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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Casey Manning

Appellate Case No. 2016-001494

.....Respondent.

Theodore P. Polansky, Employee,

v.

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

.....Appellants.

RECORD ON APPEAL

Volume 2 of 3

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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

AMENDED NOTICE OF MOTION
AND AMENDED MOTION FOR
ORDER OF SUPERSEDEAS

RICHLAND COUNTY
FILED
2016 SEP 27 AM 8:43
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO: PRESTON F. MCDANIEL, ESQUIRE, ATTORNEY FOR CLAIMANT:

YOU WILL PLEASE TAKE NOTICE THAT South Carolina Office of Attorney General and State Accident Fund ("Defendants"), by and through their undersigned attorneys, hereby amend their previously filed Motion and will move the Court, for entry of an Order of Supersedeas. Said Motion is scheduled to be heard before the Honorable Jean H. Toal in the Court of Common Pleas for Richland County on September 28, 2016 at 9:30. This Amended Motion is being filed to account for procedural changes as a result of the Dismissal of the Claimant Cross Appeal, which bore Civil Action No. 2015-CP-40-07468. 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 (Order

attached as Exhibit 1) and July 28, 2016 (Order and Notices of Appeal attached as Exhibit 2), 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 previously asserted 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. This Cross Appeal has since been dismissed. (See Stipulation of Dismissal attached as Exhibit 3).

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 "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 a Motion for Reconsiderations. The Circuit Court denied the Motion for Reconsideration by Order dated July 28, 2016.

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 4). The Defendants have worked continuously to perfect the numerous Appeals in these cases since their filings.

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.

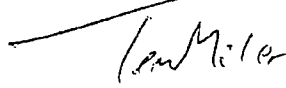
Furthermore, the amendments to §42-17-60 of the South Carolina Code Ann. (Supp 2008), arguably now has codified the ruling in the *Case* decision and specifically states that the employer is required to make only weekly payments of compensation following the date of appeal to the Court of Appeals. The 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 and July 28, 2016 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.



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Attorney for Employer/Carrier

September 26, 2016

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 : _____

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 _____ day of _____, 20____ 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)

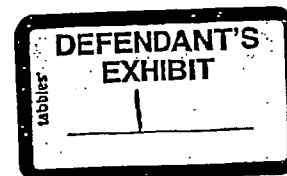
ATTORNEY(S) FOR THE DEFENDANT(S)

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-40-07380 ✓

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

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.

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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

SCANNED

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.

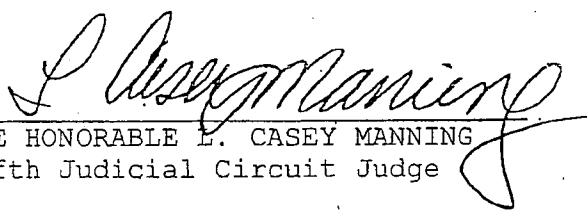
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart 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

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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

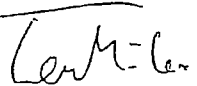
Theodore P. Polansky,.....Respondent.

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

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. 1, Insured); ☐ 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 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,
Claimant/Respondent/
Appellant,

Case Nos: 2015-CP-40-07380
&
2015-CP-40-07468

v.

SC OFFICE OF THE ATTORNEY
GENERAL,

ORDER DENYING APPELLANTS'
RULE 59(E) MOTION

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

RICHLAND COUNTY
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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

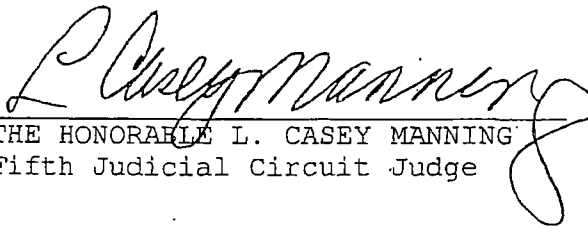
SCANNED

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
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.

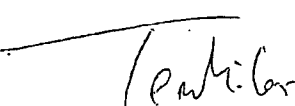
IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-07468

STIPULATION OF DISMISSAL

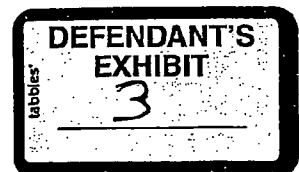
RICHLAND COUNTY
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2016 SEP 22 PM 4:02
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure the above-captioned action is dismissed without prejudice by stipulation of the Plaintiff and with the consent of the Defendant. This Dismissal shall be of no effect on the companion Appeal bearing Civil Action No. 2015-CP-40-07380.


Temus C. Miles, Jr., Esquire
McKay, Cauthen, Settana & Stublely, P.A.
P.O. Drawer 7217
Columbia, SC 29202
Attorney for Appellants/Cross Respondents


Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Ave
Columbia, SC 29201
Attorney for Respondent/Cross Appellant

Dated: 9/22/16



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.
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

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 entered 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 *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, 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 *Jeannette W. McBride*

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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>. 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 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.

SCANNED₁₀

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.

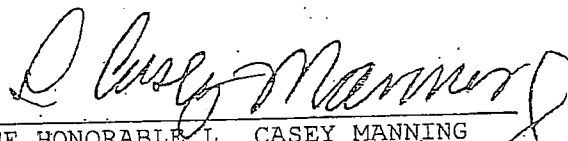
Finally, the Court would note that if it did apply it would apply to the Defendants failure to timely raise the defense. Both parties had the same notice from 2002 through 2011 concerning the Claimant's injury to his brain. Further, it was the Defendants and not the Claimant that did not provide the 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

SCANNED₂

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.

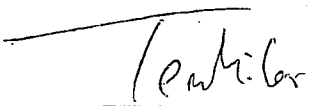
IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-07468

STIPULATION OF DISMISSAL

RICHLAND COUNTY
FILED
2016 SEP 22 PM 4:02
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure the above-captioned action is dismissed without prejudice by stipulation of the Plaintiff and with the consent of the Defendant. This Dismissal shall be of no effect on the companion Appeal bearing Civil Action No. 2015-CP-40-07380.


Temus C. Miles, Jr., Esquire
McKay, Cauthen, Settana & Stuble, P.A.
P.O. Drawer 7217
Columbia, SC 29202
Attorney for Appellants/Cross Respondents


Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Ave
Columbia, SC 29201
Attorney for Respondent/Cross Appellant

Dated: 9/22/16

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

July 27, 2016

VIA EMAIL - mcbridej@rcgov.us
AND US MAIL

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

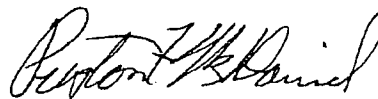
RE: Theodore P. Polansky v. SC Office of the Attorney General
C/A Nos: 2015-CP-40-07380 & 2015-CP-40-07468

Dear Ms. McBride:

Enclosed please find the original and one copy of my REPLY TO RULE 59(e) MOTION and Proposed Order in the above-referenced matters. I would appreciate your filing the original and returning the clocked-in copy via the enclosed, self-addressed, stamped envelope.

By copy of this letter, I am serving Counsel of Record with a copy of same and sending a copy to Judge Manning.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Honorable L. Casey Manning (Via Email and US Mail)
Temus C. Miles, Jr., Esquire (Via Email and US Mail)
Mr. Theodore P. Polansky

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,)

**REPLY TO RULE 59(e)
MOTION FILED BY
APPELLANTS/CROSS-RESPONDENTS**

Employer, and)
)
STATE ACCIDENT FUND,)

Carrier,)

Defendants/Appellants/)
Respondents.)

By way of Reply to the Rule 59(e) Motion filed by the Appellants which actually applies to the Order of the Court granting the Motion filed with the Court ordering the Appellants to pay the accrued workers' compensation benefits in a lump sum under the, "Award", of the Workers' Compensation Commission, the Respondent would respectfully submit:

1. That it should first be noted that current Counsel filing the Rule 59(e) Motion was not Attorney of Record and did not argue this matter at the time of the hearing. As the Court is aware, not only was there extensive argument on the Motion to the Court but Briefs were presented on this issue at the time of the argument of the Motion.

As the Court is aware, the specific point that is being brought before the Court by the Rule 59(e) Motion to alter or amend the judgment was the same exact basis for and argument was made to the Court by the Appellants at the February hearing. The Rule 59(e) Motion filed by current Counsel presents nothing new that was not already presented and argued to the Court for its consideration at the time of the Court's original Hearing and Ruling.

2. That as is set out in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), and as was argued at the time of the original Motion, the Case decision incorporates reviews and is based on the four (4) prior decisions of the SC Supreme Court applying the provisions of SC Code §42-17-60 (pre-2007) to four different fact situations, including a situation where as here, the Hearing Commissioner awarded benefits establishing a date after which the Award of benefits was made and the Hearing Commissioner's decision is then affirmed by the Full Commission. As is set out in Case v. Hermitage, supra, that scenario was the specific scenario which was addressed and which served as the basis of the Supreme Court's Decision in the case of Godfrey v. Mills' Mills No. 2, 234 S.C. 401, 108 S.E.2d 587 (1959). In Godfrey, the Supreme Court affirmed the Circuit Court's Order ordering payment of all accrued weekly compensation benefits due under the Award of the Commission from the date of the original Award of benefits by the Commission. The Godfrey decision is copiously and extensively

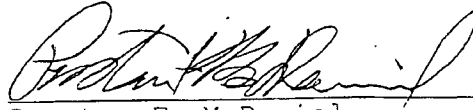
discussed in the Court's Order as is the Case decision, supra.

Rehearing has traditionally been granted, as is set out in the Supreme Court Rules, to determine whether or not the Court misapprehended or overlooked an issue of fact or law. In this case there is absolutely no misapprehension nor did the Court overlook any issue raised in the Rule 59(e) Motion. In fact, the exact same language as is set out by the Appellants in their Rule 59(e) Motion is set out by the Court in its Order and serves as the basis for the Court's decision.

3. That finally under Rule 62(a), SCRCp, execution on a judgment is only stayed for ten (10) days after Notice of the Judgment unless otherwise ordered pursuant to subsection (d) of the Rule and where a request is made for a longer stay in the Rule 59(e) Motion. Further, pursuant to SC Code §42-17-60 and Rule 241(b)(7), SCACR, the Order of this Court is not stayed even if this matter is appealed and the Respondent would request immediate payment pursuant to the statutes of the Award and the lump sum that is being paid pursuant to the Award.

WHEREFORE, having fully responded, the Respondent requests that the Court deny the Rule 59(e) Motion as set forth hereinabove and for the immediate payment of the Award and if not paid within fourteen (14) days of the Court's Order, that the Court direct the Appellants/Cross-Respondents to pay 10% penalty and interest on the judgment of this Court entered pursuant to the Award of the Commission.

Respectfully submitted,

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

Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Respondent

July 27, 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,)
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**

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

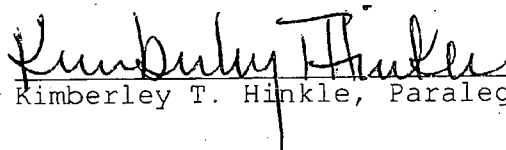
_____, 2016

CERTIFICATE OF SERVICE

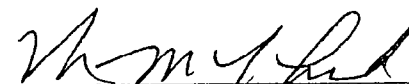
C/A NOS.: 2015-CP-40-07468
&
2015-CP-40-07380

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 REPLY TO RULE 59(e) MOTION FILED BY APPELLANTS/CROSS-RESPONDENTS and Proposed ORDER DENYING APPELLANTS' RULE 59(e) MOTION 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
27 day of July, 2016.



Notary Public for South Carolina (L.S.)
My Commission Expires: 2/4/24

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stublely
Janet Brooks Holmes
Peter P. Leventis, IV*
Kelli L. Sullivan*
George D. Gallagher*
Temus C. Miles, Jr.
David M. Bomemann
Brandon P. Jones
James E. L. Fickling+
Charles A. Kinney, Jr.+
Erica E. Loudin

Of Counsel:
C. E. Hardin, Jr.

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

Post Office 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.

July 22, 2016

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

RE: Theodore Polansky v. SC Attorney General
Case No. 2015-CP-4007380 & 2015-CP-4007468
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 Defendants Motion to Reconsider in the above-referenced matter together with a Certificate of Service. Please return a clocked copy of this document with my courier. By copy of this letter, I am serving counsel of record with the same and sending a copy to Judge Manning.

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

Thank you for your time and assistance.

Sincerely,



Temus C. Miles, Jr.

TCM/ecs

Enclosures

cc: Preston F. McDaniel, Esquire (w/encl)
The Honorable L. Casey Manning (w/encl)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Theodore Polansky,

Plaintiff,

vs.

SC Office of Attorney General,

Defendant.

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-07380 &
2015-CP-40-07468

**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 7271, Columbia, SC 29202 Phone: 803-256-4645 Fax 803-753-5790 E-mail: tmiles@mckayfirm.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II) ☐ 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 <u>Tem Miles</u>			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ 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. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

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
TO ALTER OR AMEND JUDGMENT**

RICHLAND COUNTY
FILED
2016 JUL 22 PM 4:20
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Defendants respectfully move this Honorable Court, for an order reconsidering, altering or amending the Orders in these matters signed by the Honorable L. Casey Manning on June 3, 2016 and filed on July 5, 2016. The Defendants received written notice of these Orders on July 14, 2016. Copies of these Orders are attached and incorporated by reference (Exhibit 1 & 2). Defendants move, pursuant to Rule 59(e), S.C.R.C.P., and the Court's inherent authority to amend its own ruling, that the Court reconsider, alter or amend the July 5, 2016 Orders as outlined below.

BACKGROUND

These matters came before the Court February 8, 2016 for a hearing on Respondent/Cross Appellant, Theodore Polansky's, Motion for payment of accrued Worker's Compensation benefits. By Orders filed July 5, 2016, the Court ordered that the "Defendants shall make

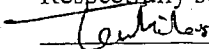
immediate payment to the Claimant in a lump sum of all accrued weekly compensation payment” dating back to the date of accident (March 8, 2011). This Motion for reconsideration follows.

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. This issue is controlled by *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960), in which 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 Court on payment of accrued benefits should be reconsider and reissued in-line with *Case v. Hermitage Cotton Mills*.

CONCLUSION

For the reasons stated above, the Defendants request that the Court alter or amend the Orders filed on July 5, 2016.

Respectfully submitted,



Temus C. Miles, Jr., Esquire
McKay, Cauthen, Settana & Stuble, PA
Post Office Box 7217
Columbia, SC 29202
803-256-4645
Attorney for the Defendants

Columbia, South Carolina
July____, 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, 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

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,

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

SCANNED

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.

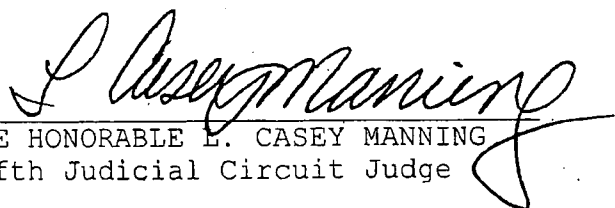
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart 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

RECEIVED
7

CERTIFICATE OF SERVICE

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

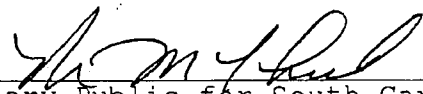
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the and Proposed Order Ordering Payment of Accrued Award Pursuant to SC Code §42-17-60 addressed as follows:

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 AGENCIES 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
OF THE FIFTH JUDICIAL CIRCUIT

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

Docket No: 2015-CP-40-07468
&
2015-CP-40-07383

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 12:28
J. A. BRIDE
C.C.P. & P.

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

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

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

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.

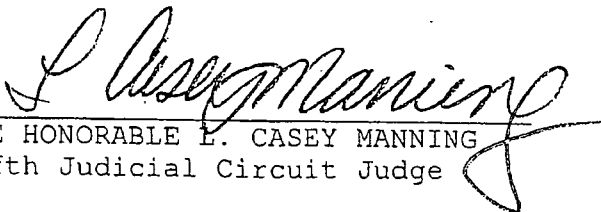
Finally, the motion sets out that the Claimant had made demand for payment of the accrued Award and that as of November 10, 2015 the accrued temporary total disability weekly compensation benefits due and owing under the Award was the amount of \$123,791.00. The Defendants agree that they did not restart 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
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
TO ALTER OR AMEND JUDGMENT**

RICHLAND COUNTY
FILED
2016 JUL 22 PM 4:20
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

CERTIFICATE OF SERVICE

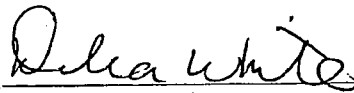
I, Debra White, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stubley, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants Motion to Reconsider has been served upon the following by placing a copy of the same in the United States mail, first class postage prepaid, addressed as shown below this the 22 day of July, 2016.

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

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

The Honorable L. Casey Manning
Circuit Court Judge
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201

A handwritten signature in cursive script, appearing to read "Debra White", written over a horizontal line.

Debra, Paralegal
McKay, Cauthen, Settana & Stublely, P.A.
Post Office Box 7817
Columbia, South Carolina 29202-7217

(803) 256-4645

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

June 27, 2016

VIA EMAIL - cmanningj@sccourts.org & cmanninglc@sccourts.org
AND US MAIL

The Honorable L. Casey Manning
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192

RE: Theodore P. Polansky v. SC Office of the Attorney General
C/A Nos.: 2015-CP-40-07468 & 2015-CP-40-07380

Defendants' wrongfully captioned Rule 59(e) Motion filed
wrongfully as to 2015-CP-40-07468 but presumably filed as
to the Order of the Court in Docket No. 2015-CP-40-07380.

Dear Judge Manning:

Please find attached my Return to the Motion which could have been short and sweet in that in your Order you considered the two exceptions in the context in which they were presented to the Court.

However, I did a detailed Reply because quite frankly the Motion itself is procedurally fatally flawed and you will note does not even reference the correct case number. In addition although having never really presented these issues to anybody, the Hearing Commissioner, Full Commission or this Court and while I and my client are now on our fifth (5th) defense lawyer, these issues were only raised by the fourth (4th) defense lawyer (hired ten (10) days before hearing) in a Pre-Hearing Brief filed ten (10) days before the hearing was set and were not ever raised again to the Hearing Commissioner, Full Commission or this Court in the context in which they are presented in the Exceptions. I had previous discussion with the fourth (4th) defense counsel on the frivolousness of any reference to our failure to comply with the Consent Agreement as you will see in the Return to which I have attached the paperwork.

Most respectfully, I am sorry to be so thorough but quite frankly, I am very upset and tired of the frivolousness

The Honorable L. Casey Manning
June 27, 2016
Page 2

particularly as to these issues that are being presented to the Court in a circumventional fashion.

Again, Mr. Leventis was hired ten (10) days before the Hearing by the State Accident Fund to take over representation and after review, these issues were not presented to anybody after he had an opportunity to review the Record. They were only presented in the context and under the issues of delay and the submission of Dr. Rainwater's reports which are meticulously addressed in that context by both the Commission and this Court.

By copy of this email, I am notifying Temus of this communication and I look forward to receiving your Order on the Rule 59(e) Motion. I did not ask for sanctions because Temus just took over this file.

Sincerely yours,



Preston F. McDaniel

PFM/abh/kth
Enclosures

cc: Temus C. Miles, Jr., Esquire (tmiles@mckayfirm.com) ✓

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

RETURN TO MOTION TO
ALTER OR AMEND JUDGMENT
IN
CASE NO: 2015-CP-40-07380

By way of Return to the Defendants' Motion, the Appellants in this Court, the Claimant/Respondent would respectfully submit to the Court as follows:

1. That the Claimant/Respondent would first submit that the Motion is jurisdictionally fatally defective. In the caption of the Motion which creates jurisdiction over the matter, the caption is totally incorrect as to the matter and parties before the Court. The Defendants refer to the employee as the "Appellant" and as to the Employer and the Carrier as the "Respondents" and thereafter refer to the wrong case no.: 2015-CP-40-07468. Whereas the Court will note from its own caption that the Defendants were the Appellants and that the Decision of the Court is in the matter of their appeal, Docket No.: 2015-CP-

40-07380. For the Court to obtain jurisdiction over the pleading that is filed in this case the Motion, Rule 10(a), SCRCF specifically provides that the pleading must set forth the parties and the file number of the action in which it is filed and to which the pleading is addressed. This is a jurisdictional issue and pleading caption is fatally defective and it should be dismissed on that basis alone.

2. That a review of the Record before the Hearing Commissioner, the Full Commission and as presented to this Court on appeal, will show that the two (2) Exceptions as set forth as having not been considered were appropriately considered by this Court in the context in which they were presented. In their Brief, the Appellants set out all twelve (12) Exceptions raised to this Court. Those twelve (12) Exceptions are then combined into three (3) arguments. The Exceptions in question are addressed under Appellants' Argument I, which is captioned:

"Did the Single Commissioner err in overruling the Defendants' objection to the inclusion of updated medical records of Dr. Avie Rainwater; in holding that Dr. Rainwater as 'an authorized treating physician' and concluding that Dr. Rainwater's medical opinions were not pivotal or necessary to the Single Commissioner's determination of permanent physical brain damage? (Defendants'/Appellants' Grounds number '1,' '7,' '11' and '12'). (Emphasis added).

The Court will note that while these two Exceptions are very lengthy, the only place that they are further referred to in the argument is in the last paragraph of the argument and are addressed in reference to the consideration of Dr. Rainwater's report wherein the Defendants simply state that it would be

unfair and inequitable to permit the Claimant to put in Dr. Rainwater's report and allege as a basis that he had failed to submit to neuropsychological testing and evaluation.

There is simply no reference to any of the particular allegations apparently sought to be raised as Exceptions under #11 or under #12. In #11 there are statements concerning the original hearing going forward and allegations of improper procedural due process in reference to a prior Consent Order and that the Defendants had not withdrawn those issues before the Single Commissioner. In #12 they again allege improper, substantive and procedural due process and again allege that the Claimant should not be allowed to effectively use the sword and shield and allege that the Defendants had not withdrawn these objections set forth previously at the time of the first hearing raised in their Form 58 Pre-Hearing Brief. There is simply no reference to any of these particular bases for review by the Defendants in their Brief other than, again, in reference to the consideration of Dr. Rainwater's report. There is not even any inclusion of the words "substantive" or "procedural due process" nor are any of the issues purported to be alleged and raised by these two Exceptions addressed other than the context of the consideration of Dr. Rainwater's report. Therefore, these issues were not at all raised before the Court and were submitted in the context of and under the argument concerning the Hearing Commissioner's inclusion of the updated medical report from Dr. Rainwater; referring to him as an authorized treating physician

and in reference to how important his reports were to the Single Commissioner's determination of permanent physical brain damage. The Court's Order addresses these in the concept of and as presented to the Court and the issue is patently without merit.

3. That the Respondent would submit that in addition to these Exceptions being addressed in the context of the Argument presented, that based on a review of the Record there was no argument made of this nature to the Hearing Commissioner, to the Full Commission, nor in the argument and Brief presented to this Court.

A review of the Hearing Transcript before the Hearing Commissioner reveals the basis for the objections made to Dr. Rainwater's report being admitted, which are found on page 7 and 8 of the Transcript, wherein there is no reference to a Form 50 request being filed in 2012 or resolution by the Consent Order, nor is there any reference to failure of the Claimant to voluntarily submit to updated psychological evaluations or a failure to comply with the prior Consent Order the two (2) apparent allegations under #11 and #12.

Thereafter, in the Hearing Transcript at pages 15-18 as to the position of the parties, there is no reference to these issues but only the argument that the Defendants' rights were prejudiced by the unreasonable delay between 2002 and the filing of a request for compensable brain injury based on the concept of laches, waiver and estoppel and due process in reference to those. There is simply no argument in reference to the actual

Form 50 other than in reference to the delay in filing of the Form 50 in 2012.

The Court will find as the Court has already found in its Order that as to the time of the filing of the claim that the Hearing Commissioner and the Commission made repeated and numerous detailed Findings of Fact that establish that the Claimant within thirty (30) days of the date of a diagnosis of physical brain damage stemming from the 2002 encephalopathy filed for a hearing. The Full Commission and this Court also reviewed in both Orders and Decisions any issue of delay in any context and found that both parties had the same medical information between 2002 and 2012 and/or that the concepts of laches and any type of delay affecting the rights of the parties did not apply. Based on the Court's review, the Respondent would submit that there is absolutely no reference to any of these issues in the argument before the Full Commission.

Of note in the actual Brief to the Full Commission, as the Court has already reviewed, the paragraph included in the Brief before this Court is almost identical to the paragraph found at the bottom of page 9 and at the top of page 10 of that Brief and it is again only in reference to that the inclusion of Dr. Rainwater's report and in reference to inherent unfairness and inequity by allowing Dr. Rainwater's report into the Record and not allowing the Defendants to submit a psychological report which is not supported by the Record. Again the Court will find the context of that paragraph and of the argument made that it is

in reference to the admission of Dr. Rainwater's report and there is simply no reference to the setting of a hearing based on the Form 50 filed in 2012 or whether or not that Form 50 was superseded by a prior Consent Order, and/or as to the allegation in #12, a denial of due process by the Claimant voluntarily failing to submit to a psychological evaluation or complying with a Consent Order allowing for psychological evaluation. There is simply no specific reference to these specific Exceptions as separate and distinct Exceptions but will find that they are simply raised in the context of the submission of Dr. Rainwater's reports, the reference to him as an authorized treating physician and also as to the concept of laches and delay. All of these issues were copiously referred to in the Findings of Fact and the rulings of law and were addressed by this Court in its Order.

4. That finally in reference to the allegations in Exception #11, those are copiously addressed in reference to delay which is the context in which those were alleged. The Court meticulously reviewed the issue and the concept and issue of delay, whether that be based on waiver, estoppel and/or due process. See specifically the Findings of Fact concerning the concept of laches and waiver and delay as set forth in the Commissioner's Order and this Court's Order at pages 8-11.

5. That as to the allegations in #12, in addition to not being presented separately or distinctly argued as to the issues/allegations made and which were made and addressed in the Brief only in reference to the submission of the one-questioned

report issued by Dr. Rainwater, the Exception as written misstates the Record. The Claimant did not refuse to voluntarily allow the Defendants to obtain a psychological evaluation and/or to comply with the Consent Order allowing for a psychological evaluation. The Respondent would submit that not only is this a misstatement of the Record, but in fact these two allegations are specifically not true. This allegation is not only untrue but it is actually frivolous and the Respondent would submit is a blatant misrepresentation of the Record and the facts by previous Counsel, Mr. Leventis (retained ten (10) days before hearing), who first raised this issue.

The Court will find in the Record the Motion, which is attached hereto and incorporated herein by reference, filed by the Claimant requesting that the Commission set this matter for a hearing because of the Defendants' over a year delay and failure to obtain the agreed upon evaluation by Dr. Frierson.

What the Court will find is that in April of 2013 the parties entered into a Consent Agreement allowing the Defendants to have an independent medical evaluation be performed that the Defendants requested be performed by Dr. Richard Frierson, the Defendants' chosen physician at the USC School of Medicine. The parties signed that Consent Agreement and it was confirmed as an Order of the Commission in November of 2013. Between April of 2013 and April of 2014 the Defendants never scheduled and/or obtained that independent medical evaluation. As a result, on April 16th the Claimant moved to have the matter reset for

hearing because of the Defendants' failure to have an evaluation that they requested performed. That Motion was granted on May 7, 2014.

The Respondent would specifically ask the Court to note that the specific language used in Exception #12 is that the Claimant/Respondent failed to either, "voluntarily permit the Defendants" or to "comply with the Consent Order to permit neuropsychological testing". The Court will find that this is an absolute untrue statement and is not supported by the Record in any regard. The Court will note upon review that the parties entered into a Consent Agreement to allow the Defendants to have an independent medical evaluation performed and the Court will find that there is absolutely no reference in the Consent Order specifically for neuropsychological testing. The Consent Order was for an independent medical evaluation to include specifically:

"Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson to complete the examination."

There is no specific reference to neuropsychological testing but there is specific reference to any and all testing to which the Claimant specifically consented that Dr. Frierson felt was needed. The Defendants, not the Claimant, never scheduled that examination.

