle to employment. (Dr. Riber previously issued a report on 09/20/05 requesting neurological examination and testing). He further stated the opinion in reference to his area of specialty that physicians in the area of physical rehabilitation, pain management, neurology and psychiatry use the terms "physical brain damage" and "injury" interchangeable in referring to organic damage to the brain and that in his opinion the residual neurocognitive deficits that persisted at the time of the opinion on June 30, 2014 were likely permanent and would not change. The Claimant's treating clinical psychologist, Dr. C. Jean Jonet, Ph.D., expressed the opinion that in her clinical opinion as a clinical psychologist and the treating clinical psychologist for

Mr. Polansky since 2004 that he had sustained physical brain damage as a result of the drug-drug interaction and encephalopathy in 2002 and that he is totally and permanently disabled as a result of his condition. She also stated in her report that he was suffering from severe neurocognitive deficits including expressive aphasia as well as documented decreased attention, concentration and short term memory skills. She stated that through her treatment of Mr. Polansky that she knows him to be a college educated individual but yet he cannot even write a check, cannot count change, cannot use tools or perform household chores or repairs, and cannot now change a lock even though he had previously done that type of work prior to attending college. He frequently becomes derailed while talking, requires redirection and prompts and sometimes he stares off into space. He is tremendously or enormously forgetful, takes notes but loses them. In addition, Dr. Frank Forsthoefel and Dr. Avie Rainwater issued written reports stating not only that Mr. Polansky had suffered physical brain damage but that it is severe and is severe enough to constitute a hindrance or obstacle to employment in and of itself and that he is totally and permanently disabled due to his condition stemming from the accident.

While I have taken into consideration all this testimony and all the evidence presented in this matter, I have given great weight to and have given substantial consideration to the

testimony of the treating psychiatrist who appeared on behalf of the Claimant at the hearing and is the only testimony that was taken in this matter.

After the parties stipulated to Dr. Forsthoefel's credentials as a Board Certified psychiatrist, Dr. Forsthoefel in his testimony in summary testified that after the 2002 hospitalization for the encephalopathy, which is a physical injury to the brain involving swelling of the brain, he began to notice greater and greater problems in reference to cognitive deficits unrelated to his moods. He explained how severe the encephalopathy was in 2002 of which he has, "a vivid memory of it even to this day" which is also reflected in the Discharge Summary that Mr. Polansky was agitated, writhing, had an altered mental status, was confused, his face and ankles were swollen, he was delirious and incoherent and during the hospitalization that remitted. He explained that encephalopathy is a global syndrome of the brain involving a physical alteration of the brain structure and that it is an organic injury to the brain. He explained that after the 2002 drug-drug interaction and encephalopathy that Mr. Polansky who was already having significant psychological problems stemming from the work-related injury, for which he was treating Mr. Polansky in 2001 prior to the 2002 hospitalization, that it became clear to him that Mr. Polansky's problems with memory, confusion and other cognitive dysfunctions were not related to his psychological condition but

that there was something else going on in Mr. Polansky's mind that was not of a psychiatric nature. He explained the difference between cognitive dysfunctions stemming from a psychological condition and cognitive dysfunctions that are stemming from an organic brain injury, or in other words, physical damage to the brain. In reference to cognitive dysfunctions that stem from a psychological condition, they are what he referred to as "mood congruent". Mood congruent means that as the person's mood improves there is a decrease in the cognitive dysfunction as well. For example, if a person is suffering from depression as their depressed mood changes or improves, you will see an improvement in their cognitive dysfunction. The same is true for all other mood or psychological/functional conditions.

Throughout 2002 and 2003 and the early part of 2004 as the medications stabilized his depression and schizoaffective disorder as Dr. Forsthoefel put it, "very nicely" during this time there continued to be not only continuing cognitive deficits but those cognitive deficits continued to get worse. In Mr. Polansky's case, even as his mood would improve in reference to his psychological problems, his cognitive dysfunctions continued to decrease or in other words were not mood congruent or related to his mood. This led Dr. Forsthoefel in 2004 to recommend neurological examination and neuropsychological testing.

He testified that Mr. Polansky's moods are now stabilized on medication and have been so for quite some time but yet at the

same time he is having increased disability and inability to remember what he has read and even to express what he has read. This is not just related to the reading of the newspaper, but is related to his ability to keep his finances, use the telephone, etc.

Mr. Polansky is suffering from sensory aphasia and expressive aphasia. These refer to the ability of an individual to read something and then relate what they have read. They have problems both on the one side in actually reading something to you and then on the other side they can read something but have absolutely no idea what they just read and/or are able to relate immediately what they just read to an individual. Dr. Forsthoefel related that while Mr. Polansky may read the newspaper, which it will probably take him an entire day to do, he does not read the newspaper in the sense that we understand it. Dr. Forsthoefel testified that Mr. Polansky may be able to read words and/or sentences, but then he cannot comprehend those. Dr. Forsthoefel has confirmed through his treatment that Mr. Polansky both does not understand what he is reading and then cannot relate back what he is reading to you. He also has severe problems in reference to his memory. In reference to his memory, Dr. Forsthoefel testified that where there is a regular pattern, to what he is going, for example driving to a location or patterns of behavior such as feeding the dog, or there are circumstances or circumscribed areas that he has patterned

himself to do, he does fairly well, but if you change those patterns or ask him to do something out of that area such as give him directions to go somewhere he is not used to going or if you have asked him about something such as going on a trip and what his memory of that is, he does terrible. For example, where he regularly goes to Dr. Riber's office, Dr. Jonet's office and Dr. Forsthoefel's office, he can handle that but if you were to give him an address in Columbia or Camden, South Carolina and tell him to go there, he would not be able to do it. Most importantly he testified that aphasia is a specific condition that results directly from organic physical brain damage, not from a psychological consequence.

This Commissioner specifically asked Dr. Forsthoefel to tell this Commissioner exactly how bad Mr. Polansky's physical brain damage is to which he responded by explaining his answer in reference to the American Psychiatric Association's diagnostic criteria under DSM IV which sets out a criteria and scale for global assessment of functioning, known as the GAF. Under the GAF scale, the range for all individuals in reference to global functioning is from 0 to 100. He said almost no one gets 100 but no one receives a score of 0. He read into the Record the scale of 0 to 10 and the scale at 40 wherein there is some impairment of testing, speech is at times illogical, obscure or irrelevant, major impairment in several areas such as work, school, family, relationship, judgment thinking or mood and other criteria. He

placed Mr. Polansky between 30 and 40 on the GAF, and based on his assessment under the GAF, Dr. Forsthoefel stated the opinion that Mr. Polansky was, "very, very seriously impaired".

As this point based on the testimony of Dr. Forsthoefel up to that point and based on my observations of Mr. Polansky throughout the hearing, which in my opinion was confirmed by the testimony of Dr. Forsthoefel as to how seriously impaired Mr. Polansky was in reference to his ability to know and appreciate what was being said and/or written and specifically in reference to his testimony about how severe Mr. Polansky was impaired especially in the area of aphasia, this Commissioner went off the Record and discussed with the attorneys my opinion that Mr. Polansky appeared so impaired that he needed to have a Guardian ad Litem appointed. The Attorneys agreed and off the Record, Ms. Gale DuBose confirmed that she would agree to serve as Mr. Polansky's Guardian ad Litem at which time I went back on the Record, explained that this was simply the appointment of a Guardian not of a general nature, but simply for purposes of a workers' compensation hearing and inquired of Ms. DuBose as to whether or not she would agree to serve as Mr. Polansky's Guardian ad Litem for purposes of the workers' compensation action to which she responded she would. I appointed her at that point Mr. Polansky's Guardian ad Litem for the remainder of the pendency of the litigation.

Dr. Forsthoefel resumed and he was asked whether or not in

his medical opinion Mr. Polansky was competent or incompetent to handle his financial affairs to which he responded that in his opinion to a reasonable degree of medical certainty Mr. Polansky was incompetent to handle his financial affairs. Dr. Forsthoefel then in reference to a list of cognitive functions explained as to Mr. Polansky's impairments in those areas. In reference to the cognitive function of decision making, Dr. Forsthoefel testified that because of his inability to comprehend the written word and at times the spoken word, he is severely impaired in reference to that cognitive function. In reference to the ability to learn, he is very limited in any ability to learn any type of new things. In reference to such cognitive functions as sensory input, his ability to understand the written word, understand the spoken word, his learning problems with comprehension and expressing himself, all of those are tied together and in Dr. Forsthoefel's opinion Mr. Polansky is, "very, very impaired" in all of those areas and cognitive functions.

Dr. Forsthoefel also agreed in reference to the neuropsychological testing results that Mr. Polansky is very limited and severely impaired in reference to memory and particularly certain types of memory such as delayed memory, retention memory in his intelligence scale, and that he agreed with the assessment by Dr. Jonet, Ph.D., the clinical psychologist that has been treating Mr. Polansky since 2004. Most importantly to this Commissioner, Dr. Forsthoefel was then

asked the question that if you assume or if Mr. Polansky did not in fact have any of the physical problems including the RSD, the spinal cord stimulator, the severe problems that he has with his back, or any of the other problems that he has, in his opinion based purely on the organic brain injury and cognitive deficits that he has, is he employable or unemployable. Dr. Forsthoefel expressed the opinion that he is unemployable. He was then asked the further question that, "simply based on his organic brain damage" to a reasonable degree of medical certainty is Mr. Polansky incapable of employment, to which Dr. Forsthoefel expressed and gave the opinion unequivocally that Mr. Polansky is, "totally incapable" of employment due purely, simply and strictly based on his organic brain damage.

Subsequent to the direct testimony of Dr. Forsthoefel, Counsel for the Defendants conducted a thorough cross-examination of the Claimant's authorized treating psychiatrist and asked for an explanation of every area of the doctor's opinions in reference to Mr. Polansky and in reference to his opinion that Mr. Polansky had sustained severe disabling physical brain damage as a result of the encephalopathy stemming from the drug/drug interaction, and in the opinion of this Commissioner, left no stone unturned in reference to an explanation and clarification as to all of the opinions and evidence given by the Dr. Forsthoefel during his direct testimony. However based upon the review of that cross-examination, Dr. Forsthoefel explained to

the satisfaction of this Commissioner and gave a thorough and complete explanation in reference to the cross-examination questions of defense counsel and his opinions but maintained his position as to his opinions concerning Mr. Polansky. He was thoroughly cross-examined about Mr. Polansky's mental condition both before and after the encephalopathy and as to how those psychological conditions had been stabilized. He explained objective test results such as MRI's in the area of physical brain damage and the lack of value of those tests sometimes even in cases of documented physical damage to the brain from such global conditions as dementia.

At the conclusion of Dr. Forsthoefel's testimony, this Commissioner held a side-bar with the lawyers as far as any other testimony and subsequent to that off the Record side-bar discussion and with my appointment of a Guardian ad Litem, the Claimant advised that that constituted the Claimant's case. The Defendants presented no additional evidence or witnesses and the hearing was concluded.

Therefore based upon my review of all of the testimony and evidence presented, the medical opinion evidence from all of the Claimant's longtime and current authorized treating doctors and providers, and based particularly upon my review of the testimony of Dr. Forsthoefel to which I give great weight, it is my finding that the Claimant has proven by a preponderance of the evidence that he is entitled to the benefits sought and is entitled to an

Award for lifetime weekly compensation benefits to be resumed pursuant to the Form 50 request and that he is entitled to this Award due to having sustained serious, severe and permanent brain damage as established by the evidence and uncontested medical and professional opinions of all the Claimant's longtime authorized treating physicians and psychological professionals in this case stemming from his original injuries from the accidents and the treatment necessary to treat those injuries. I further find that the Claimant's severe injuries to his back and leg which resulted in his other severe conditions such as his psychological condition, chronic pain and RSD, combined with his pre-existing conditions to result in a much greater disability than would have been caused by the injuries alone. I further find that Mr. Polansky's physical brain damage readily meets the requirements of SC Code §42-9-400(d). I further find that the Claimant's compensation rate for the payment of benefits shall continue at the rate as previously paid by the Defendants, that being the maximum compensation rate for 2000 in the amount of \$507.34 per week. In reference to the compensation rate, it is my opinion that the maximum compensation rate for the year of the accident under S.C. Code §42-9-10 applies. Wherefore I have made the following findings of salient fact:

FINDINGS OF FACT

1. A Guardian Ad Litem was appointed by the undersigned at the hearing, based upon (a) my observations of Claimant, and (b) the testimony of Dr. Forsthoefel. The person appointed has been in a 20+ year relationship with Claimant, and in at least one record is referred to as Claimant's common law wife (e.g., Defendants APA #20, page 715; Defendants' APA #21, page 718).

2. Claimant sustained admitted accidents on October 19, 1999, and May 30, 2000, and Defendants paid Claimant 500 weeks of temporary compensation for these claims. The 500-week period ended in March 2011 (Commission's file; Defendants' APA #26, page 738; Defendants' APA #28, page 743).

3. The admitted body parts/conditions are (a) the back (for which Claimant underwent spinal cord stimulator implantation, and re-implantation in Colorado), and psychological overlay (2000); and (b) the left knee (1999). See e.g., Claimant's APA #7, page 250.

4. The parties mediated the claims in November 2014, and agreed that Claimant was permanently and totally disabled, and is entitled to receive lifetime causally-related treatment per the agreement. The parties did not reach the issue of whether Claimant had sustained an alleged brain injury or physical brain damage after a drug-drug interaction (Claimant's APA #15).

5. Prior to the mediation, there was no (a) Order from the Commission setting forth the compensable body parts/conditions; or (b) agreement by the parties setting forth the compensable

body parts/conditions.

6. Claimant contends that he sustained physical brain damage pursuant to Section 42-9-10(C), after a drug-drug interaction in 2002 caused encephalopathy, and therefore is entitled to receive lifetime compensation. Procedurally, Claimant contends that Defendants are estopped from denying physical brain damage as Defendants (a) have paid for all of Claimant's treatment, (b) had knowledge of Claimant's cognitive condition and decline, and (C) impliedly accepted physical brain damage (or at least a brain injury) through the provision of treatment. Claimant filed a Form 50 (including the brain) in May 2011, and re-filed a Form 50 in March 2012 (Commission's file; Defendants' APA #27, page 740).

7. Defendants contend that Laches, waiver, and estoppel, whether separately or collectively, apply and bar any claim of physical brain damage. Regardless, Defendants contend that, at most, Claimant sustained a brain injury pursuant to Regulation 67-1101. Defendants maintain that Claimant's cognitive problems are more the result of Claimant's psychological/psychiatric issues than organic damage.

8. Claimant was hospitalized in February 2002 after a drug reaction to Seroquel which had been prescribed to treat his admitted injuries (Claimant's APA #11).

9. Claimant has a preponderance standard to meet, and I find that he meets it: Claimant has been diagnosed with physical

brain damage resulting from Claimant's drug-drug chemical encephalopathy by more than one authorized physician and all of his current treating physicians, Dr. Frank Forsthoefel, M.D. (authorized treating psychiatrist since 2001) and Dr. Ezra Riber (chronic pain specialist since 2000). (Claimant's APA #1, pages 2, 6-8, and 10; Claimant's #2, page 12).

10. Claimant's condition since the 2002 hospitalization has deteriorated. Medical evidence from 2007 notes that Claimant reported concerns with increasing cognitive difficulties. After administering a battery of tests, Dr. Lind found that "the feigning of memory difficulties is not likely," and is "suggestive of dementia." I give great weight to this evidence, and find that it dovetails with Dr. Forsthoefel's testimony that Claimant has experienced a severe cognitive decline independent of Claimant's psychiatric condition/mood. (Defendants' APA #23, pages 723 and 725-727; testimony of Dr. Forsthoefel; Claimant's APA #1, pages 5 and 9; Claimant's APA #8, pages 341-343).

11. Dr. Jonet, Ph.D., the authorized treating clinical psychologist since 2004, also opines that Claimant has brain damage. Dr. Jonet's treatment records from 2004 - 2015 speak to Claimant's cognitive impairment and decline, memory problems, and forgetfulness. In 2005, because of Claimant's cognitive decline, Dr. Jonet stated that Claimant "needs neuro referral." (Claimant's APA #3, pages 15-19; Claimant's APA #8, e.g., pages 341-362, 368-369, 371, 374-376, 378-379, 382, 384-389, 393, 406,

415, 417, 420, 432-433, 437-439, 453, 463-464, 471-472, 482, 484, 501, 505, 507, 516-517, 520, 553, 561, 564-565, 563, 577, 582, 600, and 603-606).

12. Dr. Jonet met with Carrier's case manager regarding Claimant's cognitive impairment (Claimant's APA #8, page 589, dated 2005).

13. Dr. Marturano (treating psychiatrist) also documented Claimant's poor memory, at one point believed to be attributable to chronic narcotic use. In 2009, Dr. Marturano noted that he needed to discuss Claimant's memory issues with Dr. Jonet. Dr. Marturano also documented Claimant's (a) inability to comprehend the newspaper or to figure out "brain teasers" anymore; (b) inability to remember his zip code and his PIN for ATM machines, (c) forgetfulness while driving (missing turns, etc.), and (d) going to the "wrong appointment location" to see Dr. Marturano, among other difficulties. Because of Claimant's presentation, Dr. Marturano also recommended and requested neuro-psych testing (for Claimant's memory issues) throughout his records from 2005 to 2009. (Claimant's APA #9, pages 608-616, 619-624, 626, 628-629, 632, 634, 642, 653-654, 656, and 661).

14. Dr. Krebs also documented Claimant's forgetfulness (Claimant's APA #10, page 667).

15. Rehabilitation Consultant Fi-Fi Jubran found Claimant "to be sincere and to want to help himself get better." (Claimant's APA #17, page 704).

16. Of all the evidence submitted by the parties, by far the most compelling is the testimony of Claimant's treating psychiatrist (Dr. Forsthoefel), who treated Claimant from 2001-2004, and again from 2009 to the present (i.e., as of the date of the hearing). I give this testimony great weight because despite Defendants' counsel's skillful and thorough cross examination, Dr. Forsthoefel does not retreat from his opinions that (a) Claimant has suffered a physical, organic alteration to the brain-physical damage to the "structure of the brain;" (b) Claimant's brain has been "terribly compromised," "very seriously impaired," "severely impaired," and "very, very impaired;" (c) Claimant's brain injury alone renders Claimant unemployable; and (d) Claimant's increasing cognitive deficits are not mood congruent, i.e., Claimant developed cognitive problems unrelated to his psychiatric condition. Dr. Forsthoefel considered the records/opinions of other experts, yet still maintains the opinions he holds (Claimant's APA #1, pages 1-3; testimony of Dr. Forsthoefel; Claimant's APA #6 in its entirety; Claimant's APA #16, pages 683-685).

17. The greater weight of the evidence shows that Claimant's physical brain damage is permanent in nature (Claimant's APA #2, pages 13-14; See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Crisp v. Southco, Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)).

18. The greater weight of the evidence shows that

Claimant's brain injuries is one of those "most serious" and "severe" cases contemplated by *Crisp* and *Sparks*; therefore, Claimant meets his burden of establishing by the preponderance of the evidence that he has sustained physical brain damage. Claimant is not required to prove physical brain damage by objective diagnostic tests or by clear and convincing evidence.

19. At the hearing, Defendants' counsel highlighted and emphasized records which by all appearances would be favorable to the Defendants. However, Dr. Forsthoefel explained to my satisfaction that Claimant has physical brain damage. Given Dr. Forsthoefel's continuum of treatment from 2001 to the present—except for the break in the treating relationship from 2004–2008—I find that Dr. Forsthoefel is in the best position to render this opinion as Dr. Forsthoefel has observed the cognitive changes himself.

20. I considered Dr. Adams' opinion from his report of August 23, 2004 (in which he recommended that if "memory" was the issue that Claimant undergo psychological testing (Defendants' APA #20, pages 715–716), but Dr. Forsthoefel's opinion is the more persuasive of the two.

21. I considered the fact that Claimant can drive some, but Dr. Forsthoefel testified that it is limited to familiar places. Further, various treatment notes chronicle Claimant's difficulty driving. Finally, Claimant's license was last renewed in 2006 and does not expire until 2016. (testimony of Dr. Forsthoefel;

Defendants' APA #43, page 849; See also Defendants' APA #31, page 808).

22. Defendants' defense of Laches is not persuasive. If Defendants had never paid for any of Claimant's treatment, had no knowledge of the encephalopathy or Claimant's cognitive decline, and were just now or recently being asked to assume the treatment for the organic brain injury/damage, the result in this case might be vastly different. However, Defendants had access to Claimant's medical records and provided benefits for his treatment. Further, the extent of Claimant's condition was not wholly apparent or fully appreciated after the diagnosis of encephalopathy, but rather has continued to decline since 2002.

23. As to Defendants' objections concerning Dr. Rainwater's records, the conclusion (regarding mail order prescriptions) in Claimant's APA #4, page 20, is the same conclusion as reached by Dr. Jonet in Claimant's APA #3, page 15. I can therefore discount or even disregard that e-mail objected to by Defendants in Claimant's APA #4. 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.

25. Although Claimant's APA #9, page 664 is part of the

treatment records, I find them wholly unnecessary to my conclusions herein. I can also similarly disregard pages 633, 637, and 662, although these submissions were not objected to.

26. I can (and do) completely disregard Claimant's APA #9, page 663, and reach the same conclusions I reach herein. This document is wholly unnecessary to my decision.

27. Claimant's average weekly wage is \$877.01, yielding a compensation rate of \$507.34, the maximum for 2000. I do not find persuasive Claimant's argument that exceptional circumstances exist to change the compensation rate (paid over the 500-week period), and that Claimant's compensation rate should be based upon that of 2015 or any date other than that of the later accident date. Although I considered it, the Circuit Court Order submitted by Claimant is not binding or of precedential value.

28. Claimant is entitled to lifetime benefits.

29. The Commission Record reflects that the State Accident Fund filed for benefits and was awarded coverage under the Second Injury Fund based on pre-existing psychological problems and pre-existing conditions in the Claimant's back which combined with the effects of the injury to the Claimant's psychological condition and back injury stemming from the accident to result in a greater disability and greater degree of medical care than would have resulted from the injuries from the accident alone. The combination of the Claimant's pre-existing conditions and the

injuries from the accidents and the treatment necessary to treat those problems caused and resulted in the Claimant's serious, severe and permanent physical brain damage. In 2009 the State Accident Fund as is reflected in the Record sought assistance of the Claimant in obtaining Second Injury Fund coverage for these problems. It is also clear that in 2009 the Claimant placed the State Accident Fund on notice of this claim for lifetime benefits due to physical brain damage and the desire to resolve that issue by agreement without the need for further litigation expense.

30. Based on the Record, the Claimant's pre-existing psychological and back problems combined with the effects on the injuries including chronic pain, RSD, and depression to cause greater psychological problems, diagnosed as schizoaffective disorder and bi-polar disorder which necessitated the administration of such drugs as Seroquel. The administration of Seroquel resulted in a drug-drug reaction that caused the encephalopathy. Therefore the reaction to the medications needed to treat the conditions stemming from the combination of the pre-existing conditions and the injuries stemming from the accidents resulted in the Claimant's physical brain damage and the tremendous increase in benefits, lifetime compensation, stemming from the accidents.

CONCLUSIONS OF LAW

Under S.C. Code §42-17-40 the following Conclusions of Law apply in this case to the issues presented for decision:

1. Under S.C. Code §42-1-40 and S.C. Code §42-9-10, the Decision is made as to the applicable compensation rate in this matter. All cases, decisions and legal memorandum as to exceptional circumstances and the wording and meaning of S.C. Code §42-9-10 have been taken into consideration as the issue of the applicable average weekly wage and compensation rate that applies. The provisions and requirements of S.C. Code §42-17-10 were taken into consideration in making this decision since no prior decision has been made by the Commission on that issue and it is appropriate that a decision be made at this time.

2. Under S.C. Code §42-9-10(C), the determination is made as to the Claimant's entitlement to lifetime weekly compensation benefits due to having sustained physical brain damage resulting from the encephalopathy which resulted from a drug-drug interaction from drugs necessary to treat the Claimant's disabling symptoms and conditions stemming from the work-related injuries. The South Carolina Supreme Court Decision in the cases of Sparks v. Palmetto Hardwood, Inc., 406 SC 124, 750 Southeastern 2d 61 (2013) and Crisp v. Southco, Inc., 401 SC 627, 738 Southeastern 2d 835 (2013) were taken into consideration in determining whether or not the Claimant has met his burden of proof in establishing that he has sustained physical brain damage severe enough to establish his entitlement to an Award for

lifetime compensation benefits under S.C. Code § 42-9-10(C). The evidence establishes in accordance with those decisions that the Claimant has sustained severe permanent impairment of the normal functioning of the brain and has sustained physical brain damage that is both serious and severe. In fact, based on the undisputed testimony of the Claimant's treating psychiatrist, Mr. Polansky's physical brain damage is so severe that he is unemployable due to his physical brain damage alone regardless of any other physical or psychological impairments.

3. Under the Mediated Settlement Agreement, the Claimant is entitled to lifetime medical care under SC Code §42-15-60(C) as set out in that Agreement which Agreement is incorporated herein as part of this Order and that his physical brain damage is causally related to the injuries sustained in the accident for which he is entitled to lifetime medical care.

4. Under the stipulations of the parties, the parties stipulated to jurisdiction and venue and to the other issues as reflected in the stipulations.

5. Under the Defendants' defense listed in their Pre-Hearing Brief of Laches, waiver, and estoppel, based on a review of the evidence, their argument and cases cited, I do not find their argument persuasive or in fact supported by fact or law. The Claimant in reply to this defense cited the case of Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2011) and asserted the concept of Laches waiver and estoppel.

should be applied to the Defendants.

The State Accident Fund paid for the hospitalization for the encephalopathy (brain injury) in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive dysfunction. In 2004 at the request of the authorized treating psychiatrist for neurologic examination by Dr. Ngo for cognitive dysfunction believed to be in part due to the encephalopathy, the assigned rehab nurse scheduled and a neurological evaluation was performed by Dr. Julian Adams who noted that, "if memory loss" is the important factor in your investigation that Mr. Polansky should have "psychological testing". At the recommendation of treating doctors, Dr. Forsthoefel, Dr. Marturano, Dr. Jonet, Ph.D. and Dr. Riber and at the continual request of the Claimant between 2004 - 2007, in late 2007 and 2008, the State Accident Fund had neuropsychological testing performed by Dr. Nicholas Lind, Ph.D. (but did not provide him with treatment records) who found severe cognitive impairment and recommended further testing concerning, "possible dementia", a physical brain damage condition. In 2009, the Claimant placed the State Accident Fund on notice that he believed he had suffered physical brain damage and requested discussion to resolve that by agreement without litigation. Between 2009 and 2011 the State Accident Fund paid for treatment which noted continual decline in cognitive function and paid for medications specifically for the treatment of physical brain

conditions. Then in 2011 within three months of the opinions of Dr. Rainwater, Ph.D. and Dr. Forsthoefel and within one week of Dr. Forsthoefel's opinion that Mr. Polansky was suffering from physical brain damage, the Claimant filed for a hearing.

Based on this evidence I do not find the Defendants' position to be persuasive but I do find the argument persuasive that laches should apply as to the Defendants. In this case the Defendants paid for all treatment and evaluations requested for brain injury between 2002 and 2011. In Jervy the Court of Appeals applied laches to hold that the Defendants acceptance of the claim including the payment of medicals and compensation for a period of 455 days barred the Defendants from raising a denial to the claim. In this case the Defendants paid medical care for brain injury for nine years at the time of the first definitive medical opinion that the Claimant had sustained permanent brain damage.

Even applying Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), upon which the defense relies on the elements required to establish laches and estoppel is that only where there is the relinquishment of a, "known right" for an unreasonable length of time so these concepts apply. There is no evidence that before the opinion of Dr. Forsthoefel in 2011 that there was medical opinion evidence stating to a reasonable degree of medical certainty that Mr. Polansky had sustained permanent physical brain damage that was causing his severe cognitive

dysfunction. Within one week of that opinion being given by of the authorized treating psychiatrist, the Claimant filed for an Award. Further, the party asserting these affirmative defenses has the burden of proof to prove prejudice, and opportunity to have acted sooner and material prejudice. I do not find any evidence that the Defendants have met that burden of proof.

ORDER AND AWARD

THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed.

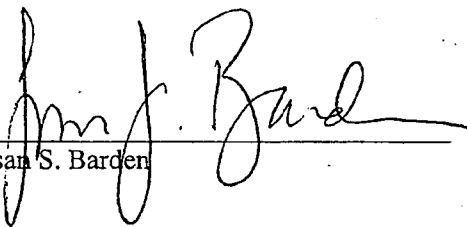
IT IS FURTHER ORDERED that the Claimant is entitled to lifetime medical care pursuant to the mediated Settlement Agreement through the authorized treating physicians Dr. Forsthoefel, Dr. Jonet, Dr. Riber and Dr. Beasley and such other medical providers as those physicians deem necessary and to include lifetime medical care for the physical brain damage and all causally related medical conditions, pursuant to SC Code §42-

15-60(C).

IT IS FURTHER ORDERED that the previous decision by this Commission on Second Injury Fund coverage is incorporated hereby by reference as to the Findings of Fact and Conclusions of Law made on the Award for physical brain damage.

No hearing costs are assessed in this matter.

AND IT IS SO AWARDED AND ORDERED.



Susan S. Barden

CERTIFICATE OF SERVICE

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

June 1, 2015

By: Kristi Love, Administrative
Assistant to Commissioner Barden

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 9922954
Carrier File #: 1999003671
January 7, 2015

NOTICE OF HEARING

THEODORE P POLANSKY v. SC OFFICE OF ATTORNEY GENERAL

Subject: To determine issues as set forth on Forms 50 and 51.
Date: March 6, 2015 at 01:30 PM
Location: SC Workers' Compensation Commission, 1333 Main Street, Suite 500, Hearing Room A
Columbia, SC 29202

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Susan S. Barden
803-737-5660, klove@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Kristi L Love, SC Workers' Compensation, January 7, 2015

Party

Employee: THEODORE P POLANSKY

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

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South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
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(803) 737-5723



WCC File #: 9922954
Carrier File #: 1999003671
July 7, 2014

NOTICE OF HEARING

THEODORE P POLANSKY v. SC OFFICE OF ATTORNEY GENERAL

Subject: To determine issues as set forth on Forms 50 and 51.
Date: September 3, 2014 at 10:30 AM
Location: SC Workers' Compensation Commission, 1333 Main Street, Suite 500 Hearing Room B
Columbia, SC 29202

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner Aisha Taylor
803-737-5692, rgsmith@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Renee G. Smith, SC Workers' Compensation, July 7, 2014

Party

Employee: THEODORE P POLANSKY

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

Attorney

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2 can

cc: ER, Ellen

Computer ✓
Calendar ✓
PHB 8/22/14

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 9922954/0024408

Theodore P. Polansky,

Claimant,
vs.

SC Office of Attorney General,

Employer,

State Accident Fund,

Carrier,
Defendants

CERTIFICATE OF SERVICE

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

By Elaine Boyd on May 8, 2014

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

- ☒ Motion to Set Hearing Pursuant to Commission Regulation 67-601 and 67-613(B)(4)
- ☐ Appointment of guardian Ad Litem
- ☐ Attorney's appearance before the Commission
 - ☐ Withdrawal of Representation
 - ☐ Attorney's Fee
- ☐ Claim Pending Commission Review
 - ☐ Postpone
 - ☐ Adjourned the Scheduled Hearing
- ☐ Self Insurance Privileges
- ☐ Penalties and Interest
- ☐ Third Party Practice
- ☐ Other:

The following disposition has been made:

- ☒ Granted ☐ Denied
- ☐ Set for Hearing
 - ☐ Have Attorneys brief the Issue

Reasons:

Columbia, SC

Commissioner



South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



WCC File #: 9922954
Carrier File #: 1999003671
April 11, 2012

NOTICE OF HEARING

THEODORE P POLANSKY v. SC OFFICE OF ATTORNEY GENERAL

phbdell
5/21/12

Subject: To determine issues as set forth on Forms 50 and 51.
Date: June 5, 2012 at 09:30 AM
Location: SC Workers' Compensation Commission, 1333 Main Street, Suite 500, Hearing Room A
Columbia, SC 29202

South Carolina Regulations 67-601 through 67-615 govern hearings before the South Carolina Workers' Compensation Commission. The claimant must attend when not represented by an attorney or when disfigurement is involved. Corporations must be represented by an attorney, and uninsured employers must attend.

Attorneys must file a Form 58 with proof of service pursuant to Regulation 67-611. Postponements are only granted pursuant to Regulation 67-613. Please visit www.wcc.sc.gov/Commissioners to view Commissioners' Preferences. If you have questions regarding this matter, please contact the office of the undersigned Jurisdictional Commissioner.

Commissioner G. Bryan Lyndon
803-737-5668, tmorris@wcc.sc.gov

CERTIFICATE OF SERVICE – This is to certify the undersigned has served this notice in the above entitled action upon all parties to this cause by sending a copy hereof by electronic mail or United States mail.

By: Tamara Morris, SC Workers' Compensation, April 11, 2012

Party

Employee: THEODORE P POLANSKY

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

Employer: SC OFFICE OF ATTORNEY GENERAL
Carrier: State Accident Fund

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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

RECEIVED

MAR 13 2017

SC Court of Appeals

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

v.

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

APPELLANTS' RETURN TO RESPONDENT'S
MOTION TO DISMISS

Pursuant to Rules 240 (e) of the South Carolina Appellate Court Rules, Appellants hereby files this Return to the Respondent's Motion to Dismiss and requests an Order of the Court denying it for the reasons set forth herein.

1) This appeal arose from an Order of the South Carolina Worker's Compensation Commission, which was appealed by both the current Appellant's and Respondent to the Circuit Court before the Honorable L. Casey Manning.

2) The Circuit Court issued multiple Orders that resulted in the filing of multiple companion appeals (Appellate Case Numbers: 2016-001494; 2016-001890; and 2016-001892).

LCM

3) Based on the differing times at which the multiple circuit court Orders became final for purposes of Appeal and uncertainty as to if additional related Orders would be issued by the Circuit Court, the Appellant sought an Order of the Court of Appeals holding "the above-captioned Appeal in abeyance until such time as the remaining Orders of the Circuit Court arising from the same Order of the South Carolina Workers Compensation Commission as the above-captioned Appeal are finalized and a determination as to if they will be appealed and, if so, consolidated with the above captioned Appeal is made." One of the remaining matters before the Circuit Court at that time was a Motion to Dismiss the Appeal that had been filed by the Respondent and which, still to this day, has not been expressly ruled upon.

4) By Order of the Honorable James E. Lockemy, dated September 28, 2016, the above captioned Appeal was "held in abeyance pending the circuit court's action on those remaining matters. Counsel for Appellants shall provide this court with a status update in thirty days and every thirty days thereafter." (Attached as Exhibit A).

5) Counsel for the Appellant has provided status updates to the Court on the following dates: October 26, 2016 (Attached as Exhibit B); November 30, 2016 (Attached as Exhibit C); and February 10, 2017 Attached as Exhibit D).

6) Counsel for the Appellant did not provide the updates due on December 30, 2017 or January 30, 2017. Counsel for the Appellant has no excuse for this and begs the Court's grace. Counsel for the Appellant believes, but is not sure, that the end of the Year 2016 resulted in his recurring electronic-calendar notification failing to prompt him to send the required Status Updates. Additionally, this issue should not reoccur in this case as Counsel for Appellant is, on the same day as filing this Motion, requesting that the Order of Abeyance be lifted and a briefing order be established. (See Exhibit E).

7) Counsel for the Appellant believes that if any sanction is appropriate, it would be removing the abeyance from this Appeal not the dismissal of the underlying Appeal.

8) Despite the claims of Respondent's Counsel that the Appellant's conduct has been dilatory in this case, Appellant's Counsel has worked to narrow the issues on Appeal in this matter as quickly as possible. Appellant's Counsel has dismissed the two companion Appeals (Appellate Case Numbers 2016-001890 & 2016-001892). Additionally, by separate letter on the same day as filing this Return, Appellant's Counsel has written the Court and requested that the court lift the abeyance and set a briefing order. The request for the abeyance being lifted is based upon the Respondent's Counsel for the first time unequivocally stating on Page 7 of his Memorandum In Support of Motion to Dismiss that Respondent's Counsel has "no intent to move forward with any further actions in Circuit Court".

9) Many of the grounds set forth in the current Motion to Dismiss are related to Appellate Case Number 2016-00-1890 which has been voluntarily dismissed by the Appellant (first request to dismiss submitted via letter dated November 30, 2016). Specifically, Respondent's Counsel has made mention of the Fact that the Appellant did not file a Motion after the Court's Letter dated November 9, 2016. (See Exhibit F). The Court's instruction in this letter was addressed to Appellate Case Number 2016-001890. Appellant's Counsel did not file a Motion in that matter but, instead, wrote the Court on November 30, 2016 requesting that it be dismissed. (See Exhibit G). This dismissal was intended addressed the action requested by the Court as the Motion would not be needed as the Appeal was dismissed. These issues are related solely to Appellate Case Number 2016-001890 and are of no consequence to Appellate Case Number 2016-001494 (the only matter currently before the Court of Appeals and the subject of the Motion to Dismiss).

10) Respondent's Counsel's claims that Appellant's Counsel failed "to notify the Court that all matters that gave rise to the Stay have been resolved and that this matter could proceed with a Briefing Schedule" are simply false. Respondent's Counsel relies upon a December 1, 2016 Letter he wrote to Appellant's Counsel which included the following:

I just thought of this as a way that we can get moving forward on the appeal. Since Judge Manning Judge Manning did not rule on the Motion but the Motion was filed and heard, what I propose is that we can include the Motion as part of the Designation of Matter and then I will submit an argument that the appeal should have been dismissed as an additional sustaining Ground....

(See Exhibit H).

11) Council for the Respondent has failed to mention the correspondence that he sent Appellant's Counsel expressly saying he intended to seek further Orders from the Circuit Court. (Please see Letters dated November 21, 2016 (Attached as Exhibit I) (with attached proposed Letter to Judge Manning and Justice Toal dated November 14, 2016 (Attached as Exhibits J and K) and November 22, 2016 (Attached as Exhibit L)).

12) In response to these letters, Appellant's Counsel emailed Respondent's Counsel on November 22, 2016 and explained, in part,:

As for the Motion to Dismiss the Appeal, the court issued (at your request) an Order on the Appeal. This is a de facto denial of your Motion to Dismiss. We appealed the ruling on the Appeal to the Court of Appeals, where it is now pending. This divested the Circuit Court of Jurisdiction. I had intended to write the S.C. Court of Appeals today and inform them that all matters in the Circuit had been resolved, request that the abeyance be lifted, and that a Briefing Schedule be established. Given that you are once again bringing proceedings before the Circuit Court, I will not be able to do so.

(See Exhibit M).

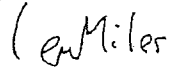
13) Based upon these correspondences, Counsel for the Appellant believed Respondent's Counsel to be still considering all available options on his previously filed Motion to Dismiss the Appeal in Circuit Court, including possibly seeking an additional Order of the Circuit Court. It was with this understanding that Appellant's Counsel wrote the Court on February 10, 2017, and requested the Appeal continue to be held in abeyance based on the "the possibility of an additional Order of the Circuit Court...." (See Exhibit D)

14) At no time prior to Appellant Counsel's February 10, 2017 letter had Respondent Counsel ever stated he would not seek further Orders of the Circuit Court in relation to this Appeal. The first such statement of the Respondent's Counsel was set forth in Page 7 of his Memorandum In Support of Motion to Dismiss, which unequivocally states Respondent's Counsel has "no intent to move forward with any further actions in Circuit Court". Based upon this statement, by separate letter to the Court, Appellant's Counsel has requested that the Order of abeyance be lifted and a briefing schedule be established.

15) Had Respondent's Counsel simply made this statement at any prior point, Appellant Counsel would have requested the Order of abeyance be lifted without subjecting the parties or the Court to the costs and delay of addressing this Motion. Prior to filing this Return, Counsel for Appellant explained to Counsel for Respondent the matters set forth in this Return and that a request was being made to lift the Order of Abeyance. Counsel for Appellant's requested that the Motion to Dismiss be dropped. Counsel for the Respondent refused to drop the Motion to Dismiss, which required the filing of this Return.

For the reasons set forth above, Appellant's Counsel request that the Motion to Dismiss be denied. Additional, Appellant requests an award of costs and attorney's fees in relation to having to respond to this Motion.

Respectfully submitted,

Handwritten signature of Temus C. Miles, Jr. in cursive script.

Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

March 13, 2017

Other Counsel of Record copied:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent

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

RECEIVED

MAR 13 2017

SC Court of Appeals

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

v.

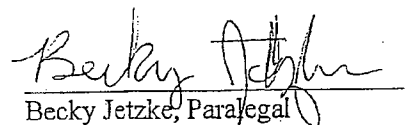
SC Office of Attorney General, employer,
and State Accident Fund, carrier.....Appellants.

PROOF OF SERVICE

I certify that I have served the Return to the Respondent's Motion to Dismiss on the attorney of record for Theodore Polansky by depositing a copy of it in the United States Mail, postage prepaid, on March 13, 2017, addressed as follows:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

March 13, 2017


Becky Jetzke, Paralegal
The McKay Firm, P.A.
Post Office Box 7217
Columbia, South Carolina 29202
(803) 256-4645

The South Carolina Court of Appeals

Theodore P. Polansky, Employee, Respondent,

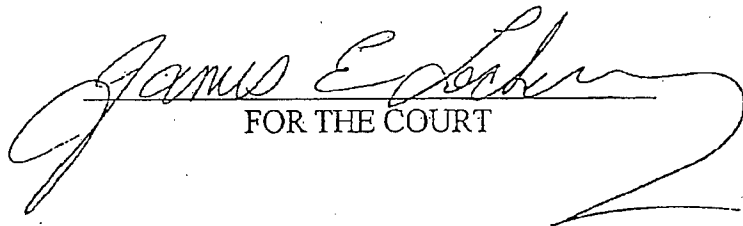
v.

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

Appellate Case No. 2016-001494

ORDER

After careful consideration, Appellants' motion to hold this appeal in abeyance is granted. It appears the circuit court is currently considering matters arising from the same Workers' Compensation Commission order that is on appeal here. Accordingly, this appeal shall be held in abeyance pending the circuit court's action on those remaining matters. Counsel for Appellants shall provide this court with a status update in thirty days and every thirty days thereafter.


FOR THE COURT

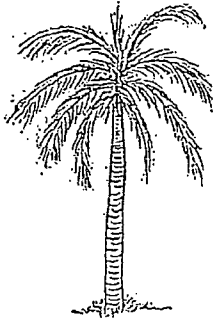
Columbia, South Carolina

cc:
Temus C. Miles, Jr., Esquire
Preston F. McDaniel, Esquire

FILED

September 28, 2016





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

(803) 256-4645 Telephone
(803) 765-1839 Fax

www.McKayFirm.com

Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

October 26, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RECEIVED

OCT 27 2016

SC Court of Appeals

RE: *Theodore Polansky v. SC Attorney General*
Appeal Case No. 2016-1494 & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074

Dear Mrs. Kitchings:

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. One of those remaining issues (the immediate payment of accrued benefits) gave rise to Appeal # 2016-1890.

I have enclosed a copy of a October 10, 2016 Order of the Honorable Jean H. Toal granting an Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890. I am currently waiting to see if the Claimant will appeal the Order of Supersedeas. I request that all deadlines in Appeal # 2016-1890 be held in abeyance until the issue of Supersedeas is finally determined, after which Appeal # 2016-1890 will likely be dismissed or consolidated in to Appeal # 2016-1494

Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

Sincerely,

Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

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(803) 765-1839 Fax

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Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

November 30, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RECEIVED

DEC 01 2016

SC Court of Appeals

RE: *Theodore Polansky v. SC Attorney General*
Appeal Case No: 2016-1494 & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074

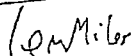
Dear Mrs. Kitchings:

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. I recently received correspondence from the Claimant Attorney indicating that he intends to seek further Orders of the Circuit Court in regards to the matters that gave rise to Appeal # 2016-1494. Accordingly, I request that the Court continue to hold Appeal # 2016-1494 in abeyance.

Additionally, as time to appeal the circuit Court's Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890 has passed with no appeal being initiated, further action on Appeal # 2016-1890 will not be needed. Accordingly, I request that Appeal # 2016-1890 be dismissed at this time.

Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

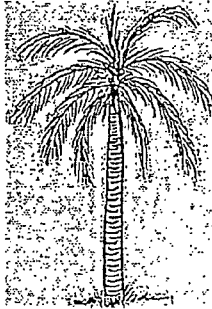
Sincerely,


Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

(803) 256-4645 Telephone
(803) 765-1839 Fax

www.McKayFirm.com

Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

February 10, 2017

Via Hand Delivery

The-Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RECEIVED

FEB 10 2017

SC Court of Appeals

RE: *Theodore Polansky v. SC Attorney General*
Appeal No.: 2016-001494 & 2016-001890
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Mrs. Kitchings:

Thank you for the Court's patience in these matters. These cases, and the resulting appeals, have had a long and complex procedural history which has slowed their progress.

In regards to your letter dated February 1, 2017 requesting an update on the status of Appellate Case No. 2016-001890, I request that you please dismiss that appeal at this time. I intended to dismiss that matter previously when I dismissed Appellate Case No. 2016-001892. The failure to do so at that time was an oversight on my part.

As for Appellate Case No. 2016-001494, I request that the Court continue to hold it in abeyance pursuant to the stay entered by Judge Lockemy on September 28, 2016. The attorney for the claimant/respondent has expressed the desire to possibly seek an additional Order from the Circuit Court challenging the appeal on grounds that it was untimely. Accordingly, the possibility of an additional Order of the Circuit Court in this matter still exists.

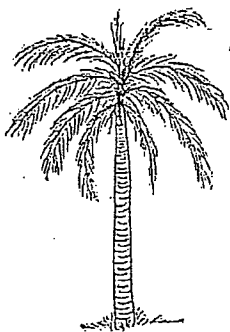
Should you have any questions or concerns regarding this matter, please contact me at my direct dial: (803) 705-2149.

Sincerely,

Temus C. Miles, Jr.
Temus C. Miles, Jr.

cc: Preston F. McDaniel, Esquire





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

(803) 256-4645 Telephone
(803) 765-1839 Fax

www.McKayFirm.com

Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

March 13, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

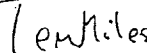
RE: Theodore Polansky v. SC Attorney General
Appeal No.: 2016-001494
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Mrs. Kitchings:

As you are aware, the above-referenced matter was stayed by Order of the Honorable James E. Lockemy on September 9, 2016. This Order was entered due to the fact that the Circuit Court was "considering matters arising from the same workers' compensation commission Order that is on appeal here." In page 7 of the Respondent's Memorandum in Support of Motion to Dismiss, Counsel for the Respondent unequivocally states there is "no intent to move forward with further actions in the Circuit Court." Accordingly, I request the stay in this matter be lifted and a briefing schedule be established.

Should you have any questions or concerns regarding this matter, please contact me at my direct dial: (803) 705-2149.

Sincerely,


Temus C. Miles, Jr.

cc: Preston F. McDaniel, Esquire





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 09, 2016

Mr. Temus C. Miles, Jr., Esquire
PO Box 7217
Columbia SC 29202

Re: Theodore Polansky v. SC Office of the Attorney General (2)
Appellate Case No. 2016-001890

Dear Counsel:

We have received your letter dated October 26, 2016.

Please file a motion pursuant to Rule 240 of the South Carolina Appellate Court Rules, SCACR.

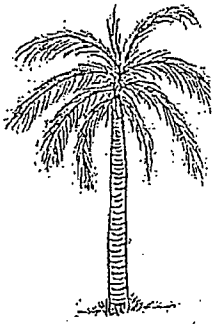
Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Preston F. McDaniel, Esquire





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

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(803) 765-1839 Fax

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TMiles@McKayFirm.com

November 30, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RECEIVED

DEC 01 2016

SC Court of Appeals

RE: *Theodore Polansky v. SC Attorney General*
Appeal Case No: 2016-1494 & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074

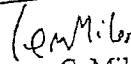
Dear Mrs. Kitchings: ..

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. I recently received correspondence from the Claimant Attorney indicating that he intends to seek further Orders of the Circuit Court in regards to the matters that gave rise to Appeal # 2016-1494. Accordingly, I request that the Court continue to hold Appeal # 2016-1494 in abeyance.

Additionally, as time to appeal the circuit Court's Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890 has passed with no appeal being initiated, further action on Appeal # 2016-1890 will not be needed. Accordingly, I request that Appeal # 2016-1890 be dismissed at this time.

Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

Sincerely,


Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel



McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew C. Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

December 1, 2016

VIA EMAIL - tmiles@mckayfirm.com
AND US MAIL
Temus C. Miles, Jr., Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201

RE: Ted Polansky vs. SC Attorney General's Office
WCC File Nos: 9922954 & 0024408
C/A Nos: 2015-CP-40-07380 & 2015-CP-40-07468

Dear Tem:

I just thought of this as a way that we can get moving forward on the appeal. Since Judge Manning did not rule on the motion but the motion was filed and heard, what I propose is that we can include the Motion as part of the Designation of Matter and then I will submit an argument that the Appeal should have been dismissed as an additional sustaining ground as to the Award of the Commission awarding benefits.

Next, in reference to the conflict issue, I will not keep beating a dead horse and since Harry is committed to appealing this action over advice of counsel, at the appropriate time I guess we will all have to deal with: his failure to actively pursue a SIF claim, what the employer and insurance carrier SAF knew in reference to that claim and my reliance on the representations made to me, in another appropriate forum.

Next, on a side note, I understood everything in your letter and understand your position except for the statement that I was to blame for the long and convoluted procedural history that developed over the summer. That really bothered me. The only thing I know that I did was to file a Motion to Dismiss the Appeal, file for an expedited hearing requesting the payment of temporary total, (which, by the way State Accident Fund did not start up voluntarily) and then at the request for the payment of back due temporary total to give Pete a chance to get the case accepted by SIF and then resolve the claim. Judge Manning knew all of this and had "basically" told us that he was going to grant the back due payment and would deny my Motion to Dismiss



Temus C. Miles, Jr., Esquire
December 1, 2016
Page 2

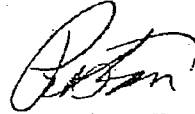
simply because he hates kicking people out of Court. Then right in the middle of all of this, Pete leaves your firm, leaving you with an eight banker box file and you requested an extension of time to come up to snuff even though the records and briefs and everything were already in.

In all of the orders I prepared, you will note that I clearly notified the clerk as to which file the order applied to and actually used only the appropriate filing number and/or underlined filing numbers for them which apparently the clerk's office ignored.

I am not the one who filed for extensions, re-hearings and for supersedes and I am not the one that refused to pay my client so, would you please tell me how I am to blame for the convoluted process and the delay in this case? Again, that just bothers me. Of course my ABC store thanks the SAF for all of this as it has increased their profits.