The Respondent takes specific exception to this untrue, inaccurate, blatant misstatement of the Record in this matter by Counsel by Mr. Leventis who was only obtained ten (10) days

before this matter was originally set for hearing on September 3, 2014.

Wherefore, the Court will find after review of its own Order and review of the Record that in the context in which any issue raised by Exceptions #11 and #12 was presented to the Court for consideration that this Court properly considered those and ruled upon those. In addition, as to the specific allegations made by Exceptions #11 and #12 upon which the Appellants request reconsideration or specific rulings, those issues were not ever presented to the Court for its consideration and ruling. Wherefore, the Motion for Rehearing to Alter or Amend the Judgment should be denied.

Respectfully submitted,

Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Respondent/
Appellant

June 27, 2016

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) 262-0709

April 16, 2013

VIA EMAIL ONLY - egoodwin@saf.sc.gov

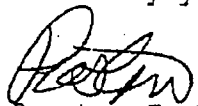
Ellen H. Goodwin, Attorney
State Accident Fund
Post Office Box 102100
Columbia, SC 29221-5000

Re: Theodore Polansky vs. South Carolina Attorney
General's Office
WCC File No: 9922954 & 0024408

Dear Ellen:

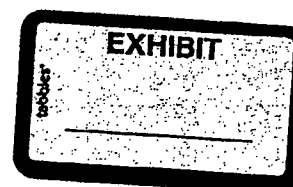
Please find attached the Consent Agreement to allow for the independent medical evaluation that the State Accident Fund wanted performed. Please review it and I am pretty sure it is in agreement with our discussions and if so, please sign it. If not, give me a call to discuss so we can get it out so we can get this evaluation performed. I look forward to hearing from you.

Sincerely yours,



Preston F. McDaniel

PFM/kic
Enclosure



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

Proudly representing injured workers
for over 25 years.

Preston F. McDaniel
Justin S. Byers
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

May 1, 2013

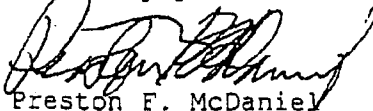
Virginia L. Crocker, Judicial Director
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

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



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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:

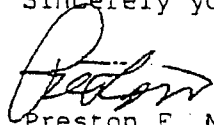
Please find attached a Draft of a Motion that I will be filing with the Commission and serving on you personally this coming Thursday so that hopefully this matter can be heard before I leave on vacation on June 28, 2013. If you can draft or will agree to the one I drafted we can get the Consent Agreement 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.



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

BFM/pkb
Enclosure

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) WORKERS' COMPENSATION COMMISSION
WCC File No: 9922954

Theodore Polanksy,)
Employee-Claimant,)
v.) MEMORANDUM IN SUPPORT OF
SC Attorney General's Office,) MOTION CONFIRMING CONSENT
as Employer, and) AGREEMENT AND ORDERING MATTER
State Accident Fund,) BE SET FOR HEARING
as Carrier,)
Respondent-Defendants.)

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

*****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.

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 Robertson
OF COUNSEL:
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

September 5, 2013

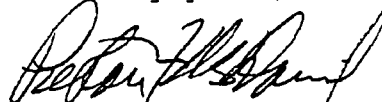
VIA EMAIL ONLY - abracy@wcc.sc.gov
Commissioner T. Scott Beck
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

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

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
))	WORKERS' COMPENSATION COMMISSION
COUNTY OF RICHLAND)	WCC File No: 9922954 & 0024408
THEODORE POLANKSY,)	
))	
Employee-Claimant,)	
))	
v.)	
))	
SC ATTORNEY GENERAL'S OFFICE,)	CONSENT AGREEMENT TO
))	EVALUATION PERFORMED IN
as Employer, and)	COLUMBIA, SC BY
))	DR. RICHARD FRIERSON, MD
STATE ACCIDENT FUND,)	PURSUANT TO SC CODE §42-15-80
))	
as Carrier,)	
))	
Respondent-Defendants.)	
_____)	

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:

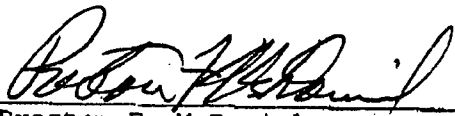
1. That the parties agree and the Claimant will submit to an examination by Dr. Richard Frierson with the USC School of Medicine Neurology Clinic in Columbia who is licensed physician or surgeon in the State of South Carolina for the purpose of an

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

Kim Hinkle

From: Bracy, Amy <abracy@wcc.sc.gov>
Sent: Thursday, October 24, 2013 9:42 AM
To: Kim Hinkle
Cc: egoodwin@saf.sc.gov
Subject: RE: Ted Polansky v. SC Attorney General's Office; WCC File Nos. 9922954 & 0024408

This order fell through the cracks. This is not a file that is being handled by Commissioner Beck and should have gone to Judicial to route to the proper Commissioner to sign. My apologies. I will get it to a Commissioner to sign ASAP.

From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Friday, October 04, 2013 2:42 PM
To: Bracy, Amy
Cc: egoodwin@saf.sc.gov
Subject: RE: Ted Polansky v. SC Attorney General's Office; WCC File Nos. 9922954 & 0024408

Amy: Would you please advise as to the status of the Consent Order being signed by Commissioner Beck? Thank you in advance! Kim

Kimberley T. Hinkle, Paralegal
to Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
T: 803-771-7211
F: 803-252-0709



Please consider the environment before printing

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From: Kim Hinkle [mailto:kim@pfmcdlaw.com]
Sent: Thursday, September 05, 2013 3:04 PM
To: 'abracy@wcc.sc.gov'
Cc: 'egoodwin@saf.sc.gov'
Subject: Ted Polansky v. SC Attorney General's Office; WCC File Nos. 9922954 & 0024408

The attached is being sent to you at the request of Preston F. McDaniel.

Kimberley T. Hinkle, Paralegal
to Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201

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

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Preston F. McDaniel
Matthew Robertson
OF COUNSEL
Michael Johnson, P.C.

Telephone (803) 771-7211

Facsimile (803) 252-0709

May 6, 2014

VIA EMAIL: vcrocker@wcc.sc.gov
Virginia L. Crocker, Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Theodore Polansky v. SC Attorney General's Office
WCC File Nos.: 9922954 & 0024408

Dear Ginger:

As you know, pursuant to your recommendation, I filed a Motion to have the above referenced matter reset for Hearing. As you know Rule 67-613 (B) (4) provides that where a case is postponed, like this one was, where "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." Based on the regulation there is actually no need for a Hearing or anything else other than a request by the moving party. Therefore, based on the regulation and my motion I would appreciate if you could let me know on the status of this matter being reset for Hearing. I was very much in hopes that it could be reset no later than in July or August so we can move this case forward.

By copy of this letter I am notifying Ellen Goodwin of this communication.

Sincerely yours,



Preston F. McDaniel

PFM/rmt

cc: Ellen Goodwin, Attorney VIA EMAIL: egoodwin@saf.sc.gov



Kim Hinkle

From: Rose Thielke <rose@pfmcdlaw.com>
Sent: Wednesday, May 07, 2014 9:07 AM
To: kim@pfmcdlaw.com
Subject: FW: Theodore Polansky v SC Attorney General's Office

From: Crocker, Virginia [<mailto:vcrocker@wcc.sc.gov>]
Sent: Wednesday, May 07, 2014 8:21 AM
To: Rose Thielke
Cc: egoodwin@saf.sc.gov
Subject: RE: Theodore Polansky v SC Attorney General's Office

Commissioner Wilkerson has jurisdiction. Your motion was referred to his office on the day of receipt.

Ginger

Virginia L. Crocker
Judicial Director
803.737.5739 Voice
803.239.7935 Cell

From: Rose Thielke [<mailto:rose@pfmcdlaw.com>]
Sent: Tuesday, May 06, 2014 5:09 PM
To: Crocker, Virginia
Cc: egoodwin@saf.sc.gov
Subject: Theodore Polansky v SC Attorney General's Office

The attached letter is being sent at the request of Preston McDaniel.

Rose Thielke
McDaniel Law Firm



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:

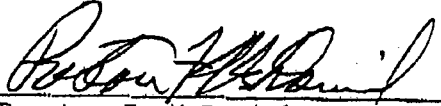
1. That the parties agree and the Claimant will submit to an examination by Dr. Richard Frierson with the USC School of Medicine Neurology Clinic in Columbia who is licensed physician or surgeon in the State of South Carolina for the purpose of an

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

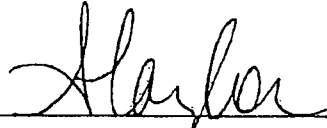

Ellen Goodwin, Attorney
Attorney for Defendants

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 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

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



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File Nos: 9922954 & 0024408

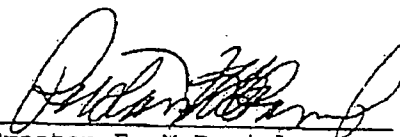
Theodore Polanksy,)
Employee-Claimant,)
v.)
SC Attorney General's Office,)
as Employer, and)
State Accident Fund,)
as Carrier,)
Respondent-Defendants.)

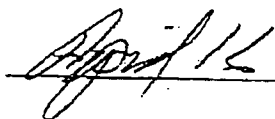
MOTION TO SET HEARING
PURSUANT TO COMMISSION
REGULATION 67-601
AND 67-613(B)(4)

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

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) 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.)

MEMORANDUM IN SUPPORT OF
MOTION TO SET HEARING
PURSUANT TO COMMISSION
REGULATION 67-601
AND 67-613(B)(4)

The Claimant would respectfully show unto the Commission as follows:

1. That the Claimant originally filed a Form 50 in this accepted case for a termination of his entitlement of permanent benefits on May 12, 2011 which was withdrawn due to the Claimant having a re-implantation of a spinal cord stimulator in Colorado in August of 2011 and after recovery it was refiled on March 2, 2012. The case was set before Commissioner Melanie James in May 2012 but after a Motion she ordered a continuance of the case and ordered that the Claimant submit to an evaluation pursuant to that Order. The Order resulted in an appeal and at the time of the Appellate Panel hearing set for November 14, 2012, the parties were verbally advised that no hearing would be held as the appeal

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.

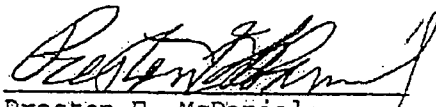
5. That ever since the Agreement was entered into back in April of 2013 and through the current date, no appointment has ever been set up with Dr. Frierson per the Consent Agreement which is now a period of over one (1) year.

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

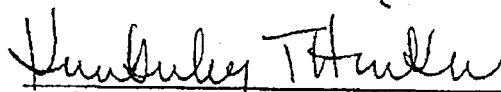
CERTIFICATE OF SERVICE

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.)

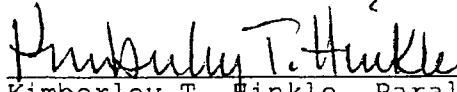
My Commission Expires: 10/28/16

CERTIFICATE OF SERVICE

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

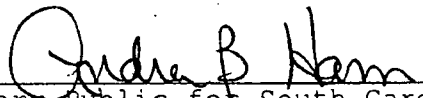
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the **RETURN TO MOTION TO ALTER OR AMEND JUDGMENT IN CASE NO. 2015-CP-40-07380** by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Temus C. Miles, Jr., Esquire
McKay Law firm
PO Box 7217
Columbia, South Carolina 29202-7217



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
27th day of June, 2016.



Notary Public for South Carolina (L.S.)
My Commission Expires: 2-27-24

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stublely
Janet Brooks Holmes
Peter P. Leventis, IV*
Kelli L. Sullivan*
George D. Gallagher*
Temus C. Miles, Jr.
David M. Bornemann
Brandon P. Jones
James E. L. Fickling+
Charles A. Kinney, Jr.+
Erica E. Loudin.

Of Counsel:
C. E. Hardin, Jr.

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*S.C. Certified Mediator
+ Also licensed in N.C.

May 13, 2016

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

RE: *Theodore Polansky v. SC Attorney General*
Case No. 2015-CP-4007380 & 2015-CP-4007468
WCC No.: 9922954 & 0024408
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

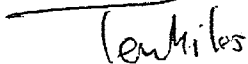
Dear Ms. McBride:

Enclosed for filing please find the original and one (1) copy of the Defendants Brief in the above-referenced matter together with a Certificate of Service. Please return a clocked copy of this document with my courier. By copy of this letter, I am serving counsel of record with the same. I am also emailing a copy to Judge Manning.

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

Thank you for your time and assistance

Sincerely,



Temus C. Miles, Jr.

TCM/ecs
Enclosures

cc: Preston F. McDaniel, Esquire
Meggan Damiano

After the Claimant's second admitted injury in 2000, he was taking the prescription drug Seroquel as part of his treatment for his admitted psychological injury, by aggravation of numerous pre-existing psychological conditions. In February of 2002, the Claimant had to be hospitalized, purportedly due to a drug-drug interaction between the prescription drug Seroquel, and some other prescription medication the Claimant was taking at that time.

Subsequent to the March 6, 2015 hearing, in a June 1, 2015 Order, the Claimant was awarded life time indemnity benefits under S.C. Code Ann. §42-9-10 subsection (C) for an alleged physical brain injury. Among other things in dispute at the March 6, 2015 hearing were: a) Whether or not the Claimant had suffered permanent physical brain injury entitling him to life time indemnity benefits; b) Even if the Claimant had otherwise suffered a permanent physical brain injury, if such injury rose to the level of physical brain injury for permanent life time indemnity benefits as envisioned by the General Assembly in promulgating S.C. Code Ann. §42-9-10, and related case law from the S.C. Supreme Court; c) Even if otherwise compensable, if such benefits of lifetime indemnity proceeds would be barred by the equitable doctrine of *laches*, due to the ten years' long intervening delay in requesting such benefits after the date of the alleged brain injury, resulting in material prejudice to these Defendants; and d) Certain procedural issues as to the admission of the reports of Dr. Avie Rainwater into evidence and the setting of the hearing on a Form 50 hearing request made approximately three years prior to the date of the proceedings March 2015 proceedings in this matter. In addition to these issues, the Claimant requested that the single Commissioner raise the compensation rate of the Claimant above the maximum compensation rate for his 2000 date of injury, to reflect what his earnings *might* be today, and at a bare minimum, to the maximum compensation rate for 2015, or \$766.05 per week or higher.

The single Commissioner ultimately overruled any objection by the Defendants to the reports of Dr. Avie Rainwater, and as to the procedural flaw of holding the hearing on a Form 50 Hearing Request/Complaint originally filed requesting a hearing several years prior. The single Commissioner also ruled that the Claimant has indeed suffered a physical brain injury in this matter, which entitled him to life time benefits, and which was not barred by the equitable doctrine of *laches*, nor for any other reason. The hearing Commissioner denied the request for a higher compensation rate above that of the maximum compensation rate for the Claimant's date of injury.

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

ISSUES PRESENTED IN THE DEFENDANT'S APPEAL

1. Did the Appellate Panel err affirming the overruling of the Defendants objection to the include the updated medical reports of Dr. Avie Rainwater, and referring to Dr. Rainwater as "an authorized treating physician", when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law, and/or an abuse of discretion?
2. Did the Appellate Panel affirming the ruling, 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 unsupported by the evidence in this matter and/or contrary to South Carolina law?

3. Did the Appellate Panel err in affirming the ruling, that the Defendants should have been on notice of a physical brain injury – related to these accidents and subsequent treatments prefaced upon references made to the record in Findings of Fact No's 10-16, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
4. Did the Appellate Panel err in affirming the ruling, 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 unsupported by the evidence in this matter and/or contrary to South Carolina law?
5. Did the Appellate Panel err affirming the ruling, 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, and per the testimony of Dr. Forsthoefel, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
6. Did the Appellate Panel err in affirming the ruling, that the Claimant's request for benefits for a permanent physical brain injury, was not barred under the equitable doctrine of *laches*, when failing to do so, was unsupported by the evidence in this matter and/or contrary to South Carolina law?
7. Did the Appellate Panel err in affirming the ruling that Dr. Rainwater's opinion was not pivotal or necessary to the determination of permanent physical brain damage, its severity, its medical causation and relation to the 1999 and 2000 date of accident, and resulting treatment therefrom, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
8. Did the single Commissioner err affirming the ruling, that the Claimant is entitled to "lifetime [indemnity] benefits," when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
9. Did the Appellate Panel err affirming the ruling 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 life time medical and indemnity benefits, for permanent and total disability, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?

10. Did Appellate Panel err affirming the ruling that the Claimant is entitled to life time medical care and indemnity benefits in conjunction with an awarded permanent physical brain injury, and resulting permanent total disability, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
11. Did the Appellate Panel err affirming the ruling that the original trial hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, nor was otherwise violate of the substantive 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 – this was originally appealed by these Defendants/Appellants from the single Commissioner Order to the full Commission's Appellate Panel Order.
12. Did the Appellate Panel err in affirming the ruling that the original proceedings before the single Commissioner were able to go forward and were 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. This was also originally raised as an appellate ground by these Defendants from the Order of the single Commissioner to the Appellate Panel of the Full Commission).

ISSUES PRESENTED IN THE CLAIMANT'S CROSS APPEAL

1. The Commission 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 S.C. Code Section 42-9-10 and decisions of the Supreme Court and Court of Appeals under those sections.
2. The Commission erred as a matter of law by failing to increase the compensation rate based on the decisions of the S.C. Supreme Court and Court of Appeals under the exceptional circumstances paragraph of Section 9-1-40.

3. The Commission erred as a matter of law by failing to increase the compensation rate to fairly compensate 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 Commission 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 statutes and Court Rules.

ARGUMENT

Did the single Commissioner err in overruling the Defendants objection to the inclusion of the updated medical reports of Dr. Avie Rainwater; in holding that Dr. Rainwater as "an authorized treating physician," and concluding that Dr. Rainwater's medical opinions were not pivotal or necessary to the single Commissioner's determination of permanent physical brain damage? (Defendants' Appellate Grounds No. "1," "7," "11," and "12).

The record of the parties and APA submissions include medical reports spanning over 15 years due to the initial date of injury in this matter (1999), and the date of the proceedings which give rise to this appeal, in March of 2015. (See Generally the APA submission No. 4 of the Claimant at pp. 20-30, of Dr. A. Rainwater from October 10, 2001 to July 24, 2014). Defendants raised objection at the hearing before Commissioner Barden as to the inclusion of the updated records of Dr. Rainwater from 2011 forward, and specifically APA p. 20-23, with updated reports and opinions of the Claimant's condition pursuant to the medical reasoning of Dr. Rainwater.

The basis for the objection to the updated medical reports of Dr. Rainwater into the record, are because Dr. Rainwater, and the Defendant Carrier in this matter, are adverse litigants

in a contested legal matter between the carrier and Dr. Rainwater as litigants to separate civil legal dispute which did result in the filing of legal suits in the Court of Common Pleas. (See Defendants Exhibit 44, a copy of certain pleadings filed between Dr. Avie Rainwater and the S.C. State Accident Fund). On this point, the single Commissioner held, and the full Commission affirmed, that, "the Defendants alleged as the basis for the objection that there was some type of conflict as to his latest report because there existed a dispute between the Defendant State Accident Fund and Dr. Rainwater over the payment for his services in other cases unrelated to this one. I specifically note from the Record not only was Dr. Rainwater involved in this case beginning in 2001 but that his evaluation and testing of which the Defendants complain was in fact conducted on March 22, 2011. Whereas the earliest pleading that was filed in that matter concerning the dispute between the Fund and Dr. Rainwater was filed on October 10, 2011. It would be patently unfair to the Claimant to disregard this authorized treating medical provider's opinion particularly where there is no evidence of any bias or prejudice or that any payments due to Dr. Rainwater were at issue in this case."

First, the Defendants refute the assertion by the Commission that Dr. Rainwater is the authorized treating physician in this matter. The first evaluation of the Claimant by Dr. Rainwater was in October of 2001, The only purpose for this evaluation was as referral by the treating pain management physician to Dr. Rainwater for his determination if the Claimant was, psychologically, an appropriate candidate for a spinal cord stimulator. The Defendants have no objection to this prior report. (Claimant's APA 4 at pp. 25-30). The next report was in March 2011, starting with the opening line that the Claimant is a 53 year male "kindly referred by his attorney..." (Claimant's APA 4 at p. 21). This sequence of evaluations does not make Dr. Rainwater an authorized treating physician in this matter. If anything, he was a onetime

evaluator for the limited purpose of determining if a spinal cord stimulator was appropriate back in 2001, and subsequently, upon referral by his own attorney in 2011, would have been considered an independent medical evaluator. Of note, he never truly really treated the Claimant.

Furthermore, Defendants contend that the objection to the updated records should have been sustained. Per the objection, and as substantiated by Exhibit 44, the Defendants in this matter, and Dr. Rainwater are adverse parties in a law suit on another matter. Defendants assert this would *per se* cause Dr. Rainwater's opinion to be tainted as to the Defendants in this matter. To presume that one person or entity would be in pitched litigation with, or considering filing legal action against, another person or entity, but would similarly be fair and unbiased in rendering simultaneous opinions about that adverse person or entity in other matters strains credulity. By counter example, Defendants contend that no Judge or Commissioner would purport to be able to rule fairly and objectively in a law suit between two parties, if that Judge or Commissioner was in being sued by or contemplating suing one of the parties to the action before him or her. An attorney who did not request that the Judge or Commissioner recuse themselves under these circumstances would have likely breached their fiduciary duty protect the interests of their client. The appearance of a conflict is so apparent in such an example that the Defendants believe it would warrant such recusal. Similarly, it should have warranted in this same situation, the sustaining of the objection, to exclude the updated records of Dr. Rainwater from the record.

While these Defendants would concede it is certainly *possible* that a Judge, Doctor, or Commissioner may be able to be sue, or be sued by, another for in excess of \$75,000.00 (See APA at p. 859), and still objectively make determinations that materially impact or affect that

person in another matter, but it is not the most likely outcome. To simply give Dr. Rainwater's professional ethics 'the benefits of the doubt' is to alternatively give the detriment of the issues to the Defendants – on an issue that in balance, is more likely than not, one where the average person would not be able to be fair and objective, hence the appearance of conflict in the first instance.

The Commission also indicated that because the date of the civil Complaint of Dr. Rainwater against the Defendant Carrier in this matter was in October of 2011, and the date of the report of Dr. Rainwater objected to by these Defendant was in March of 2011, the lawsuit was not material to any prejudice Dr. Rainwater may have had at that time, March 2011. Nevertheless, even the exhibits to the law suit of Dr. Rainwater, are for allegedly breached contracts in 2005 and forward.

The Commission also indicated on this point in finding numbered "23" and "24" that: 23. [...Notwithstanding any dispute between Dr. Rainwater and the carrier, I find the opinions of Dr. Forsthoefel to be the most compelling of all the evidence. (See Defendants' APA #44; Claimant's APA #1, page 7).

24. Dr. Rainwater's opinion is not pivotal or necessary in this case, and I can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

However, Defendants contend that Dr. Forsthoefel actually relied on the reports and testing results of Dr. Rainwater in coming to his opinion that the Claimant's cognitive decline was purportedly related to the alleged 2002 drug-drug interaction, and not to the Claimant's own, very significant pre-existing depression, obsessive compulsive disorder, bi-polar disorder and schizoaffective disorder, or some other degenerative disorder – such as Alzheimer's unrelated to

any drug-drug interaction of the Claimant in 2002. (See Hearing Transcript at p. 28 line 24 – p. 29 line 9) (Also references to Dr. Forsthoefel's review and reliance on Dr. A. Rainwaters records at APA 1 p. 3 and APA 1 p. 7). One of the difficulties in this matter from the Defendants standpoint is fettering out the difference between the Claimant's ongoing pre-existing psychological conditions, and the alleged brain injury condition. Dr. Forshoefel points out in his testimony that he believes the fact that it is related to a brain injury is validated "with his [Dr. Rainwater's] testing..." (Hearing Transcript at p. 30). The Defendants assert that Dr. Rainwaters testing in 2011 was used by Dr. Forsthoefel, and perhaps others, to substantiate the medical opinion that the claimant had a permanent physical brain injury – allegedly separate and apart from – his ongoing pre-existing mental and psychological conditions. The Defendant contend it was reversible error to permit the updated 2011 opinions of Dr. Rainwater into the record, and that such opinions did affect the weight of the evidence necessary to argue the Claimant suffered and suffers from a permanent physical brain injury.

Of note, these Defendants further objected to the inclusion of the Dr. Rainwater testing because 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, where the Claimant has failed to submit to the neuropsychological testing and evaluation agreed up in the prior Consent Order in this claim. (See Generally Exhibits Tabs 36, 39 and 40 of the Defendants). This also should have been an additional grounds for sustaining the objection to the 2011 report of Dr. Avie Rainwater.

Did the Commission err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered physical brain damage in relation

to his two work related injuries in 1999 and 2000, or related treatment, (Barden Order, Finding of Fact No. 17, at p. 41); and in finding that such brain injury was among "those 'serious' and 'severe' cases contemplated by *Crisp* and *Sparks* [Supreme Court Decisions]" thereby entitling the Claimant to life time indemnity benefits (Defendants' Appellate Grounds No. "2," "4," "5," and "8-10.")

First and foremost, these Defendants contend that the Claimant's alleged brain injury is not one that rises to the level of severity contemplated by the General Assembly in promulgating the potential benefits of life time awards pursuant to S.C. Code Ann. §42-9-10 (c), and as interpreted by the South Carolina Supreme Court in the cases of *Crisp v. SouthCo. Inc.* 401 S.C. 627, 738 S.E.2d 835 (2013) and *Sparks v. Palmetto Hardwood Inc.* 406 S.C. 124, 750 S.E.2d 61 (2013). The Claimant's contention is that he suffered a significant and severe, and ultimately permanent, physical brain injury from his drug-drug interaction and hospitalization in February of 2002, and he has had several psychologist and psychiatrist opine that is the case over a decade later. The fact of the matter is, however, that after the alleged injury to the brain from the drug/drug interaction had subsided - the presumed problematic medication was removed from the Claimant's system - and the Claimant went back to normal. Notably, prior to the 2002 drug/drug interaction, the Claimant had admittedly suffered from very significant and severe psychological conditions and mental disorders, which even as late as 2001, just months prior to the February 2002 hospitalization, had led him to be treated both as an inpatient and monitored outpatient in relation to psychological breaks, hallucination and hearing voices in relation to his significant pre-existing depression, bi-polar disorder, schizoaffective disorder, anxiety, oppressive compulsive disorder, memory loss/aphasia and other disorders. Again, prior to the 2002 accident, Dr. Forsthoefel notes that "dynamically it may be that Ted's earlier sexual abuse laid the groundwork for his future psychotic decompensation with stress." (Claimant's APA 1 at p. 10). Again prior to the 2002 hospitalization, Dr. Forsthoefel's March 3, 2011 letter references

that in October of 2001 even Dr. Rainwater documented "Ted's concentration as 'grossly disruptive, loses his train of thought readily. Tangential thinking.' And Ted's memory as 'impaired.'" (at *Id.*).

After the 2002 drug-drug interaction, the Claimant made a full recovery. (See Defendants APA 19, at p. 713 normal KEG testing). In a letter to Jeanne Beard in March of 2002, only weeks after the hospitalization, Dr. Forsthoefel references the fact that the Claimant's "Clinical and cognitive deterioration has fully remitted[.]" and "[h]is neuropsychological testing after this remission [from the Seroquel reaction] is entirely within normal limits as is hi EEG and brain scan." (Defendants APA 24 at p. 731). And indicating that the Claimant's read[ing] skills, comprehension, and memory retention have all returned to normal limits from its deterioration prior to the hospital use of Seroquel. "It is clear to me that this earlier two month deterioration, prior to the hospitalization, was caused by his own confusion due to problems with compliance and probably over medication." at *Id.*

In 2004, Dr. Julian Adam, MD, evaluated the psychological and neurological complaints of the Claimant. In addition to "probably malingering" Dr. Adams found that since the 2002 drug-drug interaction the Claimant had had "multiple tests on his head in the past such as MRI scans, EEGs, etc. All of them have been normal. I do not think they need repeating at the present time." (Defendants APA at p. 716).