I look forward to the appeal and moving forward *and to working with you.*

Sincerely yours,



Preston F. McDaniel

PFM/abh/rmt

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew Robertson

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Facsimile (803) 252-0709

November 21, 2016

VIA EMAIL - tmiles@mckayfirm.com
Temus C. Miles, Jr., Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201

RE: Ted Polansky vs. SC Attorney General's Office
C/A Nos: 2015-CP-40-07468 & 2015-CP-40-07380

Dear Temus:

Please find attached a proposed letter (which I will file Wednesday) to Judge Manning and to Justice Toal, requesting a Hearing on the Motion to dismiss, that was never finally decided, and also as to whether or not there is a conflict of interest between the best interest of your one client, that being the State Accident Fund and the best interest of the employer, the Attorney General's Office. I understand your position on the conflict, but also it is incumbent upon the State Accident Fund as the insurer to aggressively prosecute the Second Injury Fund Claim on behalf of the employer, particularly in this case, where we were talking about obtaining reimbursement of public funds on behalf of a public agency. I was, to be quite honest with you, incensed when I received the reply from the Executive Director that he wanted me to proceed with the Second Injury Fund claim, where I absolutely have no right to do so, and in addition, where this could mean a substantial savings on behalf of the employer.

I look to hear from you and will send this out on Wednesday, if I haven't heard from you. I will glad to consider any modifications you deem appropriate, but I want a Hearing on these issues and I anticipate filing the documents that I have in my file and will go over those with you as to whether or not we can submit those without objection. Also I anticipate calling as a witness your former associate, Peter Leventis, to confirm our discussions in reference to what I was being told in reference to the State Accident Fund processing of the claim for Second Injury Fund Recovery in reference to delaying decisions on the Motion and the request for a lump sum.

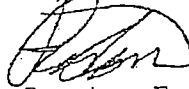


Temus C. Miles, Jr., Esquire
November 21, 2016
Page 2

Also, I would be glad to have a discussion with you about your Appeal in this matter to the South Carolina Court of Appeals, and what issues you intend to present on behalf of the Fund at the Court of Appeals. If you want to have that discussion, I would welcome it, but if not I understand.

I look forward to hearing from you.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Preston F. McDaniel", written over a horizontal line.

Preston F. McDaniel

PFM/rmt
Enclosures

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Telephone (803) 771-7211

Matthew C. Robertson

Facsimile (803) 252-0709

November 14, 2016

VIA EMAIL - cmanningj@scccourts.org & cmanninglc@scccourts.org
L. Casey Manning
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192

VIA EMAIL ONLY - jtoalj@scccourts.org
Honorable Jean H. Toal
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192

RE: Theodore P. Polansky v. SC Office of Attorney General and
State Accident Fund
C/A No.: 2015-CP-40-07380

Dear Judge Manning & Justice Toal:

I am writing this to both of you because you have both held Hearings on this case. New defense counsel (5th counsel of this case), Mr. Temus Miles requested and was granted a stay by the Court of Appeals on his Appeal in order to consolidate all issues and Appeals for Appeal.

As we have wanted since last November, we want no further delay and did not file for reconsideration and are not and will not appeal the granting of the Supersedeas. However, while we want no further delay because of misrepresentations made to me upon which I relied after their Appeal in November 2015, which delayed specifically various decisions on those issues for over (9) months, there are still two issues upon which we need a hearing and a final resolution.

First, Judge Manning you heard a Motion to dismiss along with our back payment request back in February. Then subsequently at the Hearing in May on their Appeal, I again asked you not to make a decision on either issue until after a decision on the underlining appeal of the defendants from the Workers' Compensation Commission. You issued an Order in June affirming that decision and based on further discussions, I then requested a Ruling on the lump sum request and there has been no decision on my Motion to dismiss the Appeal.

Justice Toal, at the Supersedeas Hearing and as part of my reply to the Motion for a Supersedeas, I requested that the Court address whether or not there was conflict of interest, of which I had recently been made aware by Mr. Miles, between and in



The Honorable L. Casey Manning
& Honorable Jean H. Toal
November 21, 2016.
Page 2

reference to the best interest of his two clients, that being the employer in this Workers' Compensation matter and the insurance carrier, the State Accident Fund.

Because there has been no decision on my Motion to dismiss, we need to have a decision entered and I would prefer at this late date to reargue that Motion to dismiss. In addition, because of the prior representations, prior to Mr. Miles involvement, made to me and upon which I detrimentally relied, I deferred and requested a delay in a decision beginning in January (note, I had requested and filed for an expedited Hearing of all issues in December, granted by Judge Lee), both on the request for payment of the past due Workers' Compensation benefits under the Award of the Commission in a lump sum and I requested a delay in a decision on the Motion to dismiss.

As part of the Hearing I would request a Hearing on the issue as to whether or not there is a conflict of interest and if so as to whether or not separate counsel needs to be appointed or retained to handle the Appeal in reference to and in the best interest of the South Carolina State Accident Fund and Mr. Miles other client, that being the employer, the Attorney General's Office.

Because of your past involvement in these issues, I believe it is appropriate to request that either one of you hear this matter and would request that it be heard, of course, as soon as possible so that we can move forward all independent counsel involved at that point.

By copy of this letter I am notifying Temus Miles of this communication and request for a Hearing on the Motion to dismiss and on the conflict of interest, of which I have been made aware by Temus but upon which material misrepresentation of fact, I detrimentally relied and contrary to the best interest of my client.

Sincerely yours,

Preston F. McDaniel

PFM/rmt

Cc: Temus C. Miles, Jr., Esquire (via email: tmiles@mckayfirm.com)

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew C. Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

November 22, 2016

VIA EMAIL ONLY - tmiles@mckayfirm.com
Temus C. Miles, Jr., Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201

RE: Ted Polansky vs. SC Attorney General's Office

Dear Tem:

We have had a very cordial relationship since your involvement and I am going to hold up on the letter, and I know you didn't mean it as a threat in your discussion about sanctions and costs. With that said, I want to address the two issues in my letter hereinafter, and let's move forward.

First, in reference to the conflict and really what is an ethics dilemma, I have been involved in a similar situation myself on the other side wherein I represented an employer in his workers' compensation claim and I represented one of his employee's in his workers' compensation claim. They came in at two different times and I did not catch the fact (corporate name) but after I did, I discussed it with the defense attorney and then we actually got an informal ethics opinion and then I discussed my continued representation with both of my clients and after written notification, they agreed to allow me to proceed to representing both clients in their individual cases as did Defense Counsel.

I've tried to avoid framing this in reference to ethics and have referred to it in terms of how it affected me and my client. Please understand you had nothing to do with this and I am not asserting anything against anyone. I am just trying to protect my client, me and all of us. Therefore, I am going to put this in writing. Your former associate, Pete Leventis, who was handling this case when I filed the Motion to Dismiss and also the Motion for the payment of the back due temporary total and also when I filed for an expedited hearing which was set in January, discussed with me the fact that he thought that if we could get the Second Injury Fund claim applied to the brain claim, that there would be no incentive to continue with the appeal. The



Temus C. Miles, Jr., Esquire
November 22, 2016
Page 2

State Accident Fund had not instituted paying temporary total disability benefits at that time and was not complying with the statute.

We agreed that I would put off a decision on the Motion to Dismiss and they would institute the payment of temporary total disability benefits back dated to the date of the Award. I would hold off on pushing for the past due Award and he would continue to check on Second Injury Fund recovery and once they made temporary total payments, follow-up and see if the Second Injury Fund started reimbursing the State Accident Fund for the renewed temporary total, he would let me know. If they did, they would have accepted the brain claim as part of the Second Injury Fund claim and he was going to recommend dismissal of the appeal.

As you are aware, it was during this period of time when he left the firm. You then asked for a thirty (30) day extension so you could review the file. The end result was that we did not get a decision on the appeal actually until June.

Right after your involvement and I checked on the status of the Second Injury Fund reimbursement is when you advised me that your firm had a conflict. As I see it, and correct me if I am wrong, I was lead to believe by your former associate that he was working with the State Accident Fund and following up on the status of the Second Injury Fund request and I relied on that to the detriment of my client.

Like every defense attorney in a workers' compensation case, you have two clients. There is no question that if the Second Injury Fund case is prosecuted to its fullest and Second Injury Fund recovery is obtained for the brain injury, it will be in the best interest of your one client, the employer, as it will have a tremendous effect on their experience modifier for setting their premium. It is in my client's best interest we resolve the appeal.

I believe it is incumbent upon the State Accident Fund to fully prosecute that claim. However, that is my opinion.

Subsequent to all this, we have been advised by the Executive Director that it appears that they are not aggressively prosecuting that claim and that you, because of your conflict, cannot be actively involved in the prosecution of that claim and I have no way of knowing what attorney, if any, is actually involved in prosecuting that claim.

I am sure that you have contacted both of your clients and have discussed the conflict that you have and have probably obtained similar releases like I did in reference to the situation I found myself in.

Temus C. Miles, Jr., Esquire
November 22, 2016
Page 3

So with all of that said, in reference to what occurred prior to your involvement, please let me know what you think is the appropriate forum for me to address that where I was relying on the representations being made to me by Defense Counsel on behalf of his clients then only to find out after new Defense Counsel became involved that your firm has a conflict and that nothing was going on that I was told was going on.

Quite frankly, I thought that by having a hearing it would provide all of us with a Decision, that the conflict was appropriately addressed moving forward if the appeal moved forward on behalf of either the State Accident Fund or the Attorney General's office, or they both agreed that they wanted to appeal and whatever decision they made in reference to prosecution of the Second Injury Fund request. Since you disagree with that and don't want that to happen, and because I don't want any more trouble, we simply will not address that further in this forum. Let me say in conclusion on that issue that I have unfortunately delayed the processing of this case for over a year on behalf of my client. I hope you know how that makes me feel.

As to the Motion to Dismiss, I am not sure whether or not I agree with you or disagree with you but I think the cleanest way to handle this would be to have a final decision on the Motion to Dismiss. In that regard, I would propose that we write a letter and see if we can get this matter heard next week and if I lose, I can promise you that I will immediately notify the Court that we will not be filing a Motion for Reconsideration and I will not appeal the Decision. If I prevail, then you can simply merge that appeal with the affirmation of the Award.

I look forward to your thoughts and if I don't hear from you before Thanksgiving, I hope you have a wonderful Thanksgiving. My cell phone number is 606-2107 if you want to call me.

Sincerely yours,



Preston F. McDaniel

PFM/kth

Tem Miles

From: Tem Miles
Sent: Tuesday, November 22, 2016 10:59 AM
To: 'Preston McDaniel'
Cc: 'Rose Thielke'
Subject: RE: Ted Polansky v SC Attorney General's Office

Preston,

You and I have discussed the issue that you believe create a conflict of interest in regards to my representation at length. I do not agree with you and do not think is appropriate for you raise this issue with the Court seeing as you are not my client and, are in fact, are my clients' adversary in this proceeding.

As for the Motion to Dismiss the Appeal, the court issued (at your request) an Order on the Appeal. This is a de facto denial of your Motion to Dismiss. We appealed the ruling on the Appeal to the Court of Appeals, where it is now pending. This divested the Circuit Court of Jurisdiction. I had intended to write the S.C. Court of Appeals today and inform them that all matters in the Circuit had been resolved, request that the abeyance be lifted, and that a Briefing Schedule be established. Given that you are once again bringing proceedings before the Circuit Court, I will not be able to do so.

I can't speak on issues prior to my involvement in this case. However, since my involvement, the excessive procedural complexity and associated delay and costs in this matter has been caused by you alone. I will oppose any additional proceeding, hearing, or order that you request in the circuit court regarding these cases until after a final determination is made on the Appeals by the higher courts. Please be aware, I will also seek all available sanctions and costs reimbursements for having to respond to such matters.

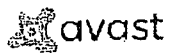
Thank you,

Tem

From: Rose Thielke [<mailto:rose@pfmcdlaw.com>]
Sent: Monday, November 21, 2016 5:42 PM
To: Tem Miles
Subject: Ted Polansky v SC Attorney General's Office

The attached letter is being sent at the request of Preston McDaniel.

Rose Thielke
McDaniel Law Firm



This email has been checked for viruses by Avast antivirus software.
www.avast.com



Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stublely
Janet Brooks Holmes
Peter P. Leventis, IV
Kelli L. Sullivan*

David M. Bornemann
Temus C. Miles, Jr.
Brandon P. Jones
James E. L. Fickling+
Richard E. Marsh, III
Meghan H. Hall

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*S.C. Certified Mediator
+ Also licensed in N.C.

February 24, 2015

VIA E-MAIL

The Honorable Susan S. Barden
Commissioner
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

RE: Theodore Polansky v. SC Attorney General
WCC No.: 9922954 & 0024408
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Commissioner Barden:

Enclosed please find the Defendant's Pre-hearing Brief and Notice of Witnesses and Written Medical Reports.

By copy of this letter to claimant's attorney, Preston F. McDaniel, I am serving him with the Pre-hearing Brief and Notice of Witnesses and copies of all medical reports we intend to submit pursuant to the Administrative Procedures Act via U.S. regular mail.

Sincerely,



Peter P. Leventis, IV

PPL/ecs
Enclosures

cc: Preston F. McDaniel, Esquire (w/encl)
Caroline Jurga (w/encl)



Claimant's Name: Theodore Polansky Employer's Name: SC Attorney General's Office
Address: _____ Address: Rembert C. Dennis Bldg
City: Columbia State: SC Zip: 29212 City: Columbia State: SC Zip: 29211
Home Phone: () - Work Phone: () - Carrier: State Accident Fund
Preparer's Name: Esquire Preparer's Phone #: (803) 256-4645

A claim for workers' compensation benefits is made based on the following grounds:

☐ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$507.34 (Max for 2000) 2. AWW: \$877.01 Date of Injury: 10/19/1999 & 05/30/2000
3. Type of injury and body part(s): Defendants admit injury to the back and psyche only in relation to the 5/30/2010 accident. Defendants admit injury to the Left knee only in relation to the 10/19/1999 injury.
This hearing is set on the Form 50 of the Claimant served on March 2, 2012. At that time, the only injuries the Claimant was alleging for both dates of accident were his: Back, left knee (resulting in RSD), psychological injury, and brain injury.
4. Facts in controversy: See Addendum
5. Legal issues involved: See Addendum
6. Unusual aspects: This case is set upon the Form 50 hearing request of the Claimant from back in 2012. Defendants contend this is based on upon improper procedure and violates the procedural and/or substantive due process rights of the Defendants in so much as the prior Form 50 was essentially dealt with by prior Order of the Commission, which was appealed and then settled on a consent Order.
Moreover, these Defendants contend that the Claimant alleges numerous additional injuries/conditions in his pre-hearing filings that were not raised on the Form 50 hearing request in 2012.
The Claimant waited in excess of 9 years to allege a physical brain injury, prefaced on a purported 2002 drug-drug interaction.
7. Witnesses (designate if expert):* The Claimant, any witness called by the Claimant, Amanda Duke; Mee-Ling Khor-Gould, Jessica Carter, and Caroline Jurga with the State Accident Fund; any expert called by the Claimant.
(The Defendants reserve the right to cross-examine any expert submitted by the claimant pursuant to 1-23-330 (3). The Defendants reserve the right to amended their Pre-hearing brief upon receipt of additional information.
8. Exhibits: See APAs
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
See APA Submissions.
10. Name, address, and specialty, if any, of the treating physician: _____
11. Impairment rating(s); body part(s); physician and date of opinion: _____
12. I am amending my Form 50/51 in the following manner: N/A

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Preston F. McDaniel,

1315 Elmwood Ave, Columbia, SC 29201 on the 24 day of Feb, 2015; ☒ first class postage ☐ certified mail ☐ personal service.

Signature: _____

Peter V. Leventis

Email: _____

pleventis@mckayfirm.com

Date of hearing: _____

March 6, 2015 (Commissioner Barden)

Time needed for hearing: _____

2.5 hours

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67- 1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58

Revised 7/13

58

PRE-HEARING BRIEF

Form 58 Addendum of the Defendants in re:

Theodore Polansky v. SC Attorney General

WCC No.: 9922954 & 0024408

Carrier Claim No.: 1999-003671 & 2000-3303

DOA: 10/19/1999 & 5/30/2000

Set for Hearing on: March 6, 2015

The Defendants contend that the Claimant has impeded their ability to comply with the prior consent Order for them to provide and obtain an examination of the Claimant's cognitive abilities, and that such impediment has hampered their ability to evaluate and assess the allegation of a brain injury in this matter. The Claimant was previously successful in keeping the Claimant from submitting to an IME evaluation by a neuropsychologist because he was not a medical doctor/physician, but has failed to comply with the obtainment and testing request by the Defendant and consented to by the Claimant.

4. A. This case is set for a hearing on a Form 50 filed back in 2012. The Defendants contend it is improper procedure and violates their procedural and substantive due process rights to set the hearing on such a matter two years later. Moreover These Defendants have not received thirty days' notice of all contested issues in this matter in that the March 2, 2012 Form 50 only alleges injury to the left knee, resulting RSD, as well as psychological and brain injury. The Form 58 pre-hearing filings of the Claimant however, allege and request a hearing as to the compensability of both legs, shoulders, kidneys, bladder and sexual dysfunction, in addition to the originally requested injuries back in 2012. Lastly, the Defendants contend this prior Form 50 was dealt with via an Order of Commissioner James, which was subsequently appealed, to the Full Commission and the Circuit Court by the Claimant, and disposed of via a Consent Order, which did not address having the hearing re-set on the prior Form 50.

B. Moreover, the Claimant submits his own psychological opinion/testing reports from non-physician psychologists. The Defendants object to the inclusion of reports by Dr. Avie Rainwater (who the Claimant lists on his pre-hearing filings as an "M.D." (Medical Doctor)) who is actually a Ph.D., as well as any reports from any non-medical doctor physicians in that: (a) the Claimant refused to undergo evaluation or testing by any non-physician of the Defendants, and it would cause inherent unfairness and inequity to the Defendants to permit the Claimant to use the sword and the shield in successfully keeping out any evaluation or opinion of non-physician evaluators of the Claimant, while at the same time permitting the Claimant to put forth such evidence; (b) Where the Claimant has failed to submit to the neuropsychological testing and evaluation agreed up in the prior Consent Order in this claim; and (c) when specifically as to

Ph.D. Dr. A. Rainwater, is in contested litigation with the Defendant S.C. State Accident Fund over a fee dispute, and has been for almost 3 years, and his opinions are, or demonstrably could be, in all likelihood colored and influenced by such litigation.

- C. As to the Claimant's alleged injury to his brain (as well as newly alleged injuries to his shoulders, Kidneys, bladder, right leg, and sexual dysfunction) these Defendants raise the equitable defenses of *laches*, waiver and estoppel. The Claimant alleges he suffered a permanent physical brain injury by accident in the form of drug interaction back in 2002 due to encephalopathy. He did not raise this issue until 2011- that is, over nine years after the alleged physical brain injury took place. *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 Claimant delayed unreasonably. The Claimant, 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.

Further, this unreasonable delay took place while the Claimant clearly had the ability and the opportunity to act sooner in asserting his rights (note the Claimant filed his own Form 40 hearing request for expedited consideration of medical treatment on other issues in March of 2012, for example, and was represented by legal counsel the entire time). Lastly, this delay has resulted in material prejudice to the Defendants 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 Claimant was still receiving ongoing medical management and diagnostics with other physicians. As to prejudice, the Claimant has also waited well beyond the statute of limitations for the Defendants 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 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 Defendants to file for indemnification, reimbursement or any other cause of action against the actual at fault medical

provider, and or drug manufacturer, pharmacist, or party(s) (See Gen. §15-3-454). More to the point, on the issue of prejudice, in addition to the inability of the Defendant to assess and investigate the medical condition of the Claimant for these alleged brain injuries back in 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011, the Claimant failed to even raise the issue in time for the Defendant to possibly assert this matter to the SC Second Injury Fund. Even if otherwise compensable, due to the Claimant's clearly unreasonable delay, without excuse and the clear ability to act sooner, great material prejudice has and will inure to the Defendants. Therefore, under the doctrine of *laches*, waiver, and estoppel the Claimant should be barred from now successfully asserting any alleged brain injury, as well as the multitude of other injuries he now asserts – some for the first time, almost a decade and a half after the date of the original accident. Note, the Claimant cites his reason for delaying in asserting or litigating his brain injury case – *even though he believed he had a brain injury the whole time* – was predicated on an inability to get the records for a number of years. Defendants are unaware of a motion to compel the production of documents against the medical provider, nor of any reason it would have taken in excess of 1 year, or 2 years, much less 10 years or 12 years in order to obtain such records.

5. A. As to the proper AWW/CR for this claim under S.C. Code Ann. §42-1-40; §42-1-50 and §42-9-10, the Claimant first cites to numerous *non*-compelling authorities from Circuit Court hearings and opinions. These are not cogent or binding legal precedential authorities. Defendants are aware of no authority to raise the compensation rate of the Claimant above the maximum compensation rate for the year in which the Claimant was injured. Even the seminal case in S.C. for finding an “extraordinary” reason for recalculating the compensation rate of a Claimant to a higher amount after the fact, *Sellers v. Pinedale*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), ultimately only raised the Claimant's AWW/CR up to the maximum AWW/CR for the year of his injury. However, even that finding of an unusual or extraordinary basis for changing the compensation rate, did not find that the compensation rate should go above the AWW in this state for the preceding fiscal year, or the “maximum comp. rate” for the year of injury. Such an interpretation of the law would emasculate the statutes further provided for in the Act such as lump sum payments of proceeds, the necessity for a discount rate for the pro-ration of benefits, the premise for permanency awards being based on a number of weeks at particular AWW/CR (See for example S.C. Code Ann. §42-9-10, -20 and -30), as well as other cogent legal authorities and statutes under Title 42 and the accompanying Regulations (See Generally Chapter 67), which are all prefaced upon there being a maximum compensation rate for a claimant arising on his date of injury.
- B. In addition to the raised defenses of *laches*, waiver, and estoppel against the Claimant's assertion for a higher AWW/CR over 12 years after he first started receiving benefits, and which was only ever raised (or even alleged) after Mr. Polanksy had received 500 weeks of weekly TTD benefits, these Defendants

contend that no extraordinary basis exists for changing the AWW/CR at this late date. The only basis the Claimant sites is that he made a high wage at the time of his injury and that the AWW/CR has gone up in this state by a certain percentage since he was injured. The fact of the matter is that for any wage earner at the maximum comp. rate for any claim, who receives TTD benefits or permanency benefits for in excess of one year, unless they make wages commensurate with exactly max comp. rate, then each year the max. comp. rate goes up would be an argument that their CR should go up. This is not written into the Act, and is prohibited by the Act. Furthermore, even if the AWW/CR was below the maximum for the year of the injury, and such circumstances did exist back in 1999 and 2000 which normally would have justified an extraordinary and unusual reason for increasing the AWW/CR, doing so after the payment of 500 weeks of benefits would unduly prejudice a carrier which has – for example – already assessed premiums for over 12 years based on the injury and components AWW/CR prefaced on upon the compensation rate with the Claimant received weekly checks on for 500 weeks without ever asserting or alleging this right.

- C. Defendants dispute the alleged physical brain injury, shoulder, liver and bladder injury, and that such has been caused by or is causally related to the 1999 and/or 2000 dates of accident under S.C. Code Ann. §42-1-160, and deny that the Claimant has suffered a compensable physical brain injury which has rendered him permanently totally disabled, and for which the Claimant first sought medical treatment nine years after the alleged injury took place.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	WORKERS' COMPENSATION
COUNTY OF RICHLAND	)	COMMISSION
Theodore Polansky,	)	WCC FILE NOS: 9922954 & 0024408
	)	
Employee,	)	
	)	
Vs.	)	
	)	NOTICE OF WITNESSES
SC Attorney General's Office,	)	AND WRITTEN REPORT(S) PHYSICIAN
	)	OR OTHER EVIDENCE TO BE
Employer,	)	INTRODUCED ON BEHALF OF
	)	THE EMPLOYER/CARRIER
And	)	
	)	
State Accident Fund,	)	
	)	
Carrier.	)	

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND
THE CLAIMANT'S ATTORNEY PRESTON F. McDANIEL:

YOU ARE HEREBY NOTIFIED THAT THE employer/carrier, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330 (1976, as amended), herewith submits the following reports/physicians or other evidence on behalf of the employer/carrier, to wit:

APA #	NAME OF PHYSICIAN/OTHER	DATED	PAGE NOS.
18.	Lexington Open MRI	6/25/2001	712
19.	Palmetto Baptist Medical Center	2/27/2002	713 - 714
20.	SC Neurological Clinic (Dr. Julian Adams)	8/23/2004	715 - 716
21.	Columbia Counseling Center	3/10/2005	717 - 718
22.	Radiology Exam Report	8/18/06 - 8/19/06	719 - 721
23.	Post Trauma Resources	11/5/2007	722 - 730

EXH #	EXHIBIT	DATED	PAGE NOS.
24.	Letter from Frank Forsthoefel to Ms. Jeanne Beard	3/8/2002	731
25.	Form 40 filed by claimant's attorney with	3/15/2011	732 - 737

	attachments		
26.	Letter from Mee Ling Khor-Gould & attachment	9/15/2011	738 – 739
27.	Form 50 filed by claimant's attorney with addendum	3/2/2012	740 – 742
28.	SC WCC Form 18	3/6/2012	743
29.	SC Workers' Compensation Hearing transcript before Commissioner James	5/16/2012	744 – 799
30.	Decision & Order on Defendant's Motion to Compel	6/27/2012	800 – 806
31.	SC Traffic Collision Report	10/28/2012	807 – 808
32.	Letter from claimant's attorney to Commissioner Beck with Consent Order	9/5/2013	809 – 812
33.	Decision & Order by Appellate Panel	2/7/2013	813 – 822
34.	Letter from claimant's attorney to Attorney Ellen Goodwin	4/16/2013	823 – 826
35.	Letter from claimant's attorney to SCWCC	5/1/2013	827
36.	Letter from claimant's attorney to Attorney Ellen Goodwin	6/13/2013	828 – 834
37.	Motion to Set Hearing Pursuant to Commission Regs	4/16/2014	835 – 840
38.	Administrative Order of Commissioner Wilkerson	5/8/2014	841
39.	Letter from claimant's attorney to Ms. Mee-Ling Khor-Gould	6/6/2014	842 – 843
40.	Letter from claimant's attorney to Attorney Ellen Goodwin	6/20/2014	844 – 845
41.	A.J. Harrison Investigations report & DVD	6/23/2014	846 – 847
42.	Letter from claimant's attorney to Ms. Mee-Ling Khor-Gould	6/26/2014	848
43.	Official 10 Year Driving Record of Claimant		849
44.	Certain Pleadings of the proceedings between Avie Rainwater, Ph.D. vs. South Carolina State Accident Fund		850 - 884

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the deposition(s) of any of the physicians or other person(s), whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER HEREBY NOTIFIED that the originals of the documents referred herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the employer/carrier.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the employer/carrier:

The Claimant, any witness called by the Claimant, Amanda Duke; Mee-Ling Khor-Gould, Jessica Carter, and Caroline Jurga with the State Accident Fund; any expert called by the Claimant. The Defendants reserve the right to cross-examine any expert submitted by the claimant pursuant to 1-23-330(3).



Peter P. Leventis, IV
McKay, Cauthen, Settana & Stublely
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Columbia, South Carolina

February 24, 2015

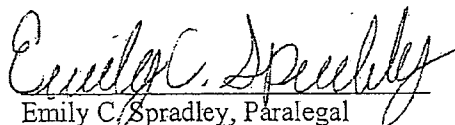
CERTIFICATE OF SERVICE

Emily C. Spradley, states that she is a paralegal for McKay, Cauthen, Settana & Stubley, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Pre-hearing Brief, Notice of Witnesses and medical records, have been served upon the claimant, by placing a copy of the same in the United States mail, first class postage prepaid, addressed to him at his office as shown below this the 24 day of February, 2015 as follows:

VIA E-MAIL

The Honorable Susan A. Barden
Commissioner
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

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DEFENDANTS APAS AND EXHIBITS

Theodore Polansky v. SC Attorney General's Office

WCC File No.: 9922954 & 0024408

Date of Injury: 10/19/1999 & 05/30/2000

Date of Hearing: March 6, 2015

Time: 1:30 p.m.

Hearing: 50/51

Location: SC Workers' Compensation Commission
1333 Main Street, Suite 500 – Hearing Room A
Columbia, SC 29202

Commissioner: Susan A. Barden

CA: Preston F. McDaniel

APA #	NAME OF PHYSICIAN/OTHER	DATED	PAGE NOS.
18.	Lexington Open MRI	6/25/2001	712
19.	Palmetto Baptist Medical Center	2/27/2002	713 – 714
20.	SC Neurological Clinic (Dr. Julian Adams)	8/23/2004	715 - 716
21.	Columbia Counseling Center	3/10/2005	717- 718
22.	Radiology Exam Report	8/18/06 – 8/19/06	719 – 721
23.	Post Trauma Resources	11/5/2007	722 – 730

EXH #	EXHIBIT	DATED	PAGE NOS.
24.	Letter from Frank Forsthoefel to Ms. Jeanne Beard	3/8/2002	731
25.	Form 40 filed by claimant's attorney with attachments	3/15/2011	732 – 737
26.	Letter from Mee Ling Khor-Gould & attachment	9/15/2011	738 – 739
27.	Form 50 filed by claimant's attorney with addendum	3/2/2012	740 – 742
28.	SC WCC Form 18	3/6/2012	743
29.	SC Workers' Compensation Hearing transcript before Commissioner James	5/16/2012	744 – 799
30.	Decision & Order on Defendant's Motion to Compel	6/27/2012	800 – 806
31.	SC Traffic Collision Report	10/28/2012	807 – 808
32.	Letter from claimant's attorney to Commissioner Beck with Consent Order	9/5/2013	809 – 812

33.	Decision & Order by Appellate Panel	2/7/2013	813 – 822
34.	Letter from claimant's attorney to Attorney Ellen Goodwin	4/16/2013	823 – 826
35.	Letter from claimant's attorney to SCWCC	5/1/2013	827
36.	Letter from claimant's attorney to Attorney Ellen Goodwin	6/13/2013	828 – 834
37.	Motion to Set Hearing Pursuant to Commission Regs	4/16/2014	835 – 840
38.	Administrative Order of Commissioner Wilkerson	5/8/2014	841
39.	Letter from claimant's attorney to Ms. Mee-Ling Khor-Gould	6/6/2014	842 – 843
40.	Letter from claimant's attorney to Attorney Ellen Goodwin	6/20/2014	844 – 845
41.	A.J. Harrison Investigations report & DVD	6/23/2014	846 – 847
42.	Letter from claimant's attorney to Ms. Mee-Ling Khor-Gould	6/26/2014	848
43.	Official 10 Year Driving Record of Claimant		849
44.	Certain Pleadings of the proceedings between Avie Rainwater, Ph.D. vs. South Carolina State Accident Fund		850 - 884

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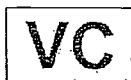
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Lexington

OPEN MRI

1999-3671

Experience the open difference

PATIENT: Polansky, Theodore
DATE OF BIRTH: 4/7/57
REFERRING PHYSICIAN: Dr. Frank Forsthoefel
DATE OF EXAMINATION: 6/25/01
PATIENT PHONE NUMBER: 788-2453

CT HEAD WITH CONTRAST

CLINICAL DATA: Posttraumatic stress disorder. Please evaluate for organic cause.

TECHNIQUE: Contiguous axial images were obtained with 5 mm of collimation from the skull base through the vertex after the administration of intravenous contrast. There are no priors for comparison.

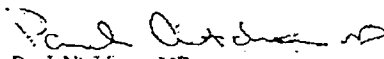
FINDINGS: The ventricles and cisterns are normal in size, shape and position. No intra-axial or extraaxial masses are present. No extraaxial fluid collections. No evidence of mass effect or midline shift. No evidence of hemorrhage.

There is no abnormal enhancement seen within the cisterns or sulci. No intraparenchymal mass lesions.

No obvious retro-orbital radiopaque foreign bodies are present.

The sinuses are within normal limits. Note is made the scan began at the inferior orbital rim, and if the patient's prior history is of a radiopaque foreign body along the inferior orbit, inferior to the globe, this should be excluded with orbital films prior to MRI.

CONCLUSION: Normal contrast head CT.


Paul Aitchison, MD
Radiologist
PA/H

2997 Sunset Boulevard, West Columbia, SC 29169
(803) 936-0223 - Fax (803) 936-0229

P.712

Radiology Services
Baptist Medical Center
Columbia, SC 29220

Patient Name
POLANSKY, THEODORE

Address

1999-3071X

MR#
B000435519

City ST Zip Code
COLUMBIA SC 29223

CPT: 70470

Account#
B0205200610

Check in D/T
02/27/02 1720

DOB
04/07/57

Age
44Y

Sex
M

Room#
5A-543-01

Pat Type
PYB

Release D/T
03/01/02 104

Ordering Physician
ADAMS, JULIAN C
PO BOX 1488

Admitting Physician
FORSTHOEFEL, FRANK

COLUMBIA

SC

VC

29202

Chk-in Date

Chk-in #

Exam

02/27/02

3156132

01832

CT HEAD W/WO CONT

Ord Diag: ;WITHDRAWL

The ventricular system is of normal size. There are no areas of altered density.

IMPRESSION: Normal CT with and without enhancement.

M.Burns/JA/lmp

/READ BY/ X CLEAR SYSTEM
/Released By/ X CLEAR SYSTEM

03/01/02 1041
LMP

FINAL

RECEIVED DATE : 03/01 10:43'02 FROM :

P.714

THE SOUTH CAROLINA NEUROLOGICAL CLINIC, P.A.

P.O. BOX 1488

COLUMBIA, SOUTH CAROLINA 29202

Telephone: (803) 254-6391 FAX: (803) 799-0682

Julian C. Adams, M.D. J. E. Carnes, M.D. Lawrence B. Mauldin, M.D. Theodore T. Faber, M.D.
Mark K. Lencke, M.D. Charles G. Shissias, M.D. Diana Fernandez, M.D.

Patient ID: 166965

Patient Name: THEODORE P POLANSKY

Date of Service: 08/23/2004

 CORRECTED COPY

1999-3671

NEUROLOGICAL CONSULTATION

HISTORY: Theodore P. Polansky is a 47-year-old male whom I apparently am seeing for Workers' Compensation because of "mental deterioration" according to both his history as well as his "girlfriend" of 20 years who came to the office. I saw him in February 2002 in neurological consultation at the Baptist Hospital because of a seizure that I thought was due to his drug dependency and drug withdrawal. He had some other problems related to drug use also. He has been on prescription drugs for many years. At the present time, he and his girlfriend state he has Reflex Sympathetic Dystrophy. He notes it in an area confined to the left patella about 2 inches by 3 inches. He uses a nerve stimulator applied by Dr. Ross Lynch, he claims, three years ago. He claims he has pains develop in the left knee travel down his left foot and travel back up his leg into his thigh and into his low back several times a day. He has seen several other doctors since last seen by me. He sees a Dr. Riber at The Pain Clinic who now has him on Methadone. He apparently was taking Avinza before that. He also takes Percocet, Bextra, and Skelaxin under this doctor. He also was seeing Dr. Forsthoefel, a psychiatrist, until he retired. He is taking Celexa, Serzone, Risperdal, Provigil, Imitrex, Lomotil, Flonase, Ambien, and Midrin. His care is being transferred to Dr. Krebbs since Dr. Forsthoefel retired. He is also seeing Dr. Beasley. He gets Oxyprol for urinary incontinence.

He and his girlfriend state that the main reason I am seeing him now is because of dementia or lack of memory. He cannot remember things in his distant past or recently. He has had no seizures or blackout spells.

Previous health is as noted above. He did have a hand operation when he was a teenager, and he states he started using some pain medication for this problem. He also had some form of lymphoma when he was young and had been on treatment for that for some years. He also apparently fell down and hurt his knee in the VA Hospital, and for that reason, he is claiming a knee injury and knee pain at the present time apparently. He has also acquired some Canadian crutches since I last saw him. He claims he uses them because his legs are weak and give out at times. His history is otherwise stated on the chart in some detail in several places. We will include the quotation notes from 2002 with this letter.

A general and neurological examination were done in detail and are recorded on the chart. There were no pertinent general physical defects. There were no skin changes in the lower extremities. Straight leg raising was negative.

His neurological examination was absolutely normal including +2 and equal reflexes throughout. Plantar responses were flexor. Sensory examination was normal for all modalities. Finger-to-nose testing was done normally. The patient could identify coins in both hands with his eyes closed. He could stand from the seated position without the use of his hands. He could stand on his tiptoes and heels. He could tandem walk without any difficulty. There were no demonstrable muscle weaknesses noted. His language function was normal; however, his memory examination and cognitive examination left something to be desired. The patient claims he

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Patient ID: 166965

Patient Name: THEODORE P POLANSKY

Date of Service: 08/23/2004

could not even remember how old he was when he was in high school; however, he could tell me exactly what dates he finished college, when he got both of his degrees, how long he worked for the Attorney General's office, etc. There are some real discrepancies that I thought were due to probably malingering.

- IMPRESSION:**
1. Long-standing prescription drug dependency.
 2. Alleged weakness of extremities without any neurological evidence of neurological loss in extremities.
 3. Memory loss of unknown causes, probably secondary to malingering.
 4. Doubt Reflex Sympathetic Dystrophy.

DISPOSITION: I would suggest that if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing, for I think there is very definite evidence of probably malingering. His recall for recent events appears to be spotty. He claims he cannot remember things in the distant past, etc., etc. He has 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. I do not think Mr. Polanski needs his Canadian crutches from a neurological standpoint. I also doubt very seriously whether his pain around the right knee could qualify for such a diagnosis as Reflex Sympathetic Dystrophy.

We appreciate very much the referral of him to us.


Julian C. Adams, MD
JCA/lqc

Enclosure: Notes from 2002

Kimberly L. Fender, M.A.
Licensed Professional Counselor

Robert E. Hooper, Ph.D.
Licensed Counseling Psychologist

Darrel G. Shaver, Ph.D.
Licensed Professional Counselor

COLUMBIA COUNSELING CENTER
COLUMBIA BEHAVIORAL MEDICINE, P. A.
900 ST. ANDREWS ROAD
COLUMBIA, SOUTH CAROLINA 29210
TELEPHONE (803) 731-4708 FAX (803) 798-7607

Associates

Paula M. Berkry, M.A.
Licensed Marriage and Family Therapist

W. Birt Dowling, M.A.
Licensed Professional Counselor

David E. Michael, M.A.
Licensed Professional Counselor

Peggy K. Porter, LISW-CP
Licensed Independent Social Worker

Joan E. Huvers, M.A.
Licensed Professional Counselor/Intern

1999-3071
WH

March 10, 2005

To: Ms. Fi-Fi Jubran

From: Robert E. Hooper, Ph.D.

RE: Theodore "Ted" P. Polansky

D.O.B. - 04-07-51

REH

The patient was seen on February 24, 2005 for a 50 minute clinical evaluation in my office. He was referred by Ms. Fi-Fi Jubran. Mr. Polansky arrived for the appointment as scheduled and completed the standard intake paperwork prior to his meeting with the evaluator. He was made aware of the reason for the evaluation and was cooperative with the stated purpose and continued to be appropriately disclosing throughout the interview. Mr. Polansky was dressed casually, was reasonably groomed and appeared about his stated age. He was alert and oriented fully.

Mr. Polansky is a 52 year-old Caucasian male who is divorced, having been married for six years from 1979. He reports that he has been a resident of Columbia, South Carolina since 1970. He reported his employment was as "chief investigator" for the SC Attorney General's office from 1978 to 2003. He stated he was "retired" as "medically disabled." He states he is a college graduate from the University of South Carolina with a BS degree in Criminal Justice. Mr. Polansky reported he was injured in 1999, first with an injury to the left knee from a fall and then, in a separate incident, a back injury. He stated both occurred at work, carrying file boxes of evidence related to an investigation. He has been treated for chronic pain since the injuries. He more recently reports, since 2001, mental health treatment for "bi-polar disorder," including in-patient hospitalizations in 2001 and 2002. He has not been able to return to work since 2003 due to these reported limitations. He has been treated and is followed by primary care, orthopedic, pain management, and psychiatric physicians and a psychologist.

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1999-3071
WH

Page 2 - Polansky

Mr. Polansky reported no history of mental health treatment prior to that reported above. He denied any legal history. He does note current general anxiety and significant depression, with multiple physical complaints. He reported migraine headaches about twice monthly, insomnia, occasional suicidal thoughts (basis for prior hospitalizations), memory deficits (appear to be short term, probably related to decreased concentration/attention), indecisiveness and passivity, chronic diarrhea, and significant difficulty with his romantic relationship of 20 years. He stated that management of pain medications has been most difficult. He described fairly limited activities of daily living, describing himself as "very inactive." He did report limits on physical activities related to strength and pain problems in his left knee and back. He notes he sometimes "makes life miserable for my girlfriend."

My impression of Mr. Polansky is that of an individual who has endured a very difficult experience with significant distress in the past several years, attributable to both his physical disabling condition and related chronic pain, as well as to the reported affective disorder. His affect, cognition, behavioral report and mood appear to presently suggest a moderate range of depressed mood. He is clearly challenged by the reality of his physical disability and chronic pain, but seems to feel his medical supports are adequate for the present. He reports he is currently on twelve separate medications, of which eight are considered psychoactive. Though a person in his situation would likely require multiple and combined pharmacological support, it is clear that such assistance is not now optimally providing relief. Psychiatric, psychotherapeutic, physical and vocational rehabilitation services are clearly a legitimate need for this individual.

Diagnosis: Axis I: Bipolar II Disorder, Most recent Episode Depressed (296.22)
Axis II: No Diagnosis
Axis III: Orthopedic injury, left knee, back, chronic pain
Axis IV: Vocational disability, primary support/relationship problems
Axis V: GAF = 55

Recommendations:

1. Continued psychotherapeutic support.
2. Strongly encourage second psychiatric opinion regarding optimal medication management.
3. Vocational evaluation/rehabilitation services should be provided with view to return to effective vocational function with training/placement assistance, as required.
4. With effective medication in place, the bipolar disorder will still likely present long-term but manageable hurdles to self-direction and personal adjustment. The specific outcome is very difficult to predict at present.

RW3 Hay
3/10/05

P. 718



Radiology Exam Report

Patient Name: POLANSKY, THEODORE P
MRN: 435519
FIN: 623001583
Patient Type: IPB-Inpatient
Accession No: CT-06-049958
Exam Date/Time: 8/18/2006 18:27
Ordering Physician: Sammons MD, Hubert D
Transcribed Date/Time: 8/18/2006 18:53
Radiologist: Bell III MD, Floyd E
Reason for Exam: R/O FX.

DOB/Age/Sex: 4/7/1957 49 Years Male
Location: B PCB/ 209/ 01
Exam: CT Cervical Spine W/O Contrast
Exam Status: Completed
Transcriptionist: Hook, Suzanne D
Report Status: Final
Resident:

Finding:

CT OF THE CERVICAL SPINE WITHOUT CONTRAST:

INDICATION: Fall, possible fracture.

TECHNIQUE: Axial noncontrast images through the cervical spine. Sagittal reconstructions were performed.

FINDINGS: The alignment is normal without listhesis. Vertebral bodies are maintained. Prevertebral soft tissues are unremarkable. Mild osteophytosis is seen primarily at C5-C6 and C6-C7. No fracture is noted. Incidental note is made of congenital ununited posterior ring of C1.

IMPRESSION: No evidence of fracture.

Printed to the ER 8/18/2006, 6:53 p.m.

*** Final ***

Trans On: 08/18/2006 18:56 by: SDH

Read by: Bell III MD, Floyd E

Released By: Bell III MD, Floyd E

Released on: 08/18/2006 23:46

*** END OF REPORT ***

Page 1

Printed Date/Time: 10/3/2006 10:20:16

P. 719

Radiology Exam Report

Patient Name: POLANSKY, THEODORE P

MRN: 435519

FIN: 623001583

Patient Type: IPB-Inpatient

Accession No: CT-06-049949

Exam Date/Time: 8/18/2006 18:27

Ordering Physician: Sammens MD, Hubert D

Transcribed Date/Time: 8/18/2006 18:47

Radiologist: Bell III MD, Floyd E

Reason for Exam: Pain

DOB/Age/Sex: 4/7/1957 49 Years Male

Location: B PCB/ 209/ 01

Exam: CT Head W/O Contrast

Exam Status: Completed

Transcriptionist: Hook, Suzanne D

Report Status: Final

Resident:

Finding:

CT OF THE HEAD WITHOUT CONTRAST:

INDICATION: Pain after fall.

COMPARISON: 2/27/2002

TECHNIQUE: Axial images through the brain with contrast.

FINDINGS: No definite intra-axial or extra-axial bleed is noted. There is no evidence of mass effect or edema. There is normal gray-white matter differentiation. The ventricles are within normal limits without hydrocephalus. The osseous structures appear intact. The visualized paranasal sinuses are grossly clear.

IMPRESSION: No evidence of acute intracranial process.

Printed to the ER 8/18/2006, 6:47 p.m.

*** Final ***

Trans On: 08/18/2006 18:46: SDH

Read by: Bell III MD, Floyd E

Released By: Bell III MD, Floyd E

Released on: 08/18/2006 23:46

*** END OF REPORT ***

Page 1

Printed Date/Time: 10/3/2006 10:20:23

P. 720

Radiology Exam Report

Patient Name: POLANSKY, THEODORE P
MRN: 435519
FIN: 623001583
Patient Type: IPE-Inpatient
Accession No: CT-06-050106
Exam Date/Time: 8/19/2006 12:34
Ordering Physician: Word MD, Bradley W
Transcribed Date/Time: 8/19/2006 13:14
Radiologist: Bull MD, Douglas M
Reason for Exam: Leg Numbness

DOB/Age/Sex: 4/7/1957 49 Years Male
Location: B PCB/ 209/ 01
Exam: CT Lumbar Spine W/O Contrast
Exam Status: Completed
Transcriptionist: Jumer, Norma Y
Report Status: Final
Resident:

Finding:

CT LUMBAR SPINE:

Scans were made from T12 to the upper sacrum. Axial and sagittal reconstructed images are reviewed.

The vertebral bodies are well maintained in height and show normal alignment with no occult lesions. The vertebral bodies are maintained except for narrowing and arthrosis at L5-S1. The spinal canal is overall adequately patent in caliber.

At the disc spaces of T12-L1, L1-2, L2-3, L3-4, and L4-5, there are no significant findings.

At L5-S1, there is a moderately severe degree of degenerative disc disease and facet arthropathy all leading to bony osteophyte formation. Although there is no overt stenosis of the central canal, there is bilateral foraminal bony narrowing a bit worse on the right than on the left. Correlation is needed regarding whether this relates to the patient's current symptomatology. There is no sign of pars defect.

IMPRESSION: Degenerative disc and facet disease at L5-S1 with bony osteophytosis causing bilateral L5 nerve root foraminal narrowing. There may also be some osteophyte related deflection of the right S1 nerve root. No evidence of any overt disc herniation.

Faxed to floor 8/19/2006 13:14 PM

*** Final ***

Read by: Bull MD, Douglas M
Released By: Bull MD, Douglas M
Released on: 08/19/2006 16:57

Trans On: 08/19/2006 13:1 by: NYJ

Technologist: Stansill, Mary K, Davenport, Flora D

*** END OF REPORT ***

Page 1

Printed Date/Time: 10/3/2006 10:19:54

P. 721





Post Trauma Resources

Lawrence H. Bergmann, Ph.D., LPC, LPC/S, CTS
President

Roger W. Deal, M.D.
Medical Director

5 November 2007

State Accident Fund

Re: Theodore Polansky

A psychological examination was requested by the State Accident Fund to assess the psychological and neuropsychological impact of his 19 October 1999 work-related accident. My responsibilities were to clinically interview Mr. Polansky and offer an opinion concerning the following referral questions:

Is Mr. Polansky experiencing neuropsychological impairment?

What further evaluation would you recommend?

This report was based on a 120-minute psychological evaluation, psychological testing and neuropsychological testing. I met with Mr. Polansky on 20 September 2007 and informed him of the nature of the examination and that a report would be shared with the referral source. He articulated understanding. He was evaluated on 20 September and 18 October.

Patient Demographics

The patient is a 50 year-old Caucasian male. Mr. Polansky provided the history.

Written Documentation Reviewed

Not applicable.

1709 Laurel Street
Columbia SC 29201

phone 803.765.0700
toll free 800.459.6780
fax 803.765.1607

www.posttrauma.com

Corvel Capture 11/7/2007

P.722

Symptoms/Impairments

Mr. Polansky reported that he was working as a chief investigator in charge of healthcare fraud when, on 19 October 1999, he fell down the stairs and injured his left knee. "I don't know if I hit my head or not," he said, "I know I didn't lose consciousness." He was out of work for approximately one year until his sick leave ran out. He returned to work until he experienced difficulties with his back. He has since had a spinal cord implant. He retired in 2003, Mr. Polansky said.

Since his 1999 fall, Mr. Polansky has reportedly experienced a reduction in sleep. He said that he currently sleeps approximately four hours each night with the use of Ambien. He said that he has less interest and ability to engage in previously enjoyed activities, such as enjoying his lake home because of his developed fear of water. He reported a decrease in energy, ability to concentrate and sex drive. He denied suicidal ideation. Current risk factors for suicide include symptoms of anxiety and frustration with cognitive difficulties. Protective factors include his supportive relationship with his girlfriend and his willingness to get help. Based on Rudd et al's 2001 criteria for determining suicide risk assessment, Mr. Polansky is currently at No Risk for self-harm. The corresponding level of appropriate mental health care is outpatient therapy with recurrent risk assessment.

Mr. Polansky reported that he is most concerned about what he perceives to be his slipping cognitive abilities. He said that he cannot remember to take his medications and, because he cannot remember to turn off the stove, he stopped cooking approximately one year ago. He has word-finding difficulty and often finds himself forgetting where he is going when he gets on the interstate; he ends up heading in a wrong direction. He no longer reads, he said, and cannot remember how to operate a computer. He reportedly has difficulty spelling and he can no longer add or do calculations. "My girlfriend handles all of the finances," Mr. Polansky said. He initially said that he has had seizures since his injury, but then said, "well, I'm on anti-seizure medications; I assume that I've had them." He concluded that he cannot remember.

Mr. Polansky said that he has a piece of shrapnel in his eye and, as a result, wears glasses. He said that it does not hurt but he has been advised never to have an MRI; "it would pull out the shrapnel and may cause me to go blind." He denied a history of high blood pressure. There was no family history of dementia, as far as he knew. He completed college and maintained 3.5 gpa in order to stay on scholarship. He denied ever failing a class or being held back a grade.

His girlfriend, Gale DuBose, was interviewed by phone on 10 October 2007. She indicated that she first noticed problems with Mr. Polansky's word-finding problems. "He had problems with this for several years," she said, "but it has progressively gotten worse." He also has difficulty remembering what he did from one day to the next, Ms. DuBose said. "He'll remember if he goes somewhere, but he won't remember something like working in the yard or doing something around the house." She denied noticing any major differences in his personality, aside from his lack of confidence in his mental abilities and his more depressed mood.