At the hearing, Dr. Forsthoefel testified on behalf of the Claimant, and rather than point to a specific diagnostic test, or a specific battery of psychological tests, he indicated that the Claimant had very severe cognitive deficits prefaced on a mood disorder rating scale from the DSM. When asked about the fact that the Claimant also suffered from depression and other pre-existing mood disorders, which could also affect and/or contribute to the DSM's rating, and put

the Claimant at between a "30-40" the same DSM score Dr. Forsthoefel indicated he knew the 30-40 score was for brain injury because, "that's a clinical finding. Those are based upon my clinical background." (Hearing Transcript at p. 64). Dr. Forsthoefel's opinion was also that this physical brain injury in 2002 resulted in dementia, when asked his basis for this, he indicated "clinical findings, supported by the testing findings of Dr. Rainwater...so my reasoning is firmly grounded in other -- with other consultant's opinions as well." (Hearing Transcript at p. 61). However, Dr. Forsthoefel also indicated that the Claimant's cognitive decline took place over many years and began before the 2002 drug-drug interaction. Attorney Leventis, "Is that -- you say a pre-existing cognitive decline. Do you mean prior to the 2002 drug-drug interaction?" Dr. Forsthoefel, "Right, yeah." (Hearing Transcript at p. 61, lines 22-24).

Dr. Forsthoefel also conceded that the Claimant "had a lot of short term memor[y]" and functional problems prior to 2002. (Hearing Transcript at p. 69 lines 6-10). When pressed again on page 69 and 70 of the Hearing Transcript about how Dr. Forsthoefel could fetter out the pre- and post-2002 disability and cognitive functioning deficits, he continually indicated "those are clinical findings." Defendants contend that the greater weight of the evidence does not support the findings of the Commission that the Claimant's dementia and diagnosis of degenerating brain function, which was definitively diagnosed nine years after the 2002 drug interaction, are sufficient to support a finding of permanent physical brain injury -- causally relating back to the original 1999 and 2000 injuries. Moreover, even if otherwise supported, Defendants further assert that such a brain injury, if compensable, is of such severity as to rise to the level of entitling the Claimant to a life time indemnity award under S.C. Code Ann. §42-9-10(c). Therefore, the findings and conclusions of the Commission on these issues should be reversed.

Did the Commission err in finding that the Defendants should have been on notice of a physical brain injury -- related to these accidents and subsequent

treatments prefaced upon references made to the record in Findings of Fact No's 10-16? Did the single Commissioner err in failing to find that the Claimant's request for benefits for a permanent physical brain injury, was barred under the equitable doctrine of *laches*. (Defendants' Appellate Ground No. "3" and "6").

Defendants assert that this claim for benefits should be barred under the equitable doctrine of *laches*. Defendants respectfully submit that these rulings by the Commission misapprehended the appropriate application of the equitable doctrine of *laches* to this claim. "*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). Whether a claim is barred by *laches* is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute *laches*. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E. (2d) 357 (Ct. App. 1985). In sum, to prove *laches*, a party must show delay that was unreasonable, that resulted in prejudice to that parties' defense of the claim. *Hallums v. Hallums* 296 S.C. 195, 71 S.E.2d 525 (1988). Defendants contend all of the aspects of *laches* are met in this claim, and should bar the Claimant's request for benefits at this time.

In the Commission's findings as to *laches*, the Commission found that the Defendants had paid for treatment for a hospital visit "for the encephalopathy (brain injury) [parenthesis in the original Order] in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive function." The Order goes on for several paragraphs explaining treatment needs of the Claimant that were paid for by the Defendants, which purportedly meant they knew or should have known all of this treatment was for a compensable physical brain injury. Importantly, it should be pointed out that even

according to Mr. Polansky's own testifying medical expert at the hearing, his treatment regimen stayed the same before and after the 2002 hospitalization, and not even Dr. Forsthoefel himself was aware when the exact same treatment – which had been for mood disorders – apparently became treatment for a permanent and severe physical brain injury.

Furthermore, despite the Commission's findings that the Defendants were on notice of the brain injury, and apparently were knowingly providing treatment for such since sometime after 2002, the Claimant himself only became aware of his brain injury approximately 2009 and filed for a determination of the compensability of such in 2011 as soon as Dr. Forsthoefel and Dr. Rainwater became aware and opined about the physical brain injury. Instead the Commission found that the Defendants knowingly paid for all of the 'brain injury' related treatment from 2002-2011. If true, this showed great prescience on the part of Defendants who apparently paid for brain injury related treatment for the Claimant prior to the knowledge of such brain injury by the Claimant or his own doctors. Notably, the Claimant suffered from very significant pre-existing mood related disorders, and had been treated in 2001 both in patient and out patient for similar psychological breaks and dysfunction, including but not limited to hearing voices and hallucinations. References in the record to dementia, which Dr. Forsthoefel later attributed to 2002 hospitalization in 2011.

In conjunction with the arguments as to the equitable defense of *laches*, argued herein below, Defendants assert the Commission's ruling that they were on notice of the brain injury claim as outlined in her Order findings, was in error. The Commission held in part that the Defendants were on notice of the Claimant's cognitive decline and increasing mental issues since the 2002 drug-drug interaction. The Commission also pointed out that the Defendant has been providing payment for treatment for the Claimant's physical brain injury her Order for several

years, and that medical records show the Claimant was suffering from significant memory complaints after the 2002 accident. (See Generally, Findings of Fact Numbered 10-16). Notably, the Claimant had significant memory complaints even before the 2002 drug-drug interaction. In 2001 his memory was diagnosed as "impaired" and Mr. Polansky had to "keep lists" of things that were important to him. (APA 4 at p. 28). Mr. Polansky, prior to 2002, already had issues with remembering which medications to take, and which medication not to take and when to take them, these pre-existing memory deficits are admittedly what lead to the drug-drug interaction that put him in the hospital in 2002.

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

Attorney Leventis: "Okay. As far as – were you still treating him medication-wise, even though you changed the Seroquel, for the same symptoms after 2002 that you were treating him for before 2002?" Dr. Forsthoefel "Yes" (Hearing Transcript at p. 76 lines 19-23). This makes it very difficult for the Defendants to realize or have realized, that apparently the same medications and treatment regimen were being prescribed, but at some point in time, it was not longer for the very significant mood and psychological disorders of the Claimant, but rather for his 'permanent physical brain injury' instead.

When Dr. Forsthoefel was asked directly how a person would know which the Claimant was being treated for (a brain injury or his mood disorders) since the treatment was the same both before and after 2002 – save that Seroquel was taken away – even Dr. Forsthoefel seemed

unclear. By attorney Leventis, "For me as a layperson, would there be any way to know if your treating him [before or after 2002] specifically for a physical brain injury versus mood disorders you were already providing similar or the same medication for?" (Hearing Transcript at p. 76 line 24 - p. 77 line 3). Dr. Forsthoefel, "Really I wasn't really - I wasn't really aware...[] But going back to your question - - I'm wondering myself." (Hearing Transcript at p. 77 lines 4, 18 - 19).

This puts a Defendant Employer/Carrier in a rather precarious and somewhat impossible situation. The Claimant was treating for mood disorder, and chronic pain and problems both before and after his February 2002 hospitalization. The treatment the Defendants were providing was the same treatment regimen the entire time (save the exclusion of Seroquel). Apparently, even the treating physicians were not clear at what point such treatment changed from being for the Claimant's mood disorder, and apparently became for treatment of Mr. Polansky's brain injury instead of - or in addition to - treatment for his mood disorder.

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

If indeed the Claimant had ongoing cognitive decline – purportedly related to his alleged brain injury in 2002, why did not choose to bring or allege it prior to 2011. 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 never raised this issues 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. If the Claimant was in need of treatment for his brain, he could have similarly filed a Form 40 over a decade ago, or a Form 50 on the merits of the alleged brain injury and its compensability back at that time.

Further, this unreasonable delay took place while the Claimant clearly had the ability and the opportunity to act sooner in asserting his rights, as noted the Claimant filed his own Form 40

hearing request for expedited consideration of medical treatment on other issues in March of 2011, for example, and was represented by legal counsel. Lastly, 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 other third party causes of action under Title 15 of the S.C. Code Ann. – See Gen. §15-3-350), or providers who may have been at fault for the drug-drug interaction which took place.

Furthermore, this time period is even beyond the statute of repose for the Defendants to file for indemnification, reimbursement or any other cause of action against the actual at fault medical provider, physician, pharmacist and/or drug manufacturer, pharmacist, or party(s) (See Gen. §15-3-454). Of note, in his March 2011 letter to opposing counsel, Dr. Forsthoefel indicated “having check with the research division of Astra/Zeneca, I learned there has been no record of Seroquel alone causing encephalopathy.” (Claimant’s APA at p. 9). 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, and the Claimant’s failure to previously raise this issue or prosecute this claim, may necessarily have damaged or foreclosed these Defendants’ recovery rights this matter to the SC Second Injury Fund. Even if otherwise compensable, due to the Claimant’s 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. The Claimant actually received an evaluation in relation to his alleged issues/injury 2004 with Dr. Julian Adams. However, Dr. Adams found that all of the Claimant's objective diagnostic testing at that time was essentially normal and did not call for updated testing at that time.

Defendants assert that the Commission erred in finding that the Defendants were effectively estopped from raising the Defense of *laches*, and in actuality, pursuant to the above outlined arguments, the Claimant, due to his unreasonable delay in pursuing the alleged brain injury, which has resulted in material prejudice to the Defendants, should be barred from a finding of compensability at this time.

1. Claimant contends in grounds "1" and "2" of cross appeal that the Commission erred in failing to raise the compensation rate of the Claimant above the maximum compensation rate for the date of his injury, pursuant to: S.C. Code Ann. §42-1-40, §42-9-10, opinions of the Supreme Court, and because the Claimant was a 'high wage earner' at the time of his accident, earning an average weekly wage, above that of the maximum compensation rate at that time – creating an exceptional circumstance under §42-1-40?
2. Claimant contends in ground "3" of his cross appeal that the Commission erred in failing to hold and conclude that S.C. Code Ann. §42-9-10 actually stands for the premise that the compensation rate for high wage earners can, and should, go up every year with the maximum compensation rate for each subsequent year?
3. Claimant contends in ground number "4" that the Commission erred in failing to hold and conclude that a Circuit Court opinion submitted by the Claimant at the hearing had binding precedential effect on the Commission?

ARGUMENT

1. Claimant contends in grounds "1" and "2" of his cross appeal that the Commission erred in failing to raise the compensation rate of the Claimant above the maximum compensation rate for the date of his injury, pursuant to: S.C. Code Ann. §42-1-40, §42-9-10, opinions of the Supreme Court, and because the

Claimant was a 'high wage earner' at the time of his accident, earning an average weekly wage, above that of the maximum compensation rate at that time – creating an exceptional circumstance under §42-1-40?

The question of whether or not to raise the compensation rate in this claim is a two-fold matter. First, whether or not an exceptional circumstance existed under S.C. Code Ann. §42-1-40 which would qualify for the purposes of deviating from the normal method of calculating the compensation rate; Secondly, whether or not the Commission should find that a higher compensation rate, than the maximum prescribed for the date of injury, should be utilized. (Argued in section "B" herein below).

Defendants concede that the South Carolina Supreme Court and Court of Appeals have found several reasons for deviating from the normal method prescribed under §42-1-40 for calculating the average weekly wage and compensation rate. However, none of those previous issues exist in the present case. Dual employment, for example, is one reason that has been found for raising a claimant's average weekly wage and compensation rate. (See Generally S.C. Code of Regs. §67-1603). However, the 'exceptional' circumstances aspect of §42-1-40 has only been addressed a handful of times by the S.C. Supreme Court and Court of appeals. (See §42-1-40 noting that: "When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."). The Claimant's request and reasoning for adjusting the AWW/C.R. would not prevail under the facts of this case in comparison to any of the cases where the courts have chosen to grant such extraordinary relief.

Other than for dual employment purposes – which were not present here – the four primary cases in which South Carolina court opinions have interpreted this section of §42-1-40

are: *Elliott v. SCDOT*, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004); *Sellers v. Pinedale Residential Center*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002); *Forrest v. A.S. Price Mechanical*, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007); and *Roberts v. McNair Law Firm*, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005). All of these four cases are readily distinguishable from Mr. Polansky claim. Mr. Polansky's wages at the time of the accident/injury in 2000 already provided that he would be at the maximum compensation rate for that year.

In the two particular cases in which the court affirmed or agreed that exceptional circumstances existed for revising the AWW upwards, *Sellers* and *Forrest*, the two young men who were injured were most definitely uniquely industrious as compared to the population as a whole. One, *Sellers*, was a full time high school student who was working three part time jobs in addition to being a full time student. The other, *Forrest*, was a young man who was continuously working at least two full time jobs, and sometimes as many as three jobs. However, in neither circumstance did the court find that the compensation rate would ever go above the maximum compensation rate for the year of injury.

Claimant Elliott was employed by the SCDOT as a "Trade Specialist II, earning an annual salary of \$19,253." After she obtained her CDL, she earned a five percent salary increase that was effective September 17, 2000. On September 28, 2000, Elliott was injured in a work-related accident. Elliott filed for workers' compensation benefits, arguing her five percent pay increase constituted an "exceptional reason" for departing from the standard method used to calculate the compensation rate. The 'standard calculation' having been upon her fifty-two weeks of her earnings immediately preceding the date of injury, as provided for in §42-1-40 above. The Court of Appeals reasoned that at the time of her accident, Elliott had *already* earned her pay increase by voluntarily pursuing special certification and licensing. The additional pay

was a merit-based reward given in recognition of her efforts to obtain a CDL license, and was not merely a standard cost-of-living increase or step increase based on longevity of service. In addition, the raise was *not speculative*, but was an established, guaranteed amount already in place at the time of the accident. However, in *Elliott* the Court did not find that the compensation rate would ever go above the maximum compensation rate for the year of injury.

The *Roberts* court decision is also not helpful to the Claimant's request to depart from the normal method of computing AWW/CR under §42-1-40. Claimant Roberts asserted an increase to her AWW based on post D.O.I. wage increases after returning to work, which Roberts felt demonstrated her "future" earning capacity. In rejecting Roberts' arguments, the court noted:

In *Sellers*, the claimant was a sixteen-year-old high school student working part-time when he sustained a spinal cord injury that rendered him a paraplegic. His compensation rate from his part-time employment was less than \$100... "

The *Roberts* court went on to indicate:

"As the commission found '[b]ut for the severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician.' [Sellers] stated his goal was to become a master electrician. In this case, Roberts was fully employed and earned a full-time salary at the time of her accident. The extraordinary circumstances present in *Sellers* are not present in this case." (citing *Sellers*). We likewise conclude the extraordinary circumstances found in *Elliott* do not apply here. In *Elliott*, the claimant received a pre-injury salary increase. Roberts' merit increases were post-injury.

(internal citations omitted) (*Roberts* at 54, 455-6)

None of the previously indicated circumstances from the Court of Appeals, nor the Supreme Court, for deviating from the prescribed method for calculation of the average weekly wage and compensation rates under S.C. Code Ann. §42-9-10 and §42-1-40 are present in the instant case. Essentially, there is not any legal or factual basis to resort to another method of calculation of benefits in Mr. Polansky's claim. The only basis for changing the AWW/CR cited by the Claimant is that: (A) he was a high wage earner at the time of his injury; and (B) That maximum compensation rate has repeatedly gone up in South Carolina since the date of his injury in 2000. Notably, the same could be said for any wage earner whose average weekly wage is above amount necessary for him or her to achieve the maximum compensation rate in this state for the date of the injury. Such a determination in these circumstances would truly emasculate the premise of an "exceptional" reason for using an alternative method of calculation. The General Assembly clearly envisioned that some wage earners AWW would take them above the maximum compensation rate for a given year, and therefore it prescribed a maximum compensation in the first place. Moreover, the maximum compensation rate in this state has risen every year for the last 35 years, and again, this does not an exceptional circumstance make.

2. Claimant contends in ground "3" of his appeal that the Commission erred in failing to hold and conclude that S.C. Code Ann. §42-9-10 actually stands for the premise that the compensation rate for high wage earners can, and should, go up every year with the maximum compensation rate for each subsequent year?

No prior published opinion in South Carolina has found the average weekly wage and compensation rate should, or could, actually be raised above maximum compensation rate for the year of the injury in which the accident happened. Despite Claimant's earlier appellate brief citing to several cases about wage calculations reaching into the future, and referencing 'future lost' earnings, to glean a modification of wages when "exceptional" circumstances are present under S.C. Code Ann. §42-1-40, no precedential court opinions of the Supreme Court of the

Court of Appeals of this state has ever held or affirmed a finding to go above the maximum compensation rate. The maximum compensation rate in this state has gone up every year for the past 35 years. (See Gen. www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx).

Generally speaking, the rights of the parties are fixed on the date of accident. (See *Sellers v. Daniel Construction Co.*, 285 S.C. 484, 330 S.E.2d 305 (S.C. 1985)). Defendants contend that the South Carolina Workers' Compensation Act is clear in setting a maximum average weekly wage for the date of injury, no matter how many weeks permanent or temporary indemnity benefits may be payable. This is delineated not only by the plan language of the statutes themselves, but also by additional statutes and regulations which provide for and prescribed lump sum awards and related discount rates for present day payments of future weeks of benefits. The changes to the Act in 1983 to §42-9-301 actually made it easier, and less stringent, for an employee to garner a lump sum award of future weekly benefits. (As Reported in *Hooks v. Southern Bell Telephone and Telegraph* 291 S.C. 41,351 S.E.2d 900 (1986)).

If the Act actually purported to, or intended to, create a circumstance in which the compensation rate (for high wage earners) was subject to change every year — due to the fact that the maximum compensation rate for high wage earners went up every year — the purpose of lump sum awards, payments and settlement could only work an unintended harm to injured workers with AWW's that would entitle them to compensation rates above the maximum compensation rate. Moreover, the parties would likely have to come back to the Commission every year for determination of the 'new' compensation rate in cases where the AWW had exceed the maximum compensation rate for the year of the accident. A Commission finding of any compensation rate of the maximum compensation rate for the year of injury would simply have

to say "for now." Again, §42-17-10, as to agreements for compensation payments, would be nothing but damaging to higher wage earners, and therefore a ridiculous idea Claimant to even consider. Any lifetime indemnity case, or death or permanent disability claim extending over fifty two weeks, with maximum compensation rate benefits would be need to come back to the Commission annually for a consideration of their newly revised compensation rate for the claim.

Despite the arguments of the Respondents on this issue, and for argument sake taking the Claimant's interpretation of the meaning of S.C. Code Ann. §42-1-40, §42-1-50 and §42-9-10 at face value, the result would be so ridiculous that it could not have been what the legislature intended. South Carolina Courts have previously held that, no matter "how clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature." *Hamm v. South Carolina Pub. Serv. Comm'n*, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985). Defendant contend the language of the statutes do not clearly read as the Claimant has interpreted them to mean, nevertheless, even still such an interpretation has never been adopted by the Supreme Court or the Court of Appeals of this state, and should similarly be rejected by this Commission.

3. Claimant contends in ground number "4" that the Commission erred in failing to hold and conclude that a Circuit Court opinion submitted by the Claimant at the hearing had binding precedential effect on the Commission?

Defendants contend this is a clear cut issue, and that by definition, the rulings of Circuit Court(s) of this state simply are not reported opinions of binding precedential value. The opinions of the Circuit Court literally – in the actual meaning of the word – are NOT reported opinions. Unlike the opinions of the South Carolina Supreme Court and the Court of Appeals, unless specifically designated at "unpolished" with a UP opinion number, Circuit Court opinions have no reporter. To go back through and search the Circuit Court opinions of this state would

require, an attorney, or a Commissioner, or Judge to go look up, find and review the actual opinions from the Court house of Common Pleas and General Sessions across all the Circuits of this state. Such opinions are not precedential in nature, and are not collected and published. Rule 268 of the S.C. Appellate Court Rules does not even give a basis or method of citation to Circuit Court opinions – again because they are not precedential in nature or binding legal authorities. Moreover, published opinions are defined by an appositive in the Appellate Court Rules as “orders of the Supreme Court or Court of Appeals” so long as they are not ‘unpublished.’ (See Gen. SCACR 268(d)). Such Supreme Court and Court of Appeals opinions are published in both the Southeastern Reporter and the South Carolina Reporter. Again, Circuit Court opinion have no reporter.

Defendants assert this is a very primordial and fundamental legal concept. Despite Claimant’s contention to the contrary, the Circuit Court Order is not precedential, nor binding legal authority on the Commission – or any other court – and no authority for such is cited by the Claimant in his appellate brief to this affect. The concept of *stare decisis* for the purpose of later courts following the precedential opinion of earlier courts, requires and relies on the idea of the publishing of opinions of the higher courts of record. The Circuit Court is not one of those courts, and would create and untenable and unworkable frame work for determining the state of the law.

CONCLUSION

For the reasons outlined hereinabove, and as to the specific points outlined herein above, these Defendants request that the Order of the single Commissioner reversed, or modified as requested and remanded for additional proceedings in relation therewith. Additionally, these Defendants request that the prior Order be affirmed as to the determination of the average weekly wage and compensation rate of the Claimant.

Respectfully Submitted

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Columbia, South Carolina
May 12, 2016

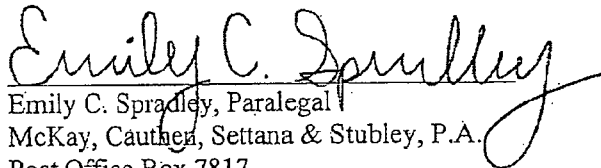
CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stublely, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants Brief 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 13 day of May, 2016.

Via Hand Delivery

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Columbia, South Carolina 29201

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May 13, 2016

Via Hand Delivery

The Honorable Jeanette W. McBride
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Columbia, South Carolina 29201

RE: Theodore Polansky v. SC Attorney General
Case No. 2015-CP-4007380 & 2015-CP-4007468
WCC No.: 9922954 & 0024408
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

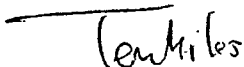
Dear Ms. McBride:

Enclosed for filing please find the original and one (1) copy of the Defendants Brief in the above-referenced matter together with a Certificate of Service. Please return a clocked copy of this document with my courier. By copy of this letter, I am serving counsel of record with the same. I am also emailing a copy to Judge Manning.

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

Thank you for your time and assistance

Sincerely,



Temus C. Miles, Jr.

TCM/ecs
Enclosures

cc: Preston F. McDaniel, Esquire
Meggan Damiano

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
Theodore Polansky,	)	Case No. 2015-CP-4007380 &
	)	2015-CP-4007468
	)	
Claimant/Respondent/	)	
Appellant,	)	
	)	
vs.	)	SC STATE ACCIDENT FUND'S/
	)	SC ATTORNEY GENERAL'S BRIEF
SC Office of Attorney General,	)	
	)	
	)	
Employer,	)	
	)	
and	)	
	)	
South Carolina State Accident Fund,	)	
	)	
	)	
Carrier,	)	
	)	
	)	
Defendants/Appellants,	)	
Respondents.	)	

STATEMENT OF THE CASE

The Claimant, Theodore Polansky, suffered from two separate work related injuries in 1999 and 2000. These claims were admitted for the Claimant's back, left knee (resulting in RSD/Complex Regional Pain Syndrome), and psychological injury. Through March of 2011, the Claimant was paid 500 weeks of temporary total disability benefits pursuant to §42-9-10. The Claimant subsequently filed a Form 50 hearing request that was ultimately heard at proceedings before the single Commissioner on March 6, 2015. Since 2002, the Claimant has been paid weekly benefits at the maximum compensation rate for the year of his second/subsequent injury or \$507.34, which ceased approximately four years ago, after payment of 500 weeks of benefits were made.

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After the Claimant's second admitted injury in 2000, he was taking the prescription drug Seroquel as part of his treatment for his admitted psychological injury, by aggravation of numerous pre-existing psychological conditions. In February of 2002, the Claimant had to be hospitalized, purportedly due to a drug-drug interaction between the prescription drug Seroquel, and some other prescription medication the Claimant was taking at that time.

Subsequent to the March 6, 2015 hearing, in a June 1, 2015 Order, the Claimant was awarded life time indemnity benefits under S.C. Code Ann. §42-9-10 subsection (C) for an alleged physical brain injury. Among other things in dispute at the March 6, 2015 hearing were: a) Whether or not the Claimant had suffered permanent physical brain injury entitling him to life time indemnity benefits; b) Even if the Claimant had otherwise suffered a permanent physical brain injury, if such injury rose to the level of physical brain injury for permanent life time indemnity benefits as envisioned by the General Assembly in promulgating S.C. Code Ann. §42-9-10, and related case law from the S.C. Supreme Court; c) Even if otherwise compensable, if such benefits of lifetime indemnity proceeds would be barred by the equitable doctrine of *laches*, due to the ten years' long intervening delay in requesting such benefits after the date of the alleged brain injury, resulting in material prejudice to these Defendants; and d) Certain procedural issues as to the admission of the reports of Dr. Avie Rainwater into evidence and the setting of the hearing on a Form 50 hearing request made approximately three years prior to the date of the proceedings March 2015 proceedings in this matter. In addition to these issues, the Claimant requested that the single Commissioner raise the compensation rate of the Claimant above the maximum compensation rate for his 2000 date of injury, to reflect what his earnings *might* be today, and at a bare minimum, to the maximum compensation rate for 2015, or \$766.05 per week or higher.

The single Commissioner ultimately overruled any objection by the Defendants to the reports of Dr. Avie Rainwater, and as to the procedural flaw of holding the hearing on a Form 50 Hearing Request/Complaint originally filed requesting a hearing several years prior. The single Commissioner also ruled that the Claimant has indeed suffered a physical brain injury in this matter, which entitled him to life time benefits, and which was not barred by the equitable doctrine of *laches*, nor for any other reason. The hearing Commissioner denied the request for a higher compensation rate above that of the maximum compensation rate for the Claimant's date of injury.

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

ISSUES PRESENTED IN THE DEFENDANT'S APPEAL

1. Did the Appellate Panel err affirming the overruling of the Defendants objection to the include the updated medical reports of Dr. Avie Rainwater, and referring to Dr. Rainwater as "an authorized treating physician", when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law, and/or an abuse of discretion?
2. Did the Appellate Panel affirming the ruling, 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 unsupported by the evidence in this matter and/or contrary to South Carolina law?

3. Did the Appellate Panel err in affirming the ruling, that the Defendants should have been on notice of a physical brain injury – related to these accidents and subsequent treatments prefaced upon references made to the record in Findings of Fact No's 10-16, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
4. Did the Appellate Panel err in affirming the ruling, 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 unsupported by the evidence in this matter and/or contrary to South Carolina law?
5. Did the Appellate Panel err affirming the ruling, 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, and per the testimony of Dr. Forsthoefel, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?.
6. Did the Appellate Panel err in affirming the ruling, that the Claimant's request for benefits for a permanent physical brain injury, was not barred under the equitable doctrine of *laches*, when failing to do so, was unsupported by the evidence in this matter and/or contrary to South Carolina law?
7. Did the Appellate Panel err in affirming the ruling that Dr. Rainwater's opinion was not pivotal or necessary to the determination of permanent physical brain damage, its severity, its medical causation and relation to the 1999 and 2000 date of accident, and resulting treatment therefrom, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
8. Did the single Commissioner err affirming the ruling, that the Claimant is entitled to "lifetime [indemnity] benefits," when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
9. Did the Appellate Panel err affirming the ruling 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 life time medical and indemnity benefits, for permanent and total disability, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?

10. Did Appellate Panel err affirming the ruling that the Claimant is entitled to life time medical care and indemnity benefits in conjunction with an awarded permanent physical brain injury, and resulting permanent total disability, when such a finding was unsupported by the evidence in this matter and/or contrary to South Carolina law?
11. Did the Appellate Panel err affirming the ruling that the original trial hearing could go forward and was not prefaced or predicated on improper substantive or procedural due process, nor was otherwise violate of the substantive 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 – this was originally appealed by these Defendants/Appellants from the single Commissioner Order to the full Commission's Appellate Panel Order.
12. Did the Appellate Panel err in affirming the ruling that the original proceedings before the single Commissioner were able to go forward and were 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. This was also originally raised as an appellate ground by these Defendants from the Order of the single Commissioner to the Appellate Panel of the Full Commission).