Previous Injuries/Psychological Treatment

Mr. Polansky denied mental health treatment prior to his injury and denied the need for such services. He denied a history of head injuries.

Behavioral Observations

Mr. Polansky appears stated age. While the Folstein Mini Mental Status Exam is typically used as a screening instrument to identify those with potential cognitive problems, it can also be useful for any provider to track cognitive change across time. He scored a 22/30 on the MMSE, which is suggestive of cognitive impairment (recommended cutoff is 23). He missed three points because he failed to identify the appropriate season, date and day of the week; a point because he was unaware of the street address of the evaluation; three points because he failed to remember the three words on the delayed recall; and a point because he failed to follow a three step instruction (took the paper with the left, rather than right, hand). He was therefore not well oriented to location or time. Regarding level of consciousness, he appears alert. Affect is flat. Reported mood is "okay." He presented himself in a casually dressed and appropriate fashion. Eye contact can be described as good. Speech is logical, coherent and goal-directed. His recent and remote memory appeared to be impaired due to assessment results and his deference to notes throughout much of the clinical interview. For example, he looked at his driver's license in order to tell me what his birthday was. Psychomotor activity is normal. There is a negligible degree of conceptual disorganization evident. His thought content is characterized by no significant preoccupations. Regarding perceptual functioning, the patient denies hallucinations and none are evident. Attitude can be described as cooperative and interested. At times he expressed embarrassment because of his performance on the tasks. As far as insight is concerned, the patient verbalizes awareness of problems and sees consequences. Judgment appears good. Attention/Concentration is characterized by limited ability to attend and maintain focus. Regarding impulse control the patient is reflective and able to resist urges.

Quality of Historian. The quality of Mr. Polansky's self-reporting of symptoms appeared consistent with his affect and presentation.

Results of Psychological Testing

The following assessment measures were used:

1. Beck Anxiety Inventory (BAI)
2. Beck Depression Inventory-Second Edition (BDI-II)
3. Boston Naming Test
4. Comprehensive Trail-Making Test (CTMT)
5. Controlled Oral Word Association (COWA)
6. Hopkins Verbal Learning Test-Revised (HVLT-R)
7. Folstein Mini-mental State Exam (MMSE; discussed in *Behavioral Observations*)
8. Rey Complex Figure Test (RCFT)
9. Wechsler Adult Intelligence Scale-Third Edition (WAIS-III)
10. Wechsler Memory Scale-Third Edition (WMS-III)

Mr. Polansky articulated understanding of each instrument.

Mood/Emotional Symptoms. He was administered the Beck Depression Inventory-Second Edition, a 21-item self-report questionnaire assessing depressive symptoms in the time frame of the "past two weeks including today." There is no validity measure. Scores range from Minimal, Mild, Moderate to Severe levels of depressive symptoms. Compared to the normal population, he reported experiencing Minimal levels of depression (BDI-II=8).

The patient was administered the Beck Anxiety Inventory, a 21-item scale which measures the severity of anxiety in the time frame of the "past week including today." There is no validity measure. Scores range from Minimal, Mild, Moderate to Severe levels of anxiety symptoms. Compared to an outpatient psychiatric population, he reported experiencing Moderate levels of anxiety (BAI=23).

Intelligence. On a measure of Intelligence, Mr. Polansky performed at the Extremely Low range of intellectual functioning (FSIQ=54; outperforming .1% of his peers) with no difference between verbal (VIQ=57) and performance (PIQ=59) subtasks. His performance was consistently in the impaired range on both verbal and nonverbal tasks. He performed best on a task that required him to recreate designs using two-sided blocks (Block Design=6), arrange a series of pictures sequentially into a story (Picture Arrangement=5) and demonstrate word knowledge (Vocabulary=4).

Memory. Mr. Polansky performed in the Borderline range on tasks requiring working memory, immediate memory for visual information, and delayed recognition of auditory information. His performance for all other memory tasks was in the impaired range. This pattern suggests that he is able to immediately recall the information that was encoded visually but forget a significant amount of it after a twenty-five minute delay. While he does not encode very much information that is verbally presented, he is able to recognize some of the information after a delay even if he had an impaired ability to recall it. Since his Auditory Immediate score was significantly lower than his scores on working memory tasks, Mr. Polansky's appears to have difficulty learning new material that is presented to him orally.

His performance on a task requiring the learning of a series of unrelated words over multiple trials was in the Mildly Impaired range (HVL-T-R total recall T=32) while his delayed recall of these words (HVL-T-R delayed recall T=20), was in the Severely Impaired range. He retained only 50% of the words he learned by the third trial and his ability to discriminate between words that were or were not on the list was in the Severely Impaired range.

Validity of Reported Memory Impairments. On a series of forced choice ("yes or no") items, Mr. Polansky performed better than chance; he answered 73% correctly. This performance, taken with his apparent effort on the intelligence and memory measures, suggests that the feigning of memory difficulties is not likely.

Page 4 of 9



This fax was received by GFI FAXmaker fax server. For more information, visit: <http://www.gfi.com>

P. 725

Language: Mr. Polansky's ability to name common objects was in the Extremely Low range of functioning.

Visuospatial Ability and Memory. On the RCFT, Mr. Polansky's abilities to copy a complex figure was in the Severely Impaired range. His ability to recall immediately (draw the figure from memory after a three minute delay) was Mildly Impaired and his ability to recall the figure after a thirty minute delay was Mildly-to-Moderately Impaired. Mr. Polansky's ability to recognize pieces of the figure was in the Severely Impaired range. His overall profile suggested storage impairment.

Executive Functions: On tasks of executive functioning, Mr. Polansky demonstrated Severely Impaired performance on tasks that required visual processing and Average ability on word-generating tasks. On tasks requiring speeded visual scanning and numerical sequencing, he performed in the Severely Impaired range. He demonstrated this severe impairment in both the simple and complex (requiring both number and letter sequencing) versions of this task. The exception was his performance on one of the simple sequencing tasks (Trail 2), on which he performed in the Mild-to-Moderately Impaired range. On each of the five tasks, Mr. Polansky committed at least one sequencing error (specifically, he skipped at least one letter or number on each of the trails).

Verbal fluency, as assessed by his ability to generate words beginning with a specified letter, was in the Average range. On a task requiring him to generate a list of animals, Mr. Polansky performed in the Low Average range.

DSM-IV-TR Diagnoses

Axis I	294.9	Cognitive Disorder Not Otherwise Specified
Axis II	V71.09	No Diagnosis or Condition on Axis II
Axis III		See medical record
Axis IV:		Social isolation and fatigue
Axis V:	GAF=65	

Responses to Specific Questions

Is Mr. Polansky experiencing neuropsychological impairment?

The results of the neuropsychological evaluation suggest impairment in word finding, immediate auditory memory, delayed memory and tasks requiring both verbal and nonverbal skills. This diffuse impairment in abilities is suggestive of dementia. If it were the result of a more localized injury, we would expect to see more variation in his scores. For example, a head injury patient would likely perform relatively well on the Verbal Paired Association tasks (Goldstein et al., 1994). Mr. Polansky's impairment appears to affect all areas of skill equally.

Mr. Polansky exhibits specific criteria for Dementia of Alzheimer's Type, including multiple cognitive deficits manifested by memory impairment (criterion A.1), aphasia



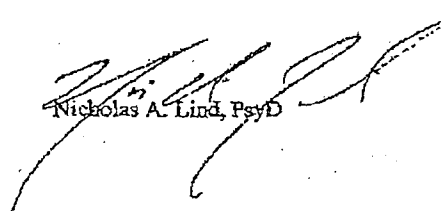
(A2a) and executive functioning disturbance (A2d). These deficits represent a significant decline from his previous level of functioning and are the result of a gradual cognitive decline. The deficits may, in fact, predate his work-related injury (although this may be difficult, if not impossible, to determine).

What further evaluation would you recommend?

I recommend that Mr. Polansky be referred for a brain scan to determine the presence/extent of atrophy. While the shrapnel in his eye may prevent an MRI from being conducted, it may be beneficial to have a CT scan to determine the presence and extent of current atrophy. MMSEs at future medical appointments may help track the course of his cognitive deterioration.

Thank you for referring Mr. Polansky. Please let me know if you have any questions or concerns.

Respectfully submitted,


Nicholas A. Lind, PsyD

*would also need blood workup
B12, folate, RPR, TSH etc
from Dr DesChamps office*

Thank Opulentians MD

Animal Naming

Raw	M	SD	
14	21.9	5.4	Low Average

Boston Naming Test

Raw	M	SD	
43	55.2	4.0	Extremely Low

Comprehensive Trail-Making Test (CTMT)

	Raw	(T)	[%tile]	
Composite Index	105	(18)	[<1]	Severely Impaired
Trails 1	142"	(18)	[<1]	Mild-to-Moderately Impaired
Trails 2	86"	(30)	[<1]	Severely Impaired
Trails 3	130"	(21)	[<1]	Severely Impaired
Trails 4	138"	(18)	[<1]	Severely Impaired
Trails 5	318"	(18)	[<1]	Severely Impaired

Controlled Oral Word Association (COWA)

	Raw	M	SD	
Total	30	39.3	11.6	Average
F	13	13.7	4.5	Average
A	7	11.2	4.3	Average
S	10	14.4	4.6	Average

Hopkins Verbal Memory Test-Revised (HVMT-R)

	Raw	(T)	
Total Recall	20	(32)	Mildly Impaired
Delay	3	(≤ 20)	Severely Impaired
Retention	50%	(≤ 20)	Severely Impaired

The Mini Mental State Examination

22 Impaired

Rey Complex Figure Test and Recognition Trial (RCFT)

	Raw	(T)	[%tile]
Copy	24.5		[≤ 1]
Immediate Recall	12	(35)	[7]
Delayed Recall	11	(31)	[3]
Recognition Total Recall	15	(≤ 20)	[≤ 1]

Wechsler Adult Intelligence Scale-Third Edition (WAIS-III)

Scale	Sum of SS	IQ Score	95% Conf. Interval	PR	Qualitative Description
Verbal	15	57	53-63	0.2	Extremely Low
Performance	17	59	55-68	0.3	Extremely Low
Full Scale	32	54	51-59	.1	Extremely Low

Sum of Index 95% Conf.

Scale	SS	Score	Interval	PR
Verbal Comprehension	9	61	57-68	0.5
Perceptual Organization	10	62	57-72	1.0

	Raw Score	Age SS	PR	Ref SS*
Verbal Subtest				
Vocabulary	16	4	2	4
Similarities	5	2	<1	2
Arithmetic	5	2	<1	2
Digit Span	2	1	<1	1
Information	5	3	1	5
Comprehension	7	3	1	4

Performance Subtest				
Picture Completion	3	2	<1	1
Digit Symbol-Coding	5	2	<1	1
Block Design	20	6	9	6
Matrix Reasoning	1	2	<1	1
Picture Arrangement	3	5	5	4

Wechsler Memory Scale-Third Edition (WMS-III)

Scale	Sum of SS	Index Score	95% Interval	Conf. PR	Qualitative Description
Auditory Immediate	8	65	60-74	1.0	Extremely Low
Visual Immediate	13	78	72-92	7.0	Borderline
Immediate Memory	21	65	60-76	1.0	Extremely Low
Auditory Delayed	8	64	59-78	1.0	Extremely Low
Visual Delayed	9	65	61-81	1.0	Extremely Low
Aud. Rec. Delayed	5	75	70-93	5.0	Borderline
General Memory	22	62	57-73	1.0	Extremely Low
Working Memory	9	71	66-84	3.0	Borderline



Wechsler Memory Scale-Third Edition (WMS-III)
(continued)

	Raw Score	Age SS	Ref SS
Logical Memory I - Recall	17	3	3
Faces I - Recognition	26	6	5
Verbal Paired Assoc I - Recall	4	5	4
Family Pictures I - Recall	34	7	6
Letter-Number Sequencing	6	6	5
Spatial Span	7	3	2
Logical Memory II - Recall	5	4	3
Faces II - Recognition	27	5	4
Verbal Paired Assoc II - Recall	0	4	2
Family Pictures II - Recall	23	4	3
Auditory Recognition - Delayed	42	5	5

JL

FRANKE FORSTHOEFEL, M.D.

1999-3671

PSYCHIATRY
1333 TAYLOR ST., SUITE 3F
COLUMBIA, SC 29201
TELEPHONE 255-2748

March 8, 2002

Ms. Jeanne Beard, RN
Case Assessment Team
PO Box 429
Chaplin, SC 29036

2-3303

RE: Ted Polansky
DOB: 04/07/57

Dear Ms. Beard:

In response to our recent telephone conversation, Mr. Ted Polansky's clinical and cognitive deterioration has fully remitted. It appears that Mr. Polansky has had an allergic reaction to Seroquel medication with facial, laryngeal, hand and ankle edema, Seroquel related encephalopathy and worsened enuresis. Elevated white and eosinophil counts and abnormal liver values support this drug reaction. This allergic reaction has not fully remitted. His neuropsychological testing after this remission is entirely within normal limits as is his EEG and Brain Scan. Ted's reading skills, comprehension and memory retention have all returned to normal from its deterioration prior to the hospital use of Seroquel. It is clear to me that this earlier two-month deterioration, prior to his hospitalization, was caused by his own confusion due to problems with compliance and probable overmedication. I have discharged from the hospital to be followed up with Dr. Riber and myself on a weekly basis.

I appreciate your continuing concern and assistance. If you should have any further questions, please feel free to contact me. I have also enclosed copies of my notes.

Sincerely yours,

Frank E. Forsthoefel
Frank E. Forsthoefel, M.D.

FEF:aag
Enclosures

Cc: Ms. Mee Ling Khor-Gould with SAF
File

P.731

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5675



WCC File #: 9922954 / 0024408
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Theodore Polensky SSN: _____ Employer's Name: SC Attorney General's Office
Address: _____ Address: P.O. Box 11549
City: Columbia State: SC Zip: 29223 City: Columbia State: SC Zip: 29211
Home Phone: (803) 773-7030 Work Phone: () Insurance Carrier: State Accident Fund
Preparer's Name: Preston F. McDaniel, Esq. Law Firm: McDaniel Law Firm Preparer's Phone #: (803) 771-7211

By signing this document, I do hereby certify that the issue involved in this motion for relief is such that immediate attention is necessary and that the issue is capable of speedy resolution by the jurisdictional Commissioner.

My motion (attached) for expedited adjudication is made on the following grounds (R.67-215):

- ☐ Death benefits are due and the employer/ carrier's investigation establishes that no dispute exists as to the disposition of death benefits (attach names, ages, and addresses of death beneficiaries)
- ☐ The parties have reached a settlement agreement on a Form 16, clincher or resolution and distribution of third party proceeds, involving unrepresented claimants, and seek an approval
- ☒ The case is accepted and involves medical treatment recommended by an authorized treating physician and employer/carrier disagrees.
- ☐ The case involves a request for a medical evaluation on change of condition pursuant to Regulation 67-602(c)
- ☐ Employer's representative has terminated payments of compensation and has not appropriately filed a Form 21, Form 15 or Form 17
- ☐ The case is accepted and the employer/carrier has not paid or has stopped paying medical bills, mileage and medication expenses
- ☐ The issue is determination of a lump sum payment under §42-9-301 and Regulation 67-1605.

This request is on behalf of the ☒ Claimant
☐ Carrier

☒ \$25 Filing Fee is attached (MUST be attached to this request)


Signature of Moving Party

RECEIVED

MAR 17 2011
MAR 17 2011

03/15/2011
Date (m/d/yyyy)

LEGAL JER.
STATE ACCIDENT F.

This form and motion must be served on all parties and filed with the Judicial Department. A proof of service and filing fee must be attached.

WCC Form # 40
Rev. 10/04

40

Motion for Expedited Adjudication

P.732

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NOS.: 9922954/0024408

THEODORE POLANSKY,
EMPLOYEE/CLAIMANT,
v.
SOUTH CAROLINA ATTORNEY
GENERAL'S OFFICE,
as EMPLOYER,
and
STATE ACCIDENT FUND,
as INSURANCE CARRIER,
DEFENDANT(S).

MOTION FOR EXPEDITED HEARING
FOR AUTHORIZATION FOR
MEDICAL CARE

TO: MEE-LING KHOR-GHOULD, STATE ACCIDENT FUND, INSURANCE CARRIER
FOR THE EMPLOYER/CARRIER

YOU WILL PLEASE TAKE NOTICE that on the 10th day after
service hereof or as soon thereafter as Counsel for the
Claimant, Theodore Polansky, may be heard or such other time as
ordered by the Commission, Mr. Polansky will move for an Order
of the Commission, ordering the Defendants to provide medical
care with Dr. Giancarlo Barolat, M.D., as recommended by the
authorized treating physician, Ezra Riber, M.D., of Palmetto
Pain Management. Said motion is based upon the Memorandum
attached hereto and incorporated herein by reference.

I SO MOVE.

Respectfully submitted,


Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

March 15, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NOS.: 9922954/0024408

THEODORE POLANSKY,

CLAIMANT,

v.

SOUTH CAROLINA ATTORNEY
GENERAL'S OFFICE,

as EMPLOYER,

and

STATE ACCIDENT FUND,

as INSURANCE CARRIER,

DEFENDANT(S).

MEMORANDUM IN SUPPORT OF
MOTION

TO: MEE-LING KHOR-GHOULD MANAGING AGENT/ADJUSTER FOR,
STATE ACCIDENT FUND, INSURANCE CARRIER FOR THE
EMPLOYER/CARRIER

The Claimant, Mr. Theodore Polansky, by and through his undersigned Counsel would submit the following in support of his Motion for medical care as ordered by the authorized treating physician:

1. That the authorized treating physician, Ezra Riber, M.D., has been treating Mr. Polansky for chronic pain and all problems related to his injury including RSD, left lower extremity, and chronic irretraceable left leg pain; chronic low back pain (right > left); radicular syndrome, right lower extremity stemming from his severe physical condition; and chronic pain syndrome, depression and anxiety (in conjunction with the treating psychiatrist).

2. That in the fall of 2010, treatment note 9/20/10, (Exhibit A attached hereto and incorporated herein by reference), the authorized treatment physician noted that "pulse generator was changed locally in August of 2009, following which the entire system failed. He was sent to Charleston for follow up treatment and revision there failed to improve his situation." According to the records, up until that failure Mr. Polansky had received a significant decrease in his lower back pain based on the spinal chord stimulator that had been implanted and after the failure the efforts had been directed at regaining this in reference to the coverage for his back and leg.

3. That Dr. Ezra Riber, the authorized treating physician, on October 20, 2010 (Exhibit B) recommended that he be referred to a renowned specialist in the area of spinal chord stimulation, Dr. Giancarlo Barolat, in Colorado, whose C.V. was forwarded to the adjuster by letter from Claimant's counsel on November 23, 2010. (Attached as Exhibit E)

4. That subsequent to the above referenced recommendation and the specific referral by Dr. Riber to Dr. Barolat, as set forth in the Affidavit from the legal assistant assigned to this file, Mrs. Glee Henderson, (attached hereto and incorporated herein by reference) she, Mr. Polansky and Mrs. Gale Dubose have all made repeated requests that this be authorized and have notified the Adjuster that the visit with Dr. Barolat has been scheduled. The Adjuster was forwarded the written referral of October 20, 2010, no later than November 16, 2010. Finally after continued refusal to provide this treatment, on January 31, 2011,

Counsel for the Claimant wrote the adjuster, Mrs. Mee-Ling Khor-Ghould, one final request requesting that this medical treatment authorized (attached as Exhibit C). The only reason ever given by the adjuster for not authorizing this care is that she will not authorize an out-of-state doctor and is trying to find someone else to do this in South Carolina.

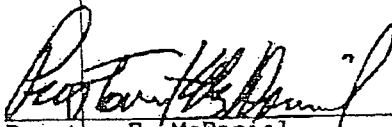
5. That subsequent to the referral of October 20, 2010, on February 16, 2011, Dr. Riber gave a detailed explanation of the reason for the referral. Dr. Barolat, as is explained in the detailed note from Dr. Riber (Attached as Exhibit D) and as set out in his C.V. (Exhibit E) is an internationally renowned expert in the area of neuromodulation and implantation of spinal chord stimulators and specialized treatment in that area. It is for this reason that Dr. Riber referred Mr. Polansky to Dr. Barolat.

6. That the adjuster, in addition to refusing to follow the recommendations of the authorized treating physician which constitutes the unauthorized practice of medicine without a license, is obviously failing to recognize the extreme specialty needed in this case that Dr. Barolet has and that the reason for the referral to him involves a very specialized type of care that is necessary in reference to Mr. Polansky's care. As Dr. Riber explains all in-state available expertise has been tried but this specialized level of care is not available in South Carolina.

7. That the authorized treating physician has referred Mr. Polansky to Dr. Barolet for the reasons as stated in his report and the Claimant requests the immediate referral to Dr. Barolet for this treatment per that referral.

Wherefore, the Claimant would respectfully move for the Commission to order the adjuster to provide the medical care as recommended by the authorized treating physician.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

March 15, 2011

P.737

SOUTH CAROLINA STATE ACCIDENT FUND

HARRY B. GREGORY, JR., Director

September 15, 2011

Social Security Administration
Mid Atlantic Social Security Center
300 Spring Garden Street.
Philadelphia, PA 19123-2999

RE: Theodore Polansky vs
Attorney General's Office
SF#: 1999-003671 & #2000-003303
Date of Injury: 10/19/1999 & 5/30/2000

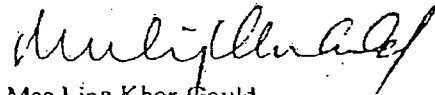
Dear Sir/Madam:

This letter is to confirm that Mr. Polansky was paid \$483.47 weekly from 8/8/2001 through 5/2/2009; and \$507.34 from 5/3/2009 through 3/8/2011. The last paid date was March 8, 2011.

Any questions, please call me @ (803)-896-5834.

Sincerely,

STATE ACCIDENT FUND



Mee Ling Khor-Gould
Claims Adjuster

/mlg

2000-3303

Social Security Administration
Retirement, Survivors, and Disability Insurance

Mid-Atlantic Program Service Center
300 Spring Garden Street
Philadelphia, PA 19123-2992
Date: July 28, 2011
Claim Number: 214-66-4408HA

SOUTH CAROLINA STATE ACCIDENT FUND
800 DUTCH SQUARE BLVD
SUITE 160
P.O. BOX 102100
COLUMBIA SC 29221-5000

We need the information listed below in connection with Social Security benefits.

PLEASE SUBMIT THE INFORMATION, SIGN AND DATE THIS LETTER AND RETURN IT IN THE ENCLOSED ENVELOPE WITHIN 10 DAYS.

We are trying to obtain verification of the workers' compensation benefits issued to Mr. Theodore P Polansky.

Our records show Mr. Polansky received the weekly workers' compensation payments of \$483.47 from 08/08/2001 through 05/02/2009 and \$507.34 from 05/03/2009 through the present.

Mr. Polansky responded to our letter dated January 11, 2011 stating that his workers' compensation payments were terminated as of March 8, 2011.

Please provide any documentation listed below as proof that Mr. Polansky's workers' compensation has been terminated.

- *Court order
- *Notice from the agency or insurance carrier
- *A letter of explanation or mailer that came with the check

Please see enclosed a copy of the letter with responses that we received from Mr. Polansky.

Thank you

I certify that the information I am providing is correct. I know that anyone who makes a false statement or representation of material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law.

(803)-896-5834
Your Daytime Telephone Number

Melinda Chubb 9/15/11
Your Signature and Today's Date

Enclosure: Envelope

MATPSC-L15 (10/02)

P.739



Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Theodore Polansky SSN: _____ Employer's Name: SC Attorney General's Office
Address: _____ Address: P.O. Box 11549
City: Columbia State: _____ Zip: 29223 City: Columbia State: SC Zip: 29211
Home Phone: (803) _____ Work Phone: () _____ Insurance Carrier: State Accident Fund
Preparer's Name: Preston F. McDaniel Law Firm: McDaniel Law Firm Preparer's Phone #: (803) 771 - 7211

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 10/19/99 & 05/30/01

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to See 1(b) Below (Part(s) of Body Injured) on 10/19/99 (Month/Day/Year) in Richland County, State of SC.
1b. Body part(s) affected are: Back / left knee/ whole person due to RSD / Psychological/brain
Briefly describe how the accident occurred: While Claimant was using a hand truck to move boxes he slipped on the stairs and injured his left knee.
Accepted Claims (See Attached)
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 10/29/99 (Month/Day/Year) in the following manner:
Written notice to Bill Gambrell, Dir. Of Medicine and Wilma Goings, Human Resources in Attorney General's Office; Accepted Claim
- ☒ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: _____
☒ (b) additional medical examination and treatment for: life time medical care due to total disability for back/ knee/ RSD/ Psychological/Brain Damage
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
Claimant received weekly TT benefits for 500 weeks and would ask that weekly compensation be resumed from the date of last payment on 03/08/11 under an award for lifetime disability due to brain damage.
- ☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☒ (1) General Disability: ☒ Total ☐ (2) Specific Disability: ☐ Total
☒ (3) Wage Loss ☐ Partial ☐ Partial
- ☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of: N/A
- 10a. At the time of the injury, the Claimant was paid weekly wages of \$ (See Attached), and demands accounting of days worked and wages earned as provided by law.
10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
None
- 11a. Further grounds or unusual aspects of claim: Any and all other benefits applicable under the Act; Claimant requests an award for total and permanent disability with lifetime benefits and lifetime medical care for having sustained brain damage.
11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
See attached list
- 11c. To the best of your knowledge, did you have any prior permanent disability? N/A
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13a. I am filing a claim. I am not requesting a hearing at this time.
☒ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: 1 hour

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: Preston F. McDaniel, Esq. Claimant's Attorney: mcDanielLaw@hotmail.com Date: March 2, 2012
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.
WCC Form # 50
Revised 9/07

RECEIVED
MAR 05 2012
LEGAL DEPT.
STATE ACCIDENT FUND

50

Employee's Notice of Claim and/or Request for Hearing

P. 740

ATTACHMENT TO FORM 50

Theodore Polansky vs. South Carolina
Attorney General's Office
WCC File #(s): 9922954

1B. In 2002, Mr. Polansky was hospitalized due to a drug interaction between medications needed to treat his medical conditions stemming from the accident, which reaction resulted in a chemical encephalopathy of the brain causing physical injury to the brain per the opinion of the authorized treating psychiatrist Dr. Frank Forsthoefel and the clinical psychologist, Dr. Avie Rainwater who had performed neuropsychological testing just prior to the hospitalization and who performed re-testing in 2011.

The request for this Award was delayed due to two (2) facts: 1) that although requested, the complete records for the 2002 BMCC admission were just recently received. BMCC kept sending the wrong admission records due to the multiple admissions to that facility of the Claimant during 2001, 2002, 2003, and 2004; and 2) repeat evaluation as to whether the Claimant had physical brain damage was not authorized.

Dr. Forsthoefel, Dr. Maturano and the claimant have repeatedly in and since 2004, 2005, 2006, 2007, 2008 requested neuropsychological testing. The treating psychiatrist in a report in 2004 attached hereto and incorporated herein by reference, noted a tremendous change in the Claimant's brain functioning after the admission.

10A. Due to Claimant's average weekly wage being \$877.01 resulting in a compensation rate of \$589.70 in 2002, the maximum compensation for 2002 of \$507.34 was applied and at which the claimant has received temporary total weekly compensation benefits. Since a determination of the compensation rate has never been made by the Commission, the claimant would request a review and that his weekly benefits be increased to the maximum compensation rate at this time pursuant to SC Code §42-1-40 and §42-9-10(1) and the Supreme Court and Court of Appeals decisions there under. Since 2000, the average weekly wage in this State has increased from \$507.34 to \$704.92 or \$138.944%. If this increase is appealed to his average weekly wage in 2000 of \$877.01 it results in an average weekly wage of \$1,218.56 and a compensation rate of \$812.41.


Preston F. McDaniel

March 2, 2012

P.741

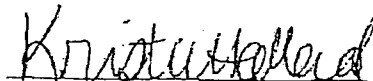
CERTIFICATE OF SERVICE BY MAIL

SC WCC File #: 0024408

I hereby certify that I have on this day served the following in the matter of Theodore Polansky vs. SC Attorney General's Office with a copy of the Form 50 Request for Hearing by depositing the same in the United States Mail with adequate postage thereon, addressed as follows:

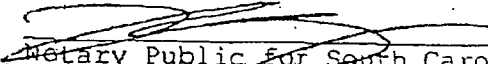
Mee Ling Khor -Gould, Adjuster
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000

Ellen H. Goodwin, Attorney-At-Law
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000



Kristin Holland

SWORN TO BEFORE ME this
2nd day of March, 2012.



Notary Public for South Carolina
My Commission Expires: 11-18-14

(L.S.)

P.742

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0024408
Carrier File # 2000-003303
Carrier Code # 500 SF
Employer FEIN 570000E20

Theodore Polansky 214-66-4408

ATTORNEY GENERAL'S OFFICE
Rembert C. Dennis Office Bldg., Columbia, SC 29211

Wk#: (803) 422-9277 Home#: (803) 732-2593

Preparer's name: Mee Ling Khor-Gould (803) 896-5834

State Accident Fund, Insurance Carrier

1. Date of injury: 05/30/2000
month day year

2. Total Weeks of Compensation Paid: 500

3. Type of Compensation Paid (TP or TT)/Periods of Payment:

Type: TT From: 08/08/2001 To: 03/08/2011

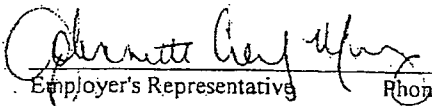
4. Date of First Payment: 07/12/2000
month day year

5. Total Amount Paid (a) Compensation: \$ 244,036.74

(b) Medical (Include Nursing, Hospital Drugs, Etc.): \$ 776,094.42

6. Informal Conference is Requested: () yes (x) no
(check one)

7. Use these lines to send a memo to the Commission:

 896-5894
Employer's Representative Phone #

03/06/2012
Date

Type or print all information. File this form 6 months after the alleged injury date and each 6 months until the Commission's File is closed. Form 18 must be filed whether or not compensation is ongoing. Check "yes" after number 6 to request an informal conference. Refer to R.67-413, R.67-507, and R.67-804 for further information.

WCC FORM # 18 REV. DATE 3/96

18

PERIODIC REPORT

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W. Atty. Hazards 3/6/12 ✓

0277

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 0024408 & 9922954

EMPLOYEE/CLAIMANT: THEODORE P. POLANSKY

EMPLOYER: S.C. OFFICE OF ATTORNEY GENERAL

INSURER: STATE ACCIDENT FUND



COPY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 16TH DAY OF
MAY, 2012, COMMENCING AT THE HOUR OF 11:51 A.M., IN
COLUMBIA, SOUTH CAROLINA, BEFORE THE HONORABLE MELODY JAMES,
ATTENDED BY COUNSEL AS FOLLOWS:

JAN L. WHITWORTH
VERBATIM REPORTER

JAN L. WHITWORTH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, S.C. 29376

Backsided p. 744
8-12-11 W

APPEARANCES

PRESTON F. MCDANIEL, ESQUIRE, OF THE FIRM
MCDANIEL LAW FIRM
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

ATTORNEY FOR THE EMPLOYEE/CLAIMANT,

ANDREW W. FAJARDO, ESQUIRE, OF THE FIRM
DANLEY LAW FIRM
POST OFFICE BOX 1454
COLUMBIA, SOUTH CAROLINA 29202

ATTORNEY FOR THE EMPLOYER/INSURER.

ALSO ATTENDING: AL DANLEY
GALE DUBOSE
THEODORE POLANSKY

1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN COLUMBIA,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * * *

6 BY COMMISSIONER JAMES:

7 TODAY'S DATE IS MAY THE 16TH, 2012. WE'RE HERE
8 FOR THE MATTER OF THEODORE POLANSKY -- AM I
9 PRONOUNCING THAT CORRECTLY? NO?

10 BY MR. McDANIEL:

11 YES, THEODORE POLANSKY.

12 BY COMMISSIONER JAMES:

13 POLANSKY. VERSUS THE SOUTH CAROLINA OFFICE OF
14 ATTORNEY GENERAL. WE HAVE PRESENT IN THE COURTROOM
15 MR. PRESTON McDANIEL WHO IS REPRESENTING THE
16 CLAIMANT, AND ON BEHALF OF THE SOUTH CAROLINA OFFICE
17 OF ATTORNEY GENERAL AND STATE ACCIDENT FUND MR.
18 ANDREW FAJARDO. THE FILE NUMBERS, WHICH ARE
19 CURRENTLY NOT CONSOLIDATED, BUT THE MOTION AND IT
20 LOOKS LIKE THE SIMILAR OR SAME MOTION HAS BEEN FILED
21 IN BOTH OF THESE CASES, ARE WORKERS' COMPENSATION
22 FILE NUMBERS 9922954 AND 0024408. GENTLEMAN, I HAVE
23 THE MOTION. I BELIEVE THAT THIS IS THE DEFENDANTS'
24 MOTION. SO, MR. FAJARDO, I'LL LET YOU START.

25 BY MR. FAJARDO:

1 YES, COMMISSIONER, MAY IT PLEASE THE COURT.
2 THESE ARE TWO SEPARATE INJURIES THAT OCCURRED, THE
3 FIRST BEING IN 1999 TO THE LEFT KNEE, THE SECOND
4 BEING IN 2000, WHICH WAS A BACK CLAIM WITH RESULTANT
5 PSYCHOLOGICAL OVERLAY. BOTH OF THOSE INJURIES WERE
6 ADMITTED AS COMPENSABLE. ESSENTIALLY WITHOUT GOING
7 INTO THE SPECIFIC MEDICAL FACTS OF THE CASE, AS IT
8 HAS BEEN EXTENSIVE OVER THE PAST TEN YEARS, THERE
9 WAS -- THE PRIMARY CRUX OF WHAT WE BELIEVE IS THE
10 ISSUE IN THIS MOTION IS THE EXTENT OF OR THE
11 PRESENCE OF WHETHER PHYSICAL BRAIN DAMAGE HAS
12 OCCURRED. THIS RESULTED FROM A POSSIBLE DRUG/DRUG
13 ENCEPHALOPATHY IN 2002 DURING A HOSPITAL STAY, AND
14 AT THAT TIME, THE TREATING NEUROLOGIST AND THE
15 PSYCHIATRIST HAD OPINED THAT ENCEPHALOPATHY HAD
16 COMPLETELY REMITTED AND RESOLVED AT THAT POINT.
17 HOWEVER, THE CLAIMANT CONTINUED TO HAVE PROBLEMS,
18 PSYCHOLOGICAL ISSUES ESPECIALLY CONCERNING MEMORY.
19 NOW, THROUGHOUT THE YEARS, HE HAS HAD EXTENSIVE
20 TESTING WITH MULTIPLE PSYCHIATRISTS AND
21 PSYCHOLOGISTS AND NEUROLOGISTS. ESSENTIALLY WHEN
22 THIS FIRST BEGAN TO BECOME AN ISSUE WAS IN MAY OF
23 2011 WHEN THE CLAIMANT FILED A FORM 50 FOR PHYSICAL
24 BRAIN DAMAGE. AT THAT TIME, PART OF THE ISSUE WAS
25 WHETHER OR NOT AGAIN THERE WAS PHYSICAL BRAIN

1 DAMAGE. AFTER RECEIVING THE CLAIM, WE FILED AND
2 SCHEDULED FOR A NEUROPSYCHOLOGICAL EXAMINATION TO BE
3 CONDUCTED. THERE HAVE BEEN PREVIOUS
4 NEUROPSYCHOLOGICAL EVALUATIONS EITHER THAT GAVE A
5 DIFFERENT DIAGNOSIS OR WERE INCONCLUSIVE. AS A
6 RESULT, WE WENT FORWARD AND TRIED TO SCHEDULE A
7 NEUROPSYCHOLOGICAL EVALUATION, WHICH WAS TO BE DONE
8 IN AUGUST OF 2011. AT THAT TIME, THERE WERE ALSO
9 SOME ISSUES OF A SPINAL CORD STIMULATOR THAT HAD TO
10 BE RE-IMPLANTED, AND THAT NEEDED TO BE DONE IN
11 COLORADO, AND BECAUSE OF TIME FRAME AROUND THAT, I
12 BELIEVE THE CLAIMANT HAD REFUSED TO ATTEND THIS
13 APPOINTMENT INITIALLY, BUT IT WAS A MOOT POINT AS HE
14 WAS GOING TO BE OUT OF STATE AT THAT TIME. THE
15 CLAIMANT WITHDREW HIS 50. NOW, MY LEGAL FILE WAS
16 CLOSED IN SEPTEMBER OF 2011, AND I WAS REASSIGNED
17 THE CASE AFTER THE CLAIMANT RE-FILED HIS FORM 50 IN
18 MARCH -- EXCUSE ME -- YES, LATE MARCH OF THIS YEAR,
19 2012. AT THAT TIME, WE IMMEDIATELY BEGAN CONTACTING
20 DR. MARK WILLIAMS TO RESCHEDULE THE NEURO-
21 PSYCHOLOGICAL EVALUATION FOR A DETERMINATION AS TO
22 WHETHER THERE IS PHYSICAL BRAIN DAMAGE. NOW, THERE
23 ARE A NUMBER OF OUTSTANDING FACTORS INCLUDING
24 PSYCHOLOGICAL ISSUES AND DIFFERENT DIAGNOSES, WHICH
25 ARE VERY COMPLEX, AND WE BELIEVE REQUIRES AN EXPERT

1 OPINION ON THIS. SO THE EXPERTS THAT WE HAD
2 PREVIOUSLY SENT THE CLAIMANT TO HAD NOT BEEN ABLE TO
3 OPINE TO ONE WAY OR ANOTHER. NOW, THE CLAIMANT HAS
4 REFUSED TO ATTEND THE NEUROPSYCHOLOGICAL EVALUATION
5 BACK IN AUGUST 2011 AND AGAIN WHEN IT WAS
6 RESCHEDULED, WHICH WOULD HAVE BEEN DONE MAY 1ST, I
7 BELIEVE. THE REASON FROM MY UNDERSTANDING ---

8 BY COMMISSIONER JAMES:

9 THE APPOINTMENTS?

10 BY MR. FAJARDO:

11 WHAT DID YOU SAY?

12 BY COMMISSIONER JAMES:

13 THE APPOINTMENT WAS TO BE MADE FIRST?

14 BY MR. FAJARDO:

15 YES, MA'AM. YES, COMMISSIONER.

16 BY COMMISSIONER JAMES:

17 OKAY.

18 BY MR. FAJARDO:

19 AND THAT WOULD HAVE BEEN DONE IN PLENTY OF TIME
20 WITHOUT ANY FURTHER DELAY, HOWEVER, BEING CLAIMANT'S
21 COUNSEL HAD OPPOSED THIS ON THE BASIS THAT WE HAD NO
22 RIGHT TO HAVE AN EVALUATION PERFORMED ON MR.
23 POLANSKY. SPECIFICALLY, WE CONTEND THAT SUCH AN
24 EVALUATION IS PERMISSIBLE UNDER 42-15-80, WHICH
25 SPECIFICALLY HAS SAID AS WE HAVE OUTLINED IN OUR

1 MOTION, THAT THE CLAIMANT IS REQUIRED TO SUBMIT
2 HIMSELF TO AN EXAMINATION AT REASONABLE TIMES AND
3 PLACES BY A QUALIFIED PHYSICIAN OR SURGEON
4 DESIGNATED BY THE EMPLOYER OR THE COMMISSION.

5 FURTHER, IF THE EMPLOYEE REFUSES TO SUBMIT HIMSELF
6 OR OBSTRUCTS IN THAT WAY, THEN HIS RIGHT TO TAKE A
7 TITLE OR PROCEEDING UNDER THIS STATUTE MUST BE
8 SUSPENDED UNTIL HE OTHERWISE SUBMITS. NOW, ANOTHER
9 COMPLICATING FACTOR IS THAT ALTHOUGH NO REQUEST WAS
10 RECEIVED FROM THE STATE ACCIDENT FUND REGARDING
11 REPEAT NEUROPSYCH TESTING AFTER THE ONE THAT WAS
12 DONE IN 2007 AND 2008, CLAIMANT UNILATERALLY WENT
13 OUT AND GOT HIS OWN SUPPOSEDLY NEUROPSYCHOLOGICAL
14 EVALUATION, AND ESSENTIALLY NOW SINCE HE HAS THE
15 EVIDENCE THAT IS IN HIS FAVOR, HE IS ATTEMPTING TO
16 CLOSE THE DOORS OF DISCOVERY AND PREVENT US FROM
17 GETTING OUR OWN EVALUATION, WHICH WE BELIEVE IS
18 CLEARLY AGAINST THE SPIRIT OF 42-15-80. NOW, ONE OF
19 THE REASONS AS I'M AWARE THAT THE CLAIMANT HAS
20 REFUSED TO ATTEND THIS IS BECAUSE HE IS NOT A
21 QUALIFIED PHYSICIAN OR A SURGEON, AND I HAVE BROUGHT
22 THE CURRICULUM VITAE OF DR. MARK WILLIAMS, WHICH I
23 WILL BE HAPPY TO SUBMIT TO YOU AND OPPOSING COUNSEL.

24 PERMISSION TO APPROACH THE BENCH, COMMISSIONER?

25 BY COMMISSIONER JAMES:

1 CERTAINLY.

2 BY MR. FAJARDO:

3 COMMISSIONER, I BELIEVE YOU WILL SEE FROM HIS
4 CURRICULUM VITAE THAT DR. WILLIAMS IS HIGHLY
5 QUALIFIED IN THE FIELD OF NEUROPSYCHIATRY. HE HAS
6 BEEN IN PRIVATE PRACTICE AS A NEUROPSYCHOLOGIST FOR
7 MORE THAN TEN YEARS AND HAS EVEN BEEN A PROFESSOR
8 THERE OF PSYCHOLOGY AT THE UNIVERSITY OF ALABAMA.
9 IN ADDITION, HE IS A SPECIFIC MEMBER OF THE AMERICAN
10 PSYCHOLOGICAL ASSOCIATION WITHIN THE CLINICAL
11 NEUROPSYCHOLOGICAL DIVISION. HE IS A MEMBER OF THE
12 INTERNATIONAL NEUROPSYCHOLOGICAL SOCIETY, AND HE IS
13 A MEMBER OF THE AMERICAN ACADEMY OF CLINICAL
14 NEUROPSYCHOLOGY. HE HAS ALSO BEEN LICENSED TO
15 PRACTICE CLINICAL PSYCHOLOGY AND NEUROPSYCHOLOGY IN
16 GEORGIA, SOUTH CAROLINA, FLORIDA, AND ALABAMA. I
17 BELIEVE THAT HE IS VERY QUALIFIED TO PERFORM A
18 NEUROPSYCHOLOGICAL EVALUATION FOR THE SPECIFIC
19 REASON OF DETERMINING WHETHER OR NOT THERE IS BRAIN
20 DAMAGE. NOW, HAD THE CLAIMANT GONE FORWARD WITH
21 THIS ABSENT HIS OBJECTION, WE WOULD HAVE HAD ALL OF
22 OUR DISCOVERY DONE IN TIME AND THERE WOULD BE NO
23 ISSUES. BUT SINCE THE CLAIMANT HAS REFUSED TO
24 ATTEND THESE ON THE BASIS THAT WE HAVE NO RIGHT TO
25 COMPEL HIM TO SUCH AN EVALUATION AFTER HE HAS

1 ALREADY GOTTEN HIS EVIDENCE, THAT IS PART OF THE
2 BASIS FOR OUR MOTION TO COMPEL. IN ADDITION, IN THE
3 EVENT THAT YOU FIND THAT FOR WHATEVER REASON DR.
4 MARK WILLIAMS, HIS EVALUATION CANNOT BE COMPELLED,
5 WE HAVE ALSO CONTACTED DR. THOMAS GUALTIERI IN NORTH
6 CAROLINA AS AN ALTERNATIVE. HE IS BOTH A MEDICAL
7 DOCTOR AND A NEUROPSYCHOLOGIST, AND WHILE WE DON'T
8 FEEL LIKE THE SPIRIT OF 42-15-80 NECESSARILY
9 REQUIRES THAT ONLY A MEDICAL DOCTOR CAN PERFORM
10 THESE TYPE OF EVALUATIONS, DR. GUALTIERI'S
11 QUALIFICATIONS I BELIEVE WILL CLEARLY GET US AROUND
12 ANY SUCH REQUIREMENT. WE WOULD HAVE ALREADY
13 SCHEDULED THIS EVALUATION; HOWEVER, WE ALREADY HAVE
14 SOME COSTS WITH DR. WILLIAMS, AND WE BELIEVE THAT
15 HIS NEUROPSYCHOLOGICAL EVALUATION IS ENTIRELY
16 APPROPRIATE UNDER THE CIRCUMSTANCES. HOWEVER, WITH
17 DR. GUALTIERI -- SHOULD YOU FIND DR. WILLIAMS IS NOT
18 THE APPROPRIATE PERSON AND HE CANNOT BE COMPELLED TO
19 ATTEND, DR. GUALTIERI'S EARLIEST AVAILABLE DATE FOR
20 APPOINTMENT IS JUNE 4TH OF 2012. AND WE WOULD
21 ESSENTIALLY REQUEST FOR AN ORDER COMPELLING THE
22 CLAIMANT TO ATTEND A NEUROPSYCHOLOGICAL EVALUATION
23 WITH DR. WILLIAMS, AND THAT WE ALSO HAVE A
24 CONTINUANCE IN THIS MATTER FOR AT LEAST 60 DAYS TO
25 BE ABLE TO HAVE THIS EVALUATION DONE AND CONDUCT ANY

1 ADDITIONAL DISCOVERY OR RESPOND TO ADDITIONAL
2 REQUESTS THAT OUR EXPERT MAY OR MAY NOT HAVE AT THAT
3 TIME TO MAKE HIS EVALUATION. AS AN ADDITIONAL
4 MATTER BESIDES THE STATUTORY LANGUAGE OF 42-15-80,
5 THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, WE DO
6 NOT BELIEVE THAT ANY SORT OF PROTECTIVE DISCOVERY
7 ORDER IS WARRANTED IN THIS SITUATION. UNDER RULE
8 26-C, AN ORDER OF PROTECTION CAN BE ISSUED TO
9 PREVENT ANNOYANCE, EMBARRASMENT, OPPRESSION OR
10 UNDUE BURDEN BY EXPENSE, AND WE DON'T BELIEVE THAT
11 ANY OF THOSE FACTORS APPLY HERE, AND WE SIMPLY SEEK
12 THE RIGHT TO DEFEND OUR CASE APPROPRIATELY. AND
13 AGAIN, WE WOULD REQUEST AND WE ARE COMPELLING THE
14 CLAIMANT TO ATTEND A NEUROPSYCHOLOGICAL EVALUATION
15 WITH DR. WILLIAMS AND FOR CONTINUANCE FOR AT LEAST
16 60 DAYS CONSIDERING THE TEN-YEAR EXTENT OF TREATMENT
17 AND THE THOUSANDS OF PAGES OF MEDICAL RECORDS, WHICH
18 ARE NECESSARY FOR REVIEW. AND FURTHER THAT BECAUSE
19 OF OUR PREJUDICE IN THIS, SHOULD YOU NOT FIND THAT
20 CONTINUANCE IS NECESSARY, THEN WE WOULD MOVE TO
21 EXCLUDE THE PSYCHOLOGICAL EVALUATION THAT WAS DONE
22 BY THE CLAIMANT'S PSYCHIATRIST, DR. AVIE RAINWATER,
23 WHO I WOULD ALSO SUBMIT HAS NO QUALIFICATIONS IN
24 NEUROPSYCHOLOGY. I HAVE COPIES OF BOTH DR.
25 RAINWATER'S CURRICULUM VITAE AND DR. GUALTIERI'S

1 SHOULD YOU WISH TO SEE THOSE, COMMISSIONER.

2 BY COMMISSIONER JAMES:

3 OKAY. AND I UNDERSTAND THE ARGUMENT ABOUT YOU
4 MOVING TO EXCLUDE AND NOT CONTINUE BECAUSE OF
5 PREJUDICE, BUT AS FAR AS THE QUALIFICATIONS OF WHAT
6 THE CLAIMANT IS SUBMITTING, I WOULD GET -- THAT
7 WOULD BE THE TYPE OF THING I WOULD GET INTO AT THE
8 HEARING. I WOULDN'T EXCLUDE ANYTHING WITH REGARDS
9 TO QUALIFICATIONS AT THIS POINT, AND IT WOULD BE
10 PART OF THE EVIDENCE ANYWAY; IT WOULD BE PART OF THE
11 ARGUMENT.

12 BY MR. FAJARDO:

13 SURE.

14 BY COMMISSIONER JAMES:

15 SO, AND THAT IS THE DEFENDANTS' POSITION,
16 CORRECT? IS THERE ANYTHING FURTHER?

17 BY MR. FAJARDO:

18 NO, COMMISSIONER.

19 BY COMMISSIONER JAMES:

20 ALL RIGHT. MR. McDANIEL.

21 BY MR. FAJARDO:

22 THANK YOU, COMMISSIONER.

23 BY MR. McDANIEL:

24 COMMISSIONER, FIRST OFF, LET ME SAY WELCOME TO
25 THE COMMISSION. IT'S A PLEASURE TO APPEAR BEFORE

1 YOU.

2 BY COMMISSIONER JAMES:

3 THANK YOU.

4 BY MR. McDANIEL:

5 IT'S THE FIRST TIME. I WANT TO HAND YOU UP A
6 COUPLE OF DOCUMENTS, AND I BELIEVE YOU SAID YOU HAVE
7 THE FILE. SO, I WOULD ASK YOU TO LOOK AT MY FORM 50
8 THAT WAS FILED IN THE SPRING OF 2011.

9 BY COMMISSIONER JAMES:

10 LET ME SEE. I MAY NOT HAVE THAT TYPE OF
11 DOCUMENTATION IN HERE.

12 BY MR. McDANIEL:

13 FOR PURPOSES OF -- LET ME SEE IF I CAN JUST
14 SIMPLY HAND YOU MINE, AND THAT MIGHT BE -- HERE IS
15 MINE OUT OF THE FILE FOR PURPOSES OF THE HEARING TO
16 JUST ALLOW YOU TO LOOK AT THIS. THIS IS THE FORM 50
17 THAT WAS FILED ON MAY 12TH, 2011.