ISSUES PRESENTED IN THE CLAIMANT'S CROSS APPEAL

1. The Commission 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 S.C. Code Section 42-9-10 and decisions of the Supreme Court and Court of Appeals under those sections.
2. The Commission erred as a matter of law by failing to increase the compensation rate based on the decisions of the S.C. Supreme Court and Court of Appeals under the exceptional circumstances paragraph of Section 9-1-40.

3. The Commission erred as a matter of law by failing to increase the compensation rate to fairly compensate 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 Commission 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 statutes and Court Rules.

ARGUMENT

Did the single Commissioner err in overruling the Defendants objection to the inclusion of the updated medical reports of Dr. Avie Rainwater; in holding that Dr. Rainwater as "an authorized treating physician," and concluding that Dr. Rainwater's medical opinions were not pivotal or necessary to the single Commissioner's determination of permanent physical brain damage? (Defendants' Appellate Grounds No. "1," "7," "11," and "12.")

The record of the parties and APA submissions include medical reports spanning over 15 years due to the initial date of injury in this matter (1999), and the date of the proceedings which give rise to this appeal, in March of 2015. (See Generally the APA submission No. 4 of the Claimant at pp. 20-30, of Dr. A. Rainwater from October 10, 2001 to July 24, 2014). Defendants raised objection at the hearing before Commissioner Barden as to the inclusion of the updated records of Dr. Rainwater from 2011 forward, and specifically APA p. 20-23, with updated reports and opinions of the Claimant's condition pursuant to the medical reasoning of Dr. Rainwater.

The basis for the objection to the updated medical reports of Dr. Rainwater into the record, are because Dr. Rainwater, and the Defendant Carrier in this matter, are adverse litigants

in a contested legal matter between the carrier and Dr. Rainwater as litigants to separate civil legal dispute which did result in the filing of legal suits in the Court of Common Pleas. (See Defendants Exhibit 44, a copy of certain pleadings filed between Dr. Avie Rainwater and the S.C. State Accident Fund). On this point, the single Commissioner held, and the full Commission affirmed, that, "the Defendants alleged as the basis for the objection that there was some type of conflict as to his latest report because there existed a dispute between the Defendant State Accident Fund and Dr. Rainwater over the payment for his services in other cases unrelated to this one. I specifically note from the Record not only was Dr. Rainwater involved in this case beginning in 2001 but that his evaluation and testing of which the Defendants complain was in fact conducted on March 22, 2011. Whereas the earliest pleading that was filed in that matter concerning the dispute between the Fund and Dr. Rainwater was filed on October 10, 2011. It would be patently unfair to the Claimant to disregard this authorized treating medical provider's opinion particularly where there is no evidence of any bias or prejudice or that any payments due to Dr. Rainwater were at issue in this case."

First, the Defendants refute the assertion by the Commission that Dr. Rainwater is the authorized treating physician in this matter. The first evaluation of the Claimant by Dr. Rainwater was in October of 2001. The only purpose for this evaluation was as referral by the treating pain management physician to Dr. Rainwater for his determination if the Claimant was, psychologically, an appropriate candidate for a spinal cord stimulator. The Defendants have no objection to this prior report. (Claimant's APA 4 at pp. 25-30). The next report was in March 2011, starting with the opening line that the Claimant is a 53 year male "kindly referred by his attorney..." (Claimant's APA 4 at p. 21). This sequence of evaluations does not make Dr. Rainwater an authorized treating physician in this matter. If anything, he was a onetime

evaluator for the limited purpose of determining if a spinal cord stimulator was appropriate back in 2001, and subsequently, upon referral by his own attorney in 2011, would have been considered an independent medical evaluator. Of note, he never truly really treated the Claimant.

Furthermore, Defendants contend that the objection to the updated records should have been sustained. Per the objection, and as substantiated by Exhibit 44, the Defendants in this matter, and Dr. Rainwater are adverse parties in a law suit on another matter. Defendants assert this would *per se* cause Dr. Rainwater's opinion to be tainted as to the Defendants in this matter. To presume that one person or entity would be in pitched litigation with, or considering filing legal action against, another person or entity, but would similarly be fair and unbiased in rendering simultaneous opinions about that adverse person or entity in other matters strains credulity. By counter example, Defendants contend that no Judge or Commissioner would purport to be able to rule fairly and objectively in a law suit between two parties, if that Judge or Commissioner was in being sued by or contemplating suing one of the parties to the action before him or her. An attorney who did not request that the Judge or Commissioner recuse themselves under these circumstances would have likely breached their fiduciary duty protect the interests of their client. The appearance of a conflict is so apparent in such an example that the Defendants believe it would warrant such recusal. Similarly, it should have warranted in this same situation, the sustaining of the objection, to exclude the updated records of Dr. Rainwater from the record.

While these Defendants would concede it is certainly *possible* that a Judge, Doctor, or Commissioner may be able to be sue, or be sued by, another for in excess of \$75,000.00 (See APA at p. 859), and still objectively make determinations that materially impact or affect that

person in another matter, but it is not the most likely outcome. To simply give Dr. Rainwater's professional ethics 'the benefits of the doubt' is to alternatively give the detriment of the issues to the Defendants – on an issue that in balance, is more likely than not, one where the average person would not be able to be fair and objective, hence the appearance of conflict in the first instance.

The Commission also indicated that because the date of the civil Complaint of Dr. Rainwater against the Defendant Carrier in this matter was in October of 2011, and the date of the report of Dr. Rainwater objected to by these Defendant was in March of 2011, the lawsuit was not material to any prejudice Dr. Rainwater may have had at that time, March 2011. Nevertheless, even the exhibits to the law suit of Dr. Rainwater, are for allegedly breached contracts in 2005 and forward.

The Commission also indicated on this point in finding numbered "23" and "24" that: 23. [...Notwithstanding any dispute between Dr. Rainwater and the carrier, I find the opinions of Dr. Forsthoefel to be the most compelling of all the evidence. (See Defendants' APA #44; Claimant's APA #1, page 7).

24. Dr. Rainwater's opinion is not pivotal or necessary in this case, and I can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

However, Defendants contend that Dr. Forsthoefel actually relied on the reports and testing results of Dr. Rainwater in coming to his opinion that the Claimant's cognitive decline was purportedly related to the alleged 2002 drug-drug interaction, and not to the Claimant's own, very significant pre-existing depression, obsessive compulsive disorder, bi-polar disorder and schizoaffective disorder, or some other degenerative disorder – such as Alzheimer's unrelated to

any drug-drug interaction of the Claimant in 2002. (See Hearing Transcript at p. 28 line 24 – p. 29 line 9) (Also references to Dr. Forsthoefel's review and reliance on Dr. A. Rainwaters records at APA 1 p. 3 and APA 1 p. 7). One of the difficulties in this matter from the Defendants standpoint is fettering out the difference between the Claimant's ongoing pre-existing psychological conditions, and the alleged brain injury condition. Dr. Forshoefel points out in his testimony that he believes the fact that it is related to a brain injury is validated "with his [Dr. Rainwater's] testing..." (Hearing Transcript at p. 30). The Defendants assert that Dr. Rainwaters testing in 2011 was used by Dr. Forsthoefel, and perhaps others, to substantiate the medical opinion that the claimant had a permanent physical brain injury – allegedly separate and apart from – his ongoing pre-existing mental and psychological conditions. The Defendant contend it was reversible error to permit the updated 2011 opinions of Dr. Rainwater into the record, and that such opinions did affect the weight of the evidence necessary to argue the Claimant suffered and suffers from a permanent physical brain injury.

Of note, these Defendants further objected to the inclusion of the Dr. Rainwater testing because 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, where the Claimant has failed to submit to the neuropsychological testing and evaluation agreed up in the prior Consent Order in this claim. (See Generally Exhibits Tabs 36, 39 and 40 of the Defendants). This also should have been an additional grounds for sustaining the objection to the 2011 report of Dr. Avie Rainwater.

Did the Commission err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered physical brain damage in relation

to his two work related injuries in 1999 and 2000, or related treatment, (Barden Order, Finding of Fact No. 17, at p. 41); and in finding that such brain injury was among "those 'serious' and 'severe' cases contemplated by *Crisp* and *Sparks* [Supreme Court Decisions]" thereby entitling the Claimant to life time indemnity benefits (Defendants' Appellate Grounds No. "2," "4," "5," and "8-10.")

First and foremost, these Defendants contend that the Claimant's alleged brain injury is not one that rises to the level of severity contemplated by the General Assembly in promulgating the potential benefits of life time awards pursuant to S.C. Code Ann. §42-9-10 (c), and as interpreted by the South Carolina Supreme Court in the cases of *Crisp v. SouthCo. Inc.* 401 S.C. 627, 738 S.E.2d 835 (2013) and *Sparks v. Palmetto Hardwood Inc.* 406 S.C. 124, 750 S.E.2d 61 (2013). The Claimant's contention is that he suffered a significant and severe, and ultimately permanent, physical brain injury from his drug-drug interaction and hospitalization in February of 2002, and he has had several psychologist and psychiatrist opine that is the case over a decade later. The fact of the matter is, however, that after the alleged injury to the brain from the drug/drug interaction had subsided - the presumed problematic medication was removed from the Claimant's system - and the Claimant went back to normal. Notably, prior to the 2002 drug/drug interaction, the Claimant had admittedly suffered from very significant and severe psychological conditions and mental disorders, which even as late as 2001, just months prior to the February 2002 hospitalization, had led him to be treated both as an inpatient and monitored outpatient in relation to psychological breaks, hallucination and hearing voices in relation to his significant pre-existing depression, bi-polar disorder, schizoaffective disorder, anxiety, oppressive compulsive disorder, memory loss/aphasia and other disorders. Again, prior to the 2002 accident, Dr. Forsthoefel notes that "dynamically it may be that Ted's earlier sexual abuse laid the groundwork for his future psychotic decompensation with stress." (Claimant's APA 1 at p. 10). Again prior to the 2002 hospitalization, Dr. Forsthoefel's March 3, 2011 letter references

that in October of 2001 even Dr. Rainwater documented "Ted's concentration as 'grossly disruptive, loses his train of thought readily. Tangential thinking.' And Ted's memory as 'impaired.'" (at *Id.*).

After the 2002 drug-drug interaction, the Claimant made a full recovery. (See Defendants APA 19, at p. 713 normal KEG testing). In a letter to Jeanne Beard in March of 2002, only weeks after the hospitalization, Dr. Forsthoefel references the fact that the Claimant's "Clinical and cognitive deterioration has fully remitted[.]" and "[h]is neuropsychological testing after this remission [from the Seroquel reaction] is entirely within normal limits as is hi EEG and brain scan." (Defendants APA 24 at p. 731). And indicating that the Claimant's read[ing] skills, comprehension, and memory retention have all returned to normal limits from its deterioration prior to the hospital use of Seroquel. "It is clear to me that this earlier two month deterioration, prior to the hospitalization, was caused by his own confusion due to problems with compliance and probably over medication." at *Id.*

In 2004, Dr. Julian Adam, MD, evaluated the psychological and neurological complaints of the Claimant. In addition to "probably malingering" Dr. Adams found that since the 2002 drug-drug interaction the Claimant had had "multiple tests on his head in the past such as MRI scans, EEGs, etc. All of them have been normal. I do not think they need repeating at the present time." (Defendants APA at p. 716).

At the hearing, Dr. Forsthoefel testified on behalf of the Claimant, and rather than point to a specific diagnostic test, or a specific battery of psychological tests, he indicated that the Claimant had very severe cognitive deficits prefaced on a mood disorder rating scale from the DSM. When asked about the fact that the Claimant also suffered from depression and other pre-existing mood disorders, which could also affect and/or contribute to the DSM's rating, and put

the Claimant at between a "30-40" the same DSM score Dr. Forsthoefel indicated he knew the 30-40 score was for brain injury because, "that's a clinical finding. Those are based upon my clinical background." (Hearing Transcript at p. 64). Dr. Forsthoefel's opinion was also that this physical brain injury in 2002 resulted in dementia, when asked his basis for this, he indicated "clinical findings, supported by the testing findings of Dr. Rainwater...so my reasoning is firmly grounded in other -- with other consultant's opinions as well." (Hearing Transcript at p. 61). However, Dr. Forsthoefel also indicated that the Claimant's cognitive decline took place over many years and began before the 2002 drug-drug interaction. Attorney Leventis, "Is that -- you say a pre-existing cognitive decline. Do you mean prior to the 2002 drug-drug interaction?" Dr. Forsthoefel, "Right, yeah." (Hearing Transcript at p. 61, lines 22-24).

Dr. Forsthoefel also conceded that the Claimant "had a lot of short term memor[y]" and functional problems prior to 2002. (Hearing Transcript at p. 69 lines 6-10). When pressed again on page 69 and 70 of the Hearing Transcript about how Dr. Forsthoefel could fetter out the pre- and post-2002 disability and cognitive functioning deficits, he continually indicated "those are clinical findings." Defendants contend that the greater weight of the evidence does not support the findings of the Commission that the Claimant's dementia and diagnosis of degenerating brain function, which was definitively diagnosed nine years after the 2002 drug interaction, are sufficient to support a finding of permanent physical brain injury -- causally relating back to the original 1999 and 2000 injuries. Moreover, even if otherwise supported, Defendants further assert that such a brain injury, if compensable, is of such severity as to rise to the level of entitling the Claimant to a life time indemnity award under S.C. Code Ann. §42-9-10(c). Therefore, the findings and conclusions of the Commission on these issues should be reversed.

Did the Commission err in finding that the Defendants should have been on notice of a physical brain injury -- related to these accidents and subsequent

treatments prefaced upon references made to the record in Findings of Fact No's 10-16? Did the single Commissioner err in failing to find that the Claimant's request for benefits for a permanent physical brain injury, was barred under the equitable doctrine of *laches*. (Defendants' Appellate Ground No. "3" and "6").

Defendants assert that this claim for benefits should be barred under the equitable doctrine of *laches*. Defendants respectfully submit that these rulings by the Commission misapprehended the appropriate application of the equitable doctrine of *laches* to this claim. "*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). Whether a claim is barred by *laches* is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute *laches*. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E. (2d) 357 (Ct. App. 1985). In sum, to prove *laches*, a party must show delay that was unreasonable, that resulted in prejudice to that parties' defense of the claim. *Hallums v. Hallums* 296 S.C. 195, 71 S.E.2d 525 (1988). Defendants contend all of the aspects of *laches* are met in this claim, and should bar the Claimant's request for benefits at this time.

In the Commission's findings as to *laches*, the Commission found that the Defendants had paid for treatment for a hospital visit "for the encephalopathy (brain injury) [parenthesis in the original Order] in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive function." The Order goes on for several paragraphs explaining treatment needs of the Claimant that were paid for by the Defendants, which purportedly meant they knew or should have known all of this treatment was for a compensable physical brain injury. Importantly, it should be pointed out that even

according to Mr. Polansky's own testifying medical expert at the hearing, his treatment regimen stayed the same before and after the 2002 hospitalization, and not even Dr. Forsthoefel himself was aware when the exact same treatment – which had been for mood disorders – apparently became treatment for a permanent and severe physical brain injury.

Furthermore, despite the Commission's findings that the Defendants were on notice of the brain injury, and apparently were knowingly providing treatment for such since sometime after 2002, the Claimant himself only became aware of his brain injury approximately 2009 and filed for a determination of the compensability of such in 2011 as soon as Dr. Forsthoefel and Dr. Rainwater became aware and opined about the physical brain injury. Instead the Commission found that the Defendants knowingly paid for all of the 'brain injury' related treatment from 2002-2011. If true, this showed great prescience on the part of Defendants who apparently paid for brain injury related treatment for the Claimant prior to the knowledge of such brain injury by the Claimant or his own doctors. Notably, the Claimant suffered from very significant pre-existing mood related disorders, and had been treated in 2001 both in patient and out patient for similar psychological breaks and dysfunction, including but not limited to hearing voices and hallucinations. References in the record to dementia, which Dr. Forsthoefel later attributed to 2002 hospitalization in 2011.

In conjunction with the arguments as to the equitable defense of *laches*, argued herein below, Defendants assert the Commission's ruling that they were on notice of the brain injury claim as outlined in her Order findings, was in error. The Commission held in part that the Defendants were on notice of the Claimant's cognitive decline and increasing mental issues since the 2002 drug-drug interaction. The Commission also pointed out that the Defendant has been providing payment for treatment for the Claimant's physical brain injury her Order for several

years, and that medical records show the Claimant was suffering from significant memory complaints after the 2002 accident. (See Generally, Findings of Fact Numbered 10-16). Notably, the Claimant had significant memory complaints even before the 2002 drug-drug interaction. In 2001 his memory was diagnosed as "impaired" and Mr. Polansky had to "keep lists" of things that were important to him. (APA 4 at p. 28). Mr. Polansky, prior to 2002, already had issues with remembering which medications to take, and which medication not to take and when to take them, these pre-existing memory deficits are admittedly what lead to the drug-drug interaction that put him in the hospital in 2002.

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

Attorney Leventis: "Okay. As far as – were you still treating him medication-wise, even though you changed the Seroquel, for the same symptoms after 2002 that you were treating him for before 2002?" Dr. Forsthoefel "Yes" (Hearing Transcript at p. 76 lines 19-23). This makes it very difficult for the Defendants to realize or have realized, that apparently the same medications and treatment regimen were being prescribed, but at some point in time, it was not longer for the very significant mood and psychological disorders of the Claimant, but rather for his 'permanent physical brain injury' instead.

When Dr. Forsthoefel was asked directly how a person would know which the Claimant was being treated for (a brain injury or his mood disorders) since the treatment was the same both before and after 2002 – save that Seroquel was taken away – even Dr. Forsthoefel seemed

unclear. By attorney Leventis, "For me as a layperson, would there be any way to know if your treating him [before or after 2002] specifically for a physical brain injury versus mood disorders you were already providing similar or the same medication for?" (Hearing Transcript at p. 76 line 24 - p. 77 line 3). Dr. Forsthoefel, "Really I wasn't really - I wasn't really aware...[] But going back to your question - - I'm wondering myself." (Hearing Transcript at p. 77 lines 4, 18 - 19).

This puts a Defendant Employer/Carrier in a rather precarious and somewhat impossible situation. The Claimant was treating for mood disorder, and chronic pain and problems both before and after his February 2002 hospitalization. The treatment the Defendants were providing was the same treatment regimen the entire time (save the exclusion of Seroquel). Apparently, even the treating physicians were not clear at what point such treatment changed from being for the Claimant's mood disorder, and apparently became for treatment of Mr. Polansky's brain injury instead of - or in addition to - treatment for his mood disorder.

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

If indeed the Claimant had ongoing cognitive decline – purportedly related to his alleged brain injury in 2002, why did not choose to bring or allege it prior to 2011. 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 never raised this issues 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. If the Claimant was in need of treatment for his brain, he could have similarly filed a Form 40 over a decade ago, or a Form 50 on the merits of the alleged brain injury and its compensability back at that time.

Further, this unreasonable delay took place while the Claimant clearly had the ability and the opportunity to act sooner in asserting his rights, as noted the Claimant filed his own Form 40

hearing request for expedited consideration of medical treatment on other issues in March of 2011, for example, and was represented by legal counsel. Lastly, 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 other third party causes of action under Title 15 of the S.C. Code Ann. – See Gen. §15-3-350), or providers who may have been at fault for the drug-drug interaction which took place.

Furthermore, this time period is even beyond the statute of repose for the Defendants to file for indemnification, reimbursement or any other cause of action against the actual at fault medical provider, physician, pharmacist and/or drug manufacturer, pharmacist, or party(s) (See Gen. §15-3-454). Of note, in his March 2011 letter to opposing counsel, Dr. Forsthoefel indicated “having check with the research division of Astra/Zeneca, I learned there has been no record of Seroquel alone causing encephalopathy.” (Claimant’s APA at p. 9). 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, and the Claimant’s failure to previously raise this issue or prosecute this claim, may necessarily have damaged or foreclosed these Defendants’ recovery rights this matter to the SC Second Injury Fund. Even if otherwise compensable, due to the Claimant’s 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. The Claimant actually received an evaluation in relation to his alleged issues/injury 2004 with Dr. Julian Adams. However, Dr. Adams found that all of the Claimant's objective diagnostic testing at that time was essentially normal and did not call for updated testing at that time.

Defendants assert that the Commission erred in finding that the Defendants were effectively estopped from raising the Defense of *laches*, and in actuality, pursuant to the above outlined arguments, the Claimant, due to his unreasonable delay in pursuing the alleged brain injury, which has resulted in material prejudice to the Defendants, should be barred from a finding of compensability at this time.

1. Claimant contends in grounds "1" and "2" of cross appeal that the Commission erred in failing to raise the compensation rate of the Claimant above the maximum compensation rate for the date of his injury, pursuant to: S.C. Code Ann. §42-1-40, §42-9-10, opinions of the Supreme Court, and because the Claimant was a 'high wage earner' at the time of his accident, earning an average weekly wage, above that of the maximum compensation rate at that time – creating an exceptional circumstance under §42-1-40?
2. Claimant contends in ground "3" of his cross appeal that the Commission erred in failing to hold and conclude that S.C. Code Ann. §42-9-10 actually stands for the premise that the compensation rate for high wage earners can, and should, go up every year with the maximum compensation rate for each subsequent year?
3. Claimant contends in ground number "4" that the Commission erred in failing to hold and conclude that a Circuit Court opinion submitted by the Claimant at the hearing had binding precedential effect on the Commission?

ARGUMENT

1. Claimant contends in grounds "1" and "2" of his cross appeal that the Commission erred in failing to raise the compensation rate of the Claimant above the maximum compensation rate for the date of his injury, pursuant to: S.C. Code Ann. §42-1-40, §42-9-10, opinions of the Supreme Court, and because the

Claimant was a 'high wage earner' at the time of his accident, earning an average weekly wage, above that of the maximum compensation rate at that time -- creating an exceptional circumstance under §42-1-40?

The question of whether or not to raise the compensation rate in this claim is a two-fold matter. First, whether or not an exceptional circumstance existed under S.C. Code Ann. §42-1-40 which would qualify for the purposes of deviating from the normal method of calculating the compensation rate; Secondly, whether or not the Commission should find that a higher compensation rate, than the maximum prescribed for the date of injury, should be utilized. (Argued in section "B" herein below).

Defendants concede that the South Carolina Supreme Court and Court of Appeals have found several reasons for deviating from the normal method prescribed under §42-1-40 for calculating the average weekly wage and compensation rate. However, none of those previous issues exist in the present case. Dual employment, for example, is one reason that has been found for raising a claimant's average weekly wage and compensation rate. (See Generally S.C. Code of Regs. §67-1603). However, the 'exceptional' circumstances aspect of §42-1-40 has only been addressed a handful of times by the S.C. Supreme Court and Court of appeals. (See §42-1-40 noting that: "When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."). The Claimant's request and reasoning for adjusting the AWW/C.R. would not prevail under the facts of this case in comparison to any of the cases where the courts have chosen to grant such extraordinary relief.

Other than for dual employment purposes -- which were not present here -- the four primary cases in which South Carolina court opinions have interpreted this section of §42-1-40

are: *Elliott v. SCDOT*, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004); *Sellers v. Pinedale Residential Center*, 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002); *Forrest v. A.S. Price Mechanical*, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007); and *Roberts v. McNair Law Firm*, 366 S.C. 50, 619 S.E.2d 453 (Ct. App. 2005). All of these four cases are readily distinguishable from Mr. Polansky claim. Mr. Polansky's wages at the time of the accident/injury in 2000 already provided that he would be at the maximum compensation rate for that year.

In the two particular cases in which the court affirmed or agreed that exceptional circumstances existed for revising the AWW upwards, *Sellers* and *Forrest*, the two young men who were injured were most definitely uniquely industrious as compared to the population as a whole. One, *Sellers*, was a full time high school student who was working three part time jobs in addition to being a full time student. The other, *Forrest*, was a young man who was continuously working at least two full time jobs, and sometimes as many as three jobs. However, in neither circumstance did the court find that the compensation rate would ever go above the maximum compensation rate for the year of injury.

Claimant Elliott was employed by the SCDOT as a "Trade Specialist II, earning an annual salary of \$19,253." After she obtained her CDL, she earned a five percent salary increase that was effective September 17, 2000. On September 28, 2000, Elliott was injured in a work-related accident. Elliott filed for workers' compensation benefits, arguing her five percent pay increase constituted an "exceptional reason" for departing from the standard method used to calculate the compensation rate. The 'standard calculation' having been upon her fifty-two weeks of her earnings immediately preceding the date of injury, as provided for in §42-1-40 above. The Court of Appeals reasoned that at the time of her accident, Elliott had *already* earned her pay increase by voluntarily pursuing special certification and licensing. The additional pay

was a merit-based reward given in recognition of her efforts to obtain a CDL license, and was not merely a standard cost-of-living increase or step increase based on longevity of service. In addition, the raise was *not speculative*, but was an established, guaranteed amount already in place at the time of the accident. However, in *Elliott* the Court did not find that the compensation rate would ever go above the maximum compensation rate for the year of injury.

The *Roberts* court decision is also not helpful to the Claimant's request to depart from the normal method of computing AWW/CR under §42-1-40. Claimant Roberts asserted an increase to her AWW based on post D.O.I. wage increases after returning to work, which Roberts felt demonstrated her "future" earning capacity. In rejecting Roberts' arguments, the court noted:

In *Sellers*, the claimant was a sixteen-year-old high school student working part-time when he sustained a spinal cord injury that rendered him a paraplegic. His compensation rate from his part-time employment was less than \$100... "

The *Roberts* court went on to indicate:

"As the commission found '[b]ut for the severe injury, [Sellers] clearly demonstrated the interest, aptitude, and ability to become an electrician.' [Sellers] stated his goal was to become a master electrician. In this case, Roberts was fully employed and earned a full-time salary at the time of her accident. The extraordinary circumstances present in *Sellers* are not present in this case." (citing *Sellers*). We likewise conclude the extraordinary circumstances found in *Elliott* do not apply here. In *Elliott*, the claimant received a pre-injury salary increase. Roberts' merit increases were post-injury.

(internal citations omitted) (*Roberts* at 54, 455-6)

None of the previously indicated circumstances from the Court of Appeals, nor the Supreme Court, for deviating from the prescribed method for calculation of the average weekly wage and compensation rates under S.C. Code Ann. §42-9-10 and §42-1-40 are present in the instant case. Essentially, there is not any legal or factual basis to resort to another method of calculation of benefits in Mr. Polansky's claim. The only basis for changing the AWW/CR cited by the Claimant is that: (A) he was a high wage earner at the time of his injury; and (B) That maximum compensation rate has repeatedly gone up in South Carolina since the date of his injury in 2000. Notably, the same could be said for any wage earner whose average weekly wage is above amount necessary for him or her to achieve the maximum compensation rate in this state for the date of the injury. Such a determination in these circumstances would truly emasculate the premise of an "exceptional" reason for using an alternative method of calculation. The General Assembly clearly envisioned that some wage earners AWW would take them above the maximum compensation rate for a given year, and therefore it prescribed a maximum compensation in the first place. Moreover, the maximum compensation rate in this state has risen every year for the last 35 years, and again, this does not an exceptional circumstance make.

2. Claimant contends in ground "3" of his appeal that the Commission erred in failing to hold and conclude that S.C. Code Ann. §42-9-10 actually stands for the premise that the compensation rate for high wage earners can, and should, go up every year with the maximum compensation rate for each subsequent year?

No prior published opinion in South Carolina has found the average weekly wage and compensation rate should, or could, actually be raised above maximum compensation rate for the year of the injury in which the accident happened. Despite Claimant's earlier appellate brief citing to several cases about wage calculations reaching into the future, and referencing 'future lost' earnings, to glean a modification of wages when "exceptional" circumstances are present under S.C. Code Ann. §42-1-40, no precedential court opinions of the Supreme Court of the

Court of Appeals of this state has ever held or affirmed a finding to go above the maximum compensation rate. The maximum compensation rate in this state has gone up every year for the past 35 years. (See Gen. www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx).

Generally speaking, the rights of the parties are fixed on the date of accident. (See *Sellers v. Daniel Construction Co.*, 285 S.C. 484, 330 S.E.2d 305 (S.C. 1985)). Defendants contend that the South Carolina Workers' Compensation Act is clear in setting a maximum average weekly wage for the date of injury, no matter how many weeks permanent or temporary indemnity benefits may be payable. This is delineated not only by the plan language of the statutes themselves, but also by additional statutes and regulations which provide for and prescribed lump sum awards and related discount rates for present day payments of future weeks of benefits. The changes to the Act in 1983 to §42-9-301 actually made it easier, and less stringent, for an employee to garner a lump sum award of future weekly benefits. (As Reported in *Hooks v. Southern Bell Telephone and Telegraph* 291 S.C. 41, 351 S.E.2d 900 (1986)).

If the Act actually purported to, or intended to, create a circumstance in which the compensation rate (for high wage earners) was subject to change every year – due to the fact that the maximum compensation rate for high wage earners went up every year – the purpose of lump sum awards, payments and settlement could only work an unintended harm to injured workers with AWW's that would entitle them to compensation rates above the maximum compensation rate. Moreover, the parties would likely have to come back to the Commission every year for determination of the 'new' compensation rate in cases where the AWW had exceed the maximum compensation rate for the year of the accident. A Commission finding of any compensation rate of the maximum compensation rate for the year of injury would simply have

to say "for now." Again, §42-17-10, as to agreements for compensation payments, would be nothing but damaging to higher wage earners, and therefore a ridiculous idea Claimant to even consider. Any lifetime indemnity case, or death or permanent disability claim extending over fifty two weeks, with maximum compensation rate benefits would be need to come back to the Commission annually for a consideration of their newly revised compensation rate for the claim.

Despite the arguments of the Respondents on this issue, and for argument sake taking the Claimant's interpretation of the meaning of S.C. Code Ann. §42-1-40, §42-1-50 and §42-9-10 at face value, the result would be so ridiculous that it could not have been what the legislature intended. South Carolina Courts have previously held that, no matter "how clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature." *Hamm v. South Carolina Pub. Serv. Comm'n*, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985). Defendant contend the language of the statutes do not clearly read as the Claimant has interpreted them to mean, nevertheless, even still such an interpretation has never been adopted by the Supreme Court or the Court of Appeals of this state, and should similarly be rejected by this Commission.

3. Claimant contends in ground number "4" that the Commission erred in failing to hold and conclude that a Circuit Court opinion submitted by the Claimant at the hearing had binding precedential effect on the Commission?

Defendants contend this is a clear cut issue, and that by definition, the rulings of Circuit Court(s) of this state simply are not reported opinions of binding precedential value. The opinions of the Circuit Court literally – in the actual meaning of the word – are NOT reported opinions. Unlike the opinions of the South Carolina Supreme Court and the Court of Appeals, unless specifically designated at "unpolished" with a UP opinion number, Circuit Court opinions have no reporter. To go back through and search the Circuit Court opinions of this state would

require, an attorney, or a Commissioner, or Judge to go look up, find and review the actual opinions from the Court house of Common Pleas and General Sessions across all the Circuits of this state. Such opinions are not precedential in nature, and are not collected and published. Rule 268 of the S.C. Appellate Court Rules does not even give a basis or method of citation to Circuit Court opinions – again because they are not precedential in nature or binding legal authorities. Moreover, published opinions are defined by an apposite in the Appellate Court Rules as “orders of the Supreme Court or Court of Appeals” so long as they are not ‘unpublished.’ (See Gen. SCACR 268(d)). Such Supreme Court and Court of Appeals opinions are published in both the Southeastern Reporter and the South Carolina Reporter. Again, Circuit Court opinion have no reporter.

Defendants assert this is a very primordial and fundamental legal concept. Despite Claimant’s contention to the contrary, the Circuit Court Order is not precedential, nor binding legal authority on the Commission – or any other court – and no authority for such is cited by the Claimant in his appellate brief to this affect. The concept of *stare decisis* for the purpose of later courts following the precedential opinion of earlier courts, requires and relies on the idea of the publishing of opinions of the higher courts of record. The Circuit Court is not one of those courts, and would create and untenable and unworkable frame work for determining the state of the law.

CONCLUSION

For the reasons outlined hereinabove, and as to the specific points outlined herein above, these Defendants request that the Order of the single Commissioner reversed, or modified as requested and remanded for additional proceedings in relation therewith. Additionally, these Defendants request that the prior Order be affirmed as to the determination of the average weekly wage and compensation rate of the Claimant.

Respectfully Submitted



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(803) 256-4645

Attorneys for the
Defendants/Appellants/Respondents
South Carolina Office of Attorney General
And South Carolina State Accident Fund

Columbia, South Carolina
May 12, 2016

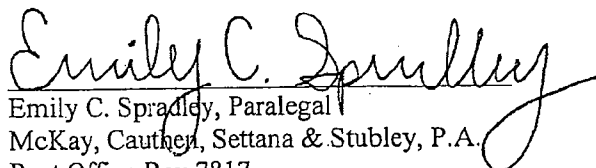
CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stublely, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants Brief 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 13 day of May, 2016.

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

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



Emily C. Spradley, Paralegal
McKay, Cauthen, Settana & Stublely, P.A.
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Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

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Matthew Robertson

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April 21, 2016

VIA EMAIL - mcbridej@rcgov.us
AND US MAIL
Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

and

VIA EMAIL - henleya@rcgov.us
AND FACSIMILE - 576-1785
Ms. Ann Henley
Docketing Clerk Non-Jury
Richland County

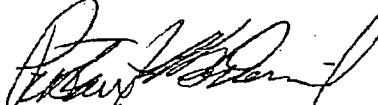
RE: Theodore P. Polansky v. SC Office of the Attorney General
C/A Nos: 2015-CP-40-07380 & 2015-CP-40-07468

Dear Ms. McBride and Ms. Henley:

Please find enclosed for filing with the Circuit Court the RETURN TO MOTION FOR STATUS CONFERENCE AND TO POSTPONE HEARING in the above-referenced matters, along with a Certificate of Service on all Counsel of Record. I would appreciate it if you would clock-in the additional copy and return it to me in the enclosed stamped, self-addressed envelope

Thank you for your assistance. I hope this is sufficient for filing this matter with the Court; however, if additional information is needed, please feel free to contact me at your convenience.

Sincerely yours,



Preston F. McDaniel

PFM/kth/abh
Enclosures

cc: Temus C. Miles, Jr., Esquire ✓
(Via email and US Mail - tmiles@mckayfirm.com)

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.

RETURN TO
MOTION FOR STATUS CONFERENCE
AND TO POSTPONE HEARING

By way of Reply to the Motion filed by the State Accident Fund as insurance carrier for the SC Office of the Attorney General, the employer of the injured worker, the Claimant/Appellant would respectfully submit to the Court as follows:

1. That the Movant is correct that a hearing was held before the Honorable L. Casey Manning on February 8, 2016 concerning Motions to Compel Payment of all temporary total disability benefits due under the Order of the Commission and more importantly to this Motion, concerning a Motion to Dismiss the Appeal of the Defendants/Appellants. As of the filing of this Motion and this Reply, no decision has been made. Judge Manning

was and is the Trial Judge before whom those issues are pending.

2. That in addition, the appeal and cross-appeal, pursuant to the request made by the injured worker SCRCB, under Rule 40(h), in December the Honorable Alison Lee as Administrative Judge granted priority status and in fact ordered that these matters to be heard as soon as possible. As a result, the appeals were scheduled for hearing before the Honorable L. Casey Manning on February 8th and following the Motions Hearings actually held that day they were set for hearing to be held on February 12th, Friday of that week.

3. That the Movant is correct in that Judge Manning that same week when it was found that the Commission Record was not at the Court, ordered that these two appeals be set before him for hearing of the appeals as soon as the Record was submitted to the Court by the SC Workers' Compensation Commission.

4. That therefore based upon the previous hearing held on the Motion to Dismiss and the other Motion for payment of the back due temporary total disability benefits upon which a decision on such Motions is pending (proposed orders have been requested and submitted and based on the further Order of the Honorable L. Casey Manning ordering that this matter be set before him for hearing of the appeals as soon as the Record from the SC Workers' Compensation Commission was submitted to the Court that Judge Manning is the Trial Judge in this matter.

5. That Rule 16(e), SCRCP, provides that the:

"Trial Judge may hold in informal conference before Trial to dispose of any remaining matters, including disposition of any pending Motions and consideration of settlement."

Thus the Judge that is appropriate to hold a status conference as requested by the Movant is the Honorable L. Casey Manning before whom are pending the Motions referred to in the Motion of the Appellants and before whom the appeals were to be held and ought to be held upon the submission of the Record from the SC Workers' Compensation Commission. Therefore the only Judge that has jurisdiction and the only Judge that is in fact the Trial Judge in this matter is the Honorable L. Casey Manning.

6. That the Claimant, the injured worker, who was awarded benefits by the Hearing Commissioner which was affirmed by the Full Commission only disagrees with the Motion in that it seeks to further delay hearing on this action and is inaccurate as to the amount of review that needs to be made in this matter. The Defendants presented only three (3) issues to the Full Commission for decision and therefore based on all undisputed case law precedents, they have waived any other issues being heard by the Court on appeal before this Honorable Court. The Claimant has previously and for months and months requested that this matter be set for priority status which was granted by this Honorable Court through the Honorable Judge Alison R. Lee back in December

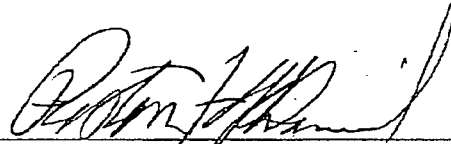
and the only reason this matter has not been held is because of the delinquency of the SC Workers' Compensation Commission in complying with the requirement of the Circuit Court Rules in provision of the Record to the Court so that the appeals may be heard. (SCRCP Rule 75 requires the Record to be filed within 30 days of the Notice of Appeal.)

Wherefore, the Claimant would therefore request no further delay be allowed in the hearing of this matter but joins in the request that a status conference be held before the Honorable L. Casey Manning within the next ten (10) days and will waive any further right to reply. At that status conference, the Claimant would join in the request that Judge Manning set this matter for hearing on the appeals and hereby agrees to abide by any decision made by Judge Manning as to when the appeals shall be heard.

The Claimant also joins in the request that all other hearings pending in this matter and various notices that have been received that are unclear as to their purpose and intent be cancelled and that the Honorable Alison R. Lee, Administrative Judge for the Fifth Judicial Circuit, enter an Order ordering this matter be set before Judge Manning at the first available

time within ten (10) days, either at Chambers or in Open Court
for a status conference.

Respectfully submitted,

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

Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Respondent/
Appellant

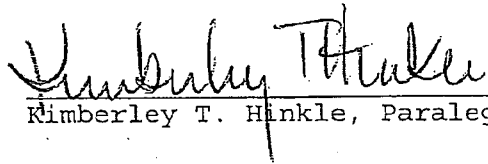
April 21, 2016

CERTIFICATE OF SERVICE

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

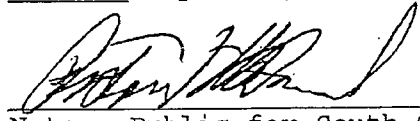
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the RETURN TO MOTION FOR STATUS CONFERENCE AND TO POSTPONE HEARING by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Temus C. Miles, Jr., Esquire
McKay Law firm
PO Box 7217
Columbia, South Carolina 29202-7217



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
01 day of April, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 10/08/18

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ATTORNEYS AND COUNSELORS AT LAW
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COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

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Matthew C. Robertson

Facsimile (803) 252-0709

May 11, 2016

VIA EMAIL cmanningj@sccourts.org & cmanninglc@sccourts.org
& US MAIL

The Honorable L. Casey Manning
Fifth Judicial Circuit
1701 Main Street, Room 214
Columbia, South Carolina 29202-0192

RE: Theodore P. Polansky v SC Office of the Attorney General
C/A Nos.: 2015-CP-40-07468 & 2015-CP-40-07380

Dear Judge Manning:

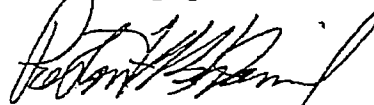
Pursuant to the instructions on the Notice of the Hearing on the Appeals in the above referenced matter, please find enclosed my Memorandum of Law in reference to the defendants Appeal.

I will be submitting our Brief on our single issue, cross appeal, on the applicable compensation rate tomorrow.

By copy of this letter I am forwarding a copy of my Brief to defense counsel.

I look forward to seeing you at the Hearing and a final resolution of my Motion to dismiss the defendants appeal, my Motion to mandate payment of the back due temporary total disability and a decision on the Appeals.

Sincerely yours,



Preston F. McDaniel

PFM/rmt

Cc: Temus C. Miles, Jr., Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	OF THE FIFTH JUDICIAL CIRCUIT
THEODORE P. POLANSKY,	)	
	)	
Employee,	)	Docket No: 2015-CP-40-07468
Respondent/Cross-Appellant,	)	&
	)	<u>2015-CP-40-07380</u>
v.	)	
	)	
SC OFFICE OF THE ATTORNEY	)	RESPONDENT'S BRIEF TO
GENERAL,	)	THE CIRCUIT COURT
	)	
Employer, and	)	
	)	
STATE ACCIDENT FUND,	)	
	)	
Carrier,	)	
Appellants/Cross-Respondents,	)	
	)	

ISSUES BEFORE THE COURT

The Appellants, the Defendants below, have appealed the same sixteen (16) exceptions that were appealed from the original Hearing Commissioner's Award of benefits to the injured worker, the Respondent in this Court. Those sixteen (16) exceptions were combined into three (3) arguments made before the Full Commission, who after review affirmed the Hearing Commissioner's Decision in total awarding benefits to the injured worker. No previous Brief has been filed by the Defendants although this matter has been repeatedly set and the due date for submission of Memorandums passed, and so the Respondent will file a Brief based on the three (3) issues that

were presented to the Full Commission for decision as set forth hereinafter.

STATEMENT OF THE CASE

From the first injury in 1999 and through Commissioner Barden's Order in 2015 and continuing at this time, the Defendants/Appellants (hereinafter "Defendants") have provided without question all treatment, evaluation and care for all problems related to his injuries specifically including: the brain; back; legs; RDS; sexual, urinary and bowel dysfunctions and psychological. Since 2002 when Mr. Polansky suffered a major encephalopathy, severe swelling of the brain, requiring hospitalization for 25 days, paid for by the Defendants, the Defendants have known, accepted, and paid for treatment, evaluation and care for that brain, "injury".

All of the authorized treating physicians and psychological professionals, Dr. Frank Forsthoefel, M.D., treating psychiatrist, (2001 to present¹), (APA pp. 42-181; 334); Dr. C. Jean Jonet, Ph.D., treating psychologist, (2004 to present), (APA pp. 341-607); and Dr. Ezra Riber, M.D., chronic pain specialist, (2001 to present), (APA pp. 182-340LLL), have all beginning in 2011 stated the opinion Mr. Polansky has severe permanent brain "damage" stemming from the 2002 brain "injury".²

¹ 2005 to 2009 Mr. Polansky was treated by Dr. Marturano, M.D. when Dr. Forsthoefel had retired from private practice. (APA, p. 683).

² Dr. Beasley has also been an authorized treating doctor for Mr. Polansky for sexual, bladder, and bowel dysfunctions since 2002.

In addition, Dr. Nicholas Lind, Ph.D. authorized to perform neuropsychological tests in 2008 (APA pp. 31-41) has also stated this opinion. Dr. Avie Rainwater, Ph.D. authorized (specifically in 2001) who performed the same identical neuropsychological testing in 2011 that he had performed in 2001 before the brain "injury" in 2002 stated this same opinion (APA pp. 20-30).

In addition to the specific authorized treatment in and after 2002 for and the numerous opinions and evaluations concerning and confirming "organic" brain problems,³ between 2004 and 2009⁴, in 2009 Claimant's Counsel in a letter to the State Accident Fund Attorney Mary Sowell, dated May 11, 2009 stated (quoting in pertinent part):

"Back in 2002 ..., Ted was hospitalized due to a reaction from a prescribed psychological prescription that resulted in a chemical encephalopathy of the brain. He was hospitalized and the doctors have said that he has suffered physical brain injury as a result of that chemical encephalopathy. I would appreciate it if you would let me know or if you could check with them and see if we are going to have any problems with Ted receiving lifetime disability benefits due to this physical BRAIN injury..." (APA, p. 699).

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

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

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

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

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

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

There was no reservation of any affirmative defenses or procedural defenses listed in the Agreement. A detailed chronological outline from 1999 to 2014 pertinent to this appeal is attached to this Brief.

ARGUMENTS

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

Evidence introduced for purposes of impeachment goes to the weight of the evidence not the admissibility of the evidence. In all workers' compensation proceedings, the Workers' Compensation Commission is the fact-finding body and our Courts will not disturb its findings if supported by reasonable inferences drawn

from the evidence. Compton v. Town of Ivey, 256 S.C. 35, 180 S.E.2d 645 (1971).

Before the physical brain injury (encephalopathy) in February of 2002, on October 10th and 15th of 2001, Dr. Avie Rainwater, Ph.D. performed neuropsychological testing on Mr. Polansky which was, "authorized" and paid for by the State Accident Fund as part of authorized treatment for Mr. Polansky. On March 22, 2011, Dr. Rainwater performed a re-evaluation performing the same identical neuropsychological testing on Mr. Polansky. (APA, pp. 21-30). On May 16, 2011, five (5) days after receiving the report of the authorized treating psychiatrist Dr. Frank Forsthoefel stating that the Claimant was totally and permanently disabled due to his cognitive dysfunction caused by his 2002 physical brain injury (encephalopathy), the Claimant filed a claim for total and permanent disability benefits for physical brain damage due to that brain injury. (Attachment to 5/16/11 Form 50 and APA, p. 8).

A. Admission of Report. Although knowing about Dr. Rainwater's opinion in 2011, in 2011, 2012, 2013, 2014 and 2015, the Defendants never took Dr. Rainwater's deposition. At the hearing, as a, and as the only basis, cited to exclude the report, over objection the Defendants were allowed to place into the Record pleadings concerning litigation between the State Accident Fund and Dr. Rainwater's group, totally unrelated to

this claim, and with the earliest pleading being filed on October 10, 2011 (seven (7) months after the retesting).

Besides the fact that the basis for the objection to these pleadings being admitted is that they are rank hearsay which do not fit under any of the exceptions for admissibility of documents, such as the Business Records Act, the only possible basis for their consideration as evidence would be as impeachment to establish bias which does not go to admissibility but instead goes to the weight that should be given the doctor's 2011 report; again assuming the pleadings should have been admitted. Trial Handbook S.C. Lawyers 5th Edition §25:7

"Impeachment By Proof of Bias ...". The purpose of any expert or medical evidence is to aid the Commission in coming to the correct conclusion and the Commission determines the weight and credit to be given to any expert testimony once admitted.

Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). Commissioner Barden properly admitted the 2011 report and as the fact-finder assigned it appropriate weight. Finally, the Respondent would ask the Commission to note that the Defendants did not cite any authority for the proposition that this written evidence, Dr. Rainwater's 2011 report, should not have been submitted into evidence, on any basis, nor even on the issue of its weight.

Also under this part of the argument, the Defendants argue that because there was litigation going on between Dr. Rainwater

and the State Accident Fund, or at least there was at some point in time in 2011 seven (7) months after the report, that this would skew Dr. Rainwater's opinion in this case. Outside of that assertion being outrageous, it is rank speculation and calls for an assumption and would make the Commission's decision the subject of speculation and innuendo. Again, this issue was first raised in August 2014, ten (10) days before a scheduled hearing⁵ and six (6) months before the hearing in February 2015. The Defendants had every right to take Dr. Rainwater's deposition since 2011 and also for the six (6) months before the hearing and did not do so and this argument is patently without merit.

Also if the Defendants resubmit their Brief to the Commission under this part of the argument, the Defendants allege that the Claimant refused to submit to neuropsychological testing which is a bold faced untruth. Since present Defense Counsel only became involved ten (10) days before this matter was reset pursuant to the Order of Commissioner Wilkerson which was issued based on Defendants' failure to have an agreed upon

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

(by Consent Agreement and Order) Independent Medical Examination performed, Counsel will not move for this improper argument to be stricken or for sanctions. As is set out in the Commission Record, an agreement and a draft Consent Agreement was entered into and submitted to Defense Counsel on April 16, 2013 agreeing to have the Claimant seen and evaluated by Dr. Richard Frierson at the USC School of Medicine Neurology Clinic which was finally signed and submitted on September 5, 2013 and ordered by Commissioner Taylor on November 7, 2013. That Consent Order specifically provided:

"Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson. . . ."

Exactly one (1) year after the Agreement and with no examination having been set, the Claimant moved for a hearing which was granted. Claimant's Counsel would beg the Court to read his letter to Defense Counsel found at Claimant's APA, pp. 732-733 and question current Counsel at oral argument on the raising of this argument if it is raised again.

B. The second basis for the argument is the Hearing Commissioner erred by referring to Dr. Rainwater as an authorized medical provider. The first and very simple answer to this argument is that the Defendants do not dispute that at one-point Dr. Rainwater was an authorized medical provider. Further, again this reference does not affect the admissibility but goes to the weight to be given. Also and very importantly

at page 7 and 8 of the Transcript, the Hearing Commissioner in admitting the contested report specifically noted as to when Dr. Rainwater was an authorized medical provider and noted:

"My response to that, based upon hearing the arguments of the parties, is that Dr. Rainwater, prior to any kind of dispute or claim or controversy between Dr. Rainwater and the Fund, Dr. Rainwater was, in fact, involved in this case, and I believe that in weighing the respected equities of the parties and the arguments, that it would be grossly unfair to the Claimant to have this expert or to be relying on this expert and then to be no longer able to use this expert. . . ." (Emphasis added).

C. Finally, in the final argument on this issue the Defendants really argue again as to the weight that the Commissioner gave to Dr. Rainwater's test results. As she stated in comparison to the other evidence and particularly the testimony, reports and evidence from Dr. Forsthoefel, the treating psychiatrist, from 2004 and continuing through the Present she gave the report little weight. The Defendants do not point out the testimony on p. 29 of Dr. Forsthoefel wherein he specifically states that the only effect the contested report had on his opinion was that Dr. Rainwater's retesting results in 2011 as compared to his 2001 testing results in reference to Dr. Forsthoefel's opinion were nothing more than,

"There were additional findings at that time consistent with my additional findings after the hospitalization in 2002 for the drug-drug encephalopathy, that my findings became increasingly obvious to me that there was something else going on in Ted's mind other than his psychiatric condition and what became evident

to me and to Dr. Rainwater as well, is that there was something organic, physical going on in his brain, and that is very well documented ..."
(Emphasis added).

Dr. Forsthoefel referred specifically to his findings stretching all the way from 2002 through 2011. Also his opinion that the brain injury in 2002 caused Mr. Polansky's organic physical brain damage, was first stated in a report dated March 3, 2011 before Dr. Rainwater's testing on March 22, 2011. (APA p. 9-10).

On p. 61, Dr. Forsthoefel in his testimony again states specifically that his opinion is based on his findings and his treatment of Mr. Polansky and that after review of and considering the findings of Dr. Lind, and the opinions by Dr. Adams and Dr. Carnes, in addition to Dr. Rainwater, he notes that these opinions are all consistent with his, "reasoning" which is, "firmly grounded" based on his treatment and, "also" these other opinions. (Tr., p. 61).

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

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

Outside of the fact that there is absolutely no contradictory medical opinion evidence or other evidence in the Record to the evidence that the Claimant sustained serious and

severe permanent physical brain damage, the assertion that Mr. Polansky's brain damage as was reviewed by the Hearing Commissioner and Commission, does not meet the standard of Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) quite frankly is beyond belief. The standard as set forth in Crisp and Sparks is simply and plainly that the physical brain damage as contemplated by those decisions and the Act is physical brain damage that is consonant with,

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

and that the brain damage is,

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

The uncontested medical and expert opinion evidence from all of Mr. Polansky's medical treatment doctors and providers is that Mr. Polansky is totally and permanently disabled from his physical brain damage and that his brain damage is severe and serious enough to constitute an obstacle and hindrance to employment: Opinion of Dr. Forsthoefel, authorized treating psychiatrist beginning in 2001 and presently (APA, pp. 2-3); Dr. Riber, authorized chronic pain specialist, 2001 to the present and continuing (APA, pp. 12-13); Dr. C. Jean Jonet, Ph.D., authorized treating psychologist since 2004 and continuing (APA, pp. 16-17). In addition, Dr. Nicholas Lind, Ph.D., authorized

clinical psychologist, found severe cognitive deficits in his evaluation and testing. (APA, pp. 31-41).

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

"Mr. Polansky is college educated yet he cannot write a check, cannot count change, cannot use tools or perform household chores or repairs. . . . He frequently becomes derailed while talking, requires re-direction and prompts. Sometimes he just stares off into space. He is enormously forgetful, takes notes and loses them. . . ."
(Tr., p. 18).

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

"He cannot read and understand the newspaper. While he can read the paper wherein it will take him a day to completely read one article in the paper, he then cannot tell you what he read and he has so much trouble actually reading the article word for word, that he has to have somebody read an article that would take person, such as Ms. DuBose, a few minutes to read. However, he then does not understand what she has read to him. He can perform minimal, simple, repetitive or pattern tasks such as driving from one specific place to another, or feed the dog daily, but if you give him directions to any other place or even tell him to go to a place where he has been before but a long time ago, there is no way he can accomplish that. He has no memory of trips and has no memory away from structured, patterned responses. Remote memories for trips and one thing to another are terrible. He cannot write or count; he is incompetent to handle his financial affairs." (Tr., quoted language contained between pp. 37-45; 50-56).

Then in relation to the severity of all of these problems and considering his severe problems in reference to memory and

his severe problems due to his inability to read, write, and count (which is even to the point to where he cannot write a check), and based on her observations of Mr. Polansky in the Courtroom and after hearing Dr. Forsthoefel's testimony, Commissioner Barden from the Bench appointed Ms. DuBose as Mr. Polansky's Guardian ad litem because in her opinion his ability to testify was extremely compromised. (Tr., p. 46). In addition, after explaining all these severe cognitive deficits, Dr. Forsthoefel stated the opinion in reference to how severe these deficits alone were as to Mr. Polansky's disability as follows:

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

A: Unemployable.

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

A: Totally incapable."

(Tr., p. 56, ll. 2-14). (Emphasis added).

Under the uncontested medical and expert opinion evidence in addition to all of the other testimony and evidence submitted, the Claimant's physical brain damage alone renders him totally disabled. There is no contrary evidence to this fact in the

Record. Therefore, not only does the brain damage which Mr. Polansky has meet the standard of Crisp and Sparks, which is that his brain damage must be severe enough that in and of itself it would constitute a hindrance or obstacle to employment, (that is the Crisp and Sparks standard and that is the wording that the Supreme Court has stated is to be applied), in this case, not only is that standard met, but more importantly, the uncontested expert medical opinion evidence and all the evidence in the Record establishes that he is totally incapable of employment and is not even sufficiently competent enough to testify due purely and strictly to his brain damage. The issue is without merit.

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

While the Defendants couple two arguments together in the caption of this argument, they in fact are arguing one argument which is laches. While the Claimant is of the opinion that laches does not apply and should not be applied to either party, if it were to be applied, it should be applied to the Defendants. Further, the Defendants are being disingenuous in making this argument by failing to note that the only issue left open after the mediation and in the Mediation Agreement was whether or not the Claimant had sustained compensable physical brain damage entitling him to lifetime compensation. Thus by

making this argument, they are diverting this Court's attention away from the fact that the defense of laches was not preserved. As a side note, not only does the doctrine of laches not apply in this situation, but the statute of limitations would not even apply to this situation involving an undiagnosed condition, "physical brain damage", where a brain injury (2002 encephalopathy), had been accepted and paid for medically. See: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (involving an accepted knee injury and almost three (3) years later Claimant was found to have a previously undiagnosed condition in the knee. The Court held the statutory limitation for filing a claim ran from that point). In this claim, medical care was paid for both: 1) the 2002 hospitalization for a brain "injury" and 2) all care thereafter for the brain "injury". However the Claimant was not definitively diagnosed with physical, "brain damage" until May 11, 2011 and on May 16th, he filed a claim for permanent brain damage.