18 BY COMMISSIONER JAMES:

19 I CAN PULL IT UP THROUGH OUR SYSTEM, BUT I'LL
20 HOLD YOUR COPY FOR RIGHT NOW.

21 BY MR. McDANIEL:

22 ALL RIGHT. I WANT TO CORRECT A FEW THINGS THAT
23 COUNSEL SAID. THIS ISSUE OF NEUROPSYCHOLOGICAL
24 TESTING AND THE POSSIBILITY OF BRAIN DAMAGE HAS BEEN
25 RAISED EVER SINCE 2004. THE AUTHORIZED-TREATING

1 PHYSICIAN SINCE 2004 FOR THE PSYCHOLOGICAL PROBLEMS,
2 MR. POLANSKY SUSTAINED A SEVERE INJURY THAT RESULTED
3 IN R.S.D. THAT IS AFFECTING HIS BACK AND HIS LEGS.
4 HE HAS DEVELOPED SEVERE PSYCHOLOGICAL CONSEQUENCES
5 AS A RESULT OF THAT. I KNOW THAT YOU ARE PROBABLY
6 AWARE THROUGHOUT YOUR PRACTICE OF THE SEVERE
7 PSYCHOLOGICAL CONSEQUENCES THAT COME FROM R.S.D.,
8 BUT IN ANY EVENT, MR. POLANSKY HAS HAD MULTIPLE
9 PROCEDURES. THE RE-IMPLANTATION, THE REASON THAT WE
10 WITHDREW THE 50 BACK THEN BY CONSENT WAS BECAUSE WE
11 HAD TO FIGHT FOR ALMOST A YEAR TO GET THE STATE
12 ACCIDENT FUND TO AGREE TO SEND MR. POLANSKY TO THIS
13 WORLD-RENOWN SPECIALIST, WHO IS THE ONLY PERSON THAT
14 WOULD PERFORM THE RE-IMPLANTATION OF THE SPINAL CORD
15 STIMULATOR. HE IS ONE OF THE FOREMOST SPECIALISTS
16 IN THE WORLD ON THIS PROCEDURE. HE WAS REFERRED
17 THERE BY HIS CHRONIC PAIN SPECIALIST. WE WENT
18 THROUGH A VERY SIMILAR TYPE OF ARGUMENTATION THAT
19 WE'RE DOING HERE IN REFERENCE TO THAT FINALLY BEING
20 ORDERED BY THIS COMMISSION. IT TOOK US COMING OVER
21 HERE FOR A HEARING AND IT BEING ORDERED. THAT
22 DOCTOR IN THE TRUEST SENSE OF THE WORD IS MORE
23 CONCERNED WITH HIS PATIENT THAN HE IS HIS FUNDING,
24 AND HE AGREED TO ACCEPT THE COLORADO FEE SCHEDULE
25 FOR THE RE-IMPLANTATION, AND MR. POLANSKY HAS GOTTEN

1 SOME GREAT PAIN RELIEF. I BRING THAT UP TO YOU
2 SIMPLY TO SAY HOW THIS HAS PROGRESSED AND THE TYPES
3 OF PROBLEMS THAT WE'VE BEEN PRESENTED WITH THROUGH
4 THE STATE ACCIDENT FUND EVER SINCE THIS ACCIDENT
5 CAME ABOUT. IN 2004, WHAT YOU'LL SEE ATTACHED TO MY
6 FORM 50 IS A LETTER FROM THE AUTHORIZED TREATING
7 PSYCHIATRIST, DR. FRANK FORSTHOELEF.

8 BY COMMISSIONER JAMES:

9 AND I'M ASSUMING THE DEFENDANTS HAVE ---

10 BY MR. McDANIEL:

11 THEY HAVE A COPY OF THE 50, AND IT'S ATTACHED
12 ALSO TO MY MOTION.

13 BY COMMISSIONER JAMES:

14 OKAY.

15 BY MR. McDANIEL:

16 MY REPLY TO THE MOTION. SECOND, YOU WILL SEE A
17 LETTER FROM A NEUROLOGIST, DR. NOE, AND YOU WILL
18 ALSO SEE A LETTER FROM DR. MACHARANO(phonetic), WHO
19 IS ALSO A BOARD-CERTIFIED PSYCHIATRIST THAT SAW MR.
20 POLANSKY. IN 2004 AND IN 2005, YOU WILL SEE THAT
21 ALL OF THOSE DOCTORS ARE RECOMMENDING
22 NEUROPSYCHOLOGICAL TESTING. WE -- YOU WILL SEE ALSO
23 IN MY FORM 50 AND I WILL SUBMIT TO YOU AT THE
24 HEARING THE EVIDENCE WILL SHOW THAT WE REPEATEDLY
25 REQUESTED NEUROPSYCHOLOGICAL TESTING. IT WAS NOT

1 PERFORMED. NOW, LET'S SEGWAY UP TO NOW, 2011. ONE
2 OF THE PROBLEMS WE HAD IS MR. POLANSKY WAS IN THE
3 HOSPITAL IN 2002 AT LEAST FOUR TIMES. FOR A PERIOD
4 OF YEARS WHEN I WOULD ORDER THE RECORDS, WE KEPT
5 GETTING -- WE DID NOT GET THE RECORDS FROM THE
6 HOSPITALIZATION IN REFERENCE TO THE ENCEPHALOPATHY
7 FROM THE REACTION -- DRUG INTERACTION IN REFERENCE
8 THAT CAUSED THE SWELLING OF THE BRAIN AT THAT TIME.
9 SEE, THIS DIDN'T COME ABOUT UNTIL ABOUT TWO YEARS,
10 THEN THREE YEARS LATER. IT WASN'T UNTIL 2005 THAT
11 WE REALLY STARTED TO REQUEST RECORDS. SO, WE ARE
12 NOW THREE YEARS DOWN THE ROAD. MR. POLANSKY HAD
13 FORGOTTEN THE EXACT DATES, BUT HE KNEW IT WAS DURING
14 THE HOSPITALIZATION AT THAT POINT IN TIME. SO, WE
15 STARTED REQUESTING THE RECORDS. WHEN WE FOUND THOSE
16 RECORDS EVENTUALLY, AND DR. AVIE RAINWATER, WHO
17 COUNSEL HAS SAID WE'VE GONE OUT AND FOUND -- NOW,
18 HERE'S THE NEXT POINT I WANT TO MAKE SURE THE
19 COMMISSIONER UNDERSTANDS. DR. AVIE RAINWATER WAS
20 THE AUTHORIZED CLINICAL PSYCHOLOGIST THAT PERFORMED
21 TESTING ON MR. POLANSKY PRIOR TO THE VERY IMPORTANT
22 ENCEPHALOPATHY IN 2002. BECAUSE OF OUR PROBLEM WITH
23 GETTING APPROVAL, WHICH WE NEVER WERE ABLE TO GET,
24 YES, MR. POLANSKY WENT TO DR. AVIE RAINWATER AND HAD
25 REPEAT NEUROPSYCHOLOGICAL TESTING PERFORMED. I

1 BELIEVE THAT YOU WILL FIND AT THE HEARING THAT THAT
2 IS VERY IMPORTANT BECAUSE ANY NEUROPSYCHOLOGIST OR
3 CLINICAL PSYCHOLOGIST WILL TELL YOU THAT THE SAME
4 SCALES ON MANY OF THE TESTS THAT ARE USED TO JUDGE
5 DEPRESSION AND HOW SEVERE THAT DEPRESSION IS IS ALSO
6 THE VERY SAME SCALES THAT TELL YOU WHETHER OR NOT IT
7 IS COGNITIVE DYSFUNCTION CAUSED BY ORGANIC BRAIN
8 DAMAGE. NOW, THEREFORE ---

9 BY COMMISSIONER JAMES:

10 I'M FAMILIAR WITH THAT.

11 BY MR. McDANIEL:

12 YES, I WOULD ASSUME YOU WOULD BE, AND THAT'S
13 THE REASON I'M SO GLAD TO HAVE YOU HEARING THIS
14 MOTION FOR MANY REASONS, BUT THAT IS ONE OF THE
15 REASONS. WE HAD TREMENDOUS FRUSTRATION. WE WERE
16 NEVER ABLE TO GET THIS PERFORMED. MR. POLANSKY --
17 WE WERE FINALLY ABLE TO GET THE RECORDS, AND WE
18 FOUND THAT DR. AVIE RAINWATER HAD SEEN HIM AT THAT
19 TIME. WE THEN SENT HIM TO DR. AVIE RAINWATER WHO IS
20 A CLINICAL PSYCHOLOGIST, DOES NEUROPSYCHOLOGICAL
21 TESTINGS, AND WE SENT HIM TO HIM FOR THE SPECIFIC
22 PURPOSE BECAUSE HE HAS THE UNIQUE KNOWLEDGE ABOUT
23 MR. POLANSKY THAT CAN ALLOW HIM TO DIFFERENTIATE
24 BETWEEN THE TWO. NOW ---

25 BY COMMISSIONER JAMES:

1 WHEN -- AND LET ME INTERRUPT YOU FOR JUST ONE
2 SECOND ---

3 BY MR. McDANIEL:

4 ABSOLUTELY.

5 BY COMMISSIONER JAMES:

6 --- SO I CAN MAKE SURE I UNDERSTAND. WHEN WAS
7 THE -- AND I UNDERSTAND INITIALLY THERE WAS TESTING
8 GIVEN BY DR. RAINWATER ---

9 BY MR. McDANIEL:

10 CORRECT.

11 BY COMMISSIONER JAMES:

12 --- PRIOR TO THE ENCEPHALOPATHY, BUT THEN WHEN
13 DID THE CLAIMANT GO BACK AND THE NEUROPSYCH WAS
14 DONE?

15 BY MR. McDANIEL:

16 IN THE SPRING OF 2011, EARLY PART OF 2011, WHEN
17 WE WERE FINALLY ABLE TO GET THE RECORDS, AND WE
18 SPOTTED DR. AVIE RAINWATER BEING INVOLVED AS A
19 PSYCHOLOGIST AT THAT TIME, AND BASED ON QUITE
20 HONESTLY MY KNOWLEDGE HAVING WORKED WITH DR. WADE,
21 DR. WAGGONER, THE OTHER DOCTORS THAT DO
22 NEUROPSYCHOLOGICAL TESTING, AND KNOWING THAT
23 WHenever YOU'RE PERFORMING THOSE TESTS, YOU KNOW,
24 YEARS DOWN THE ROAD, ONE OF THE PROBLEMS THEY ALWAYS
25 TELL YOU IS THERE'S A PROBLEM OF DIFFERENTIATING

1 BETWEEN, YOU KNOW, THE TWO PARTICULAR CAUSES.
2 THAT'S WHY WE CHOSE TO GO TO DR. AVIE RAINWATER AT
3 THAT TIME. WE AS -- AGAIN, HE WAS A PREVIOUSLY-
4 AUTHORIZED TREATING PSYCHOLOGIST WHO DID THE
5 PREVIOUS TESTING WAY BACK WHEN IN REFERENCE TO MR.
6 POLANSKY. FORGIVE ME, IT'S HARD FOR ME TO CALL MR.
7 POLANSKY MR. POLANSKY. I'M USED TO CALLING HIM TED,
8 BECAUSE I HIRED HIM AS AN INVESTIGATOR OR HE WORKED
9 AS AN INVESTIGATOR WITH ME IN THE ATTORNEY GENERAL'S
10 OFFICE IN -- 1980? THANKS GALE.

11 BUT ANYWAY, THEN WE SUBMITTED THOSE TEST
12 RESULTS, WHICH IS, YOU KNOW, ONE OF THE THINGS I WAS
13 GOING TO FIRST TELL YOU WHEN WE GOT UP HERE IS I WAS
14 GOING TO SAY YEP, THEY'RE A TOOL. NEUROPSYCHOLOGICAL
15 TESTING ARE NOTHING BUT A TOOL TO BE USED JUST LIKE
16 AN M.R.I. THEY NEED TO BE SUBMITTED TO A PHYSICIAN.
17 AND THAT'S WHAT WE DID. WE SUBMITTED HIM TO THE
18 AUTHORIZED TREATING PSYCHIATRIST, AND THE AUTHORIZED
19 TREATING PSYCHIATRIST, DR. FRANK FORSTHOELEF, HAS
20 SAID THAT MR. POLANSKY IN HIS OPINION SUFFERED
21 ORGANIC BRAIN DAMAGE AS A RESULT OF THE
22 ENCEPHALOPATHY. NOW, ---

23 BY COMMISSIONER JAMES:

24 WHO IS THAT, DOCTOR WHO?

25 BY MR. McDANIEL:

1 DR. FRANK FORSTHOELEF.

2 MADAM COURT REPORTER, DO YOU NEED THE SPELLING
3 ON THAT?

4 BY THE COURT REPORTER:

5 PLEASE.

6 BY MR. McDANIEL:

7 OKAY. DR. FORSTHOELEF'S NAME IS F-O-R-S-T-H-O-
8 E-L-E-F, M.D.

9 BY COMMISSIONER JAMES:

10 IS HE A NEUROPSYCHIATRIST?

11 BY MR. McDANIEL:

12 NO, HE'S A PSYCHIATRIST.

13 BY COMMISSIONER JAMES:

14 OKAY.

15 BY MR. McDANIEL:

16 HE'S NOT A NEUROPSYCHOLOGIST.

17 BY COMMISSIONER JAMES:

18 WELL, THERE ARE ALSO NEUROPSYCHIATRISTS.

19 BY MR. McDANIEL:

20 THERE ARE; YOU'RE CORRECT. THERE ARE, BUT HE
21 IS A PSYCHIATRIST. HE'S NOT A FORENSIC
22 PSYCHIATRIST, WHICH THERE ARE SOME DOCTORS THAT ARE
23 FORENSIC PSYCHIATRISTS, AND YOU ARE ABSOLUTELY
24 CORRECT, THERE ARE SOME NEUROPSYCHIATRISTS. NOW,
25 THAT'S HISTORY. THAT'S ALL HISTORY IN REFERENCE TO

1 HOW THIS CAME ABOUT, WHERE WE ARE, WHAT CAUSED US TO
2 FILE. EVERYTHING IS SET OUT IN THE FORM 50. THAT
3 WILL BE HEARD IN A HEARING. NOW, WE COME UP TO -- I
4 KNOW MR. FAJARDO SAYS THAT HIS FILE WAS CLOSED.
5 WELL, I NEVER KNEW THAT, BUT HOWEVER, THE REASON
6 THAT ANY TYPE OF TESTING OR ANY TYPE OF EVALUATION
7 WAS PUT OFF WAS BECAUSE OF MR. POLANSKY, HIS
8 CONDITION, AND GOING TO COLORADO TO HAVE THE RE-
9 IMPLANTATION OF THE SPINAL CORD STIMULATOR. AFTER
10 THAT, WE HAVE NEVER HAD ANOTHER REQUEST. THEY KNOW
11 OF HIS RECOVERING AFTER THAT. WE'VE NEVER HAD ANY
12 REQUEST TO DO NEUROPSYCHOLOGICAL TESTING OR FOR WHAT
13 YOU HAVE THE AUTHORITY TO ORDER, AND THAT IS AN
14 EVALUATION BY A PHYSICIAN. NOW -- AND LOOK AT THE
15 MOTION, AND LOOK AT WHAT -- AND YOU WILL FIND THAT
16 ON APRIL 16TH, A MONTH AND A HALF AFTER -- WELL
17 AFTER A MONTH AND A HALF AFTER I RE-FILED THE FORM
18 50 FOR A HEARING, WE GET THE NEXT REQUEST FOR AN
19 EVALUATION, AND IT IS WITH -- IT IS REALLY FOR
20 NEUROPSYCHOLOGICAL TESTING, AND IT'S MY
21 UNDERSTANDING THEY'VE ATTACHED THIS TO THE TUNE OF
22 \$3,600 THAT THEY ARE PAYING THIS NEUROPSYCHOLOGIST
23 TO DO NEUROPSYCHOLOGICAL TESTING. YOU KNOW, THE WAY
24 THE ACT IS WRITTEN AND WITH THE 2007 AMENDMENTS, THE
25 RIGHTS OF THE INJURED WORKER HAVE BECOME LESS AND

1 LESS AS FAR AS HIS ABILITY TO CHOOSE DOCTORS OR DO
2 ANYTHING IN REFERENCE TO -- PRETTY MUCH THE
3 ADVANTAGES IN REFERNECE TO THE MEDICAL LIES ON THE
4 SIDE OF THE DEFENDANTS. BUT YOU HAVE THE AUTHORITY,
5 AND THEY HAVE THE RIGHT UNDER THE STATUTE UNDER 42-
6 17-80, AND I REALLY NOTICED -- OR EXCUSE ME, 42-15-
7 80, AND I REALLY NOTICED HOW COUNSEL'S VOICE SORT OF
8 WENT DOWN WHEN HE WAS READING THE STATUTORY
9 LANGUAGE, AND LET ME RE-QUOTE THAT LANGUAGE TO YOU,
10 AND I KNOW YOU'RE FAMILIAR WITH IT. I HATE TO DO
11 IT. THE CLAIMANT HAS TO -- "SHALL SUBMIT HIMSELF TO
12 EXAMINATION AT REASONABLE TIMES AND PLACES BY A
13 QUALIFIED PHYSICIAN OR SURGEON." I HAVE SUBMITTED
14 TO YOU AN ATTORNEY GENERAL'S OPINION, WHICH I THINK
15 REALLY CUTS TO THE MUSTARD, THAT IT SPEAKS IN TERMS
16 OF WHAT WE ALL KNOW AND WHAT HAS BEEN SAID OVER AND
17 OVER AGAIN IN THE WORKERS' COMPENSATION ACT IN
18 REFERENCE TO STATUTORY CONSTRUCTION, AND THAT IS
19 "THE CARDINAL RULE OF STATUTORY CONSTRUCTION IS TO
20 ASCERTAIN AND EFFECT THE INTENT OF THE LEGISLATURE.
21 IF A STATUTE'S LANGUAGE IS PLAIN, UNAMBIGUOUS AND
22 CONVEYS A CLEAR MEANING, THEN THE RULES OF STATUTORY
23 CONSTRUCTION ARE NOT NEEDED, AND THE COURT HAS NO
24 RIGHT TO IMPOSE ANOTHER MEANING." WE HAVE TO SUBMIT
25 TO AN EVALUATION BY A QUALIFIED PHYSICIAN. HE IS

1 NOT A QUALIFIED PHYSICIAN. THEY HAVE HANDED YOU UP
2 -- I HAVE NO OBJECTION TO HIS CURRICULUM VITAE.
3 IT'S MARK ALLEN WILLIAMS, Ph.D. IN FACT, YOU WILL
4 FIND THE ATTORNEY GENERAL'S OFFICE SAYS IN THAT
5 OPINION WHAT THEY ARE ACTUALLY REFERRING TO IS THAT
6 NOBODY HAS THE RIGHT TO CLAIM TO BE A DOCTOR OR A
7 PHYSICIAN THAT HAS ANY OTHER TYPE OF DOCTORATE.

8 BY COMMISSIONER JAMES:

9 WELL. ---

10 BY MR. McDANIEL:

11 MY POINT BEING THAT THIS MAN THAT THEY WANTED
12 HIM TESTED BY IS NOT A QUALIFIED PHYSICIAN UNDER THE
13 ACT.

14 I'M SORRY, YOU WERE GOING TO ASK SOMETHING.

15 BY COMMISSIONER JAMES:

16 WELL, THERE'S A LOT OF OTHER THINGS GOING ON
17 HERE, BUT IF IT WAS JUST SIMPLY AN ISSUE OF THERE'S
18 NOT ALL THIS TIME AND IF IT WAS SIMPLY AN ISSUE OF
19 LOOKING AT THE FACT THAT YOU HAD A NEUROPSYCH, AND
20 YOU'RE SAYING THE DEFENDANTS HAVE NOT TIMELY
21 REQUESTED IS ONE OF YOUR ISSUES, AND THEN YOU WILL
22 NOT LET THEM HAVE A NEUROPSYCH, EVEN THOUGH IT'S NOT
23 ALLOWED UNDER THE -- EVEN THOUGH YOU'RE SAYING IT'S
24 NOT ALLOWED UNDER THE STATUTE. THEN IT'S -- YOU
25 KNOW, IT CAN END UP WITH REGARDS TO THE WEIGHING OF

1 THE EVIDENCE BECAUSE OF NOT ALLOWING THINGS TO BE ON
2 AN EVEN PLAYING -- YOU KNOW, EVEN GROUND. I KNOW
3 YOU ARE ARGUING SOME OTHER THINGS BESIDES JUST THE
4 ABILITY TO -- WHETHER HE CAN BE SUBMITTED BY THE
5 COMMISSION OR NOT, AND I'M GOING TO ADDRESS THOSE IN
6 JUST A MINUTE. SO, I HAVE SOME QUESTIONS ABOUT SOME
7 OF THE TIMING IN THE FILE.

8 BY MR. McDANIEL:

9 OKAY.

10 BY COMMISSIONER JAMES:

11 BUT IF IT WAS SIMPLY IT WAS FILED, YOU KNOW,
12 THIS PAST MARCH. YOU HAD A NEUROPSYCH, AND YOU
13 WOULD NOT ALLOW THEM TO HAVE THEIR OWN EVALUATION,
14 THEN IT'S NOT -- YOU KNOW, IT'S ---

15 BY MR. McDANIEL:

16 WELL, OKAY, THERE'S ONE LITTLE STEP IN THERE
17 THAT IS WHAT I -- IS ONE OF THE THINGS I REALLY HAVE
18 A PROBLEM WITH, AND OUTSIDE OF -- AND I KNOW YOU'VE
19 BEEN AN ATTORNEY PRACTICING IN THIS AREA, AND YOU
20 HAVE THIS LAST MINUTE SPRINGING TYPE THING ON A
21 RECURRING BASIS, AND THAT IS THIS -- IT'S LIKE FOR
22 EXAMPLE WHEN AN ADJUSTER SAYS, "WELL, I DON'T LIKE
23 WHAT THAT DOCTOR SAYS," IT'S NOT MY JOB AS AN
24 ATTORNEY TO TELL THEM HOW THEY SHOULD DO IT. IF
25 THEY DON'T LIKE WHAT AN AUTHORIZED TREATING

1 PHYSICIAN SAYS, THEY DON'T THINK THAT CLAIMANT NEEDS
2 THAT, THEY HAVE EVERY RIGHT TO GO GET AN I.M.E. OR
3 TO GET TO DETERMINE, AND IF THAT DOCTOR COMES BACK,
4 "WELL, YOU KNOW, MY OPINION IS THIS, SO I THINK YOU
5 OUGHT TO...", AND THEY CHOOSE TO SAY, "WELL, WE'RE
6 GOING TO CONTINUE TO PROVIDE AUTHORIZED MEDICAL CARE
7 BUT THROUGH THIS DOCTOR. WE CHOOSE TO FOLLOW HIS
8 OPINION." MANY TIMES THEY DON'T WANT TO DO IT.
9 THEY JUST WANT TO SAY, "OH, I DON'T AGREE. I DON'T
10 LIKE WHAT HE'S SAYING. I DON'T WANT TO DO THAT."
11 THEY DON'T HAVE THE RIGHT TO DO THAT. THEY DO HAVE
12 THE RIGHT TO SEEK ANOTHER MEDICAL OPINION. THAT'S
13 ONE OF THE THINGS IN REFERENCE TO OUR PHYSICIANS AND
14 MEDICAL BOARD AND ALL THE FIGHTS AND THE REASON FOR
15 38, WHICH I WAS INVOLVED IN, THE ADOPTION OF TITLE
16 38, 25 -- 27, BUT IN ANY EVENT, THAT I HANDED YOU
17 UP, AND THAT IS BECAUSE WE WERE HAVING PROBLEMS
18 WITH, YOU KNOW, PEOPLE INVADING THE PROVINCE OF THE
19 PHYSICIAN. NOW, LOOK WHAT WE DID IN THIS CASE.
20 WHEN YOU SAY HAVING A COMPETING NEUROPSYCH, DR.
21 FORSTHOELEF HAS REQUESTED A NEUROPSYCHOLOGICAL
22 EVALUATION. HE IS A BOARD-CERTIFIED PSYCHIATRIST,
23 THE AUTHORIZED-TREATING MEDICAL DOCTOR IN THIS CASE.
24 THOSE PSYCHOLOGICAL TEST RESULTS WERE SUBMITTED TO
25 HIM JUST LIKE AN M.R.I., AN E.K.G., OR WHATEVER.

1 DR. FORSTHOLEF REVIEWED THOSE, DR. AVIE RAINWATER'S
2 OPINIONS OF THOSE TEST RESULTS, AND EXPRESSED HIS
3 OPINION AS A MEDICAL DOCTOR.

4 BY COMMISSIONER JAMES:

5 BUT YOU'RE ALSO GOING TO BE SUBMITTING DR.
6 RAINWATER'S OPINION, TOO, CORRECT?

7 BY MR. McDANIEL:

8 WE'LL BE SUBMITTING HIS TEST RESULTS.

9 BY COMMISSIONER JAMES:

10 WELL...

11 BY MR. McDANIEL:

12 YOU KNOW, THERE'S CLEAR -- YOU KNOW, THIS IS
13 GETTING INTO ANOTHER AREA ALSO THAT WE REALLY JUST
14 SORT OF LOOSEY GOOSIED IN THE AREA OF WORKERS' COMP
15 IN REFERENCE TO MEDICAL OPINIONS. IN READING BACK
16 OVER THIS STUFF OVER AND OVER AGAIN, I WAS SITTING
17 THERE GOING LIKE, YOU KNOW, "HMM, YOU KNOW, WE'RE
18 SORT OF -- A LOT OF PEOPLE ARE OUT THERE CROSSING
19 THE LINE, YOU KNOW, ON CERTAIN THINGS."

20 BY COMMISSIONER JAMES:

21 WELL, SO, WHAT YOU'RE SAYING, AND I'M GOING TO
22 USE ANOTHER EXAMPLE, IS IF THERE IS NOT AN ADMITTED
23 PSYCHOLOGICAL AND YOU DECIDE TO -- I'M NOT TALKING
24 ABOUT BRAIN INJURY RIGHT NOW, AND YOU DECIDE TO SEND
25 YOUR CLIENT FOR A PSYCHOLOGICAL EVALUATION, AND THE

1 EVALUATION SAYS THAT THEY HAVE PSYCHOLOGICAL OVERLAY
2 OR PROBLEMS, THEN YOU'RE SAYING THAT THE DEFENDANT
3 CANNOT GET THEIR OWN I.M.E. PURSUANT TO THAT
4 STATUTE?

5 BY MR. McDANIEL:

6 WITH A MEDICAL DOCTOR, SURE.

7 BY COMMISSIONER JAMES:

8 NO, I'M JUST TALKING ABOUT DEPRESSION OR JUST,
9 YOU KNOW, BECAUSE THERE ARE TIMES WHEN THERE ARE
10 ALLEGATIONS OF PSYCHOLOGICAL OVERLAY, AND THEN A
11 CLAIMANT WILL GET A PSYCHOLOGICAL OPINION, AND THEN
12 THE DEFENDANT MAY DECIDE TO GET AN I.M.E., AND WE'RE
13 TALKING ABOUT A PSYCHOLOGIST, A PSYCHOLOGIST OR A
14 FORENSIC PSYCHOLOGIST, NOT EVEN TALKING ABOUT THE
15 NEURO SPECIALTY; I'M NOT TALKING ABOUT THE BRAIN.
16 SO, UNDER MY HYPOTHETICAL, YOU'RE SAYING THAT THE
17 DEFENDANTS WOULD NOT BE ALLOWED PURSUANT TO THE
18 STATUTE TO HAVE THEIR OWN I.M.E. PERFORMED?

19 BY MR. McDANIEL:

20 BY A PSYCHOLOGIST. NOW, CAN I VARY YOUR FACTS
21 JUST A LITTLE BIT?

22 BY COMMISSIONER JAMES:

23 WELL, I'M JUST TRYING TO UNDERSTAND WHAT YOU'RE
24 SAYING.

25 BY MR. McDANIEL:

1 OKAY.

2 BY COMMISSIONER JAMES:

3 AND THEN MY OTHER QUESTION, AND THEN I'LL LET
4 YOU -- I'LL LET YOU GO ON WITH YOUR ARGUMENT, IS MR.
5 FAJARDO ---

6 BY MR. McDANIEL:

7 FAJARDO.

8 BY MR. FAJARDO:

9 FAJARDO.

10 BY MR. McDANIEL:

11 FAJARDO, WELL, I'M WRONG THEN.

12 BY COMMISSIONER JAMES:

13 I'M LEARNING.

14 BY MR. FAJARDO:

15 NO WORRIES.

16 BY COMMISSIONER JAMES:

17 --- INDICATES THAT THERE WERE A COUPLE OF
18 NEUROPSYCHS. THEY WERE ACTUALLY PERFORMED AT SOME
19 POINT, AND MAYBE BOTH OF Y'ALL MAY HAVE TO ANSWER
20 THIS, AND THEN WE'LL GO BACK. THERE WERE A COUPLE
21 OF NEUROPSYCH REPORTS, I'M ASSUMING, THAT WERE
22 PERFORMED AT SOME OTHER DATES IN THIS FILE THAT WERE
23 INCONCLUSIVE. WHAT ARE THE DATES OF THOSE? AND I
24 DON'T NEED TO KNOW EXACTLY WHAT THEY SAID. I'M JUST
25 TRYING TO GET SOME OF THE TIME FRAME.

1 BY MR. FAJARDO:

2 WITHOUT INTERRUPTING COUNSEL'S ARGUMENT, THE
3 NEUROPSYCH EVALUATION WAS REQUESTED AS HE SAID BACK
4 IN 2007, AND ACTUALLY THIS HAD BEEN COMPLETED WITH
5 DR. NICHOLAS LYNN AT POST TRAUMA RESOURCES, THE
6 FIRST TIME BEING IN NOVEMBER OF 2007, AND THE SECOND
7 TIME BEING IN FEBRUARY OF 2008, AGAIN WHERE HE FOUND
8 THAT HIS PRIOR RESULTS WERE INCONCLUSIVE DUE TO
9 NARCOTIC MEDICATIONS AND PSYCHOLOGICAL DIFFICULTIES
10 AS WELL.

11 BY COMMISSIONER JAMES:

12 AND THAT WAS BY WHOM?

13 BY MR. FAJARDO:

14 THAT WAS BY DR. LYNN.

15 BY MR. McDANIEL:

16 NICHOLAS LYNN.

17 BY MR. FAJARDO:

18 AND WE ACTUALLY HAD SENT NOTICE ---

19 BY MR. McDANIEL:

20 POST TRAUMA RESOURCES, NICK LYNN OVER THERE.

21 BY MR. FAJARDO:

22 I BELIEVE THAT WE HAD SENT A FAX OVER TO YOUR
23 FIRM AS WELL CONFIRMING THAT APPOINTMENT AT THAT
24 TIME.

25 BY COMMISSIONER JAMES:

1 OKAY. I'M JUST TRYING TO GET SOME OF THE TIME
2 LINE STRAIGHT.

3 ALL RIGHT, MR. McDANIEL, YOU WERE SAYING.

4 BY MR. McDANIEL:

5 JUST AND HERE AGAIN -- ALL RIGHT, IN YOUR
6 SCENARIO, INDEPENDENT DO THEY HAVE A RIGHT TO GO OUT
7 ON PSYCHOLOGICAL -- NOW, THERE'S ONE VERY DISTINCT
8 DIFFERENCE UNDER THE ACT THAT IS SOMETHING WE DEAL
9 WITH ALL THE TIME, AND THAT IS A LICENSED -- THE ACT
10 SAYS IF IT IS AN AREA OF A HEALTHCARE PROFESSIONAL
11 WITH WHICH THAT IS A LICENSED HEALTHCARE
12 PROFESSIONAL UNDER THE LAWS IN THE STATE OF SOUTH
13 CAROLINA. FOR EXAMPLE, A CLINICAL PSYCHOLOGIST
14 CAN'T EXPRESS CONCERNING A PSYCHOLOGICAL CONDITION.
15 DO YOU FOLLOW ME? IN OTHER WORDS, THERE'S THAT.
16 HOWEVER, IN YOUR SCENARIO, IF WE'RE GOING TO GO
17 UNDER 42-15-80, ALL THEY HAVE TO DO TO GET A SECOND
18 PSYCHOLOGICAL EVALUATION IS TO SAY OKAY, ONE OF THE
19 DOCTORS SAY -- YOU KNOW, WITH OR WITHOUT THIS, OF
20 COURSE, I THINK THIS IS THE APPROPRIATE WAY IT
21 SHOULD BE DONE, AND THAT IS "WE'VE GOT THIS. DO YOU
22 THINK THERE'S ADDITIONAL TESTING NEEDED, OR DO YOU
23 THINK THERE'S ANOTHER OPINION NEEDED, OR WE WOULD
24 LIKE -- WE BELIEVE -- WE WOULD LIKE TO GET ANOTHER
25 OPINION," AND ALL THEY'VE GOT TO DO IS HAVE A

1 MEDICAL DOCTOR SAY THAT "AS PART OF MY EVALUATION, I
2 BELIEVE THAT HE -- I WOULD LIKE TO HAVE AN
3 ADDITIONAL, A SEPARATE NEURO-PSYCHOLOGICAL
4 EVALUATION PERFORMED." THEY DO NOT HAVE THE RIGHT -
5 - AND I MEAN, HERE AGAIN WE'RE GOING BACK TO THE
6 FACT OF WHAT -- YOU KNOW, WE'RE GOING BACK TO THIS
7 CONCEPT OF IT ISN'T FAIR. WELL, YOU KNOW, I THINK
8 IT'S PRETTY DARN FAIR FOR AN INJURED WORKER TO BE
9 ABLE TO PICK HIS OWN DOCTOR AND TO BE ABLE TO AT
10 LEAST COME OVER HERE AND GET YOU TO MOVE HIM. I
11 THINK THAT'S FAIR, BUT THAT'S NOT WHAT THE STATUTE
12 SAYS. OH NO, HOW MANY TIMES HAVE YOU HEARD,
13 COMMISSIONER, WHEN YOU WERE PRACTICING LAW AND NOW
14 ON THIS COMMISSION, "WE HAVE THE RIGHT TO CONTROL
15 THE MEDICAL"? OKAY, WELL, THAT'S WHAT THE STATUTE
16 SAYS. SO, THEY'RE PROBLEM RIGHT NOW -- AND THEN
17 HERE AGAIN, FOR THE FIRST TIME TODAY, FOR THE FIRST
18 TIME TODAY, I HAVE HEARD THEM SAY -- BECAUSE THEY
19 REALIZE THEY'VE GOT A PROBLEM. THE REASON THEY'RE
20 SAYING THAT IS THIS -- THEN THEY'RE SAYING THIS,
21 "WELL, WE'VE FOUND THIS DOCTOR," AND ARE YOU READY
22 FOR THIS? READY FOR THIS? WHAT IS THIS ALL ABOUT?
23 OKAY, WHAT IS THIS REALLY ALL ABOUT? "WE FOUND THIS
24 DOCTOR IN NORTH CAROLINA." HOW MANY PSYCHIATRISTS
25 ARE THERE IN THE STATE OF SOUTH CAROLINA? HOW MANY

1 PHYSICAL MEDICINE SPECIALISTS THAT SPECIALIZE IN
2 CLOSED-HEAD TRAUMA ARE THERE IN THE STATE OF SOUTH
3 CAROLINA? DO YOU KNOW DR. SIA DOWN AT THE
4 UNIVERSITY OF SOUTH CAROLINA SCHOOL OF MEDICINE DOWN
5 IN CHARLESTON? DO YOU KNOW DR. HAMMICK HERE IN
6 COLUMBIA? DO YOU KNOW DR. EDWARD SELF HERE IN
7 COLUMBIA? WHY ARE THEY GOING TO NORTH CAROLINA?
8 ANOTHER THING, MY CLIENT DOESN'T HAVE TO GO TO NORTH
9 CAROLINA FOR AN EVALUATION. THAT'S ANOTHER THING
10 THE SUPREME COURT ENDED YEARS AGO. THEY CAN'T DRAG
11 HIM ALL OVER THE COUNTRY FOR THESE EVALUATIONS.
12 THERE ARE EXCELLENT QUALIFIED DOCTORS, AND WHAT
13 SHOULD HAVE BEEN DONE IN MY OPINION, AND IT'S TOO
14 LATE NOW FOR THEM. OKAY, WHAT SHOULD HAVE BEEN DONE
15 IS THEY SHOULD HAVE SAID, "SEND HIM TO ANOTHER
16 PSYCHIATRIST OR SEND HIM TO DR. FORSTHOLEEF." ASK
17 DR. FORSTHOLEEF TO SEE IF HE NEEDED ANOTHER SET OF
18 NEUROPSYCHOLOGICAL TESTS. ASK DR. RIBER IF HE
19 NEEDED ANOTHER SET OF NEUROPSYCHOLOGICAL TESTS.
20 ASK, YOU KNOW, ASK -- IF THEY WANTED TO, SEND HIM
21 FOR AN I.M.E. WITH A PSYCHIATRIST, AND THEN IN
22 ADDITION TO THAT, SEE IF HE NEEDS ADDITIONAL
23 TESTING. THERE'S A REASON, BUT IT DOESN'T MATTER
24 WHAT THE REASON IS. WHAT WE HAVE TO DEAL WITH IS
25 THE LAW, AND THE LAW SAYS THEY HAVE THE RIGHT TO

1 SEND HIM TO A QUALIFIED PHYSICIAN, AND BY THE WAY,
2 OUR MEDICAL BOARD STATUTE PROVIDES A CEASE AND
3 ASSIST ORDER IF ANYBODY IS PERFORMING ANY EVALUATION
4 AS A PHYSICIAN AS THIS STATUTE REQUIRES, THAT'S THE
5 ONLY THING THAT THEY CAN DO -- IF ANY DOCTOR, ANY
6 PERSON, HOLDS HIM OUT TO EVALUATE SOMEBODY ON A
7 MEDICAL ISSUE, THAT IS AN UNAUTHORIZED PRACTICE OF
8 MEDICINE, AND THE BOARD CAN ISSUE A CEASE AND ASSIST
9 ORDER ORDERING THAT PERSON NOT TO PERFORM THAT
10 EVALUATION.

11 BY COMMISSIONER JAMES:

12 I UNDERSTAND YOUR ARGUMENT ON THE STATUTE,
13 OKAY. THERE'S -- YOU KNOW, THERE'S OTHER THINGS I
14 HAVE TO LOOK AT. LET ME GO BACK TO THE STATUTE
15 AGAIN. AND I WANT TO MAKE SURE -- SO, UNDER YOUR
16 SCENARIOS, IF THE CLAIMANT WAS TO NEED PSYCHOLOGICAL
17 TREATMENT AND THE DEFENDANTS WERE TO REFUSE, AND I'M
18 NOT TALKING ABOUT -- AGAIN, THIS IS HYPOTHETICAL.

19 BY MR. McDANIEL:

20 OKAY.

21 BY COMMISSIONER JAMES:

22 AND THE DEFENDANTS WERE TO REQUEST ---

23 BY MR. McDANIEL:

24 I KNOW I'M A LITTLE BIT PASSIONATE, BUT I'M
25 OKAY.

1 BY COMMISSIONER JAMES:

2 OKAY. IF THE DEFENDANTS WERE TO REFUSE TO DO
3 THAT, THEN UNDER YOUR SCENARIO, ARE YOU TELLING ME
4 THAT I DON'T -- AS A COMMISSIONER DO NOT HAVE THE
5 AUTHORITY TO TREAT HIM WITH A PSYCHOLOGIST BECAUSE
6 HE'S NOT A DOCTOR?

7 BY MR. McDANIEL:

8 SURE -- SURE, YOU DO.

9 BY COMMISSIONER JAMES:

10 OKAY.

11 BY MR. McDANIEL:

12 DOESN'T MOST OF THE TIME THE -- DOESN'T THAT
13 SCENARIO NORMALLY COME UP THOUGH WHEN A MEDICAL
14 DOCTOR SAYS, "THIS MAN IS SUFFERING FROM DEPRESSION.
15 I THINK HE NEEDS TREATMENT"?

16 BY COMMISSIONER JAMES:

17 NOT ALWAYS.

18 BY MR. McDANIEL:

19 ALL RIGHT. AND ALSO ---

20 BY COMMISSIONER JAMES:

21 SOMETIMES IT IS -- YOU KNOW, SOMETIMES IT'S A
22 QUESTION, AND YOU KNOW, THE CLAIMANT MAY AGAIN SEND
23 HIM TO A PSYCHOLOGIST OR -- WHAT I'M SAYING IS IF I
24 SAY THAT IT'S ORDERED BECAUSE THIS SAYS "QUALIFIED
25 PHYSICIAN OR SURGEON," EVEN IF -- YOU KNOW, AND WE

1 CAN ORDER OTHER THINGS, TOO. WE CAN ORDER PHYSICAL
2 -- WE CAN ORDER PHYSICAL THERAPY.

3 BY MR. McDANIEL:

4 COMMISSIONER, I'M SORRY, I DIDN'T MEAN TO
5 INTERRUPT YOU.

6 BY COMMISSIONER JAMES:

7 GO AHEAD.

8 BY MR. McDANIEL:

9 I SEE -- I KNOW WHAT YOU'RE STRUGGLING WITH,
10 BUT THAT'S ACTUALLY DIFFERENT THAN 42-15-80. WE'RE
11 ACTUALLY TALKING ABOUT 42-15-60, OKAY.

12 BY COMMISSIONER JAMES:

13 OKAY.

14 BY MR. McDANIEL:

15 AND WE'RE ALSO -- REMEMBER WHAT WE WERE TALKING
16 ABOUT EARLIER -- ANOTHER THING, I KNOW -- I KNOW
17 WHAT I'M ASKING YOU TO DO, AND I'M ASKING YOU TO DO
18 SOMETHING, WHICH IS WHAT NEEDS TO BE DONE. WE'VE
19 GOTTEN A LITTLE LOOSEY GOOSEY, AS I WILL READILY
20 ADMIT. FOR EXAMPLE, PEOPLE UNDER THAT SAME STATUTE
21 ARE REQUESTING FUNCTIONAL CAPACITY EVALUATIONS -- I
22 MEAN, EXCUSE ME -- AND THEY'RE ALSO REQUESTING THAT
23 THEY BE ALLOWED TO HAVE THEIR OWN VOCATIONAL
24 EVALUATION. THERE'S NO AUTHORITY UNDER THAT
25 STATUTE. THERE'S NO AUTHORITY UNDER THE STATUTE,

1 NOW HOWEVER, THERE IS AUTHORITY.

2 BY COMMISSIONER JAMES:

3 WELL, HERE'S THE THING IF YOU'RE SAYING THERE'S
4 NO AUTHORITY WITH REGARDS TO THE VOCATIONAL
5 EVALUATION, IF ONE SIDE COMES IN HERE WITH A
6 VOCATIONAL EVALUATION AND REFUSES AGAIN TO LET --
7 AGAIN, WE'VE GOT OTHER THINGS GOING ON HERE, BUT IF
8 WE'RE JUST LOOKING AT SOMETHING THAT'S SIMPLE AND
9 TIMELY, AND ONE PERSON SAYS "I'VE GOT THIS VOC
10 EVALUATION," AND THEN THE CLAIMANT REFUSES TO SUBMIT
11 TO A VOCATIONAL EVALUATION, THEN THAT'S GOING --
12 THAT'S GOING TO GO INTO -- YOU KNOW, IT'S GOING TO
13 GO INTO THE WEIGHING OF THE EVIDENCE.

14 BY MR. McDANIEL:

15 WELL, FIRST OFF, REMEMBER WE HAVE THE BURDEN OF
16 PROOF, NUMBER ONE. NUMBER TWO -- NUMBER TWO ABOUT
17 THAT, SOMETHING THAT MOST PEOPLE FORGET AND THE
18 COMMISSION -- THE COMMISSION HAS THE AUTHORITY TO
19 REFER TO THE SOUTH CAROLINA DEPARTMENT OF VOCATIONAL
20 REHABILITATION FOR VOCATIONAL TESTING SO THAT WE
21 CAN'T RIG IT.

22 BY COMMISSIONER JAMES:

23 I'VE GIVEN YOU A COUPLE OF DIFFERENT EXAMPLES,
24 BUT WHAT I'M SAYING IS IF THERE'S SOMETHING THAT I'M
25 NOT AUTHORIZED TO MAKE THAT TEST HAPPEN, AND THERE

1 IS ALREADY A TEST BY THE CLAIMANT, THEN WHAT
2 HAPPENS, NO MATTER WHAT SCENARIO I GIVE YOU, NO
3 MATTER WHAT HYPOTHETICAL I GIVE YOU, THEN IT ENDS UP
4 -- IT ENDS UP IN THE WEIGHING OF THE EVIDENCE. NOW,
5 WE'VE GOT OTHER THINGS GOING ON HERE, BECAUSE YOU'RE
6 SAYING THAT THEY HAVEN'T TIMELY REQUESTED THIS.

7 BY MR. McDANIEL:

8 THAT'S TRUE, TOO.

9 BY COMMISSIONER JAMES:

10 THERE'S OTHER ---

11 BY MR. McDANIEL:

12 THE M.D. -- THE M.D. PART OF IT, AND I'M ALSO
13 SAYING YES, THAT THEY HAVE WAITED UNTIL THE LAST
14 MINUTE FOR THE NEUROPSYCHOLOGICAL TESTING, SIX WEEKS
15 BEFORE.

16 BY COMMISSIONER JAMES:

17 OKAY. LET ME ASK THIS.

18 BY MR. McDANIEL:

19 OKAY.

20 BY COMMISSIONER JAMES:

21 WHEN WAS THE FIRST -- OKAY, BECAUSE WE KNEW
22 THAT IN 2011 BEFORE THE STIMULATOR, ---

23 BY MR. McDANIEL:

24 CORRECT.

25 BY COMMISSIONER JAMES:

1 --- THAT THERE WAS A REQUEST FOR THE
2 NEUROPSYCH, AND THAT IT WAS NOT GOING TO BE ABLE TO
3 BE HELD BECAUSE OF THE STIMULATOR.

4 BY MR. McDANIEL:

5 IT WAS RIGHT ---

6 BY COMMISSIONER JAMES:

7 SO, WHEN ---

8 BY MR. McDANIEL:

9 I'M SORRY.

10 BY COMMISSIONER JAMES:

11 SO, WHEN WAS THE FIRST TIME THAT THE DEFENDANTS
12 KNEW THAT A NEUROPSYCHOLOGIST WOULD HAVE BEEN
13 OBJECTIONABLE BASED ON HIS QUALIFICATIONS AND THAT
14 THERE WAS NO AUTHORITY TO SEND HIM THERE; WHEN WOULD
15 BE THE FIRST TIME THAT THAT ISSUE CAME UP?

16 BY MR. McDANIEL:

17 I CANNOT RIGHT OFF THE CUFF TELL YOU EXACTLY
18 WHEN. CANNOT -- I DO NOT REMEMBER WHETHER OR NOT --
19 AND IF HE REMEMBERS -- SOMETHING IS RUMINATING IN MY
20 MIND THAT WE DISCUSSED MY OBJECTION TO A
21 NEUROPSYCHOLOGICAL EVALUATION BACK AT THAT TIME. I
22 DON'T KNOW IF WE DID OR NOT. I WOULD NOT SUBMIT
23 HERE AS AN OFFICER OF THE COURT TO TELL YOU THAT WE
24 DEFINITELY DID OR DEFINITELY DID NOT. I DO NOT KNOW
25 WHETHER OR NOT I WROTE THEM AT THAT TIME, BECAUSE

1 THE NEUROPSYCHOLOGICAL TESTING -- MR. FAJARDO CAN
2 CORRECT ME IF I'M WRONG, BUT I BELIEVE IT WAS ALMOST
3 IDENTICALLY AT THE SAME WITHIN A WEEK OF EACH OTHER
4 OF WHEN TED WENT TO COLORADO FOR THE IMPLANTATION.
5 IT WAS SCHEDULED AROUND -- IT WAS IN AUGUST. I
6 REMEMBER THAT. AND IT WAS ALMOST IDENTICAL TO THE
7 TIME THAT HE WOUND UP HAVING THE ---

8 BY COMMISSIONER JAMES:

9 AND I'LL ASK ---

10 BY MR. McDANIEL:

11 AL, I DIDN'T RECOGNIZE YOU OVER THERE, MAN.

12 BY COMMISSIONER JAMES:

13 I'LL ASK YOU BOTH AS OFFICERS OF THE COURT.

14 BY MR. McDANIEL:

15 SURE.

16 BY COMMISSIONER JAMES:

17 BUT WHAT THE DEFENDANTS ARE TELLING ME IS THAT
18 -- I KNOW THERE'S THIS DELAY FROM 2011, AND YOU'RE
19 SAYING THAT HE WAS RELEASED FROM THE CARE IN
20 COLORADO AND COULD HAVE SUBMITTED TO A
21 NEUROPSYCHOLOGIST THAT THEY SUBMIT THAT THEY'VE
22 DONE, AND THEN THEY'RE INDICATING "WELL, WE
23 SCHEDULED IT, AND WE WOULD HAVE BEEN READY WITH OUR
24 NEUROPSYCH EXAM HAD HE WENT THE LAST TIME THAT WE
25 SCHEDULED IT," IF I'M HEARING CORRECTLY. BUT THEN

1 THIS ISSUE, AND THAT'S WHAT I'M ASKING -- WHEN DID
2 IT COME UP? WHEN WAS THE ISSUE OF THE FACT THAT A
3 NEUROPSYCHOLOGIST IS NOT SOMEBODY THAT HE CAN BE
4 ORDERED TO ATTEND?

5 BY MR. McDANIEL:

6 YOU KNOW, I'M GOING TO LET MR. FAJARDO AND IF
7 AL -- MR. DANLEY, I DID NOT REALIZE HE WAS HERE, BUT
8 I DID NOT REALIZE THAT WAS HIM SITTING NEXT TO HIM.
9 YOU'RE GETTING OLD, AL, JUST LIKE ME.

10 BY MR. DANLEY:

11 I AM.

12 BY MR. McDANIEL:

13 BUT THE POINT OF THAT IS THAT I'LL LET THEM
14 SPEAK, AND WHILE THEY DO THAT, I WILL LOOK THROUGH
15 MY FILE ON MY POINT AND SEE IF THEY HAVE ANY BETTER
16 RECOLLECTION THAN I DO.

17 BY COMMISSIONER JAMES:

18 BECAUSE THEY'RE TELLING -- THEY'RE SAYING "WE
19 WOULD HAVE HAD IT, AND WE WOULD HAVE BEEN READY."
20 AND I DON'T KNOW WHEN THIS IS SET FOR A HEARING.
21 Y'ALL ARE BOTH INDICATING TO ME THAT, YOU KNOW, THE
22 50 WAS FILED, AND I'M ASSUMING THAT IT'S PROBABLY --
23 IF I LOOK IN THE FILE, IT'S PROBABLY SET FOR A
24 HEARING IN FRONT OF ---

25 BY MR. McDANIEL:

1 JUNE.

2 BY COMMISSIONER JAMES:

3 --- ME SOME TIME IN JUNE.

4 BY MR. FAJARDO:

5 IT'S JUNE 5TH.

6 BY COMMISSIONER JAMES:

7 OKAY, ALL RIGHT. MR. FAJARDO, ARE YOU ---

8 BY MR. McDANIEL:

9 JUNE 5TH.

10 BY COMMISSIONER JAMES:

11 OKAY, RIGHT AROUND THE CORNER. MR. FAJARDO, DO
12 YOU HAVE AN ANSWER TO THE QUESTION THAT I'M ASKING?

13 BY MR. FAJARDO:

14 I DO.

15 BY COMMISSIONER JAMES:

16 OKAY.

17 BY MR. FAJARDO:

18 MAY MR. DANLEY SPEAK FOR A MOMENT REGARDING HIS
19 PRIOR INVOLVEMENT WITH THE CASE AS WELL?

20 BY MR. DANLEY:

21 COMMISSIONER, I DON'T ---

22 BY COMMISSIONER JAMES:

23 WELL, I GUESS SINCE THIS IS LONG-STANDING, WE
24 DON'T USUALLY HAVE TWO ATTORNEYS TALKING.

25 BY MR. DANLEY:

1 WHICH IS WHAT I WAS GOING TO ADDRESS. I DON'T
2 WANT TO VIOLATE THE RULES ON TWO LAWYERS ARGUING ON
3 THE SAME PARTY.

4 BY MR. McDANIEL:

5 NO. I HAVE NO PROBLEM WITH THAT.

6 BY MR. DANLEY:

7 OKAY.

8 BY MR. McDANIEL:

9 I'VE NEVER PULLED THAT ON ANYBODY, REALLY.

10 BY MR. DANLEY:

11 WELL, I APPRECIATE IT, BECAUSE I WAS INITIALLY
12 INVOLVED IN THE CASE, COMMISSIONER, AND I WAS THE
13 ONE WHO ACTUALLY INITIALLY SET THE APPOINTMENT FOR
14 MR. POLANSKY TO BE SEEN BY DR. MARK WILLIAMS IN
15 AUGUST OF LAST YEAR, AND MR. POLANSKY REFUSED TO
16 ATTEND THAT APPOINTMENT.

17 AND AS I RECALL, PRESTON, WE DIDN'T REALLY GET
18 INTO THE SPECIFICS, IF I RECALL.

19 WE DIDN'T GET INTO THE SPECIFICS OF WHY HE
20 OBJECTED TO GOING, BECAUSE WE HAD THE APPOINTMENT
21 SET, AND WE HAVE A LETTER IN FACT FROM THE STATE
22 ACCIDENT FUND.

23 BY MR. McDANIEL:

24 YOU MAY HAVE SENT IT -- DID YOU SEND THAT AS
25 PART OF THE MOTION? I THINK Y'ALL ATTACHED ONE, AL.

1 BY MR. FAJARDO:

2 THAT'S IN HIS MOTION AS WELL.

3 BY MR. DANLEY:

4 COMMISSIONER, IF YOU WILL LOOK AT -- IT'S THE
5 SECOND FROM THE LAST PAGE IN MR. McDANIEL'S
6 SUBMISSION TO YOU.

7 BY MR. McDANIEL:

8 AUGUST 4TH.

9 BY MR. DANLEY:

10 THAT'S CORRECT. THERE'S A LETTER DATED AUGUST
11 4TH ---

12 BY COMMISSIONER JAMES:

13 OKAY.

14 BY MR. DELLENEY:

15 --- FROM THE STATE ACCIDENT FUND TO DR.
16 WILLIAMS. I HAD ARRANGED THE NEUROPSYCHOLOGICAL
17 EVALUATION AT THAT TIME. DR. WILLIAMS, OF COURSE,
18 HIS FEE WAS \$3,600. THE ONLY WAY HE WOULD AGREE TO
19 DO THIS IS IF THE STATE FUND AGREED TO GUARANTEE THE
20 PAYMENT. COMMISSIONER, IF I MAY APPROACH, I CAN
21 JUST SHOW YOU THE LETTER RIGHT QUICK LIKE IF YOU
22 CAN'T FIND IT.

23 BY MR. McDANIEL:

24 IT'S ACTUALLY ATTACHED TO THE MOTION.

25 BY COMMISSIONER JAMES:

1 I SEE IT.

2 BY MR. DANLEY:

3 YOU SEE IT?

4 BY COMMISSIONER JAMES:

5 I SEE IT.

6 BY MR. DANLEY:

7 OKAY. SO, THAT SHOWS VERY CLEARLY THAT WE HAD
8 THE NEUROPSYCH EVALUATION SET IN AUGUST OF LAST
9 YEAR. MR. McDANIEL AND I HAD SOME DISCUSSION ABOUT
10 THAT, AND AROUND THAT TIME PERIOD, MR. POLANSKY WAS
11 SET TO GO OUT TO COLORADO. SO, WE JUST AGREED THAT
12 SINCE HE'S GOING TO COLORADO THAT THIS WHOLE ISSUE -
13 - WELL, SINCE HE HAD OBJECTED TO HIM SEEING DR.
14 WILLIAMS, AND WE HAD HIM GOING OUT TO COLORADO AT
15 THAT TIME, WE JUST TOOK THE CASE OFF THE DOCKET. I
16 THINK MR. McDANIEL MIGHT HAVE WITHDRAWN THE FORM 50,
17 AND SO WE JUST CANCELLED THE NEUROPSYCH EVALUATION
18 AT THAT POINT, BECAUSE WE THOUGHT IT MIGHT HAVE BEEN
19 PREMATURE, AND SO WHAT HAPPENED THEN WAS AFTER HE
20 WENT OUT TO COLORADO AND GOT BACK AND THEN MR.
21 McDANIEL RE-FILED HIS FORM 50, THE NEUROPSYCH
22 EVALUATION WAS RESET WITH DR. MARK WILLIAMS. AND IT
23 WAS SET FOR MAY 1ST. SO, TIMELINESS REALLY IS NOT
24 AN ISSUE HERE, BECAUSE HAD HE SEEN DR. WILLIAMS ON
25 MAY 1ST, WE MOST LIKELY WOULD HAVE A REPORT BY NOW.

1 THE HEARING IS JUNE 5TH. SO, THE NEUROPSYCH SET MAY
2 1ST WAS WELL OVER A MONTH BEFORE THE HEARING. SO,
3 AGAIN, WAS STATE FUND TRIFELING OR UNTIMELY IN
4 TRYING TO GET THIS DONE? - ABSOLUTELY NOT. IT WAS
5 SET ONCE BEFORE, AND THEY OBJECTED. IN THE
6 MEANTIME, WE SENT HIM OUT TO COLORADO. THE FORM 50
7 WAS WITHDRAWN. HE CAME BACK AND RE-FILED A FORM 50,
8 AND THE NEUROPSYCH WAS SET, AND CLAIMANT OBJECTED TO
9 THAT ON THE BASIS, AS I UNDERSTAND IT, THAT DR.
10 WILLIAMS IS NOT A, QUOTE, UNQUOTE, "PHYSICIAN" UNDER
11 THE ACT. AGAIN, OUR POSITION IS AS YOU WELL
12 INDICATED, COMMISSIONER, IF THEY HAVE A
13 PSYCHOLOGICAL EVALUATION, THE DEFENDANTS OUGHT TO BE
14 ABLE TO DEFEND THE CASE BY GETTING A PSYCHOLOGICAL
15 EVALUATION. IT'S LIKE AGAIN IF THEY SENT SOMEBODY
16 OUT FOR A VOCATIONAL EVALUATION, BASED ON CLAIMANT'S
17 ARGUMENT, THE DEFENDANTS WOULD NOT HAVE THE RIGHT TO
18 SEND THE PERSON OUT FOR A VOCATIONAL EXPERT, BECAUSE
19 HE'S NOT A PHYSICIAN UNDER THE ACT, AND QUOTE
20 FRANKLY, I DON'T THINK THAT ARGUMENT MAKES LOGICAL
21 SENSE WHEN YOU TAKE IT TO ITS ULTIMATE CONCLUSION.
22 SO, TIMELINESS REALLY IS NOT AN ISSUE HERE. THE
23 ISSUE IS WHETHER OR NOT THE DEFENDANTS HAVE THE
24 RIGHT TO DEFEND THIS CASE, WHICH THEY HAVE ATTEMPTED
25 TO DO, BUT THE CLAIMANT HAS OBJECTED EVERY TIME

1 WE'VE GOTTEN THE NEUROPSYCHOLOGICAL EVALUATION
2 SCHEDULED.

3 AND SO THAT'S ESSENTIALLY WHAT HAPPENED BACK IN
4 AUGUST, PRESTON, BECAUSE I GOT THE CASE AND WAS KIND
5 OF WORKING IT AND THEN MR. FAJARDO GOT INVOLVED, AND
6 SO THAT'S ESSENTIALLY WHAT HAPPENED BACK IN AUGUST
7 OF LAST YEAR.

8 BY COMMISSIONER JAMES:

9 WAS THERE SOMETHING ELSE THAT YOU WANTED TO
10 PRESENT?

11 BY MR. FAJARDO:

12 AGAIN, COMMISSIONER, IN THE EVENT THAT YOU DO
13 FIND CREDENCE THAT WE CANNOT SEND THE CLAIMANT FOR A
14 NEUROPSYCHOLOGICAL EVALUATION BASED PURELY ON THE
15 FACT THAT HE'S NOT A PHYSICIAN, WE HAVE DONE OUR DUE
16 DILIGENCE AND FOUND A NATIONAL EXPERT IN
17 NEUROPSYCHOLOGY WHO IS BOTH A MEDICAL DOCTOR AND A
18 NEUROPSYCHOLOGIST WHO CAN MORE THAN FULFILL THOSE
19 REQUIREMENTS. AND I BELIEVE THAT THERE'S NO
20 OBJECTION THAT CAN BE MADE TO THAT.

21 BY COMMISSIONER JAMES:

22 IS YOUR CLIENT OKAY?

23 IS THERE ANYTHING YOU NEED, SIR?

24 BY THE CLAIMANT:

25 NO, I JUST CAN'T SIT.

1 BY MR. McDANIEL:

2 HE JUST CAN'T SIT FOR ANY PERIOD OF TIME.

3 BY COMMISSIONER JAMES:

4 OKAY, ALL RIGHT. I JUST WANTED TO MAKE SURE
5 YOU WERE OKAY WITH THE HEARING CONTINUING, THAT YOU
6 DIDN'T NEED A BREAK.

7 ALL RIGHT, IS THERE ANYTHING ELSE, GENTLEMAN?
8 I'VE ACTUALLY -- YOU KNOW, AND I'VE BEEN DOING
9 WORKERS' COMP -- STARTING DOING IT EXCLUSIVELY IN
10 '97, AND I'VE ACTUALLY NEVER SEEN -- AND THAT'S WHY
11 I WAS ASKING YOU ABOUT THESE DIFFERENT EXAMPLES.
12 I'VE NEVER SEEN THIS -- I'VE NEVER SEEN THIS
13 ARGUMENT MADE. IT DOESN'T MEAN THAT -- IT DOESN'T
14 MEAN THAT IT DOESN'T HAVE MERIT. THERE ARE NEW
15 ARGUMENTS, YOU KNOW, ON ISSUES ALL THE TIME. I JUST
16 CAME FROM A CERTAIN VENUE IN WHICH I PRESIDED OVER
17 CASES, AND EVERY WEEK THERE WAS A -- YOU KNOW, EVERY
18 WEEK THERE WAS A NEW ARGUMENT. SO, I'M NOT SAYING
19 IT DOESN'T HAVE MERIT. IT DOESN'T SEEM TO BE -- IF
20 THE ARGUMENT HAS MERIT, THEN IT SEEMS THAT IT WEIGHS
21 -- IT'S GOING TO WEIGH IN. IF THAT'S THE CASE AND
22 IT CAN'T BE DONE FOR CERTAIN THINGS OTHER THAN A
23 PHYSICIAN, THEN THAT'S THE WAY THAT IT IS, THEN IT'S
24 GOING TO END -- IT'S GOING TO END UP HAVING AN
25 IMPACT ON HOW EVIDENCE -- HOW EVIDENCE IS WEIGHED.

1 BUT I WILL LOOK AT THIS ISSUE, GENTLEMAN, AND I WILL
2 GIVE YOU A DECISION ON IT VERY SHORTLY, BECAUSE I
3 KNOW YOU HAVE A HEARING COMING UP ON IT. IT MAY NOT
4 BE -- I'VE GOT OTHER THINGS GOING ON THIS WEEK, SO
5 IT MAY BE THE BEGINNING OF NEXT WEEK. BUT, I WILL
6 GET TO IT.

7 BY MR. McDANIEL:

8 YOU KNOW, JUST AS A GENERAL DISCUSSION, I'M
9 RAISING THAT -- HAVE BEEN RAISING IT FOR QUITE A
10 COUPLE OF YEARS. BUT YOU RAISE A GOOD POINT OR AN
11 INTERESTING POINT. YOU KNOW, THERE ARE A LOT OF
12 THINGS THAT ARE JUST SORT OF SLIDING BY THE WAY
13 SIDE, AND JUST PEOPLE ARE -- LIKE I WAS SAYING
14 BEFORE, THERE'S VERY FEW ADVANTAGES FOR THE CLAIMANT
15 ANYMORE UNDER THE ACT, AND THE ONE THING, YOU KNOW,
16 WITH THAT IS I REMEMBER THE WAY -- YOU KNOW, PEOPLE
17 ARE USING THIS SAME ACT THAT WE'RE TALKING ABOUT TO
18 GET VOC. EVALS, AND WE ALSO ARE PRESENTED WITH THAT
19 SAME, WELL, "YOU KNOW, IF YOU'VE GOT ONE, WE SHOULD
20 HAVE ONE" TYPE ARGUMENT, AND I REMEMBER HOW -- I
21 REMEMBER ONE PARTICULAR ATTORNEY ON THE DEFENSE SIDE
22 -- THE COMMISSION READILY, AND IF YOU TALK TO ANY
23 ATTORNEY THAT'S BEEN PRACTICING 20 YEARS OR MORE,
24 THE COMMISSION NEVER ALLOWED THE DEFENDANTS TO HAVE
25 A VOCATIONAL EVALUATION 20 YEARS AGO, NEVER. THEY

1 WOULD NEVER ALLOW IT. THEY WERE ABLE TO GET ONE
2 THOUGH, BECAUSE THEY WOULD DO THIS: WELDON JOHNSON
3 USED TO COME TO MY OFFICE ALL THE TIME, AND WELDON
4 WOULD BRING TO THE DEPOSITION A VOCATIONAL EXPERT.
5 THEN HE WOULD ASK DURING THE DISCOVERY DEPOSITION
6 ALL THE QUESTIONS THAT THAT VOCATIONAL EXPERT
7 WANTED, AND THEN BASED ON A REVIEW OF THE DEPOSITION
8 AND REVIEW OF THE VARIOUS RECORDS THAT HE REQUESTED,
9 THEY WOULD THEN SUBMIT HIS EXPERT OPINION ON THE
10 ISSUE OF THE VOCATIONAL ISSUES. THAT'S THE WAY IT
11 USED TO BE DONE. THAT'S GONE BY THE WAYSIDE.

12 BY COMMISSIONER JAMES:

13 WELL, AND IF YOU ARE -- YOU KNOW, YOU MAY VERY
14 WELL BE CORRECT. YOU KNOW, AND I THINK EVEN FROM
15 THE CIVIL STANDPOINT, WHICH I HAVEN'T DONE ANY CIVIL
16 WORK IN A LONG TIME, THAT THERE'S ALSO UNDER THE
17 DISCOVERY RULES, THERE ARE CERTAIN THINGS THAT CAN
18 BE REQUIRED. BUT IT SEEMS -- AS FAR AS WHAT I -- AS
19 FAR AS WHAT I'VE SEEN, IT'S -- IT DOESN'T RING TRUE
20 THE SPIRIT WITH THE SPIRIT OF LITIGATION.

21 BY MR. McDANIEL:

22 YES.

23 BY COMMISSIONER JAMES:

24 BUT IF IT IS THE CASE, THEN ---

25 BY MR. McDANIEL:

1 I DON'T DISAGREE.

2 BY COMMISSIONER JAMES:

3 --- IT HAS TO HAVE AN IMPACT SOMEHOW. IF THE
4 DEFENDANTS ARE NOT ALLOWED TO DO CERTAIN THINGS,
5 THEN IT DOESN'T -- IT HAS -- YOU KNOW, IT HAS TO
6 HAVE -- IT HAS TO HAVE AN IMPACT. I'M GOING TO GIVE
7 YOU THIS BACK. I DON'T WANT YOU TO WALK OUT,
8 BECAUSE THIS MAY BE YOUR ONLY COPY, AND I DO HAVE
9 IT. EVEN THOUGH THERE'S NOT ONE IN THE FILE, I WILL
10 HAVE A COPY OF IT ON LINE.

11 BY MR. McDANIEL:

12 AND I UNDERSTAND YOUR RULING IS GOING TO BE AS
13 CONCERNING THE NEUROPSYCHOLOGICAL TESTING THAT
14 THEY'VE REQUESTED IN FINAL MOTION; IS THAT CORRECT?

15 BY COMMISSIONER JAMES:

16 THAT IS CORRECT, AND IF -- YOU KNOW, IF I DO
17 FIND THAT THAT NEEDS TO BE DONE, THEN, OF COURSE, WE
18 WILL -- THE HEARING WILL HAVE TO BE CONTINUED.

19 BY MR. McDANIEL:

20 WILL YOU RETAIN JURISDICTION ON THE HEARING?

21 BY COMMISSIONER JAMES:

22 I DON'T KNOW.

23 BY MR. McDANIEL:

24 I WOULD HOPE SO. I WOULD ASK ---

25 BY COMMISSIONER JAMES:

1 YOU KNOW SOMETHING, I HAVE BEEN IN EACH ONE OF
2 Y'ALL'S CHAIRS, BUT IN THIS CHAIR, I HAVE TO -- I'M
3 GOING TO HAVE TO FIGURE OUT WHETHER I RETAIN
4 JURISDICTION OR NOT.

5 BY MR. McDANIEL:

6 OKAY.

7 BY COMMISSIONER JAMES:

8 IT IS A DISCOVERY ISSUE. SO, IT MAY REQUIRE
9 ADDITIONAL DISCOVERY. I DON'T KNOW WHETHER THAT
10 CHANGES THE JURISDICTIONAL COMMISSIONER OR NOT.

11 BY MR. McDANIEL:

12 WELL, AND ---

13 BY COMMISSIONER JAMES:

14 IN THIS CASE, IT'S NOT SOMETHING THAT CAN BE
15 COMPLETED -- I DON'T KNOW. IT COULD BE COMPLETED
16 BEFORE THE END OF MY ---

17 BY MR. McDANIEL:

18 WELL, MOST OF YOUR FELLOW COMMISSIONERS, AS YOU
19 ARE WELL AWARE BEING IN OUR CHAIRS PREVIOUSLY,
20 THEY'RE HOLDING EVERYTHING, AND BECAUSE OF YOUR
21 ACUTE KNOWLEDGE OF THIS, YOU KNOW, THIS SITUATION,
22 YOU KNOW, I WOULD SINCERELY APPRECIATE IT IF YOU
23 WOULD HOLD IT.

24 BY COMMISSIONER JAMES:

25 WELL, WHAT ---

1 BY MR. McDANIEL:

2 AND ANOTHER THING, TOO -- OH, GO AHEAD, I'M
3 SORRY.

4 BY COMMISSIONER JAMES:

5 I'M SORRY. BUT WHAT I EXPECT, TOO, IS THEN
6 AFTER THAT'S DONE, Y'ALL VERY WELL -- YOU MAY BE
7 REQUESTING TO DO A DEPOSITION OF THEIR EXPERT, OR
8 THERE MAY -- YOU KNOW, I'VE SEEN THESE PARTICULAR
9 CASES GO UP VARIOUS LEVELS IN THE DISCOVERY. I'M
10 NOT GOING TO SIT HERE AND SUGGEST THINGS TO YOU.
11 BUT BECAUSE I'VE SEEN THEM. ONCE YOU START WITH
12 THIS HERE, AND THEN I'VE SEEN DIFFERENT DUALING
13 EXPERTS AND DIFFERENT DEPOSITIONS. SO, I DON'T KNOW
14 WHETHER YOU WOULD BE READY FOR IT TO BE TRIED OR
15 NOT. THERE'S ALSO -- AND I UNDERSTAND. I DON'T
16 KNOW THE -- WHETHER THERE'S AUTHORITY FOR IT OR NOT.
17 I UNDERSTAND SOME OF THE COMMISSIONERS ARE ORDERING
18 MEDIATION UNDER CERTAIN -- CERTAIN CASES, COMPLEX
19 CASES. I KNOW THAT THERE IS A REGULATION THAT -- IN
20 FACT THERE'S A PUBLIC HEARING ON IT SOON, AND THIS
21 MAY BE ONE OF THE TYPES OF CASES THAT MAY END UP
22 BEING SUBJECT TO THAT MEDIATION.

23 BY MR. McDANIEL:

24 I THINK THAT ---

25 BY COMMISSIONER JAMES:

1 I DON'T KNOW, BUT LET'S ADDRESS THIS ISSUE
2 FIRST, AND THEN -- YOU KNOW, AND THEN WE WILL GO
3 FROM THERE.

4 BY MR. FAJARDO:

5 COMMISSIONER.

6 BY COMMISSIONER JAMES:

7 YES.

8 BY MR. FAJARDO:

9 ONE MORE THING. THIS IS ON A COMPLETELY
10 ANCILLARY MATTER.

11 BY COMMISSIONER JAMES:

12 OKAY.

13 BY MR. FAJARDO:

14 I'M A NAMED DEFENDANT IN A CIVIL LITIGATION
15 MATTER THAT IS GOING FORWARD -- PERMISSION TO
16 APPROACH?

17 BY COMMISSIONER JAMES:

18 YES, ABSOLUTELY.

19 BY MR. FAJARDO:

20 THIS IS A LETTER FROM MY ATTORNEY.

21 (OFF THE RECORD DISCUSSION)

22 BY COMMISSIONER JAMES:

23 AND I DON'T NEED TO NECESSARILY PUT ALL OF THIS
24 INFORMATION ON RECORD RIGHT NOW. BUT, MR. McDANIEL,
25 ARE YOU AWARE OF HIS SCHEDULING ISSUES?

1 BY MR. McDANIEL:

2 OH, I'M SORRY, NO. ON THE HEARING? OH, I
3 THOUGHT IT WAS ON ANOTHER MATTER.

4 BY COMMISSIONER JAMES:

5 NO, IT'S ANCILLARY, BUT I'M NOT GOING TO -- I
6 DON'T KNOW EXACTLY WHAT IT'S ABOUT, BUT IT'S
7 REQUIRING HIM TO BE IN ANOTHER -- SO, HE'S REQUIRED
8 TO BE IN ANOTHER COURT.

9 WHAT DATES ARE YOU REQUIRED TO BE IN ANOTHER
10 COURT?

11 BY MR. McDANIEL:

12 P.C.R.?

13 BY MR. FAJARDO:

14 IT'S A DIFFERENT MATTER.

15 FROM JUNE 4TH ---

16 BY COMMISSIONER JAMES:

17 WE'LL JUST ---

18 BY MR. FAJARDO:

19 FOR THE WEEK OF JUNE 4TH ESSENTIALLY.

20 BY COMMISSIONER JAMES:

21 SO, THE WEEK THAT IT'S SCHEDULED?

22 BY MR. FAJARDO:

23 YES, COMMISSIONER.

24 BY COMMISSIONER JAMES:

25 AND I DON'T KNOW WHAT THE REST OF MY JUNE

1 DOCKET LOOKS LIKE EITHER. BUT LET ME LOOK AT THIS
2 ISSUE FIRST.

3 BY MR. FAJARDO:

4 OKAY, SURE.

5 BY COMMISSIONER JAMES:

6 AND THEN WE'LL -- THEN WE'LL GO FROM THERE.
7 LIKE I SAID, GENTLEMAN, I WILL -- I WILL LET YOU
8 KNOW BY EMAIL. DO I HAVE BOTH OF YOUR EMAILS, I'M
9 ASSUMING?

10 BY MR. McDANIEL:

11 YOU HAVE DEFINITELY MY OFFICE EMAIL.

12 BY COMMISSIONER JAMES:

13 OKAY.

14 BY MR. McDANIEL:

15 I DON'T DO EMAIL TOO WELL.

16 BY COMMISSIONER JAMES:

17 SOMEBODY CAN ---

18 BY MR. McDANIEL:

19 TRUST ME, MY STAFF REVIEWS IT EVERY MORNING AND
20 EVERY AFTERNOON, OR AT LEAST WE MAKE SURE THAT WE --
21 YES, WE CAN GET EVERYTHING BY EMAIL, BUT LIKE I SAY,
22 IF YOU GET AN EMAIL FROM ME, ODDS ARE IT'S BEEN
23 TYPED BY SOMEBODY IN MY OFFICE.

24 BY COMMISSIONER JAMES:

25 OKAY.

1 BY MR. McDANIEL:

2 AND YOU DON'T NEED TO LAUGH.

3 BY COMMISSIONER JAMES:

4 AND THIS CONFLICT MAY BE WHAT ACTUALLY MAY
5 DRIVE IT TO THE NEXT JURISDICTIONAL COMMISSIONER,
6 BUT I WILL CONSIDER -- YOU KNOW, I DON'T KNOW WHAT
7 THE DEFENDANTS' POSITION IS, BUT I WILL CONSIDER IT.
8 IF THAT'S THEIR REQUEST, I WILL CONSIDER RETAINING
9 JURISDICTION ON THE MATTER. OKAY, AND I WILL DO
10 THIS FIRST, AND THEN WE'LL GO FROM THERE.

11 BY MR. FAJARDO:

12 I THANK YOU, COMMISSIONER.

13 BY MR. McDANIEL:

14 THANK YOU, COMMISSIONER.

15 BY COMMISSIONER JAMES:

THANK YOU.
(THERE BEING NOTHING FURTHER, THIS HEARING WAS CONCLUDED
AT 12:53 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 0024408 & 9922954

EMPLOYEE/CLAIMANT: THEODORE P. POLANSKY

EMPLOYER: S.C. OFFICE OF ATTORNEY GENERAL

INSURER: STATE ACCIDENT FUND

I, JAN L. WHITWORTH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 55 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF THEODORE POLANSKY TAKEN ON THE 16TH DAY OF MAY, 2012.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND THIS 2ND DAY OF JUNE, 2012.

JAN L. WHITWORTH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3-12-2014

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1999-3671

Order
App'd

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) WORKERS' COMPENSATION COMMISSION

Theodore Polansky,
Employee,

Claimant,

vs.

SC Office of Attorney General,

Employer,

and

State Accident Fund,

Carrier,

Defendants.

W C C File Numbers: 9922954 & 0024408

DECISION AND ORDER

Date of Hearing: May 16, 2012
Location of Hearing: Columbia, South Carolina
Appearing for Claimant: Preston F. McDaniel, Esquire
Appearing for Defendants: Andrew W. Fajardo, Esquire
Purpose of Hearing: To determine issues set forth on Defendants' Motion to Compel
Hearing Commissioner: Hon. Melody James
Dated: June 27, 2012

APA SUBMISSIONS

No APA Submissions were submitted by either party.

STIPULATIONS

No stipulations were made by either party.

STATEMENT OF THE CASE

This claim came before me pursuant to Defendants' Motion to Compel, filed on April 20, 2012. Therein, Defendants sought to compel Claimant to submit pursuant to S.C. Code § 42-15-80 for neuropsychological examination for the purpose of determining whether Claimant sustained physical brain damage during the course of his treatment for injuries sustained while employed with the South Carolina Office of the Attorney General.

Claimant sustained a compensable injury to his left knee in 1999 and compensable injuries to the back and psyche in 2000. In May of 2011, Claimant filed a Form 50 in both claims alleging physical brain damage as a result of a reaction to medication during the course of a hospital stay in 2002. In his Form 50's, Claimant alleged that he had not filed a claim for physical brain damage until 2011 as various opinions and/or records had not been received.

Claimant obtained a neuropsychological evaluation from Dr. Avie Rainwater, a previously authorized psychologist, in March of 2011 to support his claim for physical brain damage. In order to defend against Claimant's allegation of physical brain damage, Defendants scheduled an evaluation with an expert neuropsychologist, Dr. Mark Williams, to occur on August 22, 2011. At that time, Claimant was scheduled to be sent to Colorado for re-implantation and revision of a spinal cord stimulator, Claimant withdrew his Form 50 and the neuropsychological evaluation was cancelled.

On March 2, 2012, Claimant re-filed his Form 50's in both claims. Accordingly, Defendants timely re-scheduled a neuropsychological evaluation to defend against Claimant's allegation of physical brain damage. The neuropsychological evaluation with Dr. Mark Williams was to set to take place on May 1, 2012. However, Claimant refused to attend this neuropsychological evaluation on the grounds that Dr. Mark Williams, a board-certified neuropsychologist, is not a qualified physician or surgeon and Defendants had no right under the Act to compel such an evaluation. In response to Claimant's refusal to submit to a neuropsychological evaluation, Defendants filed their Motions to Compel and for Continuance in both claims.

POSITION OF THE PARTIES

It is Defendants' position that Claimant should be compelled to submit to a neuropsychological evaluation pursuant to §42-15-80. Under §42-15-80, Defendants contend that a Claimant must submit to an evaluation upon request by the employer and that Claimant has no right to proceed with a hearing on the merits of his claim until he submits to such an evaluation. Defendants submit that Claimant obtained his own neuropsychological evaluation by a psychologist to support his claim of physical brain damage and is now attempting to close the doors of discovery and prevent Defendants from defending their case. Such an attempt by Claimant is clearly against the spirit of litigation, an abuse of discovery and would result in extreme prejudice to Defendants' ability to defend against Claimant's allegations.

Defendants further assert that the Rules of Civil Procedure allow for a broad scope of discovery. Specifically, Defendants assert that Rule 26 (b)(1) of the South Carolina Rules of Civil Procedure provide that parties may obtain discovery regarding any matter not privileged

which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of that party seeking discovery or the claim or defense of any other party. Discovery is limited by Rule 26(c) of the South Carolina Rules of Civil Procedure, which provides that a court may issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden by expense. Defendants submit that none of these factors are present in this case and, therefore, no protective order is warranted. As Claimant has sought and received the opinion of his own psychologist, Defendants would submit that they clearly have the right to discovery in the form of an examination by their own neuropsychologist in order to offer a competing opinion with that of Claimant's paid psychologist.

Defendants further submit that, in the event that Claimant can not be compelled to submit to a neuropsychological evaluation by Dr. Mark Williams, an expert neuropsychologist, under §42-15-80, that Claimant must submit to a neuropsychological evaluation by a neuropsychiatrist, who is a qualified physician. Defendants have contacted an expert neuropsychiatrist, Dr. Thomas Gualtieri, located in North Carolina, who is willing to evaluate Claimant for this very purpose.

Defendants further request that the Commission issue an Order excluding from evidence any neuropsychological report submitted in this case by Claimant unless and until he voluntarily submits to neuropsychological examination by an expert of Defendants' choosing.

Finally, Defendants request that a continuance be granted for two reasons. First, a continuance is warranted in this matter because significant additional discovery will likely be necessary, at least in the form of depositions and possibly additional diagnostic testing, following Claimant's neuropsychological evaluation by Defendants' expert. Had Claimant timely

submitted to neuropsychological evaluation as previously scheduled in both August 2011 and in May of 2012, there would be no need for a continuance. However, as Claimant has repeatedly refused to attend the timely scheduled neuropsychological evaluations with Dr. Mark Williams, a continuance is absolutely necessary to protect the Defendants' rights to discovery and to defend against Claimant's allegations. Second, counsel for Defendants has a conflict in a higher court for the week of June 4th, 2012. Therefore, Defendants submit that a continuance is necessary to and warranted on both grounds.

It is Claimant's position that he cannot be compelled to attend a neuropsychological evaluation by a psychologist unless part of a larger examination ordered by a qualified physician or surgeon under §42-15-80. Claimant argues that the Commission has no jurisdiction and no authority under the Act to require Claimant to submit to an evaluation not performed by a qualified physician or surgeon. Because Dr. Mark Williams is a neuropsychologist, and not a psychiatrist or otherwise qualified physician or surgeon, Claimant argues his refusal to submit to the previously scheduled evaluations is justified. Claimant also submits that the authorized treating physicians have not requested repeat neuropsychological testing after the evaluation by Dr. Rainwater in March of 2011. Claimant admits that the Commission has the power to compel an evaluation by a qualified physician or surgeon, such as a psychiatrist. However, Claimant argues that he should not be compelled to attend a neuropsychological evaluation by an out-of-state neuropsychiatrist if there are available neuropsychiatrists within the state.

Claimant also argues that Defendants have not moved forward with discovery during the time period after Claimant withdrew his Form 50 in August of 2011 until it was re-filed in March of 2012, should not be allowed to conduct discovery efforts in the form of a neuropsychological

evaluation, and have engaged in dilatory tactics. Therefore, Claimant argues that Defendants' Motion should be denied and the matter be allowed to proceed to hearing scheduled on June 5, 2011.

FINDINGS OF FACT

1. I find that Claimant is correct that under §42-15-80 there is no authority to compel the attendance for examination, unless it is a qualified physician or surgeon.
2. An independent medical examination by a neuropsychologist would have been complete if Claimant had attended the previously scheduled appointments.
3. Claimant is to submit to an examination of a neuropsychiatrist of the choice of the Defendants. Defendants are to seek a neuropsychiatrist in South Carolina. If the availability of a qualified neuropsychiatrist is an issue in South Carolina, then Claimant is to submit to an evaluation by a qualified physician in another state. In that event, travel expenses are to be paid by Defendants to Claimant as they relate to the out-of-state evaluation.
4. This matter is continued for additional discovery and protection of Mr. Fajardo for the week of June 4th, 2012 (higher court).
5. Therefore, these claims are to be returned to General Files.

CONCLUSIONS OF LAW

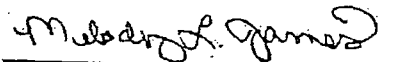
Pursuant to §42-15-80, Claimant is obligated to submit to a neuropsychological examination by a qualified physician or surgeon of Defendants' choosing.

ORDER

1. Claimant is to submit to a neuropsychological examination by a qualified physician or surgeon of Defendants' choosing.
2. W.C.C. File Numbers 9922954 & 0024408 are hereby returned to General Files pending the completion of all necessary discovery.

IT IS SO ORDERED!


Commissioner Melody L. James


Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
June 27, 2012

By: Tamara Morris, Administrative Assistant to Commissioner James

2012579336

SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM										Page #		1	
SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM										TR-310 (Rev. 7/2010)		1	
SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM										1		1	
Date: 10-28-2012 Time of Collision: 1420										Collision Location (Rt # / Name): 6 / N LAKE DR		Miles: 31	
Lane # / Dir.: 2 / S										Distance: .01		Direction: N	
1- Interstate 4- Secondary 2- US Primary 5- County 3- SC Primary 6- Other										Base Intersection (Rt # / Name): 408 / PILGRIM CHURCH RD		GPS COORDINATES 00 00 00.00	
R.R. Id.: From: N E 1 - Entrance To: N E 2 - US Primary										Second Intersection (Rt # / Name): / CONNER RD		DEGREES MINUTES SECONDS	
E-431512 Driver/Pedestrian's Full Name: POLANSKY THEODORE PAUL										E-431513 Driver/Pedestrian's Full Name: DUKE AMANDA CELESTE			
Unit # 01 Sex M Race W Street/R.F.D. Birth Date 04-07-1957										Unit # 02 Sex F Race W Street/R.F.D. Birth Date 03-10-1965			
State SC Driver's License # 004878126 Class D Insurance Company USAA										State SC Driver's License # 008328241 Class D Insurance Company OWNERS INS CO.			
Year 1996 Body 4S Vehicle Make FORD VIN # 1FMDU3ZX3TZA21955										Year 2011 Body SU Vehicle Make LEXS VIN # JTJBM7FX565029992			
State SC Year 2013 License Plate # 26211W Owner's D.L. # 004878126										State SC Year 2013 License Plate # GJX462 Owner's D.L. # 008328241			
Home Telephone (803) 7322593 Owner's Full Name POLANSKY THEODORE PAUL										Home Telephone (803) 2063305 Owner's Full Name DUKE AMANDA CELESTE			
Bus. Telephone (803) 4229277 Street/R.F.D. Contributed To Collision Yes (No)										Bus. Telephone () Street/R.F.D. Contributed To Collision Yes (No)			
Estimated Speed 35 Speed Limit 45 C.D.L. Req. Yes (No) T.B.S. Req. Yes (No) Also Orig Info (see back): Yes (No)										Estimated Speed 35 Speed Limit 45 C.D.L. Req. Yes (No) T.B.S. Req. Yes (No) Also Orig Info (see back): Yes (No)			
Driver/Pedestrian's Full Name: State Year License Plate # Owner's D.L. #										State Year License Plate # Owner's D.L. #			
Unit # 01 Sex M Race W Street/R.F.D. Birth Date City, State, & Zip										Home Telephone () Owner's Full Name			
State SC Driver's License # Class Insurance Company										Bus. Telephone () Street/R.F.D.			
Year Body Vehicle Make VIN #										Contributed To Collision Yes (No) City, State, & Zip			
Dir. of Travel: Unit 1: R S E (W) Unit 2: N S E (W) Unit 3: N S E W										Estimated Speed 35 Speed Limit 45 C.D.L. Req. Yes (No) T.B.S. Req. Yes (No) Also Orig Info (see back): Yes (No)			
										Unit 1 Dam. \$1000 Unit 2 Dam. \$2000 Unit 3 Dam. \$ Prop. Dam. 1 \$ Prop. Dam. 2 \$			
Property Owner (Witness) DARREN GOUDE Address City										Property Owner (Witness) Address City			
State SC Zip 29073 Phone 803 951 0943										State SC Zip Phone			
Photo: Describe What Happened (Refer to Units by Number) Y (N)										BOTH UNITS 1 AND 2 WERE TRAVELING WEST ON SC-6. THE DRIVER OF UNIT 2 CHANGED LANES IMPROPERLY, STRIKING UNIT 1 IN THE DRIVERS SIDE FRONT FENDER.			
Certified to be a true and correct copy of the original document on file with the South Carolina Department of Motor Vehicles.										D. L. Shelton			
Procedures & Compliance, Director													
NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANTY IS MADE AS TO THE FACTUAL ACCURACY THEREOF.													
Investigating Officer's Name: SAVJE - R M Rank: S/TSR Badge #: T 442 Jurisdiction Code: H P O 1 Review Date: 10-31-2012 Reviewer's Name: C M Shelton Rank: Sgt Internal Agency Code: 12BW212093													

P.807

2012579336

Unit	Date of Birth	Sex	Race	INI	Seat	RUSD	Adm. Eject	LAI	Trem	Name	Street Address	Zip Code
01	04-07-1957	M	WY	0	01	13	4	3	1	2	POLANSKY THEODORE PAUL	292128819
02	03-10-1965	F	W	0	01	13	4	3	1	2	DUKE AMANDA CELES	290549452

Race		A - Asian/Pacific Islander		W - Caucasian		I - Injury Status		2 - Non-Incapacitating		Seating Loc.		20 - Pedestrian		60 - Sleeper of Cab		Restraint/Safety Device	
5 - African American		H - Hispanic		O - Other		0 - Not Injured		3 - Incapacitating		01 02 03		30 - Training Unit		70 - Riding on Unit Except		00 - None Used	
1 - Abkash Native or American Indian		U - Unknown		1 - Possible Injury		4 - Fatal				04 05 06		40 - Bus or Van (4th row or higher)		80 - Lap		11 - Shoulder Belt	
				2 - 2 or 3 Wheel Motorized Vehicle						07 08 09		50 - Other Enclosed Area (nontraining)		99 - Unknown		12 - Lap Belt Only	
Air Bag Deployment / Switch		Ejection		Head Injury		1 - Yes		2 - No				61 - Other Unenclosed Area (nontraining)				13 - Shoulder & Lap Belt	
a) 1 - Deployed Front 4 - Not Deployed		1 - Not Ejected		Location After Impact		3 - Fined (non-mech.)				e) Transported to Medical Facility						Pedestrian, Motor/Pedestrian Only	
2 - Deployed Side 7 - Not Applicable		2 - Part Ejected		1 - Not Trapped		2 - Not Accessible				1 - Yes		2 - No		3 - Unknown		31 - Helmet	
3 - Deployed Both 9 - Deployment Unk.		3 - Not Ejected		2 - Ejected (Mechanical Means)		8 - Unknown				b) By:		1 - EMS		2 - Police		51 - Protective Clothing	
b) 1 - Switch in On Position 3 - No Switch		7 - Not App.		Sequence of Events												41 - Protective Pads	
2 - Switch in Off Position 9 - Unknown		8 - Unk.														61 - Lighting	

Non-Collision		P4 - Equipment Failure		Collision: Not Faced		27 - Pedestrian		Collision: Faced Object		47 - Escapement		55 - Mail Box		6 - Other	
01 - Cargo/Equipment or SHD		05 - Fire/Explosion		09 - Overturn/Rollover		28 - Railway Veh.		48 - Bridge Overhead Structure		48 - Equipment		65 - Median Barrier		3 - Unk.	
02 - Cross Median/Cutback		06 - Rain or Road Lat.		06 - Rain or Road Lat.		29 - Motor Veh. (Other)		49 - Fence		57 - Overhead Sign Support					
03 - Downhill Runaway		07 - Ice/Sleet		10 - Run off Road Right		23 - Motor Veh. (Transport)		42 - Edge Pier or Abutment		60 - Sandrail End		58 - Other (Post, Pole, Support, Etc.)			
				11 - Separation of Units		25 - Motor Veh. (Stalled)		43 - Edge Rail		61 - Guardrail Face		66 - Other (Wall, Building, Tunnel Exit)			
				12 - Split (non-mechanical)		26 - Motor Veh. (Other Roadway)		44 - Object		62 - Highway Traffic Sign Post		67 - Tree			
				15 - Other Noncollision		29 - Motor Veh. (Parked)		45 - Object		63 - Impact Absorption/Crash Cushion		68 - Pole			
				16 - Unk. Noncollision		26 - Pedestrian		46 - Object		64 - Light/Electrical Support		69 - Weak Zone Mark. Equipment			

Manner of Collision (Struck Veh.)		30 - Rear 40 - Rear		50 - Side/Swipe Same Dir.		74 - Deformed Area		1 - Deformed		112 125 15		Most Deformed		172 P 5	
150 - 00 - Not Coll. w/ Motor Veh.		41 - Angle		60 - Side/Swipe Opposite Dir.		1 2 3 4 5 6		2 - Deformed		33 34 35		53 54 55		74	
10 - Rear End		42 - Angle		70 - Backed Into		7 8 9 10 11 12		3 - Deformed		41 42 43		51 52 53		60	
20 - Head On		43 - Angle		80 - Unknown		13 14 15 16 17 18		4 - Deformed		49 50 51		59 60 61		67	

Vehicle Type:		15 - Full Size Van		27 - Motorcycle		61 - School Bus		Special Use Only	
101 - 01 - Automobile		18 - Mini Van		35 - Animal Drawn Veh.		62 - Passenger Bus		1 - Under-Compartment Intrusion	
217 - 12 - Pickup Truck		17 - Sport Utility		30 - Animal (Fadden)		60 - Other		2 - Under No Intrusion	
3 - 13 - Truck Tractor		25 - Motorcycle		41 - Pedestrian		88 - Unk. (Pit and Run Only)		3 - Under Unknown	
14 - Other Truck		26 - Other Motorcycle		51 - Train				4 - Over Other Vehicle	
								5 - None	
Vehicle Use Code		04 - Ambulance		09 - Farm Use		12 - Fire Fighting		6 - None	
101 - 01 - Personal		05 - Military		09 - Wheel or Tow		13 - Logging		7 - Unk.	
201 - 02 - Driver Training		08 - Transport Passengers		10 - Police		18 - Other		8 - Unk.	
3 - 03 - Construction/Maint.		07 - Transport Property		11 - Government		41 - Pedestrian		9 - Unk.	
								10 - Extent of Damage	
Vehicle Attachment		4 - Utility Trailer		3 - Towed Motor Vehicle		C - Other Trailer		2 - Functional Damage	
11 - 1 - None		5 - Farm Trailer		9 - Petroleum Tanker		D - Flat Bed		4 - Severe/Totaled	
21 - 2 - Mobile Home		6 - Trailer without		A - Lowboy Trailer		E - Twin Trailers		5 - Not Applicable	
3 - 3 - Semi-Trailer		7 - Camper Trailer		B - Auto-Carrier Trailer		F - Other		9 - Unk.	
								1 - Trafficway	
Action Prior to Impact		(Vehicle)		(Non-motorist)		A1 - Test Results		1 - Two-way, Not Divided	
01 - Backing		08 - Parked		21 - Approaching/Leaving Vehicle		A2 - Test Type		2 - Two-way, Divided, Unprotected Median	
02 - Changing lanes		09 - Slowing or		22 - Entering/Crossing Location		A3 - Test Type		4 - One-way	
03 - Entering traffic lane		Stopped in traffic		23 - Flaying/Working on Vehicle		A4 - Test Type		8 - Other	
04 - Leaving traffic lane		10 - Turning left		24 - Pushing Vehicle		A5 - Test Type		Trafficway	
05 - Making U-turn		11 - Turning right		25 - Standing		A6 - Test Type		1 - Two-way, Divided, Barrier	
06 - Movements Essentially Straight Ahead		25 - Walking, Playing, Cycling		26 - Waiting, Playing, Cycling		A7 - Test Type		3 - Two-way, Divided, Barrier	
07 - Overtaking/passing		88 - Other		89 - Unk.		A8 - Test Type		8 - Other	
						A9 - Test Type		Trafficway	

Weather Condition		3 - Cloudy		6 - Fog, Smog, Smoke		02 - Flashing Traffic Signal		22 - Oncoming Emergency Vehicle	
1 - Clear (no adverse conditions)		4 - Steel, Hail		7 - Blowing Sand		14 - RRR (X-bucks, Lights & Gates)		3 - Pavement Markings (only)	
2 - Rain		5 - Snow		8 - Severe Crosswinds		12 - RRR (X-bucks & Lights)		41 - Stop Sign	
						13 - RRR (X-bucks Only)		42 - School zone Sign	
Light Condition		3 - Dark		8 - Dark (Street Lamp Not Lit)		1 - Yes, Directly		2 - Yes, Indirectly	
1 - Daylight		4 - Dark (Lighting Unspecified)		7 - Dark (No Lights)		2 - Yes, Indirectly		3 - No	
2 - Dawn		5 - Dark (Street Lamp Lit)				1 - Before 1st Sign		2 - Transition Area	
						2 - Advanced Warning Area		4 - Activity Area	
Junction Type		03 - Five-Point		07 - Shared Use Paths or Trail		12 - Y-Intersection		13 - Nonjunction	
01 - Crossover		04 - Four-way Intersection		08 - T-Intersection		13 - Nonjunction		1 - Shoulder/Median Work	
02 - Driveway		05 - Railway Grade Crossing		09 - Traffic Circle		89 - Unk.		3 - Intersecting Moving Work	
								4 - Lane Closure	
								8 - Other	

Primary		Contributing Factors		Roadway		Non-Motorist		Environmental	
13 - Driver		09 - Made an Improper Turn		30 - Debris		53 - Other		80 - Animal in Road	
01 - Obstructed Signs, Signals, Etc.		10 - Medical Related		31 - Non-highway Work		59 - Unk.		81 - Gate	
02 - Distracted/Inattention		12 - Aggressive Operation of Vehicle		32 - Obstruction in Roadway				82 - Weather Cond.	
03 - Driving Too Fast for Conditions		13 - Overcorrecting/Oversteering		33 - Road Surface Condition (i.e., Wet)				83 - Other	
04 - Exceeded Authorized Speed Limit		14 - Swerving to Avoiding Object		34 - Road Surface Condition (i.e., Wet)				84 - Unk.	
05 - Failed to Yield Right of Way		15 - Wrong Side or Wrong Way		35 - Road Surface Condition (i.e., Wet)				85 - Unk.	
06 - Ran off Road		16 - Under the Influence		36 - Road Surface Condition (i.e., Wet)				86 - Unk.	
07 - Fatigued/Asleep		17 - Vision Obscured (Within Unit)		37 - Road Surface Condition (i.e., Wet)				87 - Unk.	
08 - Followed Too Closely		18 - Improper Lane Usage/Change		38 - Road Surface Condition (i.e., Wet)				88 - Unk.	
		19 - Cell Phone		39 - Road Surface Condition (i.e., Wet)				89 - Unk.	
		20 - Texting		40 - Road Surface Condition (i.e., Wet)				90 - Unk.	
		21 - Other Improper Action		41 - Road Surface Condition (i.e., Wet)				91 - Unk.	
		26 - Unk.		42 - Road Surface Condition (i.e., Wet)				92 - Unk.	

Vehicle Defect		70 - Brakes		75 - Windows/Shield	
71 - Steering		77 - Restraint System		73 - Truck Coupling	
72 - Power Plant		79 - Cargo		80 - Fuel System	
73 - Tires/Wheel		81 - Lights		82 - Other	
74 - Lights		83 - Other		84 - Unk.	
75 - Signals		85 - Unk.		86 - Unk.	

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 25 years.

Preston F. McDaniel
Justin S. Byars
Matthew Robertson
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

September 5, 2013

✓ 1999-3671
2000-3303

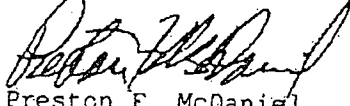
VIA EMAIL ONLY - abracy@wcc.sc.gov
Commissioner T. Scott Beck
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Ted Polansky vs. SC Attorney General's Office
WCC File No: 9922954 & 0024408

Dear Commissioner Beck:

Please find attached the Consent Order that we have entered into in the above-referenced matter. Once the Order is executed, I look forward to receiving a signed copy so we can move forward either resolving or trying this case. I have already notified Virginia Crocker that this Order resolves the Motion that I had filed to compel and as always, I appreciate all the courtesies and kindnesses shown to me by you and the Commission. By copy of this email, I am notifying Ms. Goodwin of the submission of this Order.

Sincerely yours,


Preston F. McDaniel

PFM/kth
Enclosure

cc: Ellen Goodwin, Attorney

Scan

2000-3303

Ala. Civ. 2

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No: 9922954 & 0024408

THEODORE POLANKSY,)
Employee-Claimant,)
v.)
SC ATTORNEY GENERAL'S OFFICE,)
as Employer, and)
STATE ACCIDENT FUND,)
as Carrier,)
Respondent-Defendants.)

CONSENT AGREEMENT TO
EVALUATION PERFORMED IN
COLUMBIA, SC BY
DR. RICHARD FRIERSON, MD
PURSUANT TO SC CODE §42-15-80

By and through the respective attorneys of the parties, the parties in the above-referenced matter have entered into an agreement resolving the issues that gave rise to the original Motion to Compel the Claimant to submit to an examination pursuant to the right of the Defendants under SC Code §42-15-80 to have an independent medical evaluation performed on the Claimant as to the issues that are pending before the Commission.

The parties have entered into the following agreement concerning those issues:

1. That the parties agree and the Claimant will submit to an examination by Dr. Richard Frierson with the USC School of Medicine Neurology Clinic in Columbia who is licensed physician or surgeon in the State of South Carolina for the purpose of an

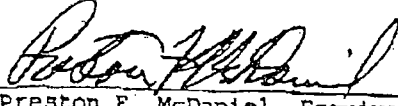
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examination performed pursuant to SC Code §42-15-80. Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson to complete the examination.