Next, as to this argument and the element of notice, both parties had the same notice from 2002 to 2011 concerning the Claimant's, "injury," to his brain. There is no question that in 2002 Mr. Polansky sustained a physical brain, "injury" in the form of an encephalopathy. In addition to the treatment records and the rehab nurse's notes which were being provided to the carrier between 2002 after the hospitalization for the brain injury and through 2004, in 2004 and 2005 Dr. Forsthoefel

(psychiatrist) and three (3) other doctors found that Mr. Polansky needed neurological evaluation and testing for: ,
"organic mental condition"; Dr. Ezra Riber, "comprehensive neurological evaluation" (APA, p. 283); Dr. Marturano (psychiatrist) on September 19, 2005, "complete neurological workup by a neurologist . . . , neurological evaluation should include EEG testing . . . , also recommend neuropsychological testing of Mr. Polansky" (APA, p. 653); and Dr. Julian Adams, "if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing". In addition there were numerous communications in 2004 and 2005 (APA, pp. 684-697) to the adjuster both from the Claimant and from, and with the concurrence of, the assigned State Fund rehab nurses requesting authorization for neuropsychological testing. That testing was delayed by the Defendants not the Claimant and was finally and only authorized and performed in late 2007 and was concluded in 2008; but again as delayed and then authorized by the Defendants. (APA, p. 698). Then in 2009, the Claimant contacted the Defendants stating the belief, and again the belief, that he had sustained, "permanent" physical brain injury as a result of the original brain "injury" in 2002 and that he was entitled to compensation. Therefore, both parties were on notice and had the same notice throughout this entire time of a brain, "injury," for which the Defendants were providing treatment and evaluation for that original

physical brain "injury" with both parties trying to determine whether or not there was a physical brain problem, as compared to a psychological or functional problem causing the Claimant's problems.

Again, the Defendants delayed providing neurological tests from 2004 to 2008, not the Claimant. Then in 2008 when they authorized testing they did not even send the medical records and Dr. Lind, Ph.D. stated that at that time had he had those that he would have found that the Claimant was suffering from physical brain damage, which he did opine in 2012 after being provided the records of the 2002 brain injury (hospitalization for encephalopathy). (APA, pp. 31-32). Therefore, there is no question that the Defendants were on notice of a physical brain "injury" and the request for a determination was to whether or not there had been some permanent consequence from that physical brain injury in 2002 from 2002 to 2011. Thus the Defendants had notice.

As to the defense of laches and the element of delay, it simply does not apply because there was no delay in filing a claim for physical brain damage. There was not a definitive diagnosis of permanent brain damage until 2011 based on a medical opinion [the Claimant would hope that the Defendants would agree that this is a medically complex issue requiring expert opinion evidence as the Commission found], and the

Claimant filed his claim one week after that diagnosis; there was no delay.

However, if one applies the doctrine of laches to this claim, the Court as the Commission did, should apply that doctrine to the actions of the Defendants. The Defendants love to cite to the case of Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), and while the Claimant will set out hereinafter the latter case which applied laches to the Defendants in a much less egregious case than this one as far as the provision of medical care and then a denial of benefits, let's apply the doctrine of laches as set out in the Muir case.

Under the doctrine of laches, if a party knowing his rights, does not timely assert them and by an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position then equity will normally refuse to enforce those rights. That equitable principle applies to the rights of both sides; claims and defenses. (Emphasis added). In Muir the Court specifically noted that delay alone (if that existed at all in this case) does not establish laches and that so long as there is no knowledge of the wrong committed and no refusal to embrace the opportunity to assert facts, there can be no laches. The Court specifically noted that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to

have acted sooner, and also material prejudice. Not only are all of these elements not found in this case, but none of them are.

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

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

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

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

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

Applying the elements of laches to the Defendants, the Defendants, no later than 2009, were advised of the Claimant's

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

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

Next, how can the State Accident Fund even think that they can assert "clean hands" when they have caused all the delay in evaluation but provided all the years of care, never questioned the claim and specifically after 2009, and then when the very

doctors and medical providers that they have authorized to provide care for over ten (10) years state the opinion that this man is suffering from physical brain damage that is severe, outrageously severe, to the point that he cannot even write a check. How can they have the audacity to come into Court and even assert that their hands are clean in any respect? The argument is patently without merit.

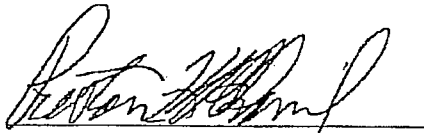
CONCLUSION

For all the foregoing reasons, the opinion of the Hearing Commissioner should be AFFIRMED. The objection to the evidence of Dr. Rainwater went to the weight, not to admissibility and the Commissioner assigned it such weight as was appropriate. The uncontradicted medical evidence establishes not only that the Claimant sustained severe permanent brain damage that was sufficient enough to constitute a hindrance or obstacle to employment, but in fact establishes that he was totally and permanently unemployable due purely and only to his physical brain damage which prevents him from even being able to write a check or testify at his own hearing. There is no laches in this case because the Claimant applied for benefits one week after he was notified definitively of the medical opinion that he had sustained permanent physical brain damage, and in addition the Defendants provided treatment for physical brain injury for ten (10) years without ever questioning that injury and delayed making a determination concerning whether or not that physical

brain injury had resulted in permanent physical brain damage.

The doctrine of laches simply does not apply nor have any of the elements been met. In addition if it is applied, it should be applied to the Defendants for their failure to raise this defense affirmatively to the Claimant for ten (10) years in reference to physical brain injury and at least three (3) years in reference to and knowing of his position that he probably sustained physical brain damage and would make a claim for that if the evidence supported it.

Respectfully submitted,

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

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

Attorney for the Respondent

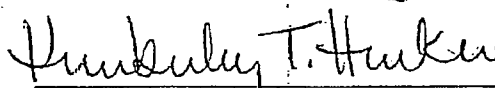
May 11, 2016

CERTIFICATE OF SERVICE

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

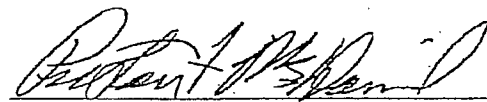
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the RESPONDENT'S BRIEF TO THE CIRCUIT COURT by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

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



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
11TH day of May, 2016.



Notary Public for South Carolina (L.S.)
My Commission Expires: 10/28/18

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
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Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

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Facsimile (803) 252-0709

May 11, 2016

VIA EMAIL cmanningj@sccourts.org & cmanninglc@sccourts.org
& US MAIL

The Honorable L. Casey Manning
Fifth Judicial Circuit
1701 Main Street, Room 214
Columbia, South Carolina 29202-0192

RE: Theodore P. Polansky v SC Office of the Attorney General
C/A Nos.: 2015-CP-40-07468 & 2015-CP-40-07380

Dear Judge Manning:

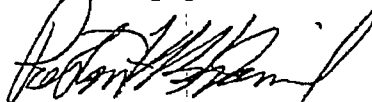
Pursuant to the instructions on the Notice of the Hearing on the Appeals in the above referenced matter, please find enclosed my Memorandum of Law in reference to the defendants Appeal.

I will be submitting our Brief on our single issue, cross appeal, on the applicable compensation rate tomorrow.

By copy of this letter I am forwarding a copy of my Brief to defense counsel.

I look forward to seeing you at the Hearing and a final resolution of my Motion to dismiss the defendants appeal, my Motion to mandate payment of the back due temporary total disability and a decision on the Appeals.

Sincerely yours,



Preston F. McDaniel

PFM/rmt

Cc: Temus C. Miles, Jr., Esquire

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	OF THE FIFTH JUDICIAL CIRCUIT
THEODORE P. POLANSKY,)	
)	
Employee,)	Docket No: <u>2015-CP-40-07468</u>
Respondent/Cross-Appellant,)	&
)	<u>2015-CP-40-07380</u>
v.)	
)	
SC OFFICE OF THE ATTORNEY)	RESPONDENT'S BRIEF TO
GENERAL,)	THE CIRCUIT COURT
)	
Employer, and)	
)	
STATE ACCIDENT FUND,)	
)	
Carrier,)	
Appellants/Cross-Respondents,)	
)	

ISSUES BEFORE THE COURT

The Appellants, the Defendants below, have appealed the same sixteen (16) exceptions that were appealed from the original Hearing Commissioner's Award of benefits to the injured worker, the Respondent in this Court. Those sixteen (16) exceptions were combined into three (3) arguments made before the Full Commission, who after review affirmed the Hearing Commissioner's Decision in total awarding benefits to the injured worker. No previous Brief has been filed by the Defendants although this matter has been repeatedly set and the due date for submission of Memorandums passed, and so the Respondent will file a Brief based on the three (3) issues that

were presented to the Full Commission for decision as set forth hereinafter.

STATEMENT OF THE CASE

From the first injury in 1999 and through Commissioner Barden's Order in 2015 and continuing at this time, the Defendants/Appellants (hereinafter "Defendants") have provided without question all treatment, evaluation and care for all problems related to his injuries specifically including: the brain; back; legs; RDS; sexual, urinary and bowel dysfunctions and psychological. Since 2002 when Mr. Polansky suffered a major encephalopathy, severe swelling of the brain, requiring hospitalization for 25 days, paid for by the Defendants, the Defendants have known, accepted, and paid for treatment, evaluation and care for that brain, "injury".

All of the authorized treating physicians and psychological professionals, Dr. Frank Forsthoefel, M.D., treating psychiatrist, (2001 to present¹), (APA pp. 42-181; 334); Dr. C. Jean Jonet, Ph.D., treating psychologist, (2004 to present), (APA pp. 341-607); and Dr. Ezra Riber, M.D., chronic pain specialist, (2001 to present), (APA pp. 182-340LLL), have all beginning in 2011 stated the opinion Mr. Polansky has severe permanent brain "damage" stemming from the 2002 brain "injury".²

¹ 2005 to 2009 Mr. Polansky was treated by Dr. Marturano, M.D. when Dr. Forsthoefel had retired from private practice. (APA, p. 683).

² Dr. Beasley has also been an authorized treating doctor for Mr. Polansky for sexual, bladder, and bowel dysfunctions since 2002.

In addition, Dr. Nicholas Lind, Ph.D. authorized to perform neuropsychological tests in 2008 (APA pp. 31-41) has also stated this opinion. Dr. Avie Rainwater, Ph.D. authorized (specifically in 2001) who performed the same identical neuropsychological testing in 2011 that he had performed in 2001 before the brain "injury" in 2002 stated this same opinion (APA pp. 20-30).

In addition to the specific authorized treatment in and after 2002 for and the numerous opinions and evaluations concerning and confirming "organic" brain problems,³ between 2004 and 2009⁴, in 2009 Claimant's Counsel in a letter to the State Accident Fund Attorney Mary Sowell, dated May 11, 2009 stated (quoting in pertinent part):

"Back in 2002 ..., Ted was hospitalized due to a reaction from a prescribed psychological prescription that resulted in a chemical encephalopathy of the brain. He was hospitalized and the doctors have said that he has suffered physical brain injury as a result of that chemical encephalopathy. I would appreciate it if you would let me know or if you could check with them and see if we are going to have any problems with Ted receiving lifetime disability benefits due to this physical BRAIN injury..." (APA, p. 699).

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

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

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

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

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

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

There was no reservation of any affirmative defenses or procedural defenses listed in the Agreement. A detailed chronological outline from 1999 to 2014 pertinent to this appeal is attached to this Brief.

ARGUMENTS

- I. THE HEARING COMMISSIONER DID NOT ERR BY: (A) ADMITTING THE REPORTS OF DR. AVIE RAINWATER; (B) BY REFERRING TO DR. RAINWATER AS AN AUTHORIZED TREATING PHYSICIAN; AND/OR (C) BY CONCLUDING THAT DR. RAINWATER'S MEDICAL OPINIONS WERE NOT PIVOTAL AND NECESSARY TO COMMISSIONER BARDEN'S DETERMINATION OF PERMANENT BRAIN DAMAGE.

Evidence introduced for purposes of impeachment goes to the weight of the evidence not the admissibility of the evidence. In all workers' compensation proceedings, the Workers' Compensation Commission is the fact-finding body and our Courts will not disturb its findings if supported by reasonable inferences drawn

from the evidence. Compton v. Town of Ivey, 256 S.C. 35, 180 S.E.2d 645 (1971).

Before the physical brain injury (encephalopathy) in February of 2002, on October 10th and 15th of 2001, Dr. Avie Rainwater, Ph.D. performed neuropsychological testing on Mr. Polansky which was, "authorized" and paid for by the State Accident Fund as part of authorized treatment for Mr. Polansky. On March 22, 2011, Dr. Rainwater performed a re-evaluation performing the same identical neuropsychological testing on Mr. Polansky. (APA, pp. 21-30). On May 16, 2011, five (5) days after receiving the report of the authorized treating psychiatrist Dr. Frank Forsthoefel stating that the Claimant was totally and permanently disabled due to his cognitive dysfunction caused by his 2002 physical brain injury (encephalopathy), the Claimant filed a claim for total and permanent disability benefits for physical brain damage due to that brain injury. (Attachment to 5/16/11 Form 50 and APA, p. 8).

A. Admission of Report. Although knowing about Dr. Rainwater's opinion in 2011, in 2011, 2012, 2013, 2014 and 2015, the Defendants never took Dr. Rainwater's deposition. At the hearing, as a, and as the only basis, cited to exclude the report, over objection the Defendants were allowed to place into the Record pleadings concerning litigation between the State Accident Fund and Dr. Rainwater's group, totally unrelated to

this claim, and with the earliest pleading being filed on October 10, 2011 (seven (7) months after the retesting).

Besides the fact that the basis for the objection to these pleadings being admitted is that they are rank hearsay which do not fit under any of the exceptions for admissibility of documents, such as the Business Records Act; the only possible basis for their consideration as evidence would be as impeachment to establish bias which does not go to admissibility but instead goes to the weight that should be given the doctor's 2011 report; again assuming the pleadings should have been admitted. Trial Handbook S.C. Lawyers 5th Edition §25:7

"Impeachment By Proof of Bias ...". The purpose of any expert or medical evidence is to aid the Commission in coming to the correct conclusion and the Commission determines the weight and credit to be given to any expert testimony once admitted.

Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). Commissioner Barden properly admitted the 2011 report and as the fact-finder assigned it appropriate weight. Finally, the Respondent would ask the Commission to note that the Defendants did not cite any authority for the proposition that this written evidence, Dr. Rainwater's 2011 report, should not have been submitted into evidence, on any basis, nor even on the issue of its weight.

Also under this part of the argument, the Defendants argue that because there was litigation going on between Dr. Rainwater

and the State Accident Fund, or at least there was at some point in time in 2011 seven (7) months after the report, that this would skew Dr. Rainwater's opinion in this case. Outside of that assertion being outrageous, it is rank speculation and calls for an assumption and would make the Commission's decision the subject of speculation and innuendo. Again, this issue was first raised in August 2014, ten (10) days before a scheduled hearing⁵ and six (6) months before the hearing in February 2015. The Defendants had every right to take Dr. Rainwater's deposition since 2011 and also for the six (6) months before the hearing and did not do so and this argument is patently without merit.

Also if the Defendants resubmit their Brief to the Commission under this part of the argument, the Defendants allege that the Claimant refused to submit to neuropsychological testing which is a bold faced untruth. Since present Defense Counsel only became involved ten (10) days before this matter was reset pursuant to the Order of Commissioner Wilkerson which was issued based on Defendants' failure to have an agreed upon

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

(by Consent Agreement and Order) Independent Medical Examination performed, Counsel will not move for this improper argument to be stricken or for sanctions. As is set out in the Commission Record, an agreement and a draft Consent Agreement was entered into and submitted to Defense Counsel on April 16, 2013 agreeing to have the Claimant seen and evaluated by Dr. Richard Frierson at the USC School of Medicine Neurology Clinic which was finally signed and submitted on September 5, 2013 and ordered by Commissioner Taylor on November 7, 2013. That Consent Order specifically provided:

"Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson. . . ."

Exactly one (1) year after the Agreement and with no examination having been set, the Claimant moved for a hearing which was granted. Claimant's Counsel would beg the Court to read his letter to Defense Counsel found at Claimant's APA, pp. 732-733 and question current Counsel at oral argument on the raising of this argument if it is raised again.

B. The second basis for the argument is the Hearing Commissioner erred by referring to Dr. Rainwater as an authorized medical provider. The first and very simple answer to this argument is that the Defendants do not dispute that at one-point Dr. Rainwater was an authorized medical provider. Further, again this reference does not affect the admissibility but goes to the weight to be given. Also and very importantly

at page 7 and 8 of the Transcript, the Hearing Commissioner in admitting the contested report specifically noted as to when Dr. Rainwater was an authorized medical provider and noted:

"My response to that, based upon hearing the arguments of the parties, is that Dr. Rainwater, prior to any kind of dispute or claim or controversy between Dr. Rainwater and the Fund, Dr. Rainwater was, in fact, involved in this case, and I believe that in weighing the respected equities of the parties and the arguments, that it would be grossly unfair to the Claimant to have this expert or to be relying on this expert and then to be no longer able to use this expert. . . ."
." (Emphasis added).

C. Finally, in the final argument on this issue the Defendants really argue again as to the weight that the Commissioner gave to Dr. Rainwater's test results. As she stated in comparison to the other evidence and particularly the testimony, reports and evidence from Dr. Forsthoefel, the treating psychiatrist, from 2004 and continuing through the Present she gave the report little weight. The Defendants do not point out the testimony on p. 29 of Dr. Forsthoefel wherein he specifically states that the only effect the contested report had on his opinion was that Dr. Rainwater's retesting results in 2011 as compared to his 2001 testing results in reference to Dr. Forsthoefel's opinion were nothing more than,

"There were additional findings at that time consistent with my additional findings after the hospitalization in 2002 for the drug-drug encephalopathy, that my findings became increasingly obvious to me that there was something else going on in Ted's mind other than his psychiatric condition and what became evident

to me and to Dr. Rainwater as well, is that there was something organic, physical going on in his brain, and that is very well documented ..."
(Emphasis added).

Dr. Forsthoefel referred specifically to his findings stretching all the way from 2002 through 2011. Also his opinion that the brain injury in 2002 caused Mr. Polansky's organic physical brain damage, was first stated in a report dated March 3, 2011 before Dr. Rainwater's testing on March 22, 2011. (APA p. 9-10).

On p. 61, Dr. Forsthoefel in his testimony again states specifically that his opinion is based on his findings and his treatment of Mr. Polansky and that after review of and considering the findings of Dr. Lind, and the opinions by Dr. Adams and Dr. Carnes, in addition to Dr. Rainwater, he notes that these opinions are all consistent with his, "reasoning" which is, "firmly grounded" based on his treatment and, "also" these other opinions. (Tr., p. 61).

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

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

Outside of the fact that there is absolutely no contradictory medical opinion evidence or other evidence in the Record to the evidence that the Claimant sustained serious and

severe permanent physical brain damage, the assertion that Mr. Polansky's brain damage as was reviewed by the Hearing Commissioner and Commission, does not meet the standard of Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) quite frankly is beyond belief. The standard as set forth in Crisp and Sparks is simply and plainly that the physical brain damage as contemplated by those decisions and the Act is physical brain damage that is consonant with,

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

and that the brain damage is,

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

The uncontested medical and expert opinion evidence from all of Mr. Polansky's medical treatment doctors and providers is that Mr. Polansky is totally and permanently disabled from his physical brain damage and that his brain damage is severe and serious enough to constitute an obstacle and hindrance to employment: Opinion of Dr. Forsthoefel, authorized treating psychiatrist beginning in 2001 and presently (APA, pp. 2-3); Dr. Riber, authorized chronic pain specialist, 2001 to the present and continuing (APA, pp. 12-13); Dr. C. Jean Jonet, Ph.D., authorized treating psychologist since 2004 and continuing (APA, pp. 16-17). In addition, Dr. Nicholas Lind, Ph.D., authorized

clinical psychologist, found severe cognitive deficits in his evaluation and testing. (APA, pp. 31-41).

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

"Mr. Polansky is college educated yet he cannot write a check, cannot count change, cannot use tools or perform household chores or repairs. . . . He frequently becomes derailed while talking, requires re-direction and prompts. Sometimes he just stares off into space. He is enormously forgetful, takes notes and loses them. . . ."
(Tr., p. 18).

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

"He cannot read and understand the newspaper. While he can read the paper wherein it will take him a day to completely read one article in the paper, he then cannot tell you what he read and he has so much trouble actually reading the article word for word, that he has to have somebody read an article that would take person, such as Ms. DuBose, a few minutes to read. However, he then does not understand what she has read to him. He can perform minimal, simple, repetitive or pattern tasks such as driving from one specific place to another, or feed the dog daily, but if you give him directions to any other place or even tell him to go to a place where he has been before but a long time ago, there is no way he can accomplish that. He has no memory of trips and has no memory away from structured, patterned responses. Remote memories for trips and one thing to another are terrible. He cannot write or count; he is incompetent to handle his financial affairs." (Tr., quoted language contained between pp. 37-45; 50-56).

Then in relation to the severity of all of these problems and considering his severe problems in reference to memory and

his severe problems due to his inability to read, write, and count (which is even to the point to where he cannot write a check), and based on her observations of Mr. Polansky in the Courtroom and after hearing Dr. Forsthoefel's testimony, Commissioner Barden from the Bench appointed Ms. DuBose as Mr. Polansky's Guardian ad litem because in her opinion his ability to testify was extremely compromised. (Tr., p. 46). In addition, after explaining all these severe cognitive deficits, Dr. Forsthoefel stated the opinion in reference to how severe these deficits alone were as to Mr. Polansky's disability as follows:

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

A: Unemployable.

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

A: Totally incapable."

(Tr., p. 56, ll. 2-14). (Emphasis added).

Under the uncontested medical and expert opinion evidence in addition to all of the other testimony and evidence submitted, the Claimant's physical brain damage alone renders him totally disabled. There is no contrary evidence to this fact in the

Record. Therefore, not only does the brain damage which Mr. Polansky has meet the standard of Crisp and Sparks, which is that his brain damage must be severe enough that in and of itself it would constitute a hindrance or obstacle to employment, (that is the Crisp and Sparks standard and that is the wording that the Supreme Court has stated is to be applied), in this case, not only is that standard met, but more importantly, the uncontested expert medical opinion evidence and all the evidence in the Record establishes that he is totally incapable of employment and is not even sufficiently competent enough to testify due purely and strictly to his brain damage. The issue is without merit.

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

While the Defendants couple two arguments together in the caption of this argument, they in fact are arguing one argument which is laches. While the Claimant is of the opinion that laches does not apply and should not be applied to either party, if it were to be applied, it should be applied to the Defendants. Further, the Defendants are being disingenuous in making this argument by failing to note that the only issue left open after the mediation and in the Mediation Agreement was whether or not the Claimant had sustained compensable physical brain damage entitling him to lifetime compensation. Thus by

making this argument, they are diverting this Court's attention away from the fact that the defense of laches was not preserved. As a side note, not only does the doctrine of laches not apply in this situation, but the statute of limitations would not even apply to this situation involving an undiagnosed condition, "physical brain damage", where a brain injury (2002 encephalopathy), had been accepted and paid for medically. See: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (involving an accepted knee injury and almost three (3) years later Claimant was found to have a previously undiagnosed condition in the knee. The Court held the statutory limitation for filing a claim ran from that point). In this claim, medical care was paid for both: 1) the 2002 hospitalization for a brain "injury" and 2) all care thereafter for the brain "injury". However the Claimant was not definitively diagnosed with physical, "brain damage" until May 11, 2011 and on May 16th, he filed a claim for permanent brain damage.

Next, as to this argument and the element of notice, both parties had the same notice from 2002 to 2011 concerning the Claimant's, "injury," to his brain. There is no question that in 2002 Mr. Polansky sustained a physical brain, "injury" in the form of an encephalopathy. In addition to the treatment records and the rehab nurse's notes which were being provided to the carrier between 2002 after the hospitalization for the brain injury and through 2004, in 2004 and 2005 Dr. Forsthoefel

(psychiatrist) and three (3) other doctors found that Mr. Polansky needed neurological evaluation and testing for: "organic mental condition"; Dr. Ezra Riber, "comprehensive neurological evaluation" (APA, p. 283); Dr. Marturano (psychiatrist) on September 19, 2005, "complete neurological workup by a neurologist . . . , neurological evaluation should include EEG testing . . . , also recommend neuropsychological testing of Mr. Polansky" (APA, p. 653); and Dr. Julian Adams, "if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing". In addition there were numerous communications in 2004 and 2005 (APA, pp. 684-697) to the adjuster both from the Claimant and from, and with the concurrence of, the assigned State Fund rehab nurses requesting authorization for neuropsychological testing. That testing was delayed by the Defendants not the Claimant and was finally and only authorized and performed in late 2007 and was concluded in 2008; but again as delayed and then authorized by the Defendants. (APA, p. 698). Then in 2009, the Claimant contacted the Defendants stating the belief, and again the belief, that he had sustained, "permanent" physical brain injury as a result of the original brain "injury" in 2002 and that he was entitled to compensation. Therefore, both parties were on notice and had the same notice throughout this entire time of a brain, "injury," for which the Defendants were providing treatment and evaluation for that original

physical brain "injury" with both parties trying to determine whether or not there was a physical brain problem, as compared to a psychological or functional problem causing the Claimant's problems.

Again, the Defendants delayed providing neurological tests from 2004 to 2008, not the Claimant. Then in 2008 when they authorized testing they did not even send the medical records and Dr. Lind, Ph.D. stated that at that time had he had those that he would have found that the Claimant was suffering from physical brain damage, which he did opine in 2012 after being provided the records of the 2002 brain injury (hospitalization for encephalopathy). (APA, pp. 31-32). Therefore, there is no question that the Defendants were on notice of a physical brain "injury" and the request for a determination was to whether or not there had been some permanent consequence from that physical brain injury in 2002 from 2002 to 2011. Thus the Defendants had notice.

As to the defense of laches and the element of delay, it simply does not apply because there was no delay in filing a claim for physical brain damage. There was not a definitive diagnosis of permanent brain damage until 2011 based on a medical opinion [the Claimant would hope that the Defendants would agree that this is a medically complex issue requiring expert opinion evidence as the Commission found], and the

Claimant filed his claim one week after that diagnosis; there was no delay.

However, if one applies the doctrine of laches to this claim, the Court as the Commission did, should apply that doctrine to the actions of the Defendants. The Defendants love to cite to the case of Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), and while the Claimant will set out hereinafter the latter case which applied laches to the Defendants in a much less egregious case than this one as far as the provision of medical care and then a denial of benefits, let's apply the doctrine of laches as set out in the Muir case.

Under the doctrine of laches, if a party knowing his rights, does not timely assert them and by an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position then equity will normally refuse to enforce those rights. That equitable principle applies to the rights of both sides; claims and defenses. (Emphasis added). In Muir the Court specifically noted that delay alone (if that existed at all in this case) does not establish laches and that so long as there is no knowledge of the wrong committed and no refusal to embrace the opportunity to assert facts, there can be no laches. The Court specifically noted that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to

have acted sooner, and also material prejudice. Not only are all of these elements not found in this case, but none of them are.

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

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

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

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

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

Applying the elements of laches to the Defendants, the Defendants, no later than 2009, were advised of the Claimant's

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

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

Next, how can the State Accident Fund even think that they can assert "clean hands" when they have caused all the delay in evaluation but provided all the years of care, never questioned the claim and specifically after 2009, and then when the very

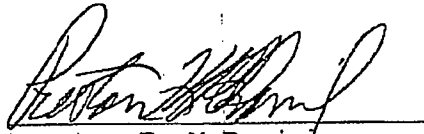
doctors and medical providers that they have authorized to provide care for over ten (10) years state the opinion that this man is suffering from physical brain damage that is severe, outrageously severe, to the point that he cannot even write a check. How can they have the audacity to come into Court and even assert that their hands are clean in any respect? The argument is patently without merit.