2. That since this examination is being performed pursuant to the right of the Defendants to have an independent medical examination performed by a duly qualified physician or surgeon under SC Code §42-15-80, there will be no interference with the independent examination to be performed by either party as to what Dr. Frierson feels is necessary to properly and completely evaluate and examine the Claimant as to the issues presented to him for examination which are pending before the Commission. Dr. Frierson shall state in writing before any type of tests are to be performed, if any, as part of his examination as to whether in his opinion the Claimant is capable in his current condition both physically and mentally to undergo such tests. Dr. Frierson may consult with the authorized treating psychologists and medical doctors treating Mr. Polansky as to his current condition.

3. That it is agreed that Dr. Frierson will be forwarded a copy of this Order and that Claimant's Counsel will be privy to all communication with Dr. Frierson's office from this date forward necessary for the scheduling of and conducting the independent medical examination performed by Dr. Frierson.

WE SO MOVE AND CONSENT:


Preston F. McDaniel, Esquire
Attorney for Claimant

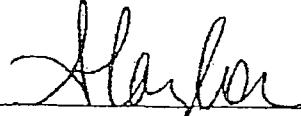

Ellen Goodwin, Attorney
Attorney for Defendants

ORDER OF CONFIRMATION

After due and proper consideration of the above-referenced agreement entered into by and between the parties, it is hereby ordered that the Agreement be and hereby is confirmed as the Order of this Commission.

AND IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION


Commissioner Aisha Taylor

April 11, 2013

CERTIFICATE OF SERVICE

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

By Renee Smith on November 7, 2013

3

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P.812



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

COMMISSION PANEL: THE HONORABLE DERRICK L. WILLIAMS,
CHAIR; THE HONORABLE ANDREA C. ROCHE; THE HONORABLE
SUSAN S. BARDEN

SCWCC FILE NO.: 9922954 & 0024408

Theodore Polansky,

Claimant

South Carolina Office of the Attorney General,

Employer, and

State Accident Fund,

Carrier, Defendants.

Hearing held in Columbia,
South Carolina on November 14th, 2012
Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston F. McDaniel, Attorney for Claimant/
Appellant

Andrew W. Fajardo, Attorney for Defendants/
Respondents

Filed: _____

2-7-13

STATEMENT OF THE CASE

On April 20th, 2012 Defendants filed a Motion pursuant to 25A S.C. Regs. 67-215(A)(1) (2012) seeking to compel Claimant to submit to an examination pursuant to S.C. Code § 42-15-80 (1976). A hearing was held in this matter on May 16th, 2012. On June 27th, 2012, The Honorable Melody James, Commissioner, issued her Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *I find that Claimant is correct that under § 42-15-80 there is no authority to compel the attendance for examination, unless it is a qualified physician or surgeon.*
2. *An independent medical examination by a neuropsychologist would have been complete if Claimant had attended the previously scheduled appointments.*
3. *Claimant is to submit to an examination of a neuropsychiatrist of the choice of the Defendants. Defendants are to seek a neuropsychiatrist in South Carolina. If the availability of a qualified neuropsychiatrist is an issue in South Carolina, then Claimant is to submit to an evaluation by a qualified physician in another state. In that event, travel expenses are to be paid by Defendants to Claimant as they relate to the out-of-state evaluation.*
4. *This matter is continued for additional discovery and protection of Mr. Fajardo for the week of June 4th, 2012 (higher court).*
5. *Therefore, these claims are to be returned to the General Files.*

RULINGS OF LAW

Pursuant to § 42-15-80, Claimant is obligated to submit to a neuropsychological examination by a qualified physician or surgeon of Defendants choosing.

ISSUES ON APPEAL

Claimant filed a Form 30 Request for Commission Review on July 10th, 2012. Claimant's Form 30 included a typewritten attachment consisting of 4 pages listing 12 grounds for appeal which are attached and herein incorporated by reference.

LAW/ANALYSIS

The Workers' Compensation Act gives parties subject to its provisions the right to have a Hearing before the Commission to decide disagreements between the parties on compensation payable. S.C. Code § 42-17-20 (1976). The Act provides that "[t]he Commission or any of its members shall hear the parties at issue . . . and shall determine the dispute in a summary manner." § 42-17-40(A). This statute gives the individual Commissioner the authority to determine disputes. Awards made by the single Commissioner are subject to review by the Full Commission. § 42-17-50. Specifically, Section 42-17-50 requires that "the Commission shall review *the award*" of the single Commissioner when properly requested by a party. § 42-17-50 (Emphasis added).

In this case, Claimant filed a Form 50 on March 2nd, 2012 alleging a dispute has arisen regarding compensation payable to him and has requested the Commission determine the dispute. Prior to holding a Hearing on the merits of Claimant's Form 50, Defendants properly filed a Motion pursuant to R.67-215(A)(1). The June 27th, 2012 Decision and Order of Commissioner James that is the subject of this appeal is a written decision issued pursuant to R.67-215(G)(2). The June 27th, 2012 Decision and Order of Commissioner James is not an award on the merits of the claim reviewable under § 42-17-50.

Claimant urges the Commission to allow a Full Commission review of an interlocutory ruling of the single Commissioner made pursuant to R.67-215(G)(2) prior to the single Commissioner making an award, together with findings of fact

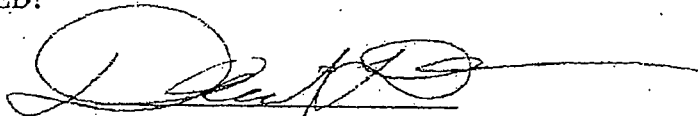
and rulings of law, on the merits of the dispute regarding compensation payable. The Commission finds such procedure would result in piecemeal appeals in disputes pending before the Commission that would adversely affect judicial economy and compromise informed appellate review. Therefore the Commission cannot review an award until such time as the single Commissioner has made an award on the merits of the dispute regarding compensation payable.

RULING

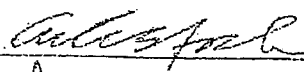
For the reasons stated above, the Commission DISMISSES the Appeal of the Decision and Order of the Single Commissioner as interlocutory. The Commission recognizes the recent holding of the South Carolina Supreme Court that "[w]here a party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal." *Bone v. U.S. Food Service*, S.C. Supreme Court Opinion No. 27153, Filed August 1, 2012. In accordance with this decision, the Commission rules that all issues raised by the parties shall be preserved until such time as the Commission has the opportunity to hear the dispute on its merits.

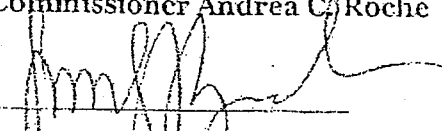
IT IS THEREFORE ORDERED that Claimant's appeal of the Decision and Order of Commissioner James dated June 27th, 2012 is hereby DISMISSED as being interlocutory. All other issues raised by the parties, including the issues raised by Claimant in the Form 30 and its attachment dated July 10th, 2012, shall be preserved until such time as the Commission may have the opportunity to hear the claims on the merits.

AND SO IT IS ORDERED!



Commissioner Derrick L. Williams,
Chair 1/31/13


Commissioner Andrea C. Roche


Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

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

By Valerie Deller on February 7, 2013

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0024408

STATE ACCIDENT FUND,

CARRIER/RESPONDENT,

- V -

SC SECOND INJURY FUND,

DEFENDANT/APPELLANT.

IN RE: THEODORE P. POLANSKY VS. SC OFFICE OF ATTORNEY GENERAL AND
STATE ACCIDENT FUND

Appellate Panel Review held in Columbia,
South Carolina on July 20, 2010 per notices
timely and properly served on all parties of
interest.

Appellate Panel Decision and Order filed
8/31, 2010.

APPEARANCES: Carrier/Respondent represented by Mary Sowell
League, Esquire, of Columbia, South Carolina.

Defendant/Appellant represented by Latonya D.
Edwards, Esquire, of Columbia, South Carolina

STATEMENT OF CASE

The parties were heard by Commissioner Derrick L. Williams on February 25, 2010 in Columbia, South Carolina. On March 19, 2010, he issued the following Order:

WHEREFORE, IT IS ORDERED that the South Carolina Second Injury Fund shall reimburse the South Carolina Office of Attorney General and the State Accident Fund for benefits paid by them to the Employee herein as set forth in S.C. Code Ann. § 42-9-400(a)(1)(2).

Within the statutory period, counsel for the South Carolina Second Injury Fund filed an Application for Review in the case setting forth her reasons, copies of which were furnished to all interested parties, prior to being argued before the Appellate Panel on July 20, 2010.

By appeal, the Second Injury Fund respectfully submits the following:

1. The medical evidence and the record established that Carrier's liability for permanent disability was not substantially increased due to Claimant's pre-existing condition.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50(1985), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Commission, by unanimous vote, has determined all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and therefore, the Order is sustained in its entirety.

FINDINGS OF FACT

After hearing argument of the parties and reviewing the evidence, the following findings of fact are made:

1. The Employee sustained an injury by accident arising out of and in the course and scope of his employment on May 30, 2000 to his back and psychological, resulting in the payment of workers' compensation benefits to him.

2. The Employee had pre-existing lumbar spine degenerative disc disease that was unknown, and pre-existing psychological problems that were known to the Employer. This was not contested by the Fund, and is based upon the statement from the Employee and the documents from the Employer.

3. The pre-existing degenerative disc disease and psychological were permanent and a hindrance or obstacle to employment. This was not contested by the Fund, and is based upon the opinion and records of Dr. Rainwater, the opinion and records of Dr. Faber, the opinion and records of Dr. Lynch, and the records from Midlands Internal Medicine, Palmetto Health Pain Management, Midlands Orthopaedics, and Palmetto Baptist Medical Center.

4. The May 30, 2000 accident did either aggravate or combine with the pre-existing psychological, causing the Employee to have substantially increased medical costs, time out of work and permanent disability than would have occurred from the accident alone. This was not contested by the Fund, and is based upon the opinion and records of Dr. Rainwater, and the records of Midlands Internal Medicine, Palmetto Health Pain Management, Midlands Orthopaedics, and Behavioral Health Group.

5. The May 30, 2000 accident did either aggravate or combine with the pre-existing lumbar spine degenerative disc disease to result in substantially increased medical costs, permanent disability and time out of work than would have occurred from the accident alone. While the Fund contends that the aggravation did not result in substantially increased disability, I give greater weight to the opinion of Dr. Faber and to the narratives that clearly show the Employee's lumbar spine injury was exacerbated by the underlying severe degenerative disc disease in the Employee's lumbar spine. He was diagnosed by both Dr. Ngo and Dr. Lynch with having severe degenerative disc disease in his spine.

6. The Carrier has met the requirements for reimbursement from the South Carolina Second Injury Fund herein.

CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-9-400 governs reimbursement to a Carrier by the South Carolina Second Injury Fund when the Carrier has paid benefits to the Employee, and the Employee has a permanent physical impairment and incurs a subsequent disability from an injury by accident arising out of and in the scope of his employment, resulting in either substantially greater compensation payments or medical expenses by reason of the combined effects of the pre-existing impairment and the subsequent injury, or by reason of the aggravation of the pre-existing impairment, than that which would have resulted from the subsequent injury alone.

2. Pursuant to S.C. Code Ann. § 42-9-400, the Carrier has established all of the elements necessary for reimbursement as provided therein.

ORDER

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner filed in the above-captioned matter on March 19, 2010 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS FURTHER ORDERED that the South Carolina Second Injury Fund shall reimburse the South Carolina Office of Attorney General and the State Accident Fund for benefits paid by them to the Employee herein as set forth in S.C. Code Ann. § 42-9-400(a)(1)(2).

AND IT IS SO ORDERED.

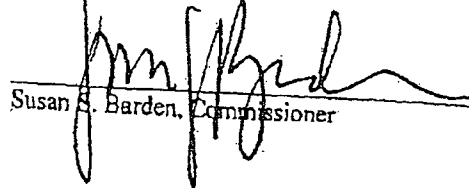
S.C. WORKERS' COMPENSATION COMMISSION

FULL AFFIRMATION

CONCUR:


David W. Huffstetter, Commissioner


T. Scott Beck, Commissioner


Susan E. Barden, Commissioner

CERTIFICATE OF SERVICE

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

This 31 day of August, 2010
By Valerie D. Deller

Administrative Assistant to the Commissioner

Mary Sowell League
Latonya D. Edwards

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 25 years.

Preston F. McDaniel
Justin S. Byars
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

April 16, 2013

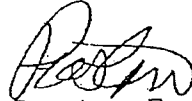
VIA EMAIL ONLY - egoodwin@saf.sc.gov
Ellen H. Goodwin, Attorney
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000

Re: Theodore Polansky vs. South Carolina Attorney
General's Office
WCC File No: 9922954 & 0024408

Dear Ellen:

Please find attached the Consent Agreement to allow for the independent medical evaluation that the State Accident Fund wanted performed. Please review it and I am pretty sure it is in agreement with our discussions and if so, please sign it. If not, give me a call to discuss so we can get it out so we can get this evaluation performed. I look forward to hearing from you.

Sincerely yours,



Preston F. McDaniel

PFM/kic
Enclosure

P.823

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No: 9922954 & 0024408

THEODORE POLANKSY,)
Employee-Claimant,)
v.)
SC ATTORNEY GENERAL'S OFFICE,)
as Employer, and)
STATE ACCIDENT FUND,)
as Carrier,)
Respondent-Defendants.)

CONSENT AGREEMENT TO
EVALUATION PERFORMED IN
COLUMBIA, SC BY
DR. RICHARD FRIERSON, MD
PURSUANT TO SC CODE §42-15-80

By and through the respective attorneys of the parties, the parties in the above-referenced matter have entered into an agreement resolving the issues that gave rise to the original Motion to Compel the Claimant to submit to an examination pursuant to the right of the Defendants under SC Code §42-15-80 to have an independent medical evaluation performed on the Claimant as to the issues that are pending before the Commission.

The parties have entered into the following agreement concerning those issues:

1. That the parties agree and the Claimant will submit to an examination by Dr. Richard Frierson with the USC School of Medicine Neurology Clinic in Columbia who is licensed physician or surgeon in the State of South Carolina for the purpose of an

examination performed pursuant to SC Code §42-15-80. Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson to complete the examination.

2. That since this examination is being performed pursuant to the right of the Defendants to have an independent medical examination performed by a duly qualified physician or surgeon under SC Code §42-15-80, there will be no interference with the independent examination to be performed by either party as to what Dr. Frierson feels is necessary to properly and completely evaluate and examine the Claimant as to the issues presented to him for examination which are pending before the Commission. Dr. Frierson shall state in writing before any type of tests are to be performed, if any, as part of his examination as to whether in his opinion the Claimant is capable in his current condition both physically and mentally to undergo such tests. Dr. Frierson may consult with the authorized treating psychologists and medical doctors treating Mr. Polansky as to his current condition.

3. That it is agreed that Dr. Frierson will be forwarded a copy of this Order and that Claimant's Counsel will be privy to all communication with Dr. Frierson's office from this date forward necessary for the scheduling of and conducting the independent medical examination performed by Dr. Frierson.

WE SO MOVE AND CONSENT:

Preston F. McDaniel, Esquire
Attorney for Claimant

Ellen Goodwin, Attorney
Attorney for Defendants

ORDER OF CONFIRMATION

After due and proper consideration of the above-referenced agreement entered into by and between the parties, it is hereby ordered that the Agreement be and hereby is confirmed as the Order of this Commission.

AND IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION

Commissioner

April _____, 2013

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
Justin S. Byars
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

May 1, 2013

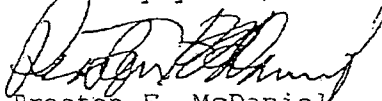
Virginia L. Crocker, Judicial Director
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Ted Polansky vs. SC Attorney General's Office
WCC File No.: 9922954 & 0024408

Dear Ginger:

As I know Eleanor Duffy Cleary has advised Gary Cannon, we have agreed to dismiss the Complaint for a Writ of Prohibition and Writ of Mandamus on the basis of an agreement I reached with the State Accident Fund through Ms. Ellen Goodwin agreeing to an evaluation by a local physician under SC Code §42-15-80 concerning the Defendants right to an independent medical evaluation by a licensed physician or surgeon. We are in the process of consummating that agreement which is simply an agreement to have that evaluation performed pursuant to Statute and we should be submitting the Consent Order within the next week. There is no reason that this evaluation can now not be performed within the next month but definitely no more than two (2) months and we should be ready for hearing either in July and absolutely no later than August. This case has been delayed long enough and I would request that it be put back on the Commission's calendar for the July/August term. By copy of this letter, I am notifying Defense Counsel Ellen Goodwin of this request and requesting that we move as fast as possible to get the Consent Order filed with the Commission. As always, I appreciate all the courtesies and kindnesses shown to me by the Commission and if you have any questions about this matter, please feel free to call me at your convenience.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Ellen Goodwin, Attorney

P.827

MCDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel
Justin S. Byars
Matthew C. Robertson
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

June 13, 2013

VIA EMAIL ONLY - egoodwin@saf.sc.gov
Ellen H. Goodwin, Attorney
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000

Re: Theodore Polansky vs. South Carolina Attorney
General's Office
WCC File No: 9922954 & 0024408

Dear Ellen:

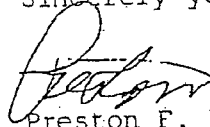
Please find attached a Draft of a Motion that I will be filing with the Commission and serving on you personally this coming Thursday so that hopefully this matter can be heard before I leave on vacation on June 28, 2013. If you can draft or will agree to the one I drafted we can get the Consent Agreement done there is absolutely no reason that we cannot have this evaluation performed, if it is possible to be performed, within thirty (30) days and this matter heard thirty (30) days thereafter. Everything is done from my side and as far as I know everything is done from your side including the deposition of the Claimant and everything else except this evaluation.

P. 828

Ellen H. Goodwin, Attorney at Law
June 13, 2013
Page 2 of 2

Finally, I have to file this Motion to get something moving
as nothing is moving on this file on the Consent Agreement.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Preston F. McDaniel", written over a horizontal line.

Preston F. McDaniel

PFM/pkb
Enclosure

P.829

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION COMMISSION
COUNTY OF RICHLAND) WCC File No: 9922954

Theodore Polanksy,)

Employee-Claimant,)

v.)

SC Attorney General's Office,)

as Employer, and)

State Accident Fund,)

as Carrier,)

Respondent-Defendants.)

MOTION CONFIRMING CONSENT
AGREEMENT AND ORDERING MATTER
BE SET FOR HEARING

TO: ELLEN GOODWIN, ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Claimant on the 10th day after service hereof or at such other time as designated by the Commission, Counsel for the Claimant will move for an Order of the Commission compelling compliance with the previous Consent Agreement entered into by Counsel for the parties and Ordering that this matter be set for hearing within sixty (60) days. Said motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.

Preston F. McDaniel
Attorney for Employee/Claimant
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

June 11, 2013

P.830

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) WORKERS' COMPENSATION COMMISSION
WCC File No: 9922954

Theodore Polanksy,)

Employee-Claimant,)

v.)

SC Attorney General's Office,)

as Employer, and)

State Accident Fund,)

as Carrier,)

Respondent-Defendants.)

MEMORANDUM IN SUPPORT OF
MOTION CONFIRMING CONSENT
AGREEMENT AND ORDERING MATTER
BE SET FOR HEARING

The movant would respectfully show unto the Commission as follows:

1. That a Petition and Complaint for a Writ of Mandamus and Writ of Prohibition were filed in the Circuit Court concerning an Order of the Commission that had been issued concerning a Motion that had been filed by the Defendant's in the above-referenced matter.

2. That the Defendants were represented at the time of the filing and prior to the untimely death of Aljernal Danley by the Danley Law Firm and specifically by Andrew Fajardo, an associate with the firm.

3. That as set forth in the Affidavit, that is attached hereto and is incorporated herein by reference of Counsel for the

P.831

*****UNCORRECTED FROM THIS POINT FORWARD*****

Claimant, prior to Mr. Danley's death Andrew Fajardo as Counsel for the Defendants contacted Counsel for the Claimant notifying him that they had found a local medical doctor that would perform an evaluation pursuant to S.C. Code §42-15-80 and based upon that Counsel for the parties entered into an agreement for that evaluation. Based upon that agreement Counsel for the Claimant, the Petitioner before the Circuit Court, notified Counsel for the Defendants in the Circuit Court matter, Ms. Elner Clary Duffy, of the agreement and notified the Court and entered into a Consent Agreement with Counsel for the Defendants in the Circuit Court matter dismissing the action and the Motion to Dismiss that had been filed in that action without prejudice and returning this matter to the Commission for purposes of having the evaluation performed and for this matter to then be set for hearing. Said Consent Agreement and correspondence concerning such is attached hereto and incorporated herein by reference as Exhibit B.

4. That subsequent thereto Mr. Aljernal Danley passed away and his law firm was closed and his files were transferred to other attorneys for handling. During this time Counsel for the Movant had conversations with Ellen Goodwin, Staff Attorney for the State Accident Fund, as to who would be handling the files.

5. That based on those conversations Counsel for the Claimant was advised that Ms. Goodwin was trying to find out the name of the local doctor who had agreed to perform the evaluation and that the files would immediately be handled by Ms. Clausen for the purposes of entering into the Consent Agreement as Andrew Fajardo had been terminated from employment due to the untimely death of Aljernal Danley and the closing of his law firm.

6. That subsequent thereto Ms. Goodwin as Staff Counsel for the Defendants, the State Accident Fund, notified Counsel for the Claimant of the name of the physician that would be performing the evaluation and correspondence was provided between the two Counsels as to the Consent Agreement.

7. That as set forth in the last correspondence it has now been a period of over two (2) months and the Consent Agreement has not been drafted nor entered into nor has any evaluation been scheduled. Upon information and belief Ms. Clausen is not handling the file and Counsel has been given the name of no other Counsel of Record other than Ms. Ellen Goodwin in reference to the handling of this file.

8. That pursuant to the last Order of this Commission this matter was held up to allow the Defendants the opportunity to have the evaluation performed which has now been entered into by Consent and the doctor has been agreed upon but nothing has been

done to move this case forward and the Claimant is desirous of moving his case to a conclusion.

WHEREFORE, based on the above the Claimant would move for an immediate hearing before the Commission and for an Order confirming the Consent Agreement entered into by the parties; Ordering that the evaluation be performed within thirty (30) days of the date of that Order and that a hearing be held no later than thirty (30) days after the date of that Order thus giving a total period of sixty (60) days from the date of the Order to have the evaluation performed and a hearing to be held in this matter.

Respectfully submitted:

Preston F. McDaniel
Attorney for Employee/Claimant
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201

June 11, 2013.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File Nos: 9922954 & 0024408

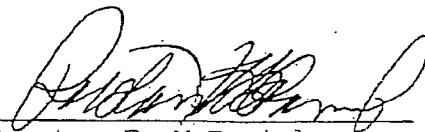
Theodore Polanksy,)
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Employee-Claimant,)
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v.)
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SC Attorney General's Office,)
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as Employer, and)
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State Accident Fund,)
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as Carrier,)
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Respondent-Defendants.)
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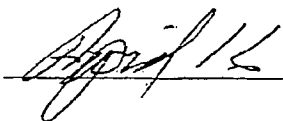
MOTION TO SET HEARING
PURSUANT TO COMMISSION
REGULATION 67-601
AND 67-613(B) (4)

TO: ELLEN GOODWIN, ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that On the 10th day after service hereof or as soon thereafter as the Claimant may be heard, the Claimant will move before the Commission to have this matter set for hearing pursuant to statute and the Commission Regulations. Said motion is based upon the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.


Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Claimant

 , 2014

was premature in the opinion of the Commission. That verbal decision resulted in a Writ of Mandamus and a Writ of Prohibition being filed in the Circuit Court and the parties reached an agreement in the Circuit Court matter as set forth in the Consent Agreement filed with the Circuit Court that, "the parties in the underlined workers' compensation claim have reached an agreement which upon consummation and approval by the South Carolina Workers' Compensation Commission will resolve the issues that gave rise to the filing of the Writs of Prohibition and Mandamus." That agreement was entered and approved by the Court on April 22, 2013.

2. That the agreement in this claim had already been entered into with Counsel for the State Accident Fund, Ms. Ellen Goodwin, as of that filing in the Circuit Court and a draft of the Agreement had been forwarded to her on April 16, 2013. A copy of that draft is attached hereto and incorporated herein by reference. Thereafter when the Agreement was not signed and returned for filing with the Commission, on May 1, 2013 Counsel for the Claimant forwarded a Request pursuant to Commission Regulation 67-613 to the Commission requesting that the matter be reset for hearing. (That Regulation specifically provides that where a hearing is postponed, "all hearings other than those set pursuant to §42-9-260 are postponed only until the following

month. If the Commissioner cannot hear the case the following month, the hearing will not be reset until the moving party files a written request with the judicial department.") To this date no hearing has been set by the Commission. A copy of that Request is attached hereto and incorporated herein by reference.

3. That subsequent thereto on June 13, 2013, Counsel wrote Counsel for the Defense with a draft Motion advising that if the Consent Agreement was not returned that counsel would move before the Commission for an Order to have this matter reset for hearing. A copy of that redacted letter and draft Motion is attached hereto and incorporated herein by reference.

4. That thereafter in September 2013, counsel for the Defendants advised Claimant's counsel that the Agreement had not been signed due to an oversight and it was thereafter signed and was submitted to the Commission to Commissioner Beck per the Commission's direction on September 5, 2013. The Order was not signed until November 7, 2013.

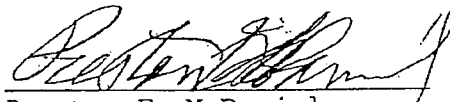
5. That ever since the Agreement was entered into back in April of 2013 and through the current date, no appointment has ever been set up with Dr. Frierson per the Consent Agreement which is now a period of over one (1) year.

6. That while Commission Regulation 67-613 requires only a request be made by the moving party for a hearing to be reset,

counsel for the Claimant is filing this Motion after being told that this is the fastest and quickest way for a hearing to be reset in this matter. Based on the filing of this Motion, the Claimant would request that the filing fee be reimbursed as part of hearing costs by the Commission.

WHEREFORE, counsel for the Claimant would request that this matter be set for hearing as soon as the Commission calendar will allow and finding that due to the fact that the Defendants have failed to procure the evaluation through the date of this Motion that the Defendants be deemed to have waived and are estopped from hereinafter setting the evaluation. The Claimant would also request reimbursement for the filing fee for the filing of this Motion and for the costs of this Motion pursuant to the Commission's authority to order costs for any hearing.

Respectfully submitted:



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Employee/Claimant

4/16, 2014

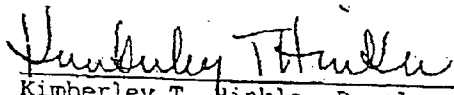
CERTIFICATE OF SERVICE

SCWCC File Nos.: 9922954 & 0024408

I hereby certify that I have on this day served the following in the matter of Theodore Polansky vs. SC Attorney General's Office with a copy of the MOTION TO SET HEARING PURSUANT TO COMMISSION REGULATION 67-601 AND 67-613(B)(4) with MEMORANDUM IN SUPPORT OF SAME in the United States Mail, with adequate postage thereon, addressed as follows:

Virginia L. Crocker, Judicial Director
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

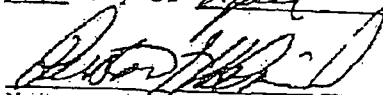
Ellen Goodwin, Attorney at Law
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

16 day of April, 2014.



Notary Public for South Carolina (L.S.)

My Commission Expires: 10/08/16

Noted

1049 1-2-11
2000-3303

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 9922954/0024408

Theodore P. Polansky,)
)
Claimant,)
vs.)
SC Office of Attorney General,)
)
Employer,)
State Accident Fund,)
)
Carrier,)
Defendants)

CERTIFICATE OF SERVICE

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

By Elaine Boyd on May 8, 2014

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

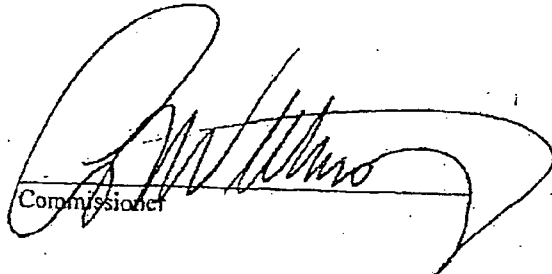
- ☒ Motion to Set Hearing Pursuant to Commission Regulation 67-601 and 67-613(B)(4)
- ☐ Appointment of guardian Ad Litem
- ☐ Attorney's appearance before the Commission
- ☐ Withdrawal of Representation
- ☐ Attorney's Fee
- ☐ Claim Pending Commission Review
- ☐ Postpone
- ☐ Adjourned the Scheduled Hearing
- ☐ Self Insurance Privileges
- ☐ Penalties and Interest
- ☐ Third Party Practice
- ☐ Other:

5-7-2014

The following disposition has been made: ☒ Granted ☐ Denied
☐ Set for Hearing
☐ Have Attorneys brief the Issue

Reasons:

Columbia, SC


Commissioner



McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 25 years.

Preston F. McDaniel
Matthew Robertson
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

May 6, 2014

Ms. Mee-Ling Khor-Ghould
State Accident Fund
Post Office Box 102100
Columbia, South Carolina 29221-5000

IMMEDIATE ATTENTION
REQUIRED

Re: Theodore Polansky v. SC Attorney General's Office
W.C.C. File No.: 9922954
S.A.F. File No.: 1999-3671 ✓

Dear Mee-Ling:

I assume that somewhere in the mix at the SAF there has been a big misunderstanding, or somebody has not told you about our previous agreement to allow for an evaluation of Mr. Polansky. I have advised Ellen Goodwin that I would consent to a different local doctor pursuant to our original agreement to send Mr. Polansky to Dr. Frierson since Dr. Frierson will not see him. However, the same provisions of that agreement apply and there is to be absolutely no contact with this doctor nor is there to be any suggestion of what he or she feels needs to be performed as part of the IME. This is to be truly an independent medical evaluation without any interference from either the State Accident Fund or from me.

Next, your statement in your letter gives me great concern in reference to, "Dr. Woolery will evaluate Mr. Polansky and let us know if he is able to undergo Neuropsych evaluation." This is an absolute violation of the agreement to suggest any evaluation or testing and also again the evaluation is to be done with a local psychiatrist or neurologist or other local medical doctor.

Therefore please cancel the evaluation with Dr. Woolery and I look forward to working with you if the State Accident Fund intends to move forward with a local medical doctor to perform an independent medical evaluation pursuant to the agreement I entered into with the State Accident Fund.

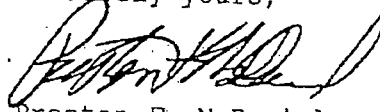
By copy of this letter sent via email, I am notifying Ellen Goodwin of this communication.

P.842

May 6, 2014
Page 2

Again, let me make it clear, Mr. Polansky will not attend any evaluation that is not in accordance with the agreement.

Sincerely yours,



Preston F. McDaniel
Attorney at Law

PFM/rmt

CC: Ellen Goodwin, Attorney

P.843

2000-3303

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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for over 30 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

June 20, 2014

VIA EMAIL ONLY - egoodwin@saf.sc.gov
Ellen H. Goodwin, Attorney
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000

Re: Theodore Polansky vs. South Carolina Attorney
General's Office
WCC File Nos: 9922954 & 0024408

Dear Ellen:

Please trust me, I am not trying to avoid you or dodge you. I have been extremely busy as I am trying to get out of here for a vacation on June 27th. I have a full day Mediation Monday and then I have a trial Friday morning, the 27th.

In reference to meeting to discuss what, "we need to do regarding Mr. Polansky's medical care/evaluation", I am not sure what you mean other than I guess you are referring to an IME. I previously advised that I would be glad to transfer the Consent Order to another local psychiatrist or neurologist, meaning somebody in Columbia, if you still wanted to get one.

Also, I think I have already offered to see if we could get one of the authorized treating doctors to recommend somebody, or contact anybody you want to contact and see if they would see Ted for an evaluation pursuant to the Consent Order. In other words, if you identify somebody you want him to see here locally, but are having trouble scheduling, I will be glad to see if we can get one of the doctors involved to ask that doctor to see him.

I still think you are going to find that any, "reputable" psychiatrist or neurologist is going to tell you that Ted is physically and mentally incapable of going through any type of an examination, much less any type of testing. There are already numerous statements to that effect on file from all of these treating doctors.

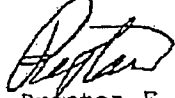
Ellen H. Goodwin, Attorney-At-Law
June 20, 2014
Page 2 of 2

I even have no problem with getting a waiver signed and letting you talk to the doctors, by letting them call you without my presence to discuss his condition.

Again, Ellen as you know I am willing to work with you, if that is something the State Fund still wants to do.

I look forward to hearing from you and you can email my office Monday, as I can be reached by them via email during the Mediation. Also, if there is anything else, other than the evaluation, you want to discuss please let me know.

Sincerely yours,



Preston F. McDaniel

PFM/rmt



A.J. Harrison Investigations, LLC

Activity Report

Reference: Theodore Polansky Date: 6/23/2014
Type: Workers' Compensation File: 14-029

(Details)

The following information is the result of surveillance and investigation conducted by Investigator Matthew E. Justice for A. J. Harrison Investigations, LLC. All times listed are approximate.

On 6/23/2014 Investigator Matthew began day one of a two day observation of Claimant (Theodore Polansky). Mr. Polansky's last known residential address is

Investigator was not provided any photos of the Claimant nor was the Investigator able to ascertain any vehicle description via internet research that the Claimant could be identified as registered owner of. This research included boat, RV, utility/ sport vehicles etc. The weather on this day consisted of clear skies with temperatures in the high 80's to low 90's.

- 8:34AM- Investigator arrived in the area of the Claimant's residence.
- 8:36AM- Investigator located the Claimant's residence and video documented three vehicles parked in either the driveway or under the carport. Note: All three vehicles were parked in a manner that the vehicle tag numbers were not visible from the street and remained parked in this manor on both days of observation. One vehicle was a light blue Ford Explorer. The second was a silver Mini-Van (manufacturer is unknown) and the third was an unidentifiable vehicle parked under the carport. Investigator surveyed the area and quickly learned that this neighborhood in which the Claimant resides has only one way in and one way out. Investigator established a near-by stationary surveillance position to monitor any traffic coming or going from the area.
- 10:17-AM- Investigator obtained a time video stamp from the stationary surveillance position with no activity to report.
- 11:09AM- Investigator obtained a time video stamp from the stationary surveillance position with no activity to report.
- 12:01PM- Investigator obtained a time video stamp from the stationary surveillance position with no activity to report.
- 12:45PM- Investigator conducted a ride of the Claimant's residence and was able to identify a gold in color Ford Ranger pick-up parked under the carport. As Investigator was attempting to video document this vehicle, Investigator observed a white male (possibly the Claimant) leaving the residence in this described Ford truck. Investigator was unable to capture video of the vehicle leaving the property. Investigator felt this could compromise the covert nature of this investigation. Investigator began mobile surveillance obtaining South Carolina tag (AYA 280) displayed on the vehicle. Investigator obtained periodic video of the vehicle in transit with the possible Claimant as the only occupant.

- 12:54PM- Investigator followed the suspected Claimant to a Bank of America Teller machine where it appeared the suspected Claimant retrieved money. Investigator obtained identifiable video of the suspected Claimant driving away. Investigator knew this video would be reviewed by someone who can positively identify the driver as the Claimant or not. Investigator continued mobile surveillance for a long distance obtaining periodic video footage of the vehicle in transit. Due to distance and traffic, Investigator eventually lost a visual of the vehicle. Investigator immediately returned to the previous stationary surveillance position to await the return of the suspected Claimant.
- 1:38PM- Investigator obtained video footage of the carport area of the Claimant's residence. Investigator documented where the Ford Ranger was parked earlier. Investigator returned to stationary surveillance position.
- 2:52PM- Investigator conducted a ride by of the Claimant's residence and video documented that the Ford truck had not returned.
- 3:05PM- Investigator obtained a time video stamp from the stationary surveillance position with no activity to report. Investigator terminated this day of observation a short time later. Investigator never observed the suspected Claimant returning to the residence.

Sworn to before me this 7TH day
of JULY, 2014

Alvin J. Harvum
Notary Public for South Carolina

Commission Expires: MAY 6TH, 2021

Investigator: *[Signature]*



2000 - 3303

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel

Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 525-0709

June 26, 2014

VIA EMAIL - mkgould@saf.sc.gov
Ms. Mee-Ling Khor-Ghould
State Accident Fund
Post Office Box 102100
Columbia, South Carolina 29221-5000

Re: Theodore Polansky v. SC Attorney General's Office
W.C.C. File No.: 9922954
S.A.F. File No.: 1999-3671

Dear Mee-Ling:

Gale DuBose sent the attached quote via fax which I wanted to make sure it is legible so I have re-typed the fax and attached it to this email wherein she states they received notification that State Accident Fund was going to some kind of a pharmacy service. I would request that Mr. Polansky be allowed to continue to get his medications from Publix. Again, as expressed by Ms. DuBose, Ted is on multiple very high-powered medications from three (3) different specialists and there is an absolute critical need to make sure of any drug interactions. In fact, Mr. Polansky's brain damage was caused by an encephalopathy from drug interaction.

I appreciate your consideration of this request. Please be advised that I will be out of the office from June 27 through July 16 and during that time, I would appreciate it if you would communicate with Kim if there are any questions concerning this. I would also appreciate it if you can let us know if this request can be honored without any further action by us.

Sincerely yours,



Preston F. McDaniel

PFM/abh
Enclosure

P. 848





OFFICIAL 10 YEAR DRIVER RECORD

Customer No: 25081264 Driver License No: 4878126
Name: POIANNEW THEODORE PAUL
Address:
City: State: Zip:
County: LEXINGTON
DOB: 4/7/1957 Sex: M Driver Training: N
Status - DL: NO SUSPENSION CDL: NO DISQUALIFICATION

License Information

Type	Class	Function	Issued	Expires	First Issued	Rest.	Endor.
Current							
DL	D	Renewal	03/17/2006	04/07/2016	04/02/1996	N	N
Prior							
DL	D	Renewal	03/22/2001	04/07/2006	04/02/1996	N	N
DL	D	Modify	06/07/2005	04/07/2006	04/02/1996	N	N

Address Change -

Date Changed: 06/07/2005

Address:
City: State: Zip:

Point Summary

Total Current Points: 0
Driver Credit: -0
Adjusted Current Points: 0

ACC: REPORTABLE

Accident: 10/28/2012
Accident Case Number: 12579336
Accident Jurisdiction: SC Acc Loc Ref: SCHDPT
Contributed: N

Posted: 11/01/2012
FR-10 Audit Number: E-431512
History: N

End of Report

Certified to be a true and correct
copy of the original document on file
with the South Carolina Department of
Motor Vehicles.

A. L. Phelps
Procedures & Compliance, Director





Jebaily Law Firm, P.A.

P.O. Box 1871 • Florence, SC 29503-1871
(843) 667-0400 • (800) 868-0400 • Fax (843) 661-6424

Ronald J. Jebaily
George D. Jebaily

Cely Anne B. Brigman
Rangeley B. Chewning
Suzanne H. Jebaily

July 1, 2013

CERTIFIED - RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY

Prentice Hall Corporation System, Inc.
1703 Laurel Street
Columbia, SC 29201

Re: LifeCare Psychology Group, LLC vs. South Carolina State Accident Fund
& Corvel Healthcare Corporation
C/A No.: 2011-CP-21-2679
Our File No.: 11-4897-RJJ

Dear Sir or Madam:

Enclosed please find a certified copy of the Amended Summons and Complaint in this matter which we are hereby serving upon you as the Registered Agent for Corvel Healthcare Corporation in accordance with Rule 4(d)(3) of the South Carolina Rules of Civil Procedure.

With kind regards, I am

Very truly yours,

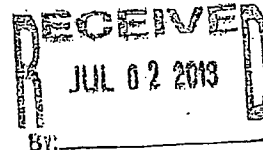
JEBAILY LAW FIRM, P.A.

Ronald J. Jebaily

RJJ/kdl

Enclosures

cc: Avie J. Rainwater, III, Ph.D./LifeCare Psychology Group, LLC
G. Murrel Smith, Jr., Esq.
Pope D. Johnson, III, Esq.



P.850

COUNTY OF FLORENCE

Lifecare Psychology Group, LLC, formerly)
Behavioral Health Group, LLC,)

Plaintiff(s))

vs.)

South Carolina State Accident Fund &)

Corvel Healthcare Corporation,)

Defendant(s))

Submitted By: Ronald J. Jebaily

Address: P.O. Box 1871, Florence, SC 29503-1871

IN THE COURT OF COMMON PLEAS

Amended

CIVIL ACTION COVERSHEET

2011-CP - 21- 2679

SC Bar #: 2966

Telephone #: 843-667-0400

Fax #: 843-661-6424

Other:

E-mail: rjebaily@jebailylaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

☐ Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199)	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Slander/Label (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Administrative Law/Relief ☐ Reinstate Dv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990)
☐ Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)	☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	☐ Employment Security Comm (99) ☐ Other (999)

Submitting Party Signature:

SCCA / 234 (06/2013)

Date:

Page 1 of 3

CERTIFIED: A TRUE COPY
Clerk of Court
Florence County, S.C.

P. 851

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Aiken, Allendale, Anderson, Bamberg, Bamwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-21-2679

3 LifeCare Psychology Group, LLC,
4 formerly Behavioral Health Group, LLC,

Plaintiff,

5 vs.

6 South Carolina State Accident Fund &
7 Corvel Healthcare Corporation,

8 Defendants.

AMENDED SUMMONS
(NON-JURY TRIAL)

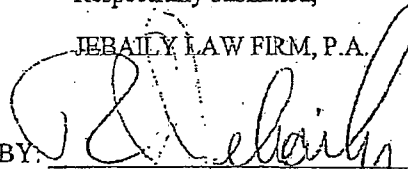
2013 JUL -1 PM 3:49
COM. CLERK
FLORENCE COUNTY, SC

9 TO: DEFENDANTS, SOUTH CAROLINA STATE ACCIDENT FUND & CORVEL
10 HEALTHCARE CORPORATION:

11 THIS SUMMONS requires you to answer the attached Complaint and serve a copy of your
12 Answer on Plaintiff's attorney at his office, 291 West Evans Street, Florence, South Carolina 29501,
13 within **THIRTY (30) DAYS** after service of this Summons and Complaint, excluding date of
14 service, and if you fail to answer the Complaint within this time, judgment by default will be
15 rendered against you for the relief demanded in the Complaint.

16 Respectfully submitted,

17 JEBAILY LAW FIRM, P.A.

18 BY: 
19
20

21 Ronald J. Jebaily, SC Bar No. 2966
22 P.O. Box 1871
23 Florence, SC 29503-1871
24 Phone: 843-667-0400
25 Fax: 843-661-6424
26 E-mail: Rjebaily@jebailylaw.com
27 ATTORNEY FOR PLAINTIFF
28

Florence, South Carolina

07/13/2013

FILED A TRUE COPY
JUL 13 2013
CLERK OF DISTRICT CLERK
FLORENCE COUNTY, SC

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-21-2679

3 LifeCare Psychology Group, LLC,
4 formerly Behavioral Health Group, LLC,

Plaintiff,

5 vs.

6 South Carolina State Accident Fund &
7 Corvel Healthcare Corporation,

8 Defendant.

AMENDED COMPLAINT
(NON-JURY TRIAL)

2013 JUL -1 PM 3:49
CLERK OF COURT
FLORENCE COUNTY, S.C.

9 Plaintiff, by and through its undersigned attorney, respectfully alleges:

10
11 **JURISDICTIONAL ALLEGATIONS**

12 1. Plaintiff, LifeCare Psychology Group, LLC, (hereinafter, "LifeCare") is a limited liability
13 company organized and existing under the laws of South Carolina and does business in the County
14 of Florence, State of South Carolina.

15 2. That, upon information and belief, Defendant, South Carolina State Accident Fund
16 (hereinafter, "State Accident Fund") is an "agency" as defined by S.C. §15-78-30(a) and a
17 "governmental entity" as defined by S.C. Code §15-78-30(d), and pursuant to Title 42 of the South
18 Carolina Code of Laws, 1976 as Amended (a) is engaged in the insurance business as it relates to
19 insurance for employees of state agencies in South Carolina, which includes approving treatment for
20 workers injured on the job and issuing payment for treatment provided to injured workers (b)
21 transacts business by its agents and employees in South Carolina, (c) contracts to supply insurance
22 services in South Carolina, (d) entered into a contract to be performed in part or in whole in South
23 Carolina, and (e) distributes services with the reasonable expectation that these services are to be
24 used in South Carolina.

25 3. That, upon information and belief, Defendant, South Carolina State Accident Fund, has its
26 principle places of business located in the County of Richland, State of South Carolina.

27 4. That, upon information and belief, Defendant, Corvel Healthcare Corporation, (hereinafter,
28 "CorVel"), is a California Corporation that is independently engaged in providing insurance services

CERTIFIED A TRUE COPY
CLERK OF COURT C.P. & C.S.
FLORENCE COUNTY, S.C.
Linda R. Smith

1 to state agencies and other local entities pursuant to the South Carolina Workers' Compensation Act,
2 disability management and cost containment services and as such contracted to provide said services
3 in whole or in part in South Carolina and distributes services with the reasonable expectation that
4 these services are to be used in South Carolina.

5 5. That all or substantially all negotiations and execution of documents occurred in Florence
6 County, South Carolina, at Plaintiff, LifeCare's, place of business.

7 6. That suit against Defendants is proper pursuant to S.C. Code §15-78-20.

8 7. That this Court has jurisdiction of the matters in controversy pursuant to S.C. Code §17-77-
9 50.

10 **FOR A FIRST CAUSE OF ACTION AS TO DEFENDANTS STATE ACCIDENT FUND**
11 **& CORVEL HEALTHCARE CORPORATION**
12 **[Breach of Contract at Common Law]**

13 8. That, upon information and belief, the Plaintiff entered into a binding contractual agreements
14 with the Defendants on behalf of multiple Jane Doe patients who sustained on-the-job injuries, for
15 the purpose of providing said injured workers with psychological care. Pursuant to the contract,
16 Defendant agreed to the treatment/payment plans and agreed to make payments for treatment. (Please
17 refer to the contracts attached to and incorporated herein by reference as Exhibits 1 through 8).

18 9. That, upon information and belief, Defendant, State Accident Fund, subcontracted with
19 Defendant, Corvel, and to provide certain insurance services as more completely shown on
20 Attachment A.

21 10. That, Defendant, State Accident Fund, cannot delegate ultimate responsibility for
22 legislatively mandated responsibility to Corvel.

23 11. That detrimentally relying upon the State Accident Fund and Corvel's representations,
24 Plaintiff provided reasonable and necessary psychological treatment to the Jane Doe patients/injured
25 workers as approved by the State Accident Fund acting through Corvel and in accordance with the
26 terms as set forth in the contractual agreement.

27 12. That, upon information and belief, the State Accident Fund and Corvel have failed to uphold
28 and/or perform its duties under the Agreement by failing to make payments to the Plaintiff in
compliance with the terms of the subject contracts supported by Plaintiff's consideration in the form

1 of detrimental reliance.

2 13. That Plaintiff has made numerous complaints to the Defendants, State Accident Fund and
3 Corvel, for correction of their failure to make payments under the terms of the contractual agreement,
4 but the Defendants continually failed and refused to comply with Plaintiff's requests and the terms
5 as set forth in the contractual agreement.

6 14. That Plaintiff has notified the State Accident Fund and Corvel of their failure to comply and
7 resulting breach of the aforesaid contracts, but they have continually failed to comply.

8 15. That the Plaintiff is informed and believes that the State Accident Fund and Corvel have
9 breached their contractual agreement.

10 16. That the State Accident Fund and Corvel have acted in bad faith or in an unreasonable
11 manner and Plaintiffs are informed and believe that they are entitled to recover reasonable attorney
12 fees and costs.

13 17. That Plaintiff is informed and believes it is entitled to judgment against the State Accident
14 Fund and Corvel for the moneys owed per the contractual agreement as well as certain consequential
15 damages, actual damages, interest, and reasonable attorneys fees together with costs for the First
16 Cause of Action.

17 18. That, upon information and belief, Corvel entered into a contract with the South Carolina
18 Budget and Control Board Materials Management Division to provide bookkeeping services to the
19 State Accident Fund.

20 19. That under the contract Corvel's duties were to provide comprehensive billing review, to
21 assist the State Accident Fund in administering its providers bill review program associated with
22 workers compensation claims.

23 20. That at all time relevant to the issues involved in this case, Corvel was acting in the aforesaid
24 capacity.

25 21. That Lifecare, at all times relevant hereto, was a preferred provider pursuant to a written
26 agreement and the mandates of state law.

27 22. That Lifecare entered into contracts with the State Accident Fund, on information and belief,
28 acting through Corvel, and received authorization to provide certain specified treatment to injured

1 workers who had been referred to them. These contracts set forth the scope of the treatment to be
2 provided by Lifecare and under Lifecare's contract the services were to be paid for according to the
3 terms of the South Carolina Workers' Compensation medical fee schedule

4 23. In accordance with this procedure, Lifecare obtained authorization from Corvel, upon
5 information and belief, acting as agent for the State Accident Fund, and provided treatment to the
6 individuals whose care is the subject of this lawsuit.

7 24. That Lifecare's charges were routinely approved and paid for a while. However, at a certain
8 point, Corvel refused to approve LifeCare's charges.

9 25. That thereafter, in an attempt to resolve the matter, further discussions were held with Corvel,
10 as agent and the State Accident Fund as principal in an attempt to resolve the issues. Such was not
11 forthcoming.

12 26. Lifecare is informed and believes that Corvel acted negligently, recklessly, willfully and
13 wantonly in denying payment either acting on its own behalf or on behalf of the State Accident Fund.

14 **FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT STATE ACCIDENT FUND**
15 **& CORVEL HEALTHCARE CORPORATION**
16 **[Bad Faith Refusal to Pay Claims]**

17 27. Plaintiff reaffirms and reiterates all allegations in the First Cause of Action as if fully
18 repeated and incorporated herein verbatim.

19 28. That Plaintiff is informed and believes that Defendants owed them a duty of good faith and
20 fair dealing and implicitly covenanted to refrain from doing anything to impair Plaintiff's rights to
21 receive benefits under the contract.

22 29. That Defendants, through its agents, servants and/or employees, knowing that Plaintiff's
23 claims were wholly valid and should be paid, have wrongfully and in breach of the implied covenant
24 of good faith and fair dealing, withheld and denied the benefits due Plaintiff. In denying its claim
25 for benefits, Defendant has acted wrongfully, unreasonably and in bad faith in the following respects,
26 among others:

- 27 a. Defendants failed and refused to make an adequate investigation before withholding
28 benefits under the agreement.
- b. Defendants refused and continues to refuse to give reasonable interpretations to the
provisions in the contract, or any reasonable application of such provisions to

1 Plaintiff's claims and has acted to protect its own financial interest therein at the
2 expense of Plaintiff's rights.

3 c. Defendants have failed to provide Plaintiff with any reasonable or justifiable basis
4 for denying Plaintiff's claims in relation to the contract, the facts or applicable law.

5 d. Defendants' refusal to pay benefits due compelled Plaintiff to engage legal counsel
6 to initiate litigation to recover such benefits.

7 30. That as a direct and proximate result of the conduct of Defendants, the Plaintiff has sustained
8 substantial compensable losses including withheld professional fees, certain consequential damages,
9 attorneys fees and costs.

10 31. That as a direct and proximate result of the conduct of the Defendants, the Jane Doe patients
11 have outstanding balances due and payable and have been subjected to risk of injury and/or harm to
12 their financial well-being.

13 32. That Defendants' actions were willful, wanton and/or in reckless disregard for Plaintiff's
14 rights and Plaintiff is informed and believes that it is entitled to punitive damages against
15 Defendants.

16 33. That Plaintiff is informed and believe that it is entitled to judgment against Defendants
17 jointly and severally in the amount of Seventy-Five Thousand Three Hundred Twenty Eight and
18 59/100 (\$75,328.59) Dollars plus interest for withheld professional fees, certain consequential
19 damages, attorney fees and costs and punitive damages as the jury may determine.

20 WHEREFORE, Plaintiffs pray that this Honorable Court grant it judgment as follows:

21 a. For the First Cause of Action against Defendants in the amount of Seventy-Five
22 Thousand Three Hundred Twenty Eight and 59/100 (\$75,328.59) Dollars for
23 withheld professional fees, for certain consequential damages as well as actual
24 damages and reasonable attorneys fees and cost of this action;

25 b. For the Second Cause of Action against Defendants in an amount to be determined
26 by the trier of facts, for certain consequential damages as well as actual damages,
27 attorney fees and costs and punitive damages as the jury may determine.

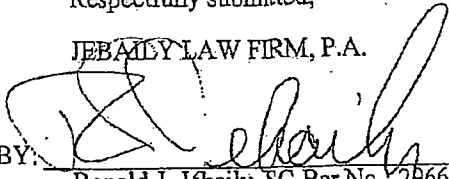
28 c. For any such other and further relief as may be just and proper.

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Respectfully submitted,

JEBAILY LAW FIRM, P.A.

BY:


Ronald J. Jebaily, SC Bar No. 2966
P.O. Box 1871
Florence, SC 29503-1871
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: Rjebaily@jebailylaw.com
ATTORNEY FOR PLAINTIFF

Florence, South Carolina

07/01/2013

1 STATE OF SOUTH CAROLINA,
2 COUNTY OF FLORENCE

3 LifeCare Psychology Group, LLC,

4 Plaintiff,

5 vs.

6 South Carolina State Accident Fund & Corvel
7 Healthcare Corporation,

8 Defendant.

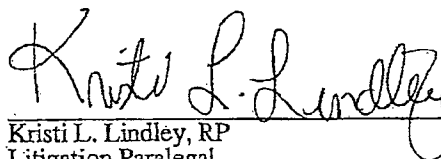
IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-21-2679

CERTIFICATE OF SERVICE

9 I, the undersigned employee of Jebaily Law Firm, P.A. hereby certify that I have served a
10 copy of the foregoing *Amended Civil Action Coversheet and Amended Summons and Complaint*
11 upon the Defendant, Corvel Healthcare Corporation, by depositing same with the U.S. Postal
12 Service, certified, return receipt requested, restricted delivery, with proper postage affixed thereto
13 as follows:

14
15 Prentice Hall Corporation System, Inc.
16 1703 Laurel Street
17 Columbia, SC 29201
18 Registered Agent for Corvel Healthcare Corporation

19
20 

21 Kristi L. Lindley, RP
22 Litigation Paralegal
23 Jebaily Law Firm, P.A.
24 Post Office Box 1871
25 Florence, South Carolina 29503

26 Florence, South Carolina

27 July 1, 2013
28

IN THE COURT OF COMMON PLEAS
THE TWELFTH JUDICIAL CIRCUIT
C.A. NO.: 2011-CP-21-2679

Plaintiff,

V.

Defendant.

ANSWER TO PLAINTIFF'S AMENDED
COMPLAINT AND/THIRD PARTY
COMPLAINT OF THE DEFENDANT
SOUTH CAROLINA STATE
ACCIDENT FUND

Third Party Plaintiff,

V.

Third Party Defendant.

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CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

LEAD

Page 1 of 11

CERTIFIED: A TRUE COPY
Christie Ruth Spierin
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

P. 862

1. Each and every allegation not hereinafter admitted, denied or qualified is hereby denied and strict proof demanded thereof.

FOR A FIRST DEFENSE

2. In regards to Paragraph 1, your Defendant admits that the Plaintiff is a limited liability company organized and existing under the laws of the State of South Carolina.

3. In regards to Paragraph 2, your Defendant admits that the State Accident Fund is a State Agency that provides Workers' Compensation insurance to State Agencies and other local government entities. Furthermore, your Defendant admits that they are governed by statutory and regulatory provisions of the South Carolina Workers' Compensation Act. The remainder of said paragraph is denied.

4. Your Defendant admits Paragraph 3 of the Plaintiff's Complaint. Furthermore, your Defendant would show that venue is proper in the County of Richland State of South Carolina pursuant to S.C. Code Ann. §15-78-100(b).

5. In regards to Paragraph 4, your Defendant denies that substantially all negotiations occurred in the County of Florence State of South Carolina. Your Defendant would show that all negotiations occurred in the County of Richland State of South Carolina.

6. Your Defendant denies Paragraphs 5, 6 and 7 and demands strict proof thereof.

7. Your Defendant denies Paragraphs 8 through 18 and demands strict proof thereof.

8. Your Defendant admits Paragraphs 19 and 20 of the Plaintiff's Complaint.

9. In regards to Paragraph 21, your Defendant admits that Lifecare was the preferred provider of Corvel. Your Defendant does not admit that Lifecare was a preferred provider of the State Accident Fund.

10. Your Defendant denies Paragraph 22 and demands strict proof thereof.
11. Your Defendant denies Paragraphs 23, 24, 25 and 26 and demands strict proof thereof.
12. In regards to Paragraph 27, your Defendant repleads his responses to Paragraphs 1-26 as if set forth herein verbatim.
13. Your Defendant denies Paragraph 28 and demands strict proof thereof.
14. Your Defendant denies Paragraph 29 including, but not limited to, its subparts.
15. Your Defendant denies Paragraphs 30, 31, 32, 33 as well as the Wherefore clause and demands strict proof thereof.

FOR A SECOND DEFENSE
(Improper Venue)

16. Your Defendant repleads all prior defenses as if set forth herein verbatim.
17. Your Defendant would show that the Plaintiff has filed this action in the wrong jurisdiction. The proper jurisdiction and venue should be in the County of Richland State of South Carolina pursuant to S.C. Code Ann. §15-78-100(b).

FOR A THIRD DEFENSE
(Lack of Subject Matter Jurisdiction)

18. Your Defendant repleads all prior defenses as if set forth herein verbatim.
19. Your Defendant would show that the Court lacks subject matter jurisdiction over the cause of action raised in the Complaint.
20. Pursuant to applicable statutory and regulatory provisions, subject matter jurisdiction over medical Fee Schedule billing disputes lies solely with the South Carolina Workers' Compensation Commission.

FOR A FOURTH DEFENSE
(Sovereign Immunity)

- 21. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 22. Your Defendant pleads the doctrine of sovereign immunity.

FOR A FIFTH DEFENSE
(Lack of Privity Contract)

- 23. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 24. Your Defendant would show that there is no contractual relationship between the parties.
Therefore, your Defendant pleads a lack of privity of contract to any and all claims of the Plaintiff.

FOR A SIXTH DEFENSE
(Good Faith)

- 25. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 26. Your Defendant would show that it acted in good faith at all times as to the actions alleged by the Plaintiff.

FOR A SEVENTH DEFENSE
(Negligence/Contractual Violations of Others)

- 27. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 28. Your Defendant would show that any injuries caused to the Plaintiff brought about through the negligence and/or contractual violations of others. Therefore, your Defendant pleads negligence and/or contractual violations of others as a complete bar to any cause of action against your Defendant.
- 29. Your Defendant would show that there is no valid written contract between the Plaintiff

and your Defendant. Therefore, your Defendant pleads the statute of frauds as to any oral contract alleged by the Plaintiff.

FOR AN EIGHTH DEFENSE
(Statute of Frauds)

30. Your Defendant repleads all prior defenses as if set forth herein verbatim.
31. Your Defendant would show that there is no valid written contract between the Plaintiff and your Defendant. Therefore, your Defendant pleads the statute of frauds as to any oral contract alleged by the Plaintiff.

FOR A NINTH DEFENSE
(Intervening Causes)

32. Your Defendant repleads all prior defenses as if set forth herein verbatim.
33. Your Defendant would show that such damages sustained, if any, by the Plaintiff were a direct and proximate cause of one or more independent, intervening causes, which acts as a complete bar to this action.

FOR A TENTH DEFENSE
(Consent)

34. Your Defendant repleads all prior defenses as if set forth herein verbatim.
35. Your Defendant is informed and believes that the allegations in the Complaint are barred by the doctrine of consent.

FOR AN ELEVENTH DEFENSE
(Release)

36. Your Defendant repleads all prior defenses as if set forth herein verbatim.
37. Your Defendant is informed and believes the Plaintiff's Complaint is barred by the

doctrine of release.

FOR A TWELFTH DEFENSE
(Waiver)

38. Your Defendant repleads all prior defenses as if set forth herein verbatim.
39. Your Defendant is informed and believes that the allegations in the Plaintiff's Complaint are barred by the doctrine of waiver.

FOR A THIRTEENTH DEFENSE
(No Right of Contract by Defendant)

40. Your Defendant repleads all prior defenses as if set forth herein verbatim.
41. Any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were caused on occasion by events of which your Defendant had no control or right of control thereby relieving your Defendant from any liability or responsibility herein.

FOR A FOURTEENTH DEFENSE
(Punitive Damages)

42. Your Defendant repleads all prior defenses as if set forth herein verbatim.
43. Your Defendant alleges that an award of punitive damages in this case would violate the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Section III of the South Carolina Constitution due to:
- a. The unfettered power toward punitive damages and any manners wholly devoid of any meaningful standard is inconsistent with due process guarantees; and,
 - b. Even if it could be argued the standard governing and imposition of punitive damage exists, the standard is void for vagueness; and,
 - c. The Plaintiff's claim for punitive damages violates the equal protection clause of

the 14th Amendment to the United States Constitution and Article I, Section III of the South Carolina Constitution in that the punitive damages are based on the wealth of the Defendant; and,

- d. The Plaintiff's claim for punitive damages violates the doctrine of separation of powers and Article I, Section III of the South Carolina Constitution because punitive damages are a creation of the Judicial branch of the government which invades the products of the Legislative Branch; and,
- e. Punitive damages are barred against governmental entities pursuant to S.C. Code Ann. §15-78-120(b).

FOR A FIFTEENTH DEFENSE
(Immunity)

- 44. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 45. Your Defendant specifically pleads immunity, both absolute and qualified as a complete bar to the allegations of the Plaintiff's Complaint.

FOR A SIXTEENTH DEFENSE
(Tort Claims Act Defenses)

- 46. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 47. Your Defendant therefore pleads the right of recovery, if any, is governed and limited pursuant to the Tort Claims Act, including but not limited to, the following:
 - a. Your Defendant is not liable for any loss from legislative, judicial, or quasi judicial act or inaction (S.C. Code Ann. §15-78-60(1));
 - b. Your Defendant is not liable for any loss from adoption, enforcement or compliance of any law for failure to adopt any law whether valid or invalid,

including, but not limited to, any charter, division, ordinance or resolution, rule, regulation or written policy (S.C. Code Ann. §15-78-60(4));

- c. Your Defendant is not liable for any loss resulting from the exercise of discretion or judgment by the governmental entity or employee or performance or failure to perform any act of service which is in the discretion or the judgment of the governmental entity or employee (S.C. Code Ann. §15-78-60(5));
- d. Your Defendant specifically pleads provisions of S.C. Code Ann. §15-78-120 and the limitations on liability and cap on damages, including the prohibition of the recovery of punitive damages.

FOR A SEVENTEENTH DEFENSE

- 48. Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 49. Your Defendant requests that the trial of fact return a special verdict specified in the portion of monetary liability to each Defendant (presuming there are multiple Defendants in this case) pursuant to S.C. Code Ann. §15-78-100 and S.C. Code Ann. §15-38-15.

FOR AN EIGHTEENTH DEFENSE

- 50. By way of a Cross Complaint/Third Party Complaint against Defendant Corvel Healthcare Corporation (hereinafter "Corvel") Your Defendant repleads all prior defenses as if set forth herein verbatim.
- 51. Your Third Party Defendant is a governmental entity that is engaged in providing insurance to State Agencies and other local entities pursuant to the South Carolina Workers' Compensation Act.
- 52. Your Third Party Plaintiff's principle place of business is located in the County of

Richland State of South Carolina.

53. Upon information and belief, your third party defendant is a California corporation organized and existing under the law of California but doing business in the County of Richland State of South Carolina

54. Your Third Party Plaintiff issued through the South Carolina Budget and Control Board, Materials Management Division, a request for a proposal to provide comprehensive billing review to assist in administering its providers bill review programs associated with Workers' Compensation claims.

55. "Corvel" was awarded this contract for October 26, 2006 through October 24, 2009 with the contract being in review for each ensuing year until November 1, 2011.

56. Pursuant to the contract between your Third Party Plaintiff and "Corvel", there was an indemnification clause of third party claims. The provision provided, "Notwithstanding any limitation in this agreement, contractor shall defend and indemnify the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all respective officers, agents and employees against all suits or claims of any nature (and all damages, settlement payments, attorneys fees, costs, expenses, losses or liabilities attributable thereto) by any third party which arise out of or result in any way from, any defect in the goods or services acquired hereunder from any act or omission of the contractors, subcontractors, there employees, workmen, servants or agents.

57. Your Third Party Plaintiff would show that the Plaintiff, Lifecare Psychology Group, LLC was a preferred provider of "Corvel" and pursuant to an agreement entered between the parties

effective January 1, 2010.

58. Prior to January 1, 2010, your Third Party Plaintiff would show that any and all billing submissions by the Plaintiff, Lifecare Psychology Group, LLC, were reviewed and approved by "Corvel".

59. As a result of "Corvel's" review of billing submission by the Plaintiff, Lifecare Psychology Group, LLC, your Third Party Plaintiff has been sued for breach of contract and bad faith refusal to pay claims.

60. Your Third Party Plaintiff has solely relied on the services provided under the contract by "Corvel" (including, but not limited to, their claims review and approval of claims by the Plaintiff) in order to reimburse any goods and services provided by the Plaintiff, Lifecare Psychology Group, LLC.

61. As a result of third party defendant denying claims submitted by the Plaintiff and/or reducing them, your Defendant has been sued as provided herein above.

62. Your Third Party Plaintiff is informed and believes that "Corvel" is contractually required to indemnify them from all liability including, but not limited to, damages, settlement payments, attorney's fees, costs, expenses, losses or liabilities attributable to the aforementioned suit.

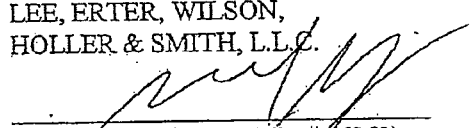
63. Your Defendant is informed and believes that "Corvel" should immediately assume the defense of this matter and reimburse your third party plaintiff for all attorney's fees, costs, expenses, losses or liability attributable to this lawsuit herein and your Third Party Plaintiff's defense hereto.

WHEREFORE, having fully answered the Plaintiff's Complaint, your Defendant/ Third Party Plaintiff, South Carolina State Accident Fund, requests this Honorable Court to dismiss the

Plaintiff's Complaint in its entirety along with costs and for such other further relief the Court may deem just and/or proper. Furthermore, your Defendant/Third Party Plaintiff, further requests that "Corvel" have judgment entered against them for the amount Plaintiff is seeking including, but not limited to, assumption of the defense any damages incurred as a result of this suit, settlement payments, attorney's fees, costs, expenses, losses or any liabilities whatsoever attributable to this action.

Respectfully submitted,

LEE, ERTER, WILSON,
HOLLER & SMITH, L.L.C.



G. Myrell Smith, Jr. (I.D. #66263)
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
ATTORNEY FOR THE DEFENDANT

July 22 2013
Sumter, South Carolina

1 STATE OF SOUTH CAROLINA }
2 COUNTY OF FLORENCE }

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-21-6679

3 LifeCare Psychology Group, LLC,
4 formerly Behavioral Health Group, LLC,

Plaintiff,

5 vs.

6 South Carolina State Accident Fund,

7 Defendant.
8

COMPLAINT
(NON-JURY TRIAL)

COPY

9 Plaintiff, by and through its undersigned attorney, respectfully alleges:
10

11 JURISDICTIONAL ALLEGATIONS

12 1. Plaintiff, LifeCare Psychology Group, LLC, (hereinafter, "LifeCare") is a limited liability
13 company organized and existing under the laws of South Carolina and does business in the County
14 of Florence, State of South Carolina.

15 2. That, upon information and belief, Defendant, South Carolina State Accident Fund
16 (hereinafter, "State Accident Fund") is an "agency" as defined by S.C. §15-78-30(a) and a
17 "governmental entity" as defined by S.C. Code §15-78-30(d), and pursuant to Title 42 of the South
18 Carolina Code of Laws, 1976 as Amended (a) is engaged in the insurance business as it relates to
19 insurance for employees of state agencies in South Carolina, which includes approving treatment for
20 workers injured on the job and issuing payment for treatment provided to injured workers (b)
21 transacts business by its agents and employees in South Carolina, (c) contracts to supply insurance
22 services in South Carolina, (d) entered into a contract to be performed in part or in whole in South
23 Carolina, and (e) distributes services with the reasonable expectation that these services are to be
24 used in South Carolina.

25 3. That, upon information and belief, Defendant has its principle places of business located in
26 the County of Richland, State of South Carolina.

27 4. That all or substantially all negotiations and execution of documents occurred in Florence
28 County, South Carolina, at Plaintiff, LifeCare's, place of business.

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FLORENCE COUNTY, S.C.

5. That suit against Defendant is proper pursuant to S.C. Code §15-78-20.

6. That this Court has jurisdiction of the matters in controversy pursuant to S.C. Code §17-77-50.

4. **FOR A FIRST CAUSE OF ACTION AS TO DEFENDANT STATE ACCIDENT FUND**
5. **[Breach of Contract at Common Law]**

6. 7. That, upon information and belief, the Plaintiff entered into binding contractual agreements with the Defendant on behalf of multiple Jane Doe patients who sustained on-the-job injuries, for the purpose of providing said injured workers with psychological care. Pursuant to the contract, Defendant agreed to the treatment/payment plans and agreed to make payments for treatment. (Please refer to the contracts attached to and incorporated herein by reference as Exhibits 1 through 7).

11. 8. That detrimentally relying upon the State Accident Fund's representations, Plaintiff provided reasonable and necessary psychological treatment to the Jane Doe patients/injured workers as approved by the State Accident Fund and in accordance with the terms as set forth in the contractual agreement.

15. 9. That, upon information and belief, the State Accident Fund has failed to uphold and/or perform its duties under the Agreement by failing to make payments to the Plaintiff in compliance with the terms of the subject contracts supported by Plaintiff's consideration in the form of detrimental reliance.

19. 10. That Plaintiff has made numerous complaints to the State Accident Fund for correction of their failure to make payments under the terms of the contractual agreement, but the State Accident Fund has continually failed and refused to comply with Plaintiff's requests and the terms as set forth in the contractual agreement.

23. 11. That Plaintiff has notified the State Accident Fund of its failure to comply and resulting breach of the aforesaid contracts, but they have continually failed to comply.

25. 12. That the Plaintiff is informed and believes that the State Accident Fund has breached their contractual agreement.

27. 13. That the State Accident Fund has acted in bad faith or in an unreasonable manner and Plaintiffs are informed and believe that they are entitled to recover reasonable attorney fees and

1 costs.

2 14. That Plaintiff is informed and believes it is entitled to judgment against the State Accident
3 Fund for the moneys owed per the contractual agreement as well as certain consequential damages,
4 actual damages, interest, and reasonable attorneys fees together with costs for the First Cause of
5 Action.

6 **FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT STATE ACCIDENT FUND**
7 **[Bad Faith Refusal to Pay Claims]**

8 15. Plaintiff reaffirms and reiterates all allegations in the First Cause of Action as if fully
9 repeated and incorporated herein verbatim.

10 16. That Plaintiff is informed and believes that Defendant owed them a duty of good faith and
11 fair dealing and implicitly covenanted to refrain from doing anything to impair Plaintiff's rights to
12 receive benefits under the contract.

13 17. That Defendant, through its agents, servants and/or employees, knowing that Plaintiff's
14 claims were wholly valid and should be paid, has wrongfully and in breach of the implied covenant
15 of good faith and fair dealing, withheld and denied the benefits due Plaintiff. In denying its claim
16 for benefits, Defendant has acted wrongfully, unreasonably and in bad faith in the following respects,
17 among others:

- 18 a. Defendant failed and refused to make an adequate investigation before withholding
19 benefits under the agreement.
- 20 b. Defendant refused and continues to refuse to give reasonable interpretations to the
21 provisions in the contract, or any reasonable application of such provisions to
22 Plaintiff's claims and has acted to protect its own financial interest therein at the
23 expense of Plaintiff's rights.
- 24 c. Defendant has failed to provide Plaintiff with any reasonable or justifiable basis for
25 denying Plaintiff's claims in relation to the contract, the facts or applicable law.
- 26 d. Defendant's refusal to pay benefits due compelled Plaintiff to engage legal counsel
27 to initiate litigation to recover such benefits.

28 18. That as a direct and proximate result of the conduct of Defendant, the Plaintiff has sustained
substantial compensable losses including withheld professional fees, certain consequential damages,
attorneys fees and costs.

19. That as a direct and proximate result of the conduct of the Defendant, the Jane Doe patients

21. That Plaintiff is informed and believe that it is entitled to judgment against Defendant in the amount of Seventy-Five Thousand Three Hundred Twenty Eight and 59/100 (\$75,328.59); Dollars plus interest for withheld professional fees, certain consequential damages, attorney fees and costs and punitive damages as the jury may determine.

- a. For the First Cause of Action against Defendant in the amount of Seventy-Five Thousand Three Hundred Twenty Eight and 59/100 (\$75,328.59) Dollars for withheld professional fees, for certain consequential damages as well as actual damages and reasonable attorneys fees and cost of this action;
- b. For the Second Cause of Action against Defendant in an amount to be determined by the trier of facts, for certain consequential damages as well as actual damages, attorney fees and costs and punitive damages as the jury may determine.
- c. For any such other and further relief as may be just and proper.

~~TERRELL~~ LAW FIRM, P.A.

Ronald J. Jebaily, SC Bar No. 2966
P.O. Box 1871
Florence, SC 29503-1871
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: Rjebaily@jebailylaw.com
ATTORNEY FOR PLAINTIFF

October 10, 2011

BEHAVIORAL HEALTH GROUP

FAX NO. : 8436673349

Feb. 22 2005 04:42 PM PZ

BEHAVIORAL HEALTH GROUP

Caring for the Care of the For Doc

FAXED TO: 803-896-5518

AVIN J. RAINWATER, III, Ph.D., ABPP
Clinical Psychologist & Behavioral Medicine

February 9, 2005

SHERYL E. CANTRY, Ph.D.
Clinical Psychology & Trauma Services

BYRON E. NAVITY, Ph.D.
Clinical Psychology & Substance Abuse

ERIKA L. ISLEIGH, M.S.
Counselor

Cumie Mack
State Accident Fund
Post Office Box 102100
Columbia, South Carolina 29221

Re: SOLOMON, Sheila

ROSEMARY E. DUNN, Ph.D., MHCSP
PATRICIA K. KROGER, MHCSP
JERRY T. HARRIS, Ph.D., MHCSP

Dear Ms. Mack:

Thank you for approving the above noted patient for psychological evaluation. I am sending you this letter so you will know what to expect in the way of charges from this office.

The assessment process has three steps. The first is an initial clinical interview. This is typically accomplished on the first visit, but it sometimes requires two sessions. Codes 90801 (initial interview) and 90820 (diagnostic interview) are used for these visits.

The second phase incorporates the indicated psychological testing. This typically includes a variety of psychometric instruments and sometimes involves an intellectual assessment. Multiple of code 96100 (psychological testing) are entered in accordance with the number of tests administered. Additionally, either code 99000 (psychometric scoring (lab) or 99099 (computer analysis of testing data) will be entered for each test depending on whether the instrument is hand or computer scored. There may also be charges using 90885 (record review) for review of associated medical records.

The third phase involves a psychophysiological evaluation called a Transactional Psychophysiological Assessment. This involves placing electrodes on the patient and measuring their psychophysiological systems against norms as well as evaluating the relative changes of their bodily responses. For this, the following codes will be used: 90876 (psychophysiological therapy or assessment), A4556 electrodes, multiple units of 90901 (biofeedback, any modality) to equal the number of channels recorded, multiple units of 90883 (interpretive services) to equal the number of channels recorded, multiple units of 99090 (computer analysis of testing data) to equal the number of channels recorded, and 90889 for creation of the associated report.

Finally, there will be either one or two units of 90857 (assessment results conference) entered depending on when and how the results are shared with the patient. Depending on the patient's circumstance, there may be a few miscellaneous charges, but those indicated above are the predominant charges you can expect. Please let me know if you have any questions or objections. Please sign the bottom of this letter and fax it back to our office to indicate your full approval of the services outlined in this letter.

Sincerely,

Sheryl E. Canty
Sheryl E. Canty
Office Manager

A. J. Rainwater 2.22.05 5:00pm
A. J. Rainwater
Date

NOTES

In accordance with South Carolina Code 19-11-95 the reader and his/her agents are required to fully protect the confidentiality of this psychological report.

McLeod Medical Park East
901 East Cherry Street
Columbia, SC 29202
Tel: 803-733-1111
Fax: 803-733-1112

(2)

BEHAVIORAL HEALTH GROUP

Caring for the Care of the People

PAID TO: 803-896-5818

AVIS J. RAINWATER, III, Ph.D., ABPP
Clinical Psychologist & Behavioral Medication

Second Request

March 17, 2005

SHERI R. CANTY, Ph.D.
Clinical Psychologist & Treatment Services

State College
State Accident Fund
Post Office Box 102100
Columbia, South Carolina 29221-3000

4-14-05

BYRON R. NAVES, Ph.D.
Clinical Psychologist & Substance Abuse

Re: TRAVIS, Myrtle
SSN: 247-82-2644

BRUCE L. MILLER, M.D.
Consultant

DEVON P. DAVIS, Office Manager
KARA TRAVIS, Insurance
JERRY TOSHI, Appointment

Dear Mr. Accrator:

Thank you for approving the above noted patient for psychological evaluation. I am sending you this letter so you will know what to expect in the way of charges from this office.

The assessment process has three steps. The first is an initial clinical interview. This is typically accomplished on the first visit, but it sometimes requires two sessions. Codes 90801 (initial interview) and 90820 (diagnostic interview) are used for these visits.

The second phase incorporates the indicated psychological testing. This typically includes a variety of psychometric instruments and sometimes involves an intellectual assessment. Multiple of code 98100 (psychological testing) are entered in accordance with the number of tests administered. Additionally, either code 99000 (psychometric scoring fee) or 99090 (computer analysis of testing data) will be entered for each test depending on whether the instrument is hand or computer scored. There may also be charges using 90885 (record review) for review of associated medical records.

The third phase involves a psychophysiological evaluation called a Functional Psychophysiological Assessment. This involves placing electrodes on the patient and measuring their psychophysiological systems against norms as well as evaluating the relative shapes of their bodily responses. For this, the following codes will be used: 90876 (psychophysiological therapy or assessment), A4356 electrodes, multiple units of 90901 (biofeedback, any modality) to equal the number of channels recorded, multiple units of 90885 (interpretive services) to equal the number of channels recorded, multiple units of 99090 (computer analysis of testing data) to equal the number of channels recorded, and 90889 for creation of the associated report.

Finally, there will be either one or two units of 90887 (assessment result conference) entered depending on when and how the results are shared with the patient. Depending on the patient's circumstance, there may be a few miscellaneous charges, but those indicated above are the predominant charges you can expect. Please let me know if you have any questions or objections. Please sign the bottom of this letter and fax it back to our office to indicate your full approval of the services outlined in this letter.

Sincerely,

Beverly Dandy
Beverly Dandy
Office Manager

Adjuster

Date

NOTE

In accordance with South Carolina Code 19-11-24 the reader and his/her agents are required to fully protect the confidentiality of this psychological report.

I cannot sign anything stating I will pay for full amt. We pay based on fee schedule. We will pay the fee scheduled amt. Charles Collins

McLeod Medical Park East
901 East Chimes Street, Suite 410
Florence, South Carolina 29508
Office 843-667-4949
Fax 843-667-3349

BEHAVIORAL HEALTH GROUP, LLC

200 E. Cherry St., Suite 201, Florence, SC 29506 (843) 667-1149 Fax 667-1149

PAID TO: 803-894-5800

AVEL RAINWATER, D.D., MFT
 RYAN R. NAWY, Ph.D.
 SHERYL L. CANTY, Ph.D.
 SARAH L. WILKINS, Ph.D.
 ERICA L. MILLER, MFT
 Beverly Dowdy, Office Manager
 (843) 894-5800
 www.bhgroup.com

August 24, 2005

Kathy Green
 State Accident Fund
 Post Office Box 102100
 Columbia, South Carolina 29221-5000

Re: MISCHER, Reina

Dear Ms. Green:

Thank you for approving the above noted patient for psychological evaluation. I am sending you this letter so you will know what to expect in the way of charges from this office.

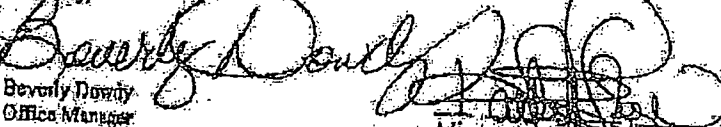
The assessment process has three steps. The first is an initial clinical interview. This is typically accomplished on the first visit, but it sometimes requires two sessions. Codes 90801 (Initial Interview) and 90820 (diagnostic interview) are used for these visits.

The second phase incorporates the indicated psychological testing. This typically includes a variety of psychometric instruments and sometimes involves an intellectual assessment. Multiple codes 96100 (psychological testing) are entered in accordance with the number of tests administered. Additionally, either code 99000 (psychometric scoring lab) or 99020 (computer analysis of testing data) will be entered for each test depending on whether the instrument is hand or computer scored. There may also be charges using 90885 (record review) for review of associated medical records.

The third phase involves a psychophysiological evaluation called a Transnational Psychophysiological Assessment. This involves placing electrodes on the patient and measuring their psychophysiological responses against norms as well as evaluating the relative shapes of their bodily responses. For this, the following codes will be used: 90876 (psychophysiological therapy or assessment), A4556 electrodes, multiple units of 90891 (biofeedback; any modality) to equal the number of channels recorded, multiple units of 90885 (interpretive services) to equal the number of channels recorded, multiple units of 99020 (computer analysis of testing data) to equal the number of channels recorded, and 90880 for creation of the associated report.

Finally, there will be either one or two units of 90887 (assessment results conference) entered depending on when and how the results are shared with the patient. Depending on the patient's circumstances, there may be a few miscellaneous charges, but those indicated above are the predominant charges you can expect. All charges are to be paid according to SCWCC fee schedule amounts. Please let me know if you have any questions or objections. Please sign the bottom of this letter and fax it back to our office to indicate your full approval of the services outlined in this letter.

Sincerely,


 Beverly Dowdy
 Office Manager

Adjuster

Date

*NOTE:

In accordance with South Carolina Code 19-11-43 the reader and his/her client are required to fully protect the confidentiality of this psychological report.

BEHAVIORAL HEALTH GROUP, LLC

200 E. Chelvey St., Suite 100, Greenville, SC 29606 (843) 657-3349 Fax: 657-3349

FAXED TO: 803-896-8818

2nd Request

February 8, 2006

2-15-06

AVON J. RANWATER, LL.M.D., ACP
 EYDIEK NAVIG, PH.D.
 STEVEN R. GANLEY, PH.D.
 SARAH L. WILLIAMS, PH.D.
 ERICA L. MURPHY, M.S.

Beverly Dowdy - Chief Manager
 Paul Fisher - Billing
 Scott Taylor - Administrative

Kathy T. Green
 State Accident Fund
 Post Office Box 102100
 Columbia, South Carolina 29221-5060

Re: PRAZIER, Cheryl

Dear Ms. Green:

became
 9/1/99

As you know, it is our policy to let adjusters know the charges they can expect as a result of care their insured receives in this office. For psychotherapy, CPT code 90806 will be the predominant code. Codes 90804 or 90808 may also be used from time to time for longer or shorter visits. Psychophysiological Therapy will be billed using 90876 (90875 for shorter sessions) with 90901 for the biofeedback utilized within the 90876 session. If more than one channel of biofeedback is used then multiple units of 90901 will be entered. Additionally, code A4556 will be entered at each biofeedback session for the electrodes used. Also, 90745 will be used if the patient is given a portable biofeedback unit for home practice (periodic charges of 99070 will also be made to cover the disposable electrodes used with that unit). Finally, if the patient is seen in group psychotherapy then CPT code 90853 will be entered.

We are asking that you approve the patient for 14 biofeedback visits (i.e., one experiential visit, twelve treatment sessions, and one post-treatment re-evaluation visit) at this time. If psychotherapy has been recommended for the patient, we ask that they be approved for psychotherapy during the time they are receiving biofeedback treatments. Following the re-evaluation we will notify you regarding any additional indicated care.

While there may be miscellaneous charges from time to time, these are the predominant charges you can expect. Please let me know if you have any objections or questions. Please sign this letter to indicate your full approval of the services outlined and fax (843-557-3349) or e-mail (Bdowdy@BehavioralHealthGroup.com) it back as soon as possible. Again, please call if you have questions.

Sincerely,

Beverly Dowdy
 Beverly Dowdy
 Office Manager

[Signature]
 Adjuster
 Date 2-17-06

SAF will pay according to the fee schedule.
 Signature represents acknowledgment of charges to be used
 All authorization for treatment should be obtained from
 Susan Cobb @ Compensum Services 877-709-2047

BEHAVIORAL HEALTH GROUP, LLC

800 E. Cheves St., Suite 300, Florence, SC 29504 (843) 667-4349 Fax 843-667-3349

AMEJ. RAINWATER, III, PH.D., ABPP
 BYRON R. NAVEY, PH.D.
 JASON D. ANDERSON, PH.D.
 LISA PRITCHARD-BOONE, PH.D.
 GAYLER, POLSTON, M.A., LPC
 ERIN L. DAVIS, M.A.
 KATHY E. CRAWFORD, M.S., LPC
 SAM J. BROUGHTON, PH.D., NCSP

11.1.07

Debra Butler
 Adjuster

STATE ACCIDENT FUND

emailed only to: DButler@SAFSCCOV

cc: SHoward@CompendiumUSA.net
 Syronda Howard, R.N.
 Nurse Care Manager
 COMPENDIUM SERVICES

Re: COOPER, Lebra

Dear Ms. Butler:

As you know, it is our policy to let adjusters know the charges they can expect as a result of care their insured receives in this office. For psychotherapy, CPT code 90806 will be the predominant code. Codes 90804 or 90808 may also be used from time to time for longer or shorter visits. Psychophysiological Therapy will be billed using 90876 (90875 for shorter sessions) with 90901 for the biofeedback utilized within the 90876 session; if more than one channel of biofeedback is used then multiple units of 90901 will be entered. Additionally, code A4556 will be entered at each biofeedback session for the electrodes used. Also, E0746 or 99199 will be used weekly if the patient is given a portable biofeedback unit for home practice as well as a device handling charge (99002) to assure this unit is working properly; periodic charges of 99070 will also be made to cover the disposable electrodes used with that unit. Finally, if the patient is seen in group psychotherapy then CPT code 90853 will be entered.

We are asking that you approve, at this time, psychological care as indicated in the evaluative report(s). Individual and group psychotherapy will be conducted basically on a weekly basis. Biofeedback will be conducted in session blocks (i.e., one experiential visit, twelve treatment sessions and one post-treatment reevaluation visit). A comparative transcranial psychophysiological assessment will be conducted after each block. This involves placing electrodes on the patient and measuring their psychophysiological systems against norms and their previous TPA findings. For this evaluation, the following codes will be used: 90876 (Psychophysiological Therapy or Assessment), A4556 Electrodes, multiple units of 90901 (Biofeedback, any modality) equal to the number of channels recorded, multiple units of 90885 (Interpretive Services) equal to the number of channels recorded, multiple units of 99090 (Computer Analysis of Testing Data) equal to the number of channels recorded and 90889 for creation of the associated report. Finally, there will be either one or two units of 90887 (Assessment Results Conference) entered depending on when and how the results are shared with the patient. Continued treatment will be undertaken if objectively measurable progress is noted. While there may be miscellaneous charges from time to time, these are the predominant charges you can expect.

We thank you in advance for agreeing with this plan and to paying in accordance with the SCWCC fee schedule and in keeping with the Commission's regulations to pay claims within 30 days of receipt. We will keep you informed of the patient's progress with copies of session notes and reports submitted with the claims. We will notify you when the patient is assessed at maximum psychological and/or psychophysiological benefit. Please let me know if you have any objections or questions. Please sign this letter to indicate approval and fax (843.667.3349) or email (BDowdy@BehavioralHealthGroup.com) it back to me ASAP. Please call if you have any questions.

Sincerely,

Beverly Dowdy
 Beverly Dowdy
 Office Manager

Debra C. Butler
 Adjuster

NOTE: The sender and his/her agents are required by SC Code § 9-11-95 and HIPAA regulations to fully protect the confidentiality of any psychological information.

SAF # 2006-002712

BEHAVIORAL HEALTH GROUP, LLC

100 E. Cherokee St., Suite 300, Florence, SC 29508 (843) 667-4919 Fax: 667-3349

1.17.08

Debra Butler, Adjuster
Ruthie Pike, Adjuster Tech
SC State Accident Fund
Emailed Only To: RPike@saf.sc.gov

Re: FRANCIS, Sylvester

Dear Ms. Butler/Ms. Pike:

Thank you for approving the above noted patient for psychological care. I am sending you this letter so you will know what to expect in the way of charges from this office.

The following CPT codes (some or all) will be utilized for the patient's psychotherapeutic services:

- 90806 Psychotherapy (90804, 90808 or 90847 may also be used for longer or shorter visits)
- 90853 Group Psychotherapy
- 90876 Psychophysiological Therapy
- A4556 Electrodes (one set per evaluation)
- 90901 Biofeedback (multiple units entered equal to the number of channels recorded)

If the patient is prescribed a home biofeedback unit, these codes will be entered:

- 99199 Portable biofeedback device for home practice (billed equivalent to once weekly)
- 99002 Device handling (to check and reset the unit, billed weekly)
- 99070 Electrode supplies (periodic charges for disposable electrodes used with home unit)
- Periodic TPA's will be performed for measurement of objective progress using these codes:

- 90876 Psychophysiological Therapy or Assessment
- A4556 Electrodes (one set per evaluation)
- 90901 Biofeedback (multiple units entered equal to the number of channels recorded)
- 99090 Computer Analysis of Data (multiple units entered equal to the number of channels analyzed)
- 90885 Interpretive Services (multiple units entered equal to the number of channels to be interpreted)
- 90889 Report (multiple units utilized to report on the clinical interview, testing and TPA)
- 99080 Fax/Copy letters or reports (multiple units equal to number of cc's of report sent)
- 90887 Assessment Results Conference (one or two units billed depending on how ARC is conducted)

We will keep you informed of the patient's progress with copies of session notes and reports submitted with the claims. We will notify you when the patient is assessed at maximum psychological and/or psychophysiological benefit. Depending on the patient's circumstance, there may be a few services not specifically described herein; all charges are to be paid according to SCVCC fee schedule amounts in an undiscounted fashion. Some codes may be entered in multiple units per day, depending on the services provided, and are to be paid in whatever multiple is charged. Some or all services may be provided and charged on the same day. Please sign this letter and fax it back to indicate authorization of these services. Please call if you have any questions.

Sincerely,

Beverly Dewey

Beverly Dewey
Office Manager

Robert P. Pepper
Adjuster
Robert P. Pepper

NOTE: The information contained herein is provided by SC Code 15-11-10 and 15-11-10. All information is fully protected by the confidentiality of the patient's information.

BEHAVIORAL HEALTH GROUP, LLC

800 E. Chaves St., Suite 300, Florence, SC 29506 (843) 667-4349 Fax: 667-3349

3.25.08

Syronda Howard, RN
Compendium Services Inc.

MAILED ONLY TO: SHoward@Compendiumusa.net

Re: HILL, Andrea B.

Dear Ms. Howard:

I am sending along with this letter the complete set of evaluative reports on Mrs. Hill. As indicated in the reports, she is in need of psychological care and psychophysiological treatment. I am sending you this letter so you will know what to expect in the way of charges from this office.

The following CPT codes (some or all) will be utilized for the patient's psychotherapeutic services:

90806 Psychotherapy (90804, 90808 or 90847 may also be used for longer or shorter visits).

90853 Group Psychotherapy

90876 Psychophysiological Therapy

A4556 Electrodes (one set per evaluation)

90901 Biofeedback (multiple units entered equal to the number of channels recorded)

If the patient is prescribed a home biofeedback unit, these codes will be entered:

99199 Portable biofeedback device for home practice (billed equivalent to once weekly)

99002 Device handling (to check and reset the unit; billed weekly)

99070 Electrode supplies (periodic charges for disposable electrodes used with home unit)

Periodic TPA's will be performed for measurement of objective progress using these codes:

90876 Psychophysiological Therapy or Assessment

A4556 Electrodes (one set per evaluation)

90901 Biofeedback (multiple units entered equal to the number of channels recorded)

99090 Computer Analysis of Data (multiple units entered equal to the number of channels analyzed)

90885 Interpretive Services (multiple units entered equal to the number of channels to be interpreted)

90889 Report (multiple units utilized to report on the clinical interview, testing and TPA)

99080 Fax/Copy letters or reports (multiple units equal to number of co's of report sent)

90887 Assessment Results Conference (one or two units billed depending on how ARC is conducted)

We will keep you informed of the patient's progress with copies of session notes and reports submitted with the claims. We will notify you when the patient is assessed at maximum psychological and/or psychophysiological benefit. Depending on the patient's circumstance, there may be a few services not specifically described herein; all charges are to be paid according to SCWCC fee schedule amounts in an undiscounted fashion. Some codes may be entered in multiple units per day, depending on the services provided, and are to be paid in whatever multiple is charged. Some or all services may be provided and charged on the same day. Please sign this letter and fax it back to indicate authorization of these services. Please call if you have any questions.

Sincerely,

A. Rainwater

Avis J. Rainwater, III, Ph.D., ABPP

Debra C. Butler 05/06/08

Adjuster

1 STATE OF SOUTH CAROLINA,
2 COUNTY OF FLORENCE

3 LifeCare Psychology Group, LLC,
4 Plaintiff,

5 vs.

6 South Carolina State Accident Fund,
7 Defendant.

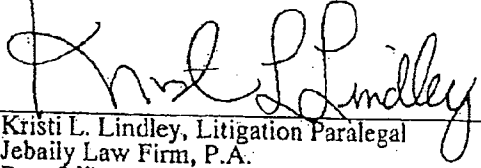
IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-21-2679

CERTIFICATE OF SERVICE

8
9 I, the undersigned employee of Jebaily Law Firm, P.A. hereby certify that I have served a
10 copy of the foregoing *Civil Action Coversheet, Summons and Complaint* upon the South Carolina
11 Attorney General by depositing same with the U.S. Postal Service, certified, return receipt requested,
12 restricted delivery, with proper postage affixed thereto as follows:

13 The Honorable Alan Wilson
14 South Carolina Attorney General
15 P.O. Box 11549
Columbia, SC 29211

16
17 
18 Kristi L. Lindley, Litigation Paralegal
19 Jebaily Law Firm, P.A.
20 Post Office Box 1871
Florence, South Carolina 29503

21 Florence, South Carolina

22 October 12, 2011

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
Janet Brooks Holmes
Kelli L. Sullivan*
Temus C. Miles, Jr.
David M. Bornemann
Brandon P. Jones
Charles A. Kinney, Jr. + #

Of Counsel:
C. E. Hardin, Jr.

Law Offices
The McKay Frim, P.A.

P.O. Box 7217
Columbia, South Carolina 29202-7217

1303 Blanding Street
Columbia, South Carolina 29201

Douglas McKay, Jr.
(1917-2008)

Telephone
(803) 256-4645
Fax
(803) 765-1839

E-Mail
pleventis@mckayfirm.com
Web
www.mckayfirm.com

*S.C. Certified Mediator
+ Also licensed in N.C.

September 19, 2016

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205 (29201)
Post Office Box 2766
Columbia, South Carolina 29202

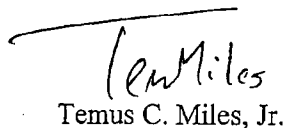
RE: *Theodore Polansky v. SC Attorney General*
WCC No.: 9922954 & 0024408
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Ms. McBride:

Enclosed for filing please find the original and one (1) copy of the Defendant's Motion for Supersedes in the above-referenced matters together with a Certificate of Service and a Civil Cover Sheet. Please stamp and file the original and return the stamped copy with the runner. Additionally, please find our firm's two checks in the amount of \$25.00 which represents the filing fee.

By copy of this letter, I am serving counsel of record with a copy of these Motions.

Sincerely,



Temus C. Miles, Jr.

TCM/jhrv

cc: Preston F. McDaniel, Esquire (w/encl)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

5th JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-07380 &
2015-CP-40-07468

Theodore Polansky,

Plaintiff,

vs.

SC Office of Attorney General & SC State
Accident Fund,

Defendant.)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Preston F. McDaniel, Bar No. _____ Address: 1315 Elmwood Ave, Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Temus C. Miles, Jr., Bar No. _____ Address: PO Box 7217, Columbia, SC 29202 Phone: 803-256-4645 Fax 803-753-5705 E-mail: tmiles@mckayfirm.com Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: ☐ YES / ☒ NO	
Estimated Time Needed: _____			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant		Date submitted	
9/19/16			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ 25.00 + 25.00 = 50.00			
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support			
☐ Domestic Abuse or Abuse and Neglect			
☐ Indigent Status ☐ State Agency v. Indigent Party			
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief			
☐ Motion for Stay in Bankruptcy			
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)			
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order.		JUDGE CODE _____	
☐ Other: _____		Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: \$ _____			
☐ CONTESTED - AMOUNT DUE: \$ _____			

THE STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Theodore Polansky,)

Employee)

Respondent/Cross Appellant,)

vs.)

SC Office of Attorney General,)

Employer,)

and)

South Carolina State Accident Fund,)

Carrier)

Appellants/Cross Respondents.)

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-07468 &
2015-CP-40-07380

NOTICE OF MOTION
AND MOTION FOR ORDER OF
SUPERSEDEAS

TO: PRESTON F. MCDANIEL, ESQUIRE, ATTORNEY FOR CLAIMANT:

YOU WILL PLEASE TAKE NOTICE THAT South Office of Attorney General and State Accident Fund ("Defendants"), by and through their undersigned attorneys, will move the Court, for entry of an Order of Supersedeas. Said Motion will be heard within ten (10) days or at such time and place as may be set by the Court thereafter in the Court of Common Pleas for Richland County, of which you will be notified. The undersigned certifies that he consulted with counsel for Claimant prior to filing this Motion. This Motion is based upon the following grounds:

Defendants respectfully move this Honorable Court, for an Order of Supersedeas over the Orders in these matters signed by the Honorable L. Casey Manning on July 5, 2016 (Two Orders attached as Exhibit 1 & 2), July 28, 2016 (Two Orders and Notices of Appeals attached as

Exhibit 3 & 4), & August 10, 2016 (Order and Notice of Appeal attached as Exhibit 5), which are subject to the Appeals now pending in the South Carolina Court of Appeals. Defendants move, pursuant to Rule 241, S.C.A.C.R., Rule 65, S.C.R.C.P. and the Court's inherent authority to enforce its own ruling, that the Court Issue an Order of Supersedeas holding all further proceedings, expressly including Rule to Show Cause and Enforcement proceedings, in relation to the above referenced Orders in abeyance pending the outcome of the now pending Appeals in these civil actions. Such Order of Superseadeas is required in Order to "prevent a contested issue from becoming moot" (as required by Rule 241(c)(2), S.C.A.C.R.) as the supersedeaul affect of an Appeal to the South Carolina Court of Appeals for payment of back due worker's compensation benefits and the underlying entitlement to the back due award are both issues expressly contested in the Appeals now pending in the Court of Appeals.

BACKGROUND

On July 1, 2015, the Claimant was awarded lifetime benefits in relation to an alleged compensable physical brain injury that Claimant asserts rendered him permanently and totally disabled under the South Carolina Workers' Compensation Act. This alleged physical brain injury is an alleged exacerbation from a drug-drug interaction suffered during treatment of an earlier workers' compensation claim ("the Original Comp Claim"). The Defendants have consistently denied that the Claimant has suffered a physical brain injury that rendered him permanently and totally disabled or is entitled to any indemnity benefits beyond 500 weeks previously paid.

The Hearing Commissioner Order, dated July 1, 2015, found for the Claimant and required payment of lifetime benefits to commence on March 8, 2011. This was the date of the last payment of compensation made to Claimant by Defendants under the 500 week award for

the Original Comp Claim. Of note, 500 weeks in which is the maximum award payable under the S.C. Workers' Compensation Act, up to including death, *except* for awards of life time indemnity benefits associated with permanent physical brain injury or other injuries expressly identified by statute.

Defendants appealed the decision of the single Commissioner to the Appellate Panel of the Full Commission. The Full Commission ultimately affirmed the "findings of fact" and "conclusions of law" of the single Commissioner's Order. Subsequently, Defendants appealed the Appellate Panel's Order. It is undisputed that the Defendants have made weekly payments to the Claimant beginning 30 days after the Order of the Full Workers' Compensation Commission, dated November 10, 2015 and that the appeal of the underlying award continues to this day.

Because the alleged date of injury in this case occurred prior to July 1, 2007, the amendments set forth in Act 111 do not apply, and jurisdiction over the appeal fell under the Court of Common Pleas pursuant to the former version of S.C. Code Ann. §42-17-60. (See Generally, S.C. Code Ann. §42-17-60 (Supp. 2006), and specifically *Pee Dee Regional v. S.C. Second Injury Fund* 375 S.C. 60, 650 S.E.2d 464 (S.C. Sup. Ct. 2007)), holding in part that appeals from the Workers' Compensation Commission to the Court of Common Pleas were procedurally appropriate when the injury *sub judice* took place prior to July 1, 2007.). Accordingly, the next level of Appeals of the Workers' Compensation Order was filed in the Court of Common Pleas for Richland County, South Carolina.