CONCLUSION

For all the foregoing reasons, the opinion of the Hearing Commissioner should be AFFIRMED. The objection to the evidence of Dr. Rainwater went to the weight, not to admissibility and the Commissioner assigned it such weight as was appropriate. The uncontradicted medical evidence establishes not only that the Claimant sustained severe permanent brain damage that was sufficient enough to constitute a hindrance or obstacle to employment, but in fact establishes that he was totally and permanently unemployable due purely and only to his physical brain damage which prevents him from even being able to write a check or testify at his own hearing. There is no laches in this case because the Claimant applied for benefits one week after he was notified definitively of the medical opinion that he had sustained permanent physical brain damage, and in addition the Defendants provided treatment for physical brain injury for ten (10) years without ever questioning that injury and delayed making a determination concerning whether or not that physical

brain injury had resulted in permanent physical brain damage. The doctrine of laches simply does not apply nor have any of the elements been met. In addition if it is applied, it should be applied to the Defendants for their failure to raise this defense affirmatively to the Claimant for ten (10) years in reference to physical brain injury and at least three (3) years in reference to and knowing of his position that he probably sustained physical brain damage and would make a claim for that if the evidence supported it.

Respectfully submitted,

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

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Respondent

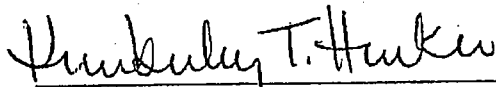
May 11, 2016

CERTIFICATE OF SERVICE

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

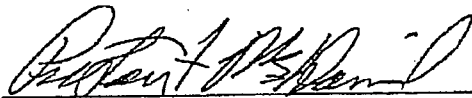
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the RESPONDENT'S BRIEF TO THE CIRCUIT COURT by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

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



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
11th day of May, 2016.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 10/28/18

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

May 11, 2016

VIA EMAIL cmanningj@sccourts.org & cmanninglc@sccourts.org
& US MAIL

The Honorable L. Casey Manning
Fifth Judicial Circuit
1701 Main Street, Room 214
Columbia, South Carolina 29202-0192

RE: Theodore P. Polansky v SC Office of the Attorney General
C/A Nos.: 2015-CP-40-07468 & 2015-CP-40-07380

Dear Judge Manning:

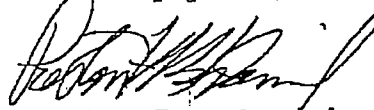
Pursuant to the instructions on the Notice of the Hearing on the Appeals in the above referenced matter, please find enclosed my Memorandum of Law in reference to the defendants Appeal.

I will be submitting our Brief on our single issue, cross appeal, on the applicable compensation rate tomorrow.

By copy of this letter I am forwarding a copy of my Brief to defense counsel.

I look forward to seeing you at the Hearing and a final resolution of my Motion to dismiss the defendants appeal, my Motion to mandate payment of the back due temporary total disability and a decision on the Appeals.

Sincerely yours,



Preston F. McDaniel

PFM/rmt

Cc: Temus C. Miles, Jr., Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	OF THE FIFTH JUDICIAL CIRCUIT
THEODORE P. POLANSKY,	)	
	)	
Employee,	)	Docket No: <u>2015-CP-40-07468</u>
Respondent/Cross-Appellant,	)	&
	)	<u>2015-CP-40-07380</u>
v.	)	
	)	
SC OFFICE OF THE ATTORNEY	)	RESPONDENT'S BRIEF TO
GENERAL,	)	THE CIRCUIT COURT
	)	
Employer, and	)	
	)	
STATE ACCIDENT FUND,	)	
	)	
Carrier,	)	
Appellants/Cross-Respondents,	)	
_____	)	

ISSUES BEFORE THE COURT

The Appellants, the Defendants below, have appealed the same sixteen (16) exceptions that were appealed from the original Hearing Commissioner's Award of benefits to the injured worker, the Respondent in this Court. Those sixteen (16) exceptions were combined into three (3) arguments made before the Full Commission, who after review affirmed the Hearing Commissioner's Decision in total awarding benefits to the injured worker. No previous Brief has been filed by the Defendants although this matter has been repeatedly set and the due date for submission of Memorandums passed, and so the Respondent will file a Brief based on the three (3) issues that

were presented to the Full Commission for decision as set forth hereinafter.

STATEMENT OF THE CASE

From the first injury in 1999 and through Commissioner Barden's Order in 2015 and continuing at this time, the Defendants/Appellants (hereinafter "Defendants") have provided without question all treatment, evaluation and care for all problems related to his injuries specifically including: the brain; back; legs; RDS; sexual, urinary and bowel dysfunctions and psychological. Since 2002 when Mr. Polansky suffered a major encephalopathy, severe swelling of the brain, requiring hospitalization for 25 days, paid for by the Defendants, the Defendants have known, accepted, and paid for treatment, evaluation and care for that brain, "injury".

All of the authorized treating physicians and psychological professionals, Dr. Frank Forsthoefel, M.D., treating psychiatrist, (2001 to present¹), (APA pp. 42-181; 334); Dr. C. Jean Jonet, Ph.D., treating psychologist, (2004 to present), (APA pp. 341-607); and Dr. Ezra Riber, M.D., chronic pain specialist, (2001 to present), (APA pp. 182-340LLL), have all beginning in 2011 stated the opinion Mr. Polansky has severe permanent brain "damage" stemming from the 2002 brain "injury".²

¹ 2005 to 2009 Mr. Polansky was treated by Dr. Marturano, M.D. when Dr. Forsthoefel had retired from private practice. (APA, p. 683).

² Dr. Beasley has also been an authorized treating doctor for Mr. Polansky for sexual, bladder, and bowel dysfunctions since 2002.

In addition, Dr. Nicholas Lind, Ph.D. authorized to perform neuropsychological tests in 2008 (APA pp. 31-41) has also stated this opinion. Dr. Avie Rainwater, Ph.D. authorized (specifically in 2001) who performed the same identical neuropsychological testing in 2011 that he had performed in 2001 before the brain "injury" in 2002 stated this same opinion (APA pp. 20-30).

In addition to the specific authorized treatment in and after 2002 for and the numerous opinions and evaluations concerning and confirming "organic" brain problems,³ between 2004 and 2009⁴, in 2009 Claimant's Counsel in a letter to the State Accident Fund Attorney Mary Sowell, dated May 11, 2009 stated (quoting in pertinent part):

"Back in 2002 ..., Ted was hospitalized due to a reaction from a prescribed psychological prescription that resulted in a chemical encephalopathy of the brain. He was hospitalized and the doctors have said that he has suffered physical brain injury as a result of that chemical encephalopathy. I would appreciate it if you would let me know or if you could check with them and see if we are going to have any problems with Ted receiving lifetime disability benefits due to this physical BRAIN injury..." (APA, p. 699).

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

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

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

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

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

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

There was no reservation of any affirmative defenses or procedural defenses listed in the Agreement. A detailed chronological outline from 1999 to 2014 pertinent to this appeal is attached to this Brief.

ARGUMENTS

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

Evidence introduced for purposes of impeachment goes to the weight of the evidence not the admissibility of the evidence. In all workers' compensation proceedings, the Workers' Compensation Commission is the fact-finding body and our Courts will not disturb its findings if supported by reasonable inferences drawn

from the evidence. Compton v. Town of Ivey, 256 S.C. 35, 180 S.E.2d 645 (1971).

Before the physical brain injury (encephalopathy) in February of 2002, on October 10th and 15th of 2001, Dr. Avie Rainwater, Ph.D. performed neuropsychological testing on Mr. Polansky which was, "authorized" and paid for by the State Accident Fund as part of authorized treatment for Mr. Polansky. On March 22, 2011, Dr. Rainwater performed a re-evaluation performing the same identical neuropsychological testing on Mr. Polansky. (APA, pp. 21-30). On May 16, 2011, five (5) days after receiving the report of the authorized treating psychiatrist Dr. Frank Forsthoefer stating that the Claimant was totally and permanently disabled due to his cognitive dysfunction caused by his 2002 physical brain injury (encephalopathy), the Claimant filed a claim for total and permanent disability benefits for physical brain damage due to that brain injury. (Attachment to 5/16/11 Form 50 and APA, p. 8).

A. Admission of Report. Although knowing about Dr. Rainwater's opinion in 2011, in 2011, 2012, 2013, 2014 and 2015, the Defendants never took Dr. Rainwater's deposition. At the hearing, as a, and as the only basis, cited to exclude the report, over objection the Defendants were allowed to place into the Record pleadings concerning litigation between the State Accident Fund and Dr. Rainwater's group, totally unrelated to

this claim, and with the earliest pleading being filed on October 10, 2011 (seven (7) months after the retesting).

Besides the fact that the basis for the objection to these pleadings being admitted is that they are rank hearsay which do not fit under any of the exceptions for admissibility of documents, such as the Business Records Act, the only possible basis for their consideration as evidence would be as impeachment to establish bias which does not go to admissibility but instead goes to the weight that should be given the doctor's 2011 report; again assuming the pleadings should have been admitted. Trial Handbook S.C. Lawyers 5th Edition §25:7 "Impeachment By Proof of Bias ...". The purpose of any expert or medical evidence is to aid the Commission in coming to the correct conclusion and the Commission determines the weight and credit to be given to any expert testimony once admitted. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). Commissioner Barden properly admitted the 2011 report and as the fact-finder assigned it appropriate weight. Finally, the Respondent would ask the Commission to note that the Defendants did not cite any authority for the proposition that this written evidence, Dr. Rainwater's 2011 report, should not have been submitted into evidence, on any basis, nor even on the issue of its weight.

Also under this part of the argument, the Defendants argue that because there was litigation going on between Dr. Rainwater

and the State Accident Fund, or at least there was at some point in time in 2011 seven (7) months after the report, that this would skew Dr. Rainwater's opinion in this case. Outside of that assertion being outrageous, it is rank speculation and calls for an assumption and would make the Commission's decision the subject of speculation and innuendo. Again, this issue was first raised in August 2014, ten (10) days before a scheduled hearing⁵ and six (6) months before the hearing in February 2015. The Defendants had every right to take Dr. Rainwater's deposition since 2011 and also for the six (6) months before the hearing and did not do so and this argument is patently without merit.

Also if the Defendants resubmit their Brief to the Commission under this part of the argument, the Defendants allege that the Claimant refused to submit to neuropsychological testing which is a bold faced untruth. Since present Defense Counsel only became involved ten (10) days before this matter was reset pursuant to the Order of Commissioner Wilkerson which was issued based on Defendants' failure to have an agreed upon

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

(by Consent Agreement and Order) Independent Medical Examination performed, Counsel will not move for this improper argument to be stricken or for sanctions. As is set out in the Commission Record, an agreement and a draft Consent Agreement was entered into and submitted to Defense Counsel on April 16, 2013 agreeing to have the Claimant seen and evaluated by Dr. Richard Frierson at the USC School of Medicine Neurology Clinic which was finally signed and submitted on September 5, 2013 and ordered by Commissioner Taylor on November 7, 2013. That Consent Order specifically provided:

"Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson. . . ."

Exactly one (1) year after the Agreement and with no examination having been set, the Claimant moved for a hearing which was granted. Claimant's Counsel would beg the Court to read his letter to Defense Counsel found at Claimant's APA, pp. 732-733 and question current Counsel at oral argument on the raising of this argument if it is raised again.

B. The second basis for the argument is the Hearing Commissioner erred by referring to Dr. Rainwater as an authorized medical provider. The first and very simple answer to this argument is that the Defendants do not dispute that at one-point Dr. Rainwater was an authorized medical provider. Further, again this reference does not affect the admissibility but goes to the weight to be given. Also and very importantly

at page 7 and 8 of the Transcript, the Hearing Commissioner in admitting the contested report specifically noted as to when Dr. Rainwater was an authorized medical provider and noted:

"My response to that, based upon hearing the arguments of the parties, is that Dr. Rainwater, prior to any kind of dispute or claim or controversy between Dr. Rainwater and the Fund, Dr. Rainwater was, in fact, involved in this case, and I believe that in weighing the respected equities of the parties and the arguments, that it would be grossly unfair to the Claimant to have this expert or to be relying on this expert and then to be no longer able to use this expert. . . ."
." (Emphasis added).

C. Finally, in the final argument on this issue the Defendants really argue again as to the weight that the Commissioner gave to Dr. Rainwater's test results. As she stated in comparison to the other evidence and particularly the testimony, reports and evidence from Dr. Forsthoefel, the treating psychiatrist, from 2004 and continuing through the Present she gave the report little weight. The Defendants do not point out the testimony on p. 29 of Dr. Forsthoefel wherein he specifically states that the only effect the contested report had on his opinion was that Dr. Rainwater's retesting results in 2011 as compared to his 2001 testing results in reference to Dr. Forsthoefel's opinion were nothing more than,

"There were additional findings at that time consistent with my additional findings after the hospitalization in 2002 for the drug-drug encephalopathy, that my findings became increasingly obvious to me that there was something else going on in Ted's mind other than his psychiatric condition and what became evident

to me and to Dr. Rainwater as well, is that there was something organic, physical going on in his brain, and that is very well documented ..."
(Emphasis added).

Dr. Forsthoefel referred specifically to his findings stretching all the way from 2002 through 2011. Also his opinion that the brain injury in 2002 caused Mr. Polansky's organic physical brain damage, was first stated in a report dated March 3, 2011 before Dr. Rainwater's testing on March 22, 2011. (APA p. 9-10).

On p. 61, Dr. Forsthoefel in his testimony again states specifically that his opinion is based on his findings and his treatment of Mr. Polansky and that after review of and considering the findings of Dr. Lind, and the opinions by Dr. Adams and Dr. Carnes, in addition to Dr. Rainwater, he notes that these opinions are all consistent with his, "reasoning" which is, "firmly grounded" based on his treatment and, "also" these other opinions. (Tr., p. 61).

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

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

Outside of the fact that there is absolutely no contradictory medical opinion evidence or other evidence in the Record to the evidence that the Claimant sustained serious and

severe permanent physical brain damage, the assertion that Mr. Polansky's brain damage as was reviewed by the Hearing Commissioner and Commission, does not meet the standard of Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) quite frankly is beyond belief. The standard as set forth in Crisp and Sparks is simply and plainly that the physical brain damage as contemplated by those decisions and the Act is physical brain damage that is consonant with,

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

and that the brain damage is,

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

The uncontested medical and expert opinion evidence from all of Mr. Polansky's medical treatment doctors and providers is that Mr. Polansky is totally and permanently disabled from his physical brain damage and that his brain damage is severe and serious enough to constitute an obstacle and hindrance to employment: Opinion of Dr. Forsthoefel, authorized treating psychiatrist beginning in 2001 and presently (APA, pp. 2-3); Dr. Riber, authorized chronic pain specialist, 2001 to the present and continuing (APA, pp. 12-13); Dr. C. Jean Jonet, Ph.D., authorized treating psychologist since 2004 and continuing (APA, pp. 16-17). In addition, Dr. Nicholas Lind, Ph.D., authorized

clinical psychologist, found severe cognitive deficits in his evaluation and testing. (APA, pp. 31-41).

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

"Mr. Polansky is college educated yet he cannot write a check, cannot count change, cannot use tools or perform household chores or repairs. . . . He frequently becomes derailed while talking, requires re-direction and prompts. Sometimes he just stares off into space. He is enormously forgetful, takes notes and loses them. . . ." (Tr., p. 18).

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

"He cannot read and understand the newspaper. While he can read the paper wherein it will take him a day to completely read one article in the paper, he then cannot tell you what he read and he has so much trouble actually reading the article word for word, that he has to have somebody read an article that would take person, such as Ms. DuBose, a few minutes to read. However, he then does not understand what she has read to him. He can perform minimal, simple, repetitive or pattern tasks such as driving from one specific place to another, or feed the dog daily, but if you give him directions to any other place or even tell him to go to a place where he has been before but a long time ago, there is no way he can accomplish that. He has no memory of trips and has no memory away from structured, patterned responses. Remote memories for trips and one thing to another are terrible. He cannot write or count; he is incompetent to handle his financial affairs." (Tr., quoted language contained between pp. 37-45; 50-56).

Then in relation to the severity of all of these problems and considering his severe problems in reference to memory and

his severe problems due to his inability to read, write, and count (which is even to the point to where he cannot write a check), and based on her observations of Mr. Polansky in the Courtroom and after hearing Dr. Forsthoefel's testimony, Commissioner Barden from the Bench appointed Ms. DuBose as Mr. Polansky's Guardian ad litem because in her opinion his ability to testify was extremely compromised. (Tr., p. 46). In addition, after explaining all these severe cognitive deficits, Dr. Forsthoefel stated the opinion in reference to how severe these deficits alone were as to Mr. Polansky's disability as follows:

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

A: Unemployable.

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

A: Totally incapable."

(Tr., p. 56, ll. 2-14). (Emphasis added).

Under the uncontested medical and expert opinion evidence in addition to all of the other testimony and evidence submitted, the Claimant's physical brain damage alone renders him totally disabled. There is no contrary evidence to this fact in the

Record. Therefore, not only does the brain damage which Mr. Polansky has meet the standard of Crisp and Sparks, which is that his brain damage must be severe enough that in and of itself it would constitute a hindrance or obstacle to employment, (that is the Crisp and Sparks standard and that is the wording that the Supreme Court has stated is to be applied), in this case, not only is that standard met, but more importantly, the uncontested expert medical opinion evidence and all the evidence in the Record establishes that he is totally incapable of employment and is not even sufficiently competent enough to testify due purely and strictly to his brain damage. The issue is without merit.

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

While the Defendants couple two arguments together in the caption of this argument, they in fact are arguing one argument which is laches. While the Claimant is of the opinion that laches does not apply and should not be applied to either party, if it were to be applied, it should be applied to the Defendants. Further, the Defendants are being disingenuous in making this argument by failing to note that the only issue left open after the mediation and in the Mediation Agreement was whether or not the Claimant had sustained compensable physical brain damage entitling him to lifetime compensation. Thus by

making this argument, they are diverting this Court's attention away from the fact that the defense of laches was not preserved. As a side note, not only does the doctrine of laches not apply in this situation, but the statute of limitations would not even apply to this situation involving an undiagnosed condition, "physical brain damage", where a brain injury (2002 encephalopathy), had been accepted and paid for medically. See: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (involving an accepted knee injury and almost three (3) years later Claimant was found to have a previously undiagnosed condition in the knee. The Court held the statutory limitation for filing a claim ran from that point). In this claim, medical care was paid for both: 1) the 2002 hospitalization for a brain "injury" and 2) all care thereafter for the brain "injury". However the Claimant was not definitively diagnosed with physical, "brain damage" until May 11, 2011 and on May 16th, he filed a claim for permanent brain damage.

Next, as to this argument and the element of notice, both parties had the same notice from 2002 to 2011 concerning the Claimant's, "injury," to his brain. There is no question that in 2002 Mr. Polansky sustained a physical brain, "injury" in the form of an encephalopathy. In addition to the treatment records and the rehab nurse's notes which were being provided to the carrier between 2002 after the hospitalization for the brain injury and through 2004, in 2004 and 2005 Dr. Forsthoefel

(psychiatrist) and three (3) other doctors found that Mr. Polansky needed neurological evaluation and testing for: ,
"organic mental condition"; Dr. Ezra Riber, "comprehensive neurological evaluation" (APA, p. 283); Dr. Marturano (psychiatrist) on September 19, 2005, "complete neurological workup by a neurologist . . . , neurological evaluation should include EEG testing . . . , also recommend neuropsychological testing of Mr. Polansky" (APA, p. 653); and Dr. Julian Adams, "if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing". In addition there were numerous communications in 2004 and 2005 (APA, pp. 684-697) to the adjuster both from the Claimant and from, and with the concurrence of, the assigned State Fund rehab nurses requesting authorization for neuropsychological testing. That testing was delayed by the Defendants not the Claimant and was finally, and only authorized and performed in late 2007 and was concluded in 2008; but again as delayed and then authorized by the Defendants. (APA, p. 698). Then in 2009, the Claimant contacted the Defendants stating the belief, and again the belief, that he had sustained, "permanent" physical brain injury as a result of the original brain "injury" in 2002 and that he was entitled to compensation. Therefore, both parties were on notice and had the same notice throughout this entire time of a brain, "injury," for which the Defendants were providing treatment and evaluation for that original

physical brain "injury" with both parties trying to determine whether or not there was a physical brain problem, as compared to a psychological or functional problem causing the Claimant's problems.

Again, the Defendants delayed providing neurological tests from 2004 to 2008, not the Claimant. Then in 2008 when they authorized testing they did not even send the medical records and Dr. Lind, Ph.D. stated that at that time had he had those that he would have found that the Claimant was suffering from physical brain damage, which he did opine in 2012 after being provided the records of the 2002 brain injury (hospitalization for encephalopathy). (APA, pp. 31-32). Therefore, there is no question that the Defendants were on notice of a physical brain "injury" and the request for a determination was to whether or not there had been some permanent consequence from that physical brain injury in 2002 from 2002 to 2011. Thus the Defendants had notice.

As to the defense of laches and the element of delay, it simply does not apply because there was no delay in filing a claim for physical brain damage. There was not a definitive diagnosis of permanent brain damage until 2011 based on a medical opinion [the Claimant would hope that the Defendants would agree that this is a medically complex issue requiring expert opinion evidence as the Commission found], and the

Claimant filed his claim one week after that diagnosis; there was no delay.

However, if one applies the doctrine of laches to this claim, the Court as the Commission did, should apply that doctrine to the actions of the Defendants. The Defendants love to cite to the case of Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), and while the Claimant will set out hereinafter the latter case which applied laches to the Defendants in a much less egregious case than this one as far as the provision of medical care and then a denial of benefits, let's apply the doctrine of laches as set out in the Muir case.

Under the doctrine of laches, if a party knowing his rights, does not timely assert them and by an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position then equity will normally refuse to enforce those rights. That equitable principle applies to the rights of both sides; claims and defenses. (Emphasis added). In Muir the Court specifically noted that delay alone (if that existed at all in this case) does not establish laches and that so long as there is no knowledge of the wrong committed and no refusal to embrace the opportunity to assert facts, there can be no laches. The Court specifically noted that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to

have acted sooner, and also material prejudice. Not only are all of these elements not found in this case, but none of them are.

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

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

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

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

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

Applying the elements of laches to the Defendants, the Defendants, no later than 2009, were advised of the Claimant's

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

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

Next, how can the State Accident Fund even think that they can assert "clean hands" when they have caused all the delay in evaluation but provided all the years of care, never questioned the claim and specifically after 2009, and then when the very

doctors and medical providers that they have authorized to provide care for over ten (10) years state the opinion that this man is suffering from physical brain damage that is severe, outrageously severe, to the point that he cannot even write a check. How can they have the audacity to come into Court and even assert that their hands are clean in any respect? The argument is patently without merit.

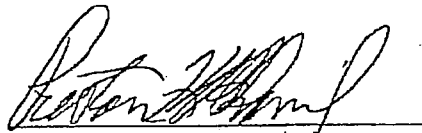
CONCLUSION

For all the foregoing reasons, the opinion of the Hearing Commissioner should be AFFIRMED. The objection to the evidence of Dr. Rainwater went to the weight, not to admissibility and the Commissioner assigned it such weight as was appropriate. The uncontradicted medical evidence establishes not only that the Claimant sustained severe permanent brain damage that was sufficient enough to constitute a hindrance or obstacle to employment, but in fact establishes that he was totally and permanently unemployable due purely and only to his physical brain damage which prevents him from even being able to write a check or testify at his own hearing. There is no laches in this case because the Claimant applied for benefits one week after he was notified definitively of the medical opinion that he had sustained permanent physical brain damage, and in addition the Defendants provided treatment for physical brain injury for ten (10) years without ever questioning that injury and delayed making a determination concerning whether or not that physical

brain injury had resulted in permanent physical brain damage.

The doctrine of laches simply does not apply nor have any of the elements been met. In addition if it is applied, it should be applied to the Defendants for their failure to raise this defense affirmatively to the Claimant for ten (10) years in reference to physical brain injury and at least three (3) years in reference to and knowing of his position that he probably sustained physical brain damage and would make a claim for that if the evidence supported it.

Respectfully submitted,

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

Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

Attorney for the Respondent

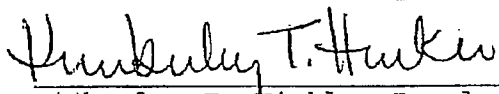
May 11, 2016

CERTIFICATE OF SERVICE

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

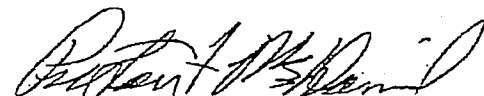
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the RESPONDENT'S BRIEF TO THE CIRCUIT COURT by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

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



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
11th day of May, 2016.



Notary Public for South Carolina (L.S.)
My Commission Expires: 10/28/18

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stubley
Janet Brooks Holmes
Peter P. Leventis, IV*
Kelli L. Sullivan*
George D. Gallagher*
Temus C. Miles, Jr.
David M. Bornemann
Brandon P. Jones
James E. L. Fickling+
Charles A. Kinney, Jr.+
Erica E. Loudin

Of Counsel:
C. E. Hardin, Jr.

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

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*S.C. Certified Mediator
+ Also licensed in N.C.

April 12, 2016

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

RE: Theodore Polansky v. SC Attorney General
Case No. 2015-CP-4007380 & 2015-CP-4007468
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 Defendants/Appellants/Respondents Motion for Status Conference and to Postpone Hearing in the above-referenced matter together with a Certificate of Service. I have also enclosed a check in the amount of \$25.00 for the filing fee. Please return a clocked copy of this correspondence with my courier. By copy of this letter, I am serving counsel of record with a copy of this document.

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

Thank you for your time and assistance

Sincerely,



Temus C. Miles, Jr.

TCM/ecs

Enclosures

cc: Preston F. McDaniel, Esquire (w/encl)
The Honorable Robert E. Hood (w/encl)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-07380 &
2015-CP-40-07468

Theodore Polansky,
Plaintiff,
vs.
SC Office of Attorney General,
Defendant.

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff'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: plevantis@mckayfirm.com Other: _____		Defendant's Attorney: Preston F. McDaniel, Bar No. _____ Address: 1315 Elmwood Ave, Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ 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	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ 25.00			
☒ 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: \$ _____			

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Theodore Polansky

Employee

Claimant/Respondent/
Appellant,

vs.

SC Office of Attorney General,

Employer,

and

South Carolina State Accident Fund,

Carrier

Defendants/Appellants/
Respondents.

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-4007380 &
2015-CP-40-07468

SC STATE ACCIDENT FUND'S/
SC ATTORNEY GENERAL'S
MOTION FOR STATUS CONFERENCE
AND TO POSTPONE HEARING

RICHLAND COUNTY
FILED
2016 APR 12 PM 3:25
JEANETTE W. MORRIS
C.C.P. & G.S.

YOU WILL PLEASE TAKE NOTICE that the SC Office of Attorney General and South Carolina State Accident Fund, by and through its undersigned attorney, pursuant Rules 16 & 40(i), SCRCPC, hereby moves the Court for an Order setting a Status Conference in the above captioned matters and continuing the currently scheduled hearings in this matters until such later time as may be ordered by the Court. 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.

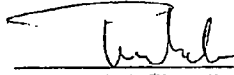
This motion is based on the following:

1. These matters are currently before the Circuit Court on an appeal from the South Carolina Workers' Compensation Commission.

2. The procedural history is extremely complex and the associated file materials are voluminous to the point that they extend over several thousands of pages of records and 16 years of factual background and litigation history.
3. For approximately the past two years, the SC Office of Attorney General and South Carolina State Accident Fund have been represented by Peter P. Leventis, Esq. in these matters.
4. At the same time as filing this Motion, I have filed a Motion for Substitution of Counsel in these matters, through which I am requesting to replace Peter P. Leventis as attorney of record for the SC Office of Attorney General and South Carolina State Accident Fund. (See Exhibit A hereto).
5. The substitution of counsel is needed due to the fact that Attorney Peter P. Leventis is in the process of leaving our firm and expects to no longer be associated with our firm as of the end of business on April 15, 2016, due to change in employment.
6. This matter is currently scheduled for a roster meeting on April 25, 2016 and for a hearing on April 29, 2016 before Judge Robert E. Hood.
7. Given the anticipated change of counsel and the complexity of these cases, there will not be ample time for the Undersigned to gain the understanding of the cases needed in order to prepare the briefing and arguments required for these matters before the currently scheduled April 29, 2016 hearing.
8. In addition to the issues relating to change of counsel, judicial economy favors granting the Status Conference and postponing the currently scheduled hearings.
9. On February 8, 2016, Judge Manning previously heard Motions in this matter, including a Motion to Dismiss the appeal.