The Defendant's Appeal of the lifetime award was assigned Civil Action #2015-CP-40-07380. In addition to this appeal, the Claimant has a Cross Appeal arising out of the same Workers' Compensation Orders relating the maximum compensation rate, which was assigned Civil Action # 2015-CP-40-07468 and has progressed along with the Defendant's Appeal.

On February 8, 2016, the Honorable L. Casey Manning heard Respondent/Cross Appellant, Theodore Polansky's, Motion for payment of accrued Worker's Compensation benefits. By an Orders dated July 5, 2016, the Circuit Court ordered that the "Defendants shall make immediate payment to the Claimant in a lump sum of all accrued weekly compensation payment" dating back to the date of last payment (March 8, 2011). The Defendants filed timely Motions for Reconsiderations. The Circuit Court denied the Motions for Reconsideration by Orders dated July 28, 2016 for 2015-CP-40-07380 and July 28, 2016 and August 10, 2016 for 2015-CP-40-07468.

Thereafter, the Defendants served Notice of Appeals to the South Carolina Court of Appeals on August 29, 2016 (copies provided with copies of the Orders). Additionally, the Defendants previously filed a Notice of Appeal on the Order of the Circuit Court affirming the lifetime award of indemnity benefits. (A copy of the Notice of Appeal is attached as Exhibit 6). The Defendants have worked continuously to perfect the numerous Appeals in these cases since their filings and all Appeals are currently active in the South Carolina Court of Appeals. The Parties are currently awaiting a final Order from the Circuit Court to address the appropriate compensation rate for this claim as raised in the Claimant's Cross Appeal.

ANALYSIS

The Orders of the Circuit Court that are at issue require the Defendants to make payment of back due weekly compensation benefits that have accrued from the date compensation was to be reinstated (March 8, 2011) through the date that Defendants resumed making weekly payments and payment of a 10% penalty on all unpaid compensation to the Claimant within 14 days of the payment becoming due, pursuant to S.C. Code Ann. §42-9-90.

Defendants contest the Circuit Court's Orders on the basis of the Supreme Court's decision in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960) and the language of S.C Code §§42-17-60 and 42-9-90. Defendants believe they are required to make only *weekly* payments of compensation while the matter is pending on appeal, with such payments not to include payment of back due accrued benefits until after the appeals are finally resolved.

The orders at issue place the Defendants in the position of having to make payments that may be determined not to have been owed if the appeal of the lifetime award results in a reversal and would leave the Defendants with no practical means to recovery the excessive payments made pursuant to the challenged Order. In the event that the Orders are given effect before the Appeals are fully decided, the rights the Defendant to make only legally due payments will be rendered moot as there will be no means to recover the undue payments made pursuant to the challenged orders. This prejudicial position was expressly recognized and addressed through the *Case* opinion. The Orders at issue also penalize the Defendants for utilizing their appellate rights by imposing a 10% penalty for the failure to make a payment that is being appealed. This is fundamentally unfair.

In *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960), the South Carolina Supreme Court clearly established what benefits are due during the pendency of an appeal for a pre-2007 injury, as we have here. The Supreme Court interpreted Section 72-356, the earlier version of what became S.C. Code Ann. 42-17-60, to require "payment, after the expiration of the thirty-day supersedeas period and during the pendency of the employer's appeal...only of the weekly compensation accruing after the date of the Commission's Award." *Id.*, 533. Accordingly, the Defendants have made all payments that are due as the

appeal of this award continues and the Orders of the Circuit Court on payment of accrued benefits should be given no further effect until the appeals are finally decided.

In *Case v. Hermitage Cotton Mills, supra*, the Supreme Court reviewed and reaffirmed four previous decisions in which the Court considered various situations concerning payment of the Commission's award during the pendency of an appeal. (See Generally *Bannister v. Shepherd*, 191 S.C. 165, 4 S.E.2d 7 (1939); *McDonald v. Palmetto Theaters*, 196 S.C. 460, 13 S.E.2d 602 (1941); *Miller v. Spring Cotton Mills*, 225 S.C. 326, 82 S.E.2d 458 (1954); and *Godfey v. Mills Mill No. 2*, 234 S.C. 401, 108 S.E. (2d) 587 (1959)). Ultimately, the Court found that Section 72-356's language (predecessor, with almost congruent language to S.C. Code Ann. §42-17-60 (Supp. 2006) applicable to this case) required payment of "weekly" compensation during the pendency of the employer's appeal to the circuit court *after* the expiration of the thirty-day supersedeas period, and that such payments *should consist not* of the "additional amounts" often included in the Commission's awards, such as awards for disfigurement, medical expenses etc., "but only of the weekly compensation accruing *after the date of the Commission's award.*" *Case*, at 533 (emphasis added).

The *Case* Court concluded that pending determination on an appeal of the lower court's judgment, the weekly payments that are to be made by the employer "should commence from the *date of [the lower] court's judgment* and should *not be calculated retroactively* from the date of the Commission's decision." *Id.* at 534. (emphasis supplied). The *Case* Opinion expressly recognized the balancing of the interest between the claimant and the Defendant in order to make sure that weekly benefits provide a sustaining benefit to the claimant during the appeal while also protecting the Defendants from a payment of an undue award to the fullest extent possible.

As *Case* expressly considered the constructions advanced by the Defendants (and adopted its use) and the construction utilized by the court (and elected not to utilize it), substantial quotation is justified to illustrate that the matters before this Court:

The provision in Section 72-356 that "thereafter (i. e., after the expiration of the supersedeas period) the employer shall be required to make payment of the award until" final determination of the issues, suggests continuing, rather than lump-sum of nonrecurring, payments. It is, also susceptible of construction as referring not only to weekly payments thereafter to become due but to all payments including those for disfigurement, medical expenses, etc., and accrued weekly compensation from the date of the accident. **But as between these two possible constructions we must choose the one which, in our judgment, not only accords with the beneficent purpose of the Section (i. e. to make provision for the employee's support pending final determination of the employer's appeal), but also limits the payments that must be made by the employer (who cannot invoke the general supersedeas provisions, Sections 7-412 and 7-418, available to all other appellants from judgments for the payment of money) to those necessary to effect that purpose.** For in the event that the employer's appeal or appeals should result in overthrow of the award, the employee would thereby be obligated to restore the payment that he had received, 3 Am. Jur. Appeal and Error. Section 1242; 5B C.J.S., Appeal and Error, § 1980; Restatement, Restitution, Section 74; *Miller v. Spring Cotton Mills*, supra; and that he may, and probably will, be unable in such case to do so, is implicit in the provision of Section 72-356 looking to his support during the pendency of the appeal.

Since under our view Section 72-356 is to be construed, in fairness to both employee and employer, as according preferential creditor status to the former only from the time of adjudication (by the Commission) in his favor, it follows that, if the Commission should deny him compensation and upon his appeal the circuit court should reverse the Commission and hold his claim compensable, the weekly payments to be made by the employer pending determination of an appeal from that judgment to the Supreme Court should commence from the date of the circuit court's judgment and should not be calculated retroactively from the date of the Commission's decision.

Case, at 533 (emphasis added). While the Supreme Court expressly recognized much of the above quoted section as dicta, it provided the language as guidance on the issue due to prior inconsistent rulings. (See *Case*, at 530).

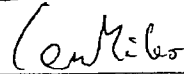
Under the legal reasoning of the *Case* Court, during the pendency of an appeal by an employer of an Order which provided benefits to a claimant, the injured worker is entitled to be provided weekly benefits to sustain him while that appeal is under review. However, the claimant is not entitled to any additional monies or award, above and beyond the weekly benefits the Claimant is presently receiving, until the appeal is adjudicated. Payment of indemnity benefits "calculated retroactively from the date of the commission's order" are expressly included in the benefits that are not due during the appeal. *Case*, at 533. Consistent logic would require this exception to be applied to a lump-sum payment of indemnity benefits calculated from a date prior to Order, as we have in this case.

Furthermore, the amendments to §42-17-60 of the South Carolina Code Ann. (Supp 2008), arguably now has codified the ruling in the *Case* decision and specifically states that the employer is required to make only weekly payments of compensation following the date of appeal to the Court of Appeals. The newly amended version of this statute clearly states that *weekly* benefits are payable, but makes no mention of paying the balance of an award or payments for a back due accrued award. Thus, pursuant to the Supreme Court's findings in *Case v. Hermitage Cotton Mills* and S.C. Code §42-17-60, Defendants are responsible for making only weekly payments of compensation only while the matter is pending on appeal.

Similarly, there is no basis for the Claimant's request that Defendants pay a 10% penalty on monies/awards not paid to the Claimant within 14 days of becoming due, as the award is not due and owed by Defendants at this time, as the Order of the Commission is presently on appeal to this Circuit Court and is therefore not a *final* Order to which payment would be required under S.C. Code Ann. §42-9-90.

CONCLUSION

For the reasons stated above, the Defendants request that the Court enter an order of Supersedeas over Orders in these matters signed by the Honorable L. Casey Manning on July 5, 2016 (Two Orders attached as Exhibit 1 & 2), July 28, 2016 (Two Orders and Notices of Appeals attached as Exhibit 3 & 4), & August 10, 2016 (Order and Notice of Appeal attached as Exhibit 5) and hold all further proceedings, expressly including Rule to Show Cause and Enforcement proceedings, in relation to the above referenced Orders in abeyance pending the outcome of the Appeals in these civil actions before higher Appellate Courts.



Temus C. Miles, Jr.
The McKay Firm, P.A.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

September 19, 2016

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

SC Attorney General

PLAINTIFF(S)

South Carolina State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____

Judge Code 2061

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of July, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of July, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

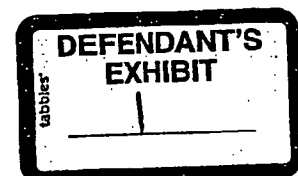
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRPC Form 4C (10/2011)

SCANNED



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,
Employee,
Respondent/Cross-Appellant
And As Movant,

Docket No: 2015-CP-40-07468
&
2015-CP-40-07380 ✓

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

ORDER ORDERING PAYMENT OF
ACCRUED AWARD PURSUANT TO
S.C. CODE §42-17-60

Employer, and

STATE ACCIDENT FUND,

Carrier,
Appellants/Cross-Respondents
And As Motion-Respondents

RICHLAND COUNTY
FILED
2016 JUL - 7 PM 12:34
JEANETTE W. MCBRIDE
C.C.P. & G.S.

This matter came to be heard by me on February 8, 2016 based on a Motion filed by the Employee/Claimant for payment of the accrued Award of the South Carolina Workers' Compensation Commission pursuant to SC Code §42-17-60. The Commission made an Award to Mr. Polansky of lifetime weekly compensation benefits reinstated as of March 8, 2011 under the Award. The Movant was represented by Preston F. McDaniel of the Richland County Bar and the Respondents to the Motion, and Appellants in this Court were represented by Peter J. Leventis, IV, also the Richland County Bar.

The Award made in this matter arose out of and as a result of two accepted injuries by accident that occurred in 1999 and 2000 and thus the provisions of SC Code §42-17-60 as amended,

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through July 1, 2007, apply to these pre-2007 claims. Prior to July 1, 2007, SC Code §42-17-60 in reference to the issue before the Court provided that:

"In the case of an appeal from the Decision of the Commission on questions of law, the appeal does not operate as a supersedes and thereafter the employer is required to make payment of the Award involved in the appeal . . . until the questions at issue have been fully determined . . ." (Emphasis added).

In this case, the Hearing Commissioner Awarded the Claimant lifetime benefits on July 1, 2015 and specifically provided in her Award that:

"THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume (sic, with) the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed." (Emphasis added).

That Award was appealed to the SC Workers' Compensation Commission and Full Commission by Order dated and filed November 10, 2015, affirmed that Award. Subsequent to the Decision of the Full Commission, on December 9th, the Award was appealed to this Court by the Defendants.

Based on the arguments presented to the Court and the Record at the Motion hearing, the parties agree that after filing the Appeal, even after request, the Defendants did not make any payment either as to the accrued Award nor did they

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restart weekly payments and as a result, the Claimant filed the Motion for Payment pursuant to the Act. Subsequently the Defendants agreed to and have resumed weekly payments of compensation but only beginning thirty (30) days after the Decision of the Full Commission but have continued to refuse to make payment of the accrued Award.

After review of the arguments, the statutes and the case law it is the finding of the Court that the Defendants shall make payment of the weekly compensation Award that has accrued from the date compensation was reinstated on March 8,, 2011 through the date that the Defendants resumed payments of weekly payments pursuant to the Award. The Supreme Court has repeatedly held and reaffirmed that in this factual scenario where a Hearing Commissioner has made an Award and that Award is affirmed on appeal by the Full Commission, that the Defendants are required to make full payment under the Award of all accrued compensation through the time that weekly compensation payments are resumed; and are required to make continuing payments of weekly compensation until the appeal is resolved. This is especially true in a case that has been accepted; weekly benefits are then stopped; and then the Commission reinstates benefits back to the date they were stopped as in this case. The Court takes note of the facts that this was an accepted case and that the parties agree the claimant is totally and permanently disabled and only disagree as to his entitlement to lifetime compensation benefits.

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The Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) went over its previous decisions concerning various fact scenarios and from what date in each of those fact situations, payment of an Award was due under §42-17-60. In the Case, Decision, supra, the Supreme Court reaffirmed its previous four (4) decisions concerning those various factual scenarios concerning payment of the Commission, "Award". As part of that confirmation, the Court reaffirmed its Decision in Godfrey v. Mills Mill No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959). In Godfrey, the Supreme Court held that in the fact scenario where payment of weekly compensation benefits was ordered to be reinstated (as here) and where that Award was affirmed by the Full Commission on Appeal (as here), full payment of accrued Award back to the date of reinstatement was required under the "Award" of the Commission. This Court has read the paragraph from Case vs. Hermitage, supra, that is actually dicta to its decision, but which was cited by both parties in support of their positions and agrees with the Claimant's reading of the decision. In the first part of that paragraph, the Court makes it clear that the Court and statute require payment, "after the date" of the, "Commission's Award" of, "weekly benefits" and that it is such, "additional amounts" in, "Addition to weekly benefits" that are not required to be paid. When read in conjunction with the last two sentences of that paragraph, it is clear that the weekly compensation required to be paid is all compensation "accruing" after the

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Award. In this case the date of the "Commission's Award" was all compensation, "accruing" after March 8, 2011.

In further confirmation of this interpretation of the Act, in 2007 the language of §42-17-60 was changed to specifically require payment of only weekly payments after the date of appeal to the Court of Appeals and a specific provision was added to provide that any unpaid portion of an Award would accrue interest. The provision of §42-17-60 in the last paragraph prior to July 1, 2007 concerning payment stated that the appeal does not operate as a supersedes and

"thereafter the employer is required to make payment of the Award involved in the appeal . . ."

And after July 1, 2007, it was changed to read,

"the appeal does not operate as a supersedes and, after that time, the employer is required to make weekly payments of compensation . . . until the questions have been fully determined."

And to that, a sentence was added that, "interest accrues on any unpaid portion of the Award . . ." Therefore the Legislature amended the Statute to provide that the employer was only responsible for payment of weekly payments after the appeal and interest accrued on the unpaid portion. There is no reference to "payment of the Award". The Legislature therefore clearly changed but also reaffirmed the intent and meaning of the pre-2007 language and requirement of the Act.

Thus, defendants are required to make payment of the weekly compensation benefits under the Award that have accrued from

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March 8, 2011 through the date that benefits were restarted in this matter. The Act under SC Code §42-9-240 requires that payment under an Award is to be paid within fourteen (14) days which this Court finds to be reasonable as to payment of the accrued Award in this case. The Act also provides that if payment is not made within that time period pursuant to SC Code §42-9-90 a 10% penalty is to be added to the amount due under §42-9-240 plus interest shall accrue at the legal rate of interest after that date. This Court finds both of those sections to be appropriate and reasonable.

Further, SCACR Rule 241(a) and (b) reaffirms that payment is not stayed by an appeal of the Order of this Court ordering payment and that this Court retains jurisdiction and, "the authority to enforce" its Order.

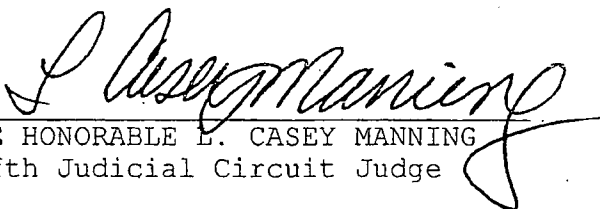
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart weekly compensation benefits until thirty (30) days after that date, meaning December 10th and therefore a period of thirty (30) days should be added to that figure as being due and payable to the claimant at this time. The defendants shall therefore pursuant to this Order calculate the amount that is to be paid to the claimant as accrued compensation under the Award of the Commission including this thirty (30) day period.

SCANNED

THEREFORE IT IS ORDERED THAT the motion is granted and the defendants shall make immediate payment to the claimant in a lump sum of all accrued weekly compensation payments that have accrued under the Award of the Commission which awarded reinstatement of weekly compensation benefits as of March 8, 2011 and before weekly compensation payments were reinstated.

IT IS FURTHER ORDERED THAT pursuant to the authority vested in the Executive Director of the State Accident Fund under SC Code §42-7-20, the Executive Director shall direct that this payment of the Award be made and that such payment shall be made within fourteen (14) days of the date of this order. If payment pursuant to this Order is not made within fourteen (14) days, upon notice, pursuant to SC Code §42-17-60 (as amended through 2007) and SCACR, Rule 241(a) and (b) this Court will issue a Rule to Show Cause to enforce the Order of this Court.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: July 5, 2016

7
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge _____

Judge Code 2061

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of July, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of July, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

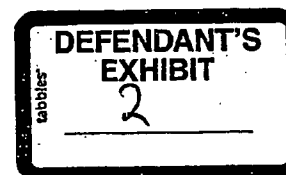
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRPC Form 4C (10/2011)

SCANNED



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
Respondent/Cross-Appellant)
And As Movant,)

Docket No: 2015-CP-40-07468

&
2015-CP-40-07388

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ORDER ORDERING PAYMENT OF
ACCRUED AWARD PURSUANT TO
S.C. CODE §42-17-60

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)
Appellants/Cross-Respondents)
And As Motion-Respondents)

This matter came to be heard by me on February 8, 2016 based on a Motion filed by the Employee/Claimant for payment of the accrued Award of the South Carolina Workers' Compensation Commission pursuant to SC Code §42-17-60. The Commission made an Award to Mr. Polansky of lifetime weekly compensation benefits reinstated as of March 8, 2011 under the Award. The Movant was represented by Preston F. McDaniel of the Richland County Bar and the Respondents to the Motion, and Appellants in this Court were represented by Peter J. Leventis, IV, also the Richland County Bar.

The Award made in this matter arose out of and as a result of two accepted injuries by accident that occurred in 1999 and 2000 and thus the provisions of SC Code §42-17-60 as amended,

SCANNED

through July 1, 2007, apply to these pre-2007 claims. Prior to July 1, 2007, SC Code §42-17-60 in reference to the issue before the Court provided that:

"In the case of an appeal from the Decision of the Commission on questions of law, the appeal does not operate as a supersedes and thereafter the employer is required to make payment of the Award involved in the appeal . . . until the questions at issue have been fully determined . . ." (Emphasis added).

In this case, the Hearing Commissioner Awarded the Claimant lifetime benefits on July 1, 2015 and specifically provided in her Award that:

"THEREFORE IT IS ORDERED that the Claimant is found to be entitled to an Award for lifetime weekly compensation benefits in the amount of \$507.34/week due to having sustained serious, severe permanent physical brain damage as a result of the injuries stemming from his work-related accidents. Those payments are to resume (sic, with) the last payment of compensation to the Claimant, which was made on or about the week of March 8, 2011. All compensation that has accrued shall be paid in a lump sum through the date that weekly compensation benefits are resumed." (Emphasis added).

That Award was appealed to the SC Workers' Compensation Commission and Full Commission by Order dated and filed November 10, 2015, affirmed that Award. Subsequent to the Decision of the Full Commission, on December 9th, the Award was appealed to this Court by the Defendants:

Based on the arguments presented to the Court and the Record at the Motion hearing, the parties agree that after filing the Appeal, even after request, the Defendants did not make any payment either as to the accrued Award nor did they

SCANNED 2

restart weekly payments and as a result, the Claimant filed the Motion for Payment pursuant to the Act. Subsequently the Defendants agreed to and have resumed weekly payments of compensation but only beginning thirty (30) days after the Decision of the Full Commission but have continued to refuse to make payment of the accrued Award.

After review of the arguments, the statutes and the case law it is the finding of the Court that the Defendants shall make payment of the weekly compensation Award that has accrued from the date compensation was reinstated on March 8,, 2011 through the date that the Defendants resumed payments of weekly payments pursuant to the Award. The Supreme Court has repeatedly held and reaffirmed that in this factual scenario where a Hearing Commissioner has made an Award and that Award is affirmed on appeal by the Full Commission, that the Defendants are required to make full payment under the Award of all accrued compensation through the time that weekly compensation payments are resumed; and are required to make continuing payments of weekly compensation until the appeal is resolved. This is especially true in a case that has been accepted; weekly benefits are then stopped; and then the Commission reinstates benefits back to the date they were stopped as in this case. The Court takes note of the facts that this was an accepted case and that the parties agree the claimant is totally and permanently disabled and only disagree as to his entitlement to lifetime compensation benefits.

SCANNED 3

The Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) went over its previous decisions concerning various fact scenarios and from what date in each of those fact situations, payment of an Award was due under §42-17-60. In the Case, Decision, supra, the Supreme Court reaffirmed its previous four (4) decisions concerning those various factual scenarios concerning payment of the Commission, "Award". As part of that confirmation, the Court reaffirmed its Decision in Godfrey v. Mills Mill No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959). In Godfrey, the Supreme Court held that in the fact scenario where payment of weekly compensation benefits was ordered to be reinstated (as here) and where that Award was affirmed by the Full Commission on Appeal (as here), full payment of accrued Award back to the date of reinstatement was required under the "Award" of the Commission. This Court has read the paragraph from Case vs. Hermitage, supra, that is actually dicta to its decision, but which was cited by both parties in support of their positions and agrees with the Claimant's reading of the decision. In the first part of that paragraph, the Court makes it clear that the Court and statute require payment, "after the date" of the, "Commission's Award" of, "weekly benefits" and that it is such, "additional amounts" in, "Addition to weekly benefits" that are not required to be paid. When read in conjunction with the last two sentences of that paragraph, it is clear that the weekly compensation required to be paid is all compensation "accruing" after the

SCANNED⁴

Award. In this case the date of the "Commission's Award" was all compensation, "accruing" after March 8, 2011.

In further confirmation of this interpretation of the Act, in 2007 the language of §42-17-60 was changed to specifically require payment of only weekly payments after the date of appeal to the Court of Appeals and a specific provision was added to provide that any unpaid portion of an Award would accrue interest. The provision of §42-17-60 in the last paragraph prior to July 1, 2007 concerning payment stated that the appeal does not operate as a supersedes and

"thereafter the employer is required to make payment of the Award involved in the appeal . . ."

And after July 1, 2007, it was changed to read,

"the appeal does not operate as a supersedes and, after that time, the employer is required to make weekly payments of compensation . . . until the questions have been fully determined."

And to that, a sentence was added that, "interest accrues on any unpaid portion of the Award . . ." Therefore the Legislature amended the Statute to provide that the employer was only responsible for payment of weekly payments after the appeal and interest accrued on the unpaid portion. There is no reference to "payment of the Award". The Legislature therefore clearly changed but also reaffirmed the intent and meaning of the pre-2007 language and requirement of the Act.

Thus, defendants are required to make payment of the weekly compensation benefits under the Award that have accrued from

SCANNED

March 8, 2011 through the date that benefits were restarted in this matter. The Act under SC Code §42-9-240 requires that payment under an Award is to be paid within fourteen (14) days which this Court finds to be reasonable as to payment of the accrued Award in this case. The Act also provides that if payment is not made within that time period pursuant to SC Code §42-9-90 a 10% penalty is to be added to the amount due under §42-9-240 plus interest shall accrue at the legal rate of interest after that date. This Court finds both of those sections to be appropriate and reasonable.

Further, SCACR Rule 241(a) and (b) reaffirms that payment is not stayed by an appeal of the Order of this Court ordering payment and that this Court retains jurisdiction and, "the authority to enforce" its Order.

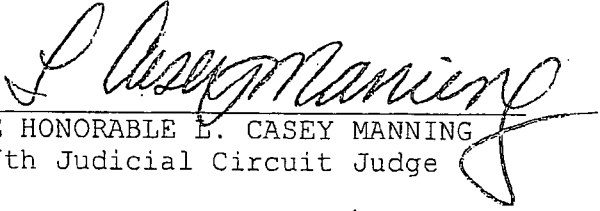
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart weekly compensation benefits until thirty (30) days after that date, meaning December 10th and therefore a period of thirty (30) days should be added to that figure as being due and payable to the claimant at this time. The defendants shall therefore pursuant to this Order calculate the amount that is to be paid to the claimant as accrued compensation under the Award of the Commission including this thirty (30) day period.

SCANNED

THEREFORE IT IS ORDERED THAT the motion is granted and the defendants shall make immediate payment to the claimant in a lump sum of all accrued weekly compensation payments that have accrued under the Award of the Commission which awarded reinstatement of weekly compensation benefits as of March 8, 2011 and before weekly compensation payments were reinstated.

IT IS FURTHER ORDERED THAT pursuant to the authority vested in the Executive Director of the State Accident Fund under SC Code §42-7-20, the Executive Director shall direct that this payment of the Award be made and that such payment shall be made within fourteen (14) days of the date of this order. If payment pursuant to this Order is not made within fourteen (14) days, upon notice, pursuant to SC Code §42-17-60 (as amended through 2007), and SCACR, Rule 241(a) and (b) this Court will issue a Rule to Show Cause to enforce the Order of this Court.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: July 5, 2016

SCANNED 7

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07380

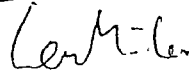
Theodore P. Polansky,.....Respondent.

v.

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

NOTICE OF APPEAL

SC Office of Attorney General and the State Accident Fund appeal the order of the Honorable L. Casey Manning dated July 28, 2016. Appellants received written notice of entry of this order on August 9, 2016.

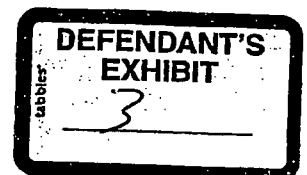


Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

August 29, 2016.

Other Counsel of Record:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent



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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4007380**

Theodore Polansky

SC Attorney General

PLAINTIFF(S)

South Carolina State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC Vol. Insult;
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Aug, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
Employee,)
Claimant/Respondent/)
Appellant,)
v.)
SC OFFICE OF THE ATTORNEY)
GENERAL,)
Employer, and)
STATE ACCIDENT FUND,)
Carrier,)
Defendants/Appellants/)
Respondents.)

Case Nos: 2015-CP-40-07380
&
2015-CP-40-07468

ORDER DENYING APPELLANTS'
RULE 59(E) MOTION

RICHLAND COUNTY
FILED
2016 AUG -3 AM 10:20
JEANETTE H. MCBRIDE
C.C.P. & G.S.

After careful review of the Rule 59(e) Motion and the Response filed by the Respondent and after careful review of this Court's Order filed July 7th, the Court finds that this Court reviewed and considered the extensive argument made before the Court in addition to reviewing the Briefs that were filed with the Court concerning the Motion to require payment of the accrued weekly compensation pursuant to the Award of the SC Workers' Compensation Commission.

Upon review, the Court further finds that the actual quotation in and basis for the Rule 59(e) was not only extensively argued to the Court and Briefed before the Court, but

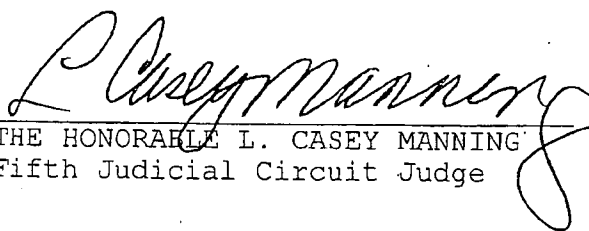
SCANNED

this Court in its Order specifically quoted that same language and cited to both the Decision of the SC Supreme Court in the matter of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) and in Godfrey v. Mill's Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959) and that the language from and basis for each decision was specifically detailed as part of the Court's original Order. Therefore, after careful review the Rule 59(e) Motion is DENIED.

Further, pursuant to Rule 62, SCRPC which provides for a ten (10) day Stay on enforcement after the entry of the Judgment which was entered on July 7, 2016), and Rule 241(b)(7), SCACR, there is no further Stay. Therefore, pursuant to SC Code §42-9-90 and §42-9-240, if payment is not made on the Judgment of this Court ordering the payment of accrued weekly compensation benefits in the lump sum amount as set forth in the Order of the Court within fourteen (14) days, making payment due July 31, 2016 there shall be added to such payment the penalty and interest as provided for under those Rules and statutes.

Upon notice from the Respondent that payment has not been timely made, this Court will issue a Rule to Show Cause to enforce payment of the judgment.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

July 28, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07468

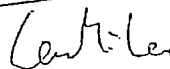
Theodore P. Polansky,.....Respondent.

v.

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

NOTICE OF APPEAL

SC Office of Attorney General and the State Accident Fund appeal the orders of the Honorable L. Casey Manning dated July 28, 2016. Appellants received written notice of entry of the order on August 9, 2016.

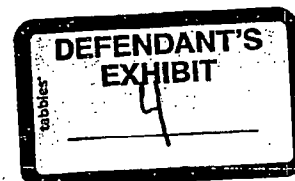


Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

August 29, 2016

Other Counsel of Record:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent



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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Aug, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
Employee,)
Claimant/Respondent/)
Appellant,)
v.)
SC OFFICE OF THE ATTORNEY)
GENERAL,)
Employer, and)
STATE ACCIDENT FUND,)
Carrier,)
Defendants/Appellants/)
Respondents.)

Case Nos: 2015-CP-40-07380
&
2015-CP-40-07468

ORDER DENYING APPELLANTS'
RULE 59(E) MOTION

RICHLAND COUNTY
FILED
2016 AUG -3 AM 10:20
JEANETTE W. MCGRIDE
C.C.P. & G.S.

After careful review of the Rule 59(e) Motion and the Response filed by the Respondent and after careful review of this Court's Order filed July 7th, the Court finds that this Court reviewed and considered the extensive argument made before the Court in addition to reviewing the Briefs that were filed with the Court concerning the Motion to require payment of the accrued weekly compensation pursuant to the Award of the SC Workers' Compensation Commission.

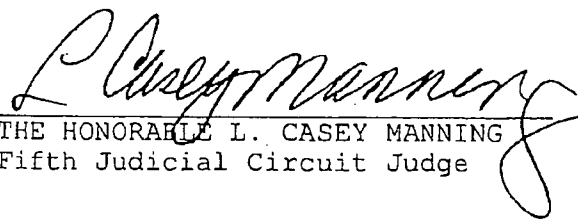
Upon review, the Court further finds that the actual quotation in and basis for the Rule 59(e) was not only extensively argued to the Court and Briefed before the Court, but

this Court in its Order specifically quoted that same language and cited to both the Decision of the SC Supreme Court in the matter of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) and in Godfrey v. Mill's Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959) and that the language from and basis for each decision was specifically detailed as part of the Court's original Order. Therefore, after careful review the Rule 59(e) Motion is DENIED.

Further, pursuant to Rule 62, SCRPC which provides for a ten (10) day Stay on enforcement after the entry of the Judgment which was entered on July 7, 2016), and Rule 241(b)(7), SCACR, there is no further Stay. Therefore, pursuant to SC Code §42-9-90 and §42-9-240, if payment is not made on the Judgment of this Court ordering the payment of accrued weekly compensation benefits in the lump sum amount as set forth in the Order of the Court within fourteen (14) days, making payment due July 31, 2016 there shall be added to such payment the penalty and interest as provided for under those Rules and statutes.

Upon notice from the Respondent that payment has not been timely made, this Court will issue a Rule to Show Cause to enforce payment of the judgment.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

July 28, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07468

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

v.

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

NOTICE OF APPEAL

SC Office of Attorney General and the State Accident Fund appeal the orders of the Honorable L. Casey Manning dated August 8, 2016. Appellants received written notice of entry of the order on August 22, 2016.

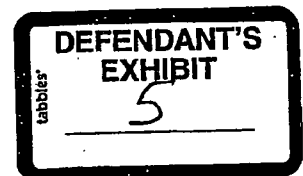
Temus C. Miles, Jr.

Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

August 29, 2016

Other Counsel of Record:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent



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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007468

Theodore P Polansky

SC Office Of Attorney General

PLAINTIFF(S)

State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

Circuit Court Judge _____ Judge Code 2061 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 12 day of August, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 12 day of August, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
)
Claimant/Respondent/)
Appellant,)
)
v.)
)
SC OFFICE OF THE ATTORNEY)
GENERAL,)
)
Employer, and)
)
STATE ACCIDENT FUND,)
)
Carrier,)
)
Defendants/Appellants/)
Respondents.)
)

Case Nos: 2015-CP-40-07380
&
2015-CP-40-07468

ORDER DENYING APPELLANTS'
RULE 59(E) MOTION AS TO
THE ORDER ORDERING
PAYMENT OF ACCRUED AWARD
PURSUANT TO SC CODE §42-
17-60 FILED JULY 7, 2016

RICHLAND COUNTY
FILED
2016 AUG 16 AM 10:04
JEANETTE W. BRIDGEMAN
C.C.P. & G.

After careful review of the Rule 59(e) Motion and the Response filed by the Respondent and after careful review of this Court's Order filed July 7th, the Court finds that this Court reviewed and considered the extensive argument made before the Court in addition to reviewing the Briefs that were filed with the Court concerning the Motion to require payment of the accrued weekly compensation pursuant to the Award of the SC Workers' Compensation Commission.

Upon review, the Court further finds that the actual quotation in and the basis for the Rule 59(e) was not only extensively argued to the Court and Briefed before the Court, but this Court in its Order specifically quoted that same language and cited to both the Decision of the SC Supreme Court in the

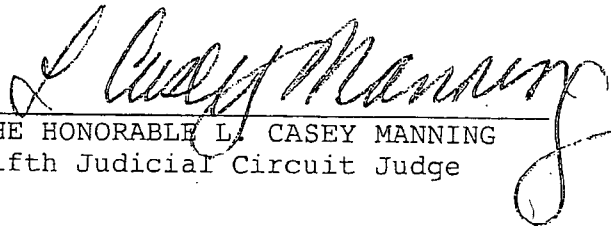
SCANNED

matter of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) and in Godfrey v. Mill's Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959) as the basis for the Court's Decision. Thus the language from and the basis for each decision was specifically detailed as part of the Court's original Order. Therefore after careful review, the Rule 59(e) Motion is DENIED.

Further, Rule 62, SCRCF, provides for only a ten (10) day Stay on enforcement of a Judgment after the entry of the Judgment which was entered July 7th, and Rule 241(b)(7), SCACR, and allows for no further Stay. Therefore, pursuant to SC Code §42-9-90 and §42-9-240, if payment is not made on the Judgment ordering payment of accrued weekly compensation benefits in the lump sum amount as set forth in the Order of the Court within fourteen (14) days of the Judgment and Stay, making payment due July 31, 2016 there shall be added to such payment the penalty and interest as provided for under those Rules and statutes.

Upon notice from the Respondent/Movant that payment has not been timely made, this Court will issue a Rule to Show Cause to enforce payment of the judgment.

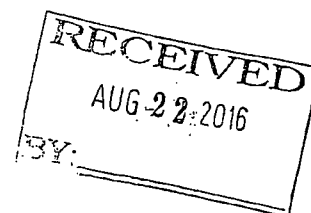
AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

August 10, 2016

SCANNED

Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202



CP14

0474

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No.: 2015-CP-40-07380

Theodore P. Polansky,.....Respondent

v.

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

NOTICE OF APPEAL

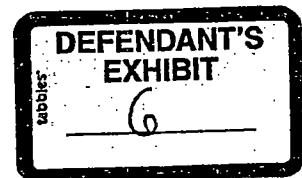
SC Office of Attorney General and the State Accident Fund appeal the order of the Honorable L. Casey Manning dated June 3, 2016. Appellants received written notice of entry of this order on June 9, 2016.

Temus C. Miles
Temus C. Miles, Jr.
Post Office Box 7212
Columbia, South Carolina 29201
(803) 256-4645
Attorney for Appellants

July 8, 2016

Other Counsel of Record:

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Respondent



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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4007380

Theodore Polansky

sc attorney general

PLAINTIFF(S)

South Carolina State Accident Fund

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : *affirmed. Formal Order attached*

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 day of June, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
Respondent/Cross-Appellant,)

Docket Nos: 2015-CP-40-07380
(Appeal);
2015-CP-40-07468
(Cross-Appeal)

v.)
)
)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

ORDER AFFIRMING THE
SC WORKERS' COMPENSATION
COMMISSION AS TO THE ISSUES
RAISED ON APPEAL BY THE
APPELLANTS

Employer, and)
)

STATE ACCIDENT FUND,)
)

DOCKET NO.: 2015-CP-40-07380
(APPEAL)

Carrier,)
Appellants/Cross-Respondents,)
_____)

This matter came to be heard by me on May 20, 2016, as
on an appeal and a cross-appeal filed by the parties in the
above-referenced matter. This Order applies to the appeal
(Docket No. 2015-CP-40-07380) filed by the Appellants, the
Defendants, (the employer and the workers' compensation
insurance carrier), below. The Appellants were represented by
Temus C. Miles, Jr., of the McKay Law Firm, a member of the
Richland County Bar. The Respondent, the Claimant below, was
represented by Preston F. McDaniel, also of the Richland County
Bar.

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After review of the Record, the Briefs, the arguments of counsel and the issues raised by the Appellants in their Appeal to this Court, I affirm the Decision of the Commission.

STANDARD OF REVIEW

The SC Administrative Procedures Act (APA) establishes the standard for judicial review of Decisions by the S.C. Workers' Compensation. Under the scope of review established in the APA, this Court may not substitute its judgment for the Commission as to the weight of the evidence on questions of fact, and may only reverse or modify the Decision if the Appellants' substantial rights have been prejudiced because the Decision is effected by an error of law or is clearly erroneous in review of the reliable, probative, and substantial evidence on the whole Record. See: SC Code §1-23-380(5)(e) (Supp. 2015). Our Supreme Court has defined substantial evidence as evidence that, "in viewing the Record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1976). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's Findings from being supported by substantial evidence. Palmetto Alliance, Inc. v. SC Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Where there is a conflict in the evidence, the Commission's Findings of Fact are conclusive. The final determination of witness credibility and the weight to the

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accorded evidence is reserved to the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Brown v. Peoplease, 402 S.C. 476, 741 S.E.2d 761 (SC App. 2013) (emp. added).

REVIEW AND DECISION OF THE ISSUES ON APPEAL

By way of appeal, the Defendants raised twelve (12) Exceptions which were combined into three (3) arguments for decision by the Court. The first centers around the "inclusion" of, but yet in the same argument the lack of weight given to, reports, referred to as "updated", medical reports of Dr. Avie Rainwater, Ph.D; and to the reference to Dr. Rainwater as an authorized medical provider. The second argument is whether the Commission erred as a matter of fact and/or concluding as a matter of law that the Claimant suffered physical brain damage and by finding such brain damage compensable under the standard established by the Supreme Court. The third argument is whether the Commission erred as a matter of fact by finding that the Defendants should have had notice of physical brain injury; and whether the Claimant's request for benefits should be barred under the equitable doctrine of laches.

As to the first issue, the Court finds no error of law or fact. The Court would note that Defendants sought to exclude the report of Dr. Rainwater based simply and only on a set of pleadings put into evidence over objection filed in an unrelated matter after the date of the report sought to be excluded. Those

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pleadings establish only that Dr. Rainwater's group filed a Complaint against the State Accident Fund, months after the challenged report, over non-payment of medical bills in totally unrelated matters. The Court would also note that such evidence is in the nature of impeachment evidence which does not go to admissibility but goes to the weight to be given such evidence. As noted in the Standard of Review and specifically as to expert evidence, the weight and credit to be given any expert testimony or evidence is for the Commission as the factfinder. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999); "Impeachment by Proof of Bias", Sanders and Nichols, Trial Handbook for S.C. Lawyers, §25:7, 5th Edition (2015). The final determination of witness credibility and the weight to be afforded evidence is reserved to the Workers' Compensation Commission, and it is not the task of the Court to weight the evidence as found by the Commission. Sharpe v. Case Produce, Inc., supra.

Also as to the report of Dr. Avie Rainwater, the Defendants take exception to the Commissioner's reference to him as an authorized treating provider. In Brief, in argument, and in the Record they do not question that he was an authorized treating medical provider, at least during some period of the time during the course of this claim between 1999 and the date of the hearing. The Record reveals specifically; that he was an authorized provider to perform psychological tests and paid for performing those tests in 2001. Clearly he was an authorized provider and there is no problem with the reference to him as being an authorized medical provider.

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Also as to these reports, while the Defendants challenged their admissibility and the reference of Dr. Rainwater as being an authorized medical provider, the Defendants then conversely challenge the fact that the Hearing Commissioner gave his reports little weight. After making numerous detailed Findings of Fact in her Award including citation to pages and pages of testimony and evidence from Dr. Frank Forsthoefer; Dr. Jean Jonet, Ph.D.; Dr. Ezra Riber, MD; Dr. Marturano; Dr. Krebs; and Dr. Adams, the Commissioner then found as a fact that she would have made the same decision regardless of Dr. Rainwater's Opinion and report and made a finding that she gave those little weight. The weight and credibility to be given to any evidence as noted above, is for the Commission. There is no merit to this argument or issue.

As to the second argument for review whether the Claimant sustained physical brain damage and whether it met the compensability standard, the Court finds no error of law or fact in the decision by the Workers' Compensation Commission and the same is hereby affirmed as to this basis for review. Without citation, where there is substantial evidence in the Record from a factual standpoint, the Decision of the Commission must be affirmed. The Defendants admit and it is agreed that the Claimant sustained a chemical encephalopathy, drug-drug interaction in 2002. Encephalopathy by its very definition is a disease of the brain, especially one involving alterations of brain structure. Merriam Webster Dictionary, URL [http: "www.merriam-webster.com"](http://www.merriam-webster.com). That condition is specifically addressed in the hospital records as occurring during and as being one of the reasons for the hospitalization in the 2002. It

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is then regularly and consistently referred to throughout the medical records thereafter; see for example, the letter of the treating psychiatrist, Dr. Frank Forsthoefel of July 29, 2004 referring to the, "allergic encephalopathy to Seroquel". (APA Submissions, p. 11). During this time, 2002 to 2005, not only does Dr. Ezra Riber, the authorized chronic pain medicine specialist refer to the encephalopathy and make a specific request for referral to a neurologist for evaluation due to the cognitive problems that this man was having but as noted by this Court he specifically forwarded a copy of all of his treatment notes to the State Accident Fund assigned adjuster, Ms. Mee-Ling Khör-Ghould. There is repeated reference to problems with memory, concentration, and requests for neuropsychological testing, and neurological evaluation throughout the medical records. By 2009, the Claimant specifically placed the Defendants on notice of his specific request for compensation benefits for permanent residual brain damage due to his encephalopathy that occurred in 2002. (APA Submissions, p. 699). There are not only numerous opinions that the Claimant sustained physical brain damage that was severe, Dr. Forsthoefel testified extensively as to the Claimant's brain damage and as to its severity. There is clearly substantial evidence that the Claimant sustained physical brain damage that it was severe and also that the Defendants were placed on notice of the Claimant's injury to the brain.

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Next, there is not only uncontradicted medical opinion testimony but numerous medical and psychological opinions in evidence that the Claimant sustained physical brain damage and that it was severe and that it is compensable under the criteria established by the SC Supreme Court. Again, the Commission is the factfinder and the report from Dr. Frank Forsthoefel, the authorized treating psychiatrist, found at the Claimant's APA Submissions, pp. 2-3, is more than sufficient evidence to meet the criteria compensability of severe brain damage as established by the Supreme Court in 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). Dr. Forsthoefel at that point specifically states that the Claimant has physical brain damage and that it is severe enough to constitute a hindrance or obstacle to employment and that it is permanent. On pp. 6 and 8, again Dr. Forsthoefel specifically states that the Claimant is totally and permanently disabled, and specifically that he is totally and permanently disabled due to the physical brain damage that he sustained as a result of the encephalopathy. The authorized treating chronic pain medicine specialist, Dr. Ezra Riber, MD, states the same opinion on pp. 12, 13 and 14 of the Claimant's APA Submissions. Finally, the Hearing Commissioner sets out repeated quotes in her Order from the testimony of Dr. Forsthoefel and in fact appointed a Guardian ad litem from the bench during the hearing due to the

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severity of the Claimant's condition. The Decision of the Workers' Compensation Commission is therefore affirmed as to this issue and these issues raised on appeal.

(As to the third argument and as to the issues raised, first there is substantial evidence to support the Commission's Decision as to notice of the physical brain injury and therefore the Decision must be affirmed by this Court. For the reasons set forth hereinbefore in reference to the second argument and the group of issues raised as to whether or not there was sufficient evidence of brain damage and whether that brain damage met the criteria for an Award for compensable brain damage entitling the Claimant to lifetime benefits, that same evidence clearly establishes that from 2002 forward that the Defendants were placed on notice of the Claimant's physical brain injury. As noted throughout the Decision on that argument, the Defendants were placed on notice in 2002 of a brain injury and from 2002 until the very date of the hearing continued to pay for all medical care related to the brain injury.

The Defendants also raise the issue of laches and based upon the Briefs of the parties and review of the Decisions of our SC Supreme Court and Court of Appeals, the issue of laches simply does not apply.¹ Under the doctrine of laches, the

¹ The Court notes that it is doubtful whether or not this issue was preserved for appeal as to the doctrine of laches. While not only was it not raised in the first Form 51 and was not set out and detailed as a specific defense until the Form 58 filed by present Counsel who was not substituted as Counsel until less than fifteen (15) days prior to the scheduled hearing, the Mediation Agreement specifically provides that the Claimant is totally and permanently disabled by agreement, and that the only

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doctrine only applies if a party: 1) knowing of his rights; 2) does not timely assert them; and 3) by any unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position and also 4) the affected party must affirmatively prove material prejudice. Only when all four elements are met will equity bar the enforcement of those known rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999). The concept of laches only applies in a very limited set of circumstances and applies equally to both of the parties, that being the Claimant and the Defendants in this case. While the Claimant has the responsibility to raise issues and claims in a timely manner, the Defendants have the same responsibility to assert any defenses that they claim. This Court agrees with the Commissioner and the Commission that the doctrine of laches simply does not apply. Both parties had access to the same medical records from 2002 through the date that a claim was filed in 2011. Both parties knew that the Claimant suffered a physical brain injury in 2002 as a result of the encephalopathy and knew that by 2004 the treating psychiatrist, and in fact three (3) other and different authorized treating and/or evaluation physicians in 2004 and 2005 recommended a complete neurological workup to include

issue left open is the, "compensability" of the physical brain damage that the Claimant incurred. In that same Mediation Agreement, the Defendants admit that they had always authorized all of the treatment for and by the treating physicians that have expressed the opinions concerning the brain damage and agreed to provide their continuing medical care for life.

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neuropsychological testing. Neuropsychological testing was not authorized and provided by the Defendants and were not performed until 2008. That testing in 2008 recorded severe cognitive deficits. The neuropsychologist who performed those tests in 2008, Dr. Nicholas Lind, Ph.D., subsequently in 2012 concurred in the opinion that the Claimant had sustained physical brain damage and that it was severe. In 2009 the Claimant wrote the Defendants and specifically placed them on notice that he was claiming severe physical brain damage and an entitlement to lifetime compensation due to that brain damage. In 2011, within one (1) week of the date that the authorized treating psychiatrist issued his opinion that the Claimant had sustained physical brain damage and that he was totally and permanently disabled from all work due to that brain damage, the Claimant filed a claim for lifetime compensation benefits due to that severe, permanent physical brain damage. In addition, the Commission, as is recorded in the Hearing Commissioner's Order found that the Defendants had paid for all medical care and specifically all of this care and had the same access to all of the medical records as did the Claimant. The doctrine of laches simply does not apply.

Also, as noted above, there was no definitive diagnosis until 2011 of physical brain damage that was permanent and severe and within one (1) week of that diagnosis the Claimant filed.

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Finally, even if the other elements were in existence, which they are not in the opinion of this Court, there is no prejudice to the Defendants because the Defendants had total access to all the medical records. There is simply no material prejudice to the Defendants in not moving forward with the defense since they had access to the same exact medical evidence as did the Claimant. In addition, while the Court is of the opinion that the doctrine of laches does not apply, it was not raised as a defense in the initial response to the Form 50 that was filed by the Claimant seeking compensation for compensable brain damage and an entitlement to lifetime compensation benefits. Also, in the mediation, simply the compensability of the brain injury was left open for decision. It was agreed that the Claimant was totally and permanent disabled.

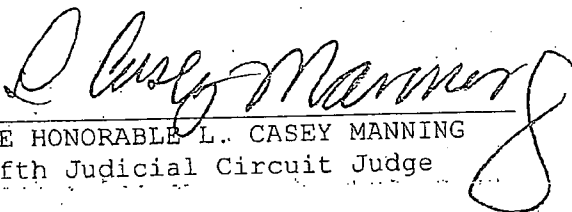
Finally, the Court would note that if it did apply it would apply to the Defendants failure to timely raise the defense. Both parties had the same notice from 2002 through 2011 concerning the Claimant's injury to his brain. Further, it was the Defendants and not the Claimant that did not provide the neuropsychological testing for a period of over four (4) years from the date it was requested. The Defendants were placed on notice of the claim no later than 2009. For all these reasons as to these bases for the appeal in the third argument, the Decision of the SC Workers' Compensation Commission is hereby affirmed.

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For all the foregoing reasons, after due and proper consideration of the Record, the Briefs and arguments of the parties, the Decision of the SC Workers' Compensation Commission is hereby affirmed as to the appeal filed by the Defendants as Appellants in this Court.

THEREFORE, IT IS ORDERED that the Decision of the SC Workers' Compensation Commission as to the appeal filed by the Defendants as Appellants before this Court be and hereby is AFFIRMED.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: June 3, 2016

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Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202

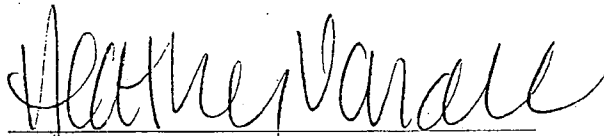
CERTIFICATE OF SERVICE

I, Heather R. Vardell, being first duly sworn, states that she is a paralegal for the firm of The McKay Firm, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants' Motion for Supersedes has been served upon the following by placing a copy of the same in the United States mail, first class postage prepaid, addressed as shown below this the 19 day of September, 2016.

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

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