10. As of the filing of this Motion, no order in regards to the Motion to Dismiss has been entered.
11. There is a possibility that Judge Manning's ruling on this issue could end this appeal and negate the end for further hearings in this appeal.
12. Additionally, on February 8, 2016, Judge Manning issued an Order instructing that he would preside over the appeal after a copy of the Record on Appeal was provided to the Court from the Workers' Compensation Commission. (See Exhibit B hereto).
13. Based upon these issues, I request that the Court grant a status conference so that the Court and the parties may discuss the current status of the case and arrive at an Order setting an appropriate date and judge for the appellate hearing to be considered, with such date allowing sufficient time for the Undersigned to review the file and prepare the briefing and arguments for the appeal hearing.
14. There is no possibility of prejudice to Theodore Polansky (Employee/Claimant/Respondent/Appellant) from the requested postponement of this hearing as he is currently the recipient of a running award for his weekly wage replacement benefits and medical treatment.
15. The undersigned certifies that I have consulted with opposing counsel prior to filing this Motion in a good faith attempt to resolve these matters.

Respectfully submitted,



Temus C. Miles, Jr.
McKay, Cauthen, Settana & Stublely, P.A.
1303 Blanding Street (29201)
P.O. Drawer 7217
Columbia, SC 29202
(803) 256-4645
Attorneys for Defendant

Columbia, South Carolina
April 12, 2016

CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stubley, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants/Appellants/Respondents' Motion for Status Conference and to Postpone Hearing 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 12 day of April, 2016.

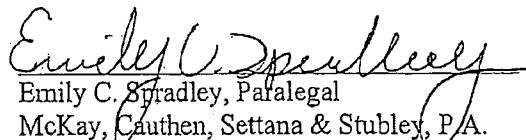
Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

The Honorable Robert E. Hood
Circuit Court Judge
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201

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

RICHLAND COUNTY
FILED
2016 APR 12 PM 3:25
JEANNETTE W. MCBRIDE
CLERK & G.S.


Emily C. Spradley, Paralegal
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7817
Columbia, South Carolina 29202-7217

(803) 256-4645

Richland County Common Pleas

Clerk : Jeanette W. McBride
Richland County Judicial Center
Columbia, SC 29201
(803) 576-1999

Received From: Miles

Date: 4/12/2016

Receipt #: 206580

Clerk: METTSB

Paying for: Polansky, Theodore P

Transaction Type: Payment

Payment Type: Check \$25.00

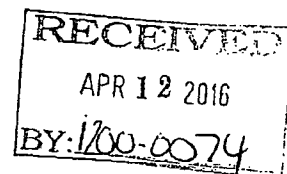
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Reference #: 27955

Comment:

Non-Refundable

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2015CP4007468	Theodore P Polansky VS SC Office Of Attorney General , defendant, et al	\$25.00	\$25.00	\$0.00
Total Cases: 1		\$25.00	\$25.00	\$0.00



Julius W. McKay, II
Mark D. Cauthen
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Kelli L. Sullivan*
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Temus C. Miles, Jr.
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Brandon P. Jones
Janice E. L. Fickling+
Charles A. Kinney, Jr.+
Erica E. Loudin

Of Counsel:
C. E. Hardin, Jr.

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

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Columbia, South Carolina 29202-7217

1303 Blanding Street
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(1917-2008)

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Web
www.mckayfirm.com

*S.C. Certified Mediator
+ Also licensed in N.C.

April 12, 2016

Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

RE: *Theodore Polansky v. SC Attorney General*
Case No. 2015-CP-4007380 & 2015-CP-4007468
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 Defendants/Appellants/Respondents Motion for Substitution of Counsel in the above-referenced matter together with a Certificate of Service. I have also enclosed a check in the amount of \$25.00 for the filing fee. Please return a clocked copy of this correspondence with my courier. By copy of this letter, I am serving counsel of record with a copy of this document.

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

Thank you for your time and assistance

Sincerely,


Temus C. Miles, Jr.

TCM/ecs
Enclosures

cc: Preston F. McDaniel, Esquire (w/encl)
The Honorable Robert E. Hood (w/encl)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Theodore Polansky,

Plaintiff,

vs.

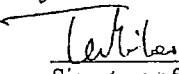
SC Office of Attorney General,

Defendant.

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-07380 &
2015-CP-40-07468

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff'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: pleventis@mckayfirm.com Other: _____		Defendant's Attorney: Preston F. McDaniel, Bar No. _____ Address: 1315 Elmwood Ave, Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ 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: _____		Estimated Time Needed: _____	
		Court Reporter Needed: ☐ YES / ☒ NO	
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 _____			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ 25.00 ☒ 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, SCRCPP) ☐ 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. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Theodore Polansky)
Employee)
Claimant/Respondent/)
Appellant,)
vs.)
SC Office of Attorney General,)
Employer,)
and)
South Carolina State Accident Fund,)
Carrier)
Defendants/Appellants/)
Respondents.)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-4007380 &
2015-CP-4007468

SC STATE ACCIDENT FUND'S/
SC ATTORNEY GENERAL'S
MOTION FOR SUBSTITUTION OF COUNSEL

FILED
2016 APR 12 PM 3:24
JANETTE L. HOFER
S.C.P. & C.S.

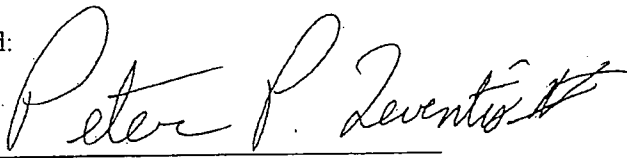
Pursuant to Rule 16, SCRCP, the undersigned hereby moves and request that this Court grant the substitution of Temus C. Miles, Jr. in place of Peter P. Leventis, IV (who has provided his consent below) as counsel of record for South Carolina Office of Attorney General and South Carolina State Accident Fund in the above captioned matters. The reasons for this Motion are as follows:

Peter P. Leventis, IV previously served as defense Counsel for Defendant South Carolina Office of Attorney General and South Carolina State Accident Fund in the above captioned matters while employed by the firm of McKay, Cauthen, Settana & Stublely, P.A. As of the close of business on April 15, 2016, Peter P. Leventis, IV employment with the law firm of McKay, Cauthen, Settana

& Stublely, P.A. will end. Temus C. Miles, Jr. is employed by the same firm and has been selected by the South Carolina Office of Attorney General and South Carolina State Accident Fund to serve as counsel of record in the above captioned matters.

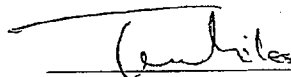
Accordingly, the undersigned, with the consent of Peter P. Leventis, IV (as shown below), requests that Temus C. Miles, Jr. be substituted in place of Peter P. Leventis, IV as attorney of record for the South Carolina Office of Attorney General and South Carolina State Accident Fund in the above captioned matters.

I so consent to being removed as counsel for Defendants South Carolina Office of Attorney General and South Carolina State Accident Fund:


Peter P. Leventis, IV, Esq.

Columbia, South Carolina
April 12, 2016

Respectfully submitted,


Temus C. Miles, Jr.
McKay, Cauthen, Settana & Stublely, P.A.
Post Office Box 7217
Columbia, SC 29202
803-256-4645
Attorney for the Respondent

Columbia, South Carolina
April 12, 2016

CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stubley, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendants/Appellants/Respondents' Motion for Substitution of Counsel 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 12 day of April, 2016.

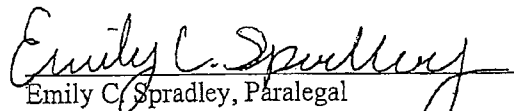
Via Hand Delivery

The Honorable Jeanette W. McBride
Richland County Clerk of Court
1701 Main Street, Room 205
Columbia, South Carolina 29201

The Honorable Robert E. Hood
Circuit Court Judge
Richland County Judicial Center
1701 Main Street
Columbia, SC 29201

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

RICHLAND COUNTY
CLERK OF COURT
2016 APR 12 PM 3:24
JANET W. MCBRIDE
CLERK OF COURT
COLUMBIA, SC


Emily C. Spradley, Paralegal
McKay, Cauthen, Settana & Stubley P.A.
Post Office Box 7817
Columbia, South Carolina 29202-7217

(803) 256-4645

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

February 3, 2016

VIA EMAIL - cmanningj@sccourts.org & cmanninglc@sccourts.org
AND US MAIL

The Honorable L. Casey Manning -
Fifth Judicial Circuit
1701 Main Street, Room 214
Columbia, SC 29202-0192

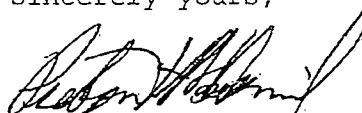
RE: Theodore P. Polansky v. SC Office of the Attorney General
C/A No.: 2015-CP-40-07468 & 2015-CP-40-07380

Dear Judge Manning:

Please find enclosed our MEMORANDUM IN SUPPORT OF MOTION FOR
PAYMENT OF THE ACCRUED AWARD PURSUANT TO SC CODE §42-17-60 in the
above-referenced matters.

By copy of this letter, I am serving the Defendants/
Appellants/Cross-Respondents with a copy of the same. I hope
this is sufficient for filing this matter with the Court;
however, if additional information is needed, please feel free to
contact me at your convenience.

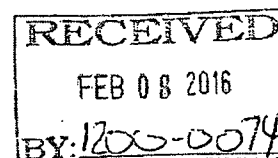
Sincerely yours,



Preston F. McDaniel

PFM/abh
Enclosure

cc: Peter P. Leventis, IV, Esquire (Via Email pleventis@mckayfirm.com) ✓
Mr. Theodore P. Polansky (Via Email grdubose2@aol.com)



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
)
Employee,)
)
Claimant/Petitioner,)
)
v.)

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

SC OFFICE OF THE ATTORNEY)
GENERAL,)
)
Employer, and)
)
STATE ACCIDENT FUND,)
)
Carrier,)
)
Defendants.)

MEMORANDUM IN SUPPORT OF
MOTION FOR PAYMENT OF THE
ACCRUED AWARD PURSUANT TO
SC CODE §42-17-60

In support of the Motion for payment of the accrued Award under the Award of the South Carolina Workers' Compensation Commission pursuant to SC Code §42-17-60, the Respondent and Cross-Appellant, the Claimant before the Commission, would respectfully show unto the Court as follows:

1. That the Award in this matter arose out of and as a result of two accepted injuries by accident that thus occurred in 1999 and 2000 and the provisions of SC Code §42-17-60 as amended, through July 1, 2007, apply to these pre-2007 claims. Prior to July 1st, 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 Decision was appealed to the SC Workers' Compensation Commission and the Commission by Full Commission Order dated and filed November 10, 2015, that Award was affirmed.

2. That subsequent to the Decision of the Full Commission, on December 9th, that Decision was appealed to this honorable Court by the Defendants. The Defendants did not make any payment either as to the accrued Award or to start weekly payments and even after request, the Defendants refused to make payment on the Award. As a result, the Claimant filed this Motion for Payment pursuant to the Act with this Court.

3. That as of the date of this Memorandum, the Defendants have resumed weekly payments of compensation but have not even paid back to the date of the Decision of the Full Commission and have refused to make payment on the accrued Award.

4. That 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 of all accrued compensation through the time that weekly compensation payments are resumed and then are to make continuing payments of weekly compensation until the appeal is resolved. 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 payment of an Award was due under §42-17-60.

In the Case, supra, Decision, the Supreme Court reaffirmed its previous four (4) decisions concerning those various factual scenarios. 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 affirmed that in the fact scenario where payment of weekly compensation benefits was ordered to be reinstated (as here) and where the Award was affirmed by the Full Commission, full payment of accrued weekly benefits back to the date of reinstatement was required and order to be made. A copy of that Decision is attached hereto and incorporated herein by reference.

5. That 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 only after 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 pre-July 1, 2007 which 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 . . ."

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 an 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 reaffirmed the intent and meaning of the pre-2007 language.

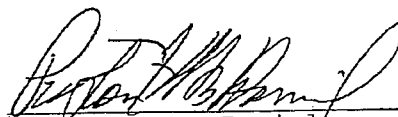
6. That the Claimant would respectfully submit that based on both the Supreme Court Decisions as affirmed and the change in the provisions of the Statute as set out by the Legislature, that the Defendants are required to make payment of the Award under this factual scenario from the date of the Award. Again, as set out in the Case, supra, Decision, this is not a situation where the Hearing Commissioner denied benefits and then the Full Commission awarded benefits, or a situation where the Hearing Commissioner and the Full Commission denied benefits and the Circuit Court awarded benefits. This is a situation identical

to Godfrey where this was an admitted accident for which benefits were paid from 2000, after the Claimant had exhausted all leave time and had to go out of work in 2000, was agreed to be totally disabled since and received weekly compensation benefits until the full 500 weeks had expired. The only question was whether he was entitled to lifetime weekly payments and the Commission made that determination and Award which has been affirmed on appeal and therefore pursuant to the, "Award" of the Commission the Claimant is entitled to benefits back to the date that the Commission ordered that those benefits be resumed.

Wherefore, the Claimant would request payment of the weekly compensation benefits that have accrued from March 8, 2011 through the date that benefits were restarted in this matter and that those be paid within fourteen (14) days as required by the Act. The Claimant would request that the Order include a provision that the Executive Director, who under the Statute has the full authority and is required to make payment, be subject to a Rule to Show Cause for failure to make timely payment pursuant to the Order of this Court, if not paid within fourteen (14) days of the date of the Order of this Court as provided in SC Code §42-9-240. SC Code §42-7-20 provides for the appointment of the Executive Director of the State Accident Fund by the Governor and places total responsibility for administration of the Fund and payment of Awards and settlements under the Director of the State Accident Fund; and SC Code §42-

7-90 provides for the Executive Director and the State Accident Fund to make payment of any, "Award" made by the Commission.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Injured Worker
/Respondent/Cross-Appellant

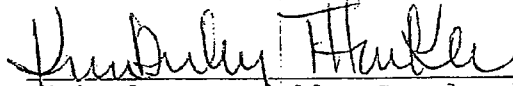
February 3, 2016

CERTIFICATE OF SERVICE

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

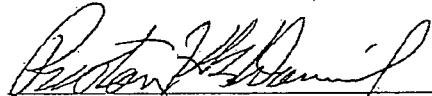
I hereby certify that I have on this day served the following in the matter of Ted Polansky v. SC Office of Attorney General with a copy of the MEMORANDUM IN SUPPORT OF MOTION FOR PAYMENT OF THE ACCRUED AWARD PURSUANT TO SC CODE S42-17-60 by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Peter P. Leventis, IV, Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this
4TH day of February, 2016.



Notary Public for South Carolina (L.S.)

My Commission Expires: 10/28/18

234 S.C. 401
Supreme Court of South Carolina.

Broadus S. GODFREY, Respondent,

v.

MILLS MILL NO. 2 (Reeves Brothers, Inc.), and
Aetna Casualty and Surety Company, Appellants.

No. 17531.

May 11, 1959.

Workmen's compensation case. The Common Pleas Court, Spartanburg County, Bruce Littlejohn, J., entered the order challenged on appeal. The Supreme Court, Oxner, J., held that employer and its workmen's compensation insurance carrier were properly required to make, during pendency of appeal from award, payments provided for in award of Industrial Commission.

Affirmed.

West Headnotes (1)

[1] Workers' Compensation

⇒ Supersedes or Stay

Employer and its workmen's compensation insurance carrier were properly required to make, during pendency of appeal from award, payments provided for in award of Industrial Commission.

2 Cases that cite this headnote

Attorneys and Law Firms

*401 **587 Carlisle, Brown & Carlisle, C. Karegeannes, Spartanburg, for appellants.

*402 Johnson & Smith, Spartanburg, for respondent.

Opinion

OXNER, Justice.

This is an appeal from an order of Judge Littlejohn requiring an employer and carrier, during the pendency of an appeal from an award of the Industrial Commission, to pay claimant weekly compensation for total disability in accordance with said award. The employer and carrier contend that payment of further compensation should be suspended until there is a final determination on the merits.

**588 Claimant sustained an injury by accident on April 19, 1956. It was recognized as a compensable one and an agreement as to compensation in the usual form was entered into between the parties on May 2, 1956. This agreement was *403 approved by the Industrial Commission on May 9, 1956 and an award for temporary total disability made at the rate of \$35 per week, beginning April 27, 1956. Compensation was regularly paid in accordance with said award through March 21, 1957 when a Final Compensation Settlement Receipt signed by claimant on March 20, 1957 was filed with the Commission.

During November, 1957, claimant's counsel requested the Industrial Commission to reopen the case. On December 16, 1957 the Commission ordered a hearing, which was held on February 12, 1958, for the purpose of determining whether or not the employer and carrier had a right to stop payment of compensation. Thereafter on May 22nd, the hearing Commissioner found that total disability had never ceased and ordered that the award of May 9, 1956 be continued in full force and effect; that weekly compensation as provided therein 'be resumed as of March 22, 1957 and continued weekly from that date for a period not to exceed 500 weeks for all such payments, or \$10,000.00, or until it is found by the South Carolina Industrial Commission that total disability has ceased.' On appeal to the full Commission, the opinion and award of the hearing Commissioner was approved on September 8, 1958. The employer and carrier appealed to the Court of Common Pleas. The appeal was heard by Judge Griffith, then presiding in the Seventh Circuit, on September 23, 1958. He took the case under advisement and requested counsel to file briefs.

On October 14, 1958, claimant's counsel gave notice of a motion to be heard before either Judge Griffith, the presiding Judge, or Judge Littlejohn, the resident Judge, for an order requiring the employer and carrier to pay compensation in accordance with the award. On October 17th counsel for the employer and carrier gave notice of a motion before Judge Griffith for an order staying enforcement of the award until the case was decided on the merits. Judge Griffith

was unable to hear either of the foregoing motions. Finally, the motion of claimant was heard on October 24, 1958 by Judge *404 Littlejohn who on October 27th issued an order requiring the employer and carrier to forthwith pay all weekly compensation from March 22, 1957 to date, amounting to \$2,940, and to continue these weekly payments in accordance with the award of the Commission. Thereafter a motion by the employer and carrier for a supersedeas was heard by this Court in November, 1958, and refused. On November 7, 1958, Judge Griffith issued an order sustaining the award made by the Industrial Commission on September 8th.

The employer and carrier have appealed both from the order of Judge Griffith and that of Judge Littlejohn. This opinion relates solely to the appeal from the last mentioned order.

The order of Judge Littlejohn requiring the employer and carrier to make the payments provided for in the award of the Industrial Commission during the pendency of the

appeal from said award is fully sustained by Bagwell v. Ernest Burwell, Inc., 227 S.C. 168, 87 S.E.2d 583. In that case periodic payments to a dependent of an employee who suffered accidental death were directed to be made during the pendency of an appeal from the award notwithstanding the fact that the award was ultimately reversed. Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611. Permission was granted to appellants to criticize this case but after careful consideration, we adhere to this decision.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

All Citations

234 S.C. 401, 108 S.E.2d 587

End of Document

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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; ☐ Other _____
- ☐ 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 2161 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 4 day of Feb, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Feb, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Peter P. Leventis IV

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,)
Claimant/Respondent/)
Appellant,)

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

v.)

SC OFFICE OF THE ATTORNEY
GENERAL,)

CONSENT AGREEMENT AND ORDER
OF CONFIRMATION SETTING
APPEAL AND CROSS-APPEAL,
AND MOTIONS ALL DURING THE
NON-JURY TERM OF
FEBRUARY 8, 2016

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants/Appellants/
Respondents.)

2016 JAN 29 AM 8:55
FILED
RICHLAND COUNTY
CLERK OF COURT
C.C.P. & C.S.

The Defendants in the above-referenced workers' compensation claim (pre-2007 claim) filed an appeal to the Circuit Court from the Award of the SC Workers' Compensation Commission. The Claimant filed a cross-appeal and a Motion to Dismiss the Defendants' Appeal and for payment of the accrued Award and weekly compensation benefits during the appeal pursuant to SC Code §42-15-60. The Claimant/Cross-Appellant requested an expedited hearing be set on the Motion to Dismiss and for Payment of Award pursuant to the Circuit Court Rules.

The parties received a Notice of Hearing on the Cross-Appeal

SCANNED

and the Motion to Dismiss Defendants' Appeal on January 29, 2016 at 9:30 o'clock a.m. during the Non-Jury Appeals Term of Court.

The parties received a second Notice setting the Motion for Payment of the Award for February 8, 2016 at 9:30 o'clock a.m.

No Notice of Hearing has been received on Defendants' appeal.

As of the date of the filing of this Consent Agreement and Request for an Order of Confirmation, the Defendants while agreeing to start payment of weekly total disability benefits beginning thirty (30) days after the Award of the Full Commission, continue to dispute the Claimant's entitlement to the payment of the accrued part of the Award that is due and payable at this time under the Claimant's position.

Based on the above, the parties mutually agree, request and hereby move for an Order cancelling all hearings set for January 29th and setting both the cross-appeal filed by the Claimant and the appeal filed by the Defendants during the same Non-Jury Appeals Term of Court. The Clerk of Court has re-scheduled both Appeals for hearing during the week of February 8th and has reset the Appeals Hearing for February 12th.

As a further Grounds and reason for setting both appeals during the February 8th Term and moving the cross-appeal from January 29th to February 12th, as of the date of this Agreement the Commission has yet to file the Record with the Court as required by the Circuit Court Rules and this would allow time for

2
SCANNED

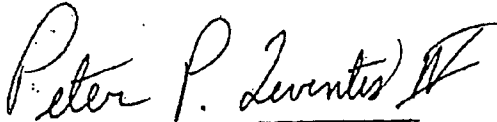
SCANNED

the Commission to have the Record available for hearing the appeals.

The parties mutually agree that the hearing on the Motion to Dismiss and for payment pursuant to SC Code §42-17-60 go forward on February 8th, at 9:30 o'clock a.m. as currently set by the Court.

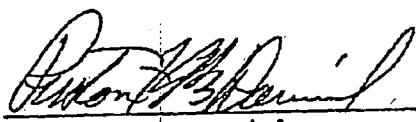
Based on the above-referenced agreements, we hereby move for an Order of Confirmation confirming the agreements entered into by and between the parties.

WE SO MOVE.



Peter P. Leventis, IV
McKay, Cauthen, Settana &
& Stubley
Post Office Box 7217
Columbia, South Carolina
(803) 256-4645

Attorney for the Defendants/
Appellants South Carolina
Office of Attorney General and
South Carolina State Accident
Fund



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/
Cross-Appellant

ORDER OF CONFIRMATION

After due and proper consideration of the Consent Agreement and requests for resetting and setting of the various matters that are pending before the Court,

SCANNED

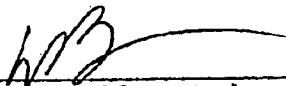
SCANNED

IT IS HEREBY ORDERED THAT the Agreement is confirmed as the Order of the Court and that all Hearings on any matters set by the Clerk at this time for January 29, 2016 be and hereby are cancelled.

IT IS FURTHER ORDERED THAT the Hearing set on the Motion to Dismiss and for Payment of the Award pursuant to SC Code §42-15-60 will go forward on February 8, 2016 at 9:30 o'clock a.m. as currently scheduled and

IT IS FURTHER ORDERED THAT the Clerk shall set both the appeal and the cross-appeal filed by the parties in this matter for a hearing during the week of February 8, 2016, and with the agreement of the parties has set those matters on February 12, 2016 at 11:00 a.m. for hearing.

AND IT IS SO ORDERED.



The Honorable DeAndrea Benjamin
Presiding Judge
Fifth Judicial Circuit

January 26, 2016

RECEIVED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Theodore Polansky,

Claimant/Respondent/
Appellant,

vs.

SC Office of Attorney General,

Employer,

and

South Carolina State Accident Fund,

Carrier,

Defendants/Appellants,
Respondents.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

) Case No. 2015-CP-4007380

) Defendants/Appellants/
) Respondents Reply to Claimants/
) Respondents/Appellants Motion for
) Payment & to Dismiss the Appeal

2015 DEC 31 PM 12:20
JANETTE W. MOORE
C.C.P. & G.S.

RICHLAND DEC 31
FILED

This reply motion arises in response to a motion from the Claimant's counsel, which was filed by the Claimant/Respondent and now Cross-Appellant Theodore Polansky. The Claimant Polansky was previously awarded life time benefits in relation to an alleged compensable physically brain injury that Claimant Polansky asserts rendered him permanently totally disabled under the South Carolina Workers' Compensation Act entitling him to life time benefits under the Act. A single Commissioner awarded such benefits to Claimant Polansky. This award was appealed by the Defendant/Appellant, Employer/Carrier to the Appellate Panel of the Workers' Compensation Commission. The Workers' Compensation Commission ultimately affirmed the single Commissioner Order's "findings of fact" and "conclusions of law."

Because this is a pre-July 1, 2007 date of injury involved, the Defendants/Appellants, ultimately appealed this Order of the Commission's Appellate Panel to the Circuit Court of

Richland County. (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. ("The injury at issue in the case at hand [Pee Dee Regional] occurred on January 30, 2002, clearly prior to July 1, 2007. Accordingly, the amendments set forth in Act 111 do not apply and, applying the former version of section 42-17-60, jurisdiction over this appeal lies in the Court of Common Pleas." at *id.*).

Subsequent to the filing of the appeal by these Defendants/Appellants to the Court of Common Pleas of Richland Co., from the adverse ruling of the Appellate Panel of the Workers' Compensation Commission, Claimant/Respondent/Cross-Appellant, filed his own appeal on other grounds, as well as a motion to this Court to: A) Dismiss the appeal of these Defendants on multiple grounds; B) Compel Payment of the prior award of the Commission; and C) Requesting applicable penalties for the Defendants failure to timely pay an award on the final Order of the Commission within 14 days. These Defendants respond to the motion to dismiss, compel payment, and for penalties as follows:

ARGUMENT IN REPLY TO CLAIMANT'S MOTION(S):

Claimant/Respondent cites multiple grounds upon which he claims the Defendants appeal from the full Commission's Appellate Panel to the Court of Common Pleas should be dismissed. First, he cites to the fact that the Defendants appealed from the single Commission to the full Commission Appellate panel untimely – note this issue was never raised by the Claimant's attorney to the Appellate – more to the point, opposing counsel himself was a cross-appellant to the full Commission panel filing his own appeal on that same date. As a threshold matter,

Claimant Polansky should be judicially estopped from simultaneously taking two contradictory and adverse positions on the same point of law (timeliness of an appeal) wherein he both: a) purports that his own appeals was timely when filed on the same date as the Defendants, yet; b) alleges that the Defendants appeal filed that same date to the full Commission was somehow not timely filed. This is impermissible under South Carolina law. (See *Generally Hayne Federal Credit Union v. Bailey* 327 S.C. 242, 489 S.E.2d 472 (S.C. 1997) stating in part that “judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.” (Also See *Colleton Reg. Hosp. v. MRS Med. Rev. Sys.*, 866 F.Supp. 896 (D.S.C.1994))).

While it was never actually raised by the Claimant to the Commission, the Claimant now asserts via motion to the Circuit Court, that the full Commission panel did not have jurisdiction to hear this appeal, because the Order of the single Commissioner was issued on June 1, 2015, and that the Defendant's/Appellants appeal of that Order served on June 15 was not timely. The statute S.C. Code §§42-17-50 et. seq. permits 14 days' time in which the Defendants may file their appeal from the single Commissioner's Order to the Appellate Panel of the Full Commission. Claimant contends that by filing and serving the appeal on June 15, this was actually “15 days” according to the calculation method of Claimant's counsel. Therefore, according to the motion of the Claimant, the appeal should now be dismissed by the Circuit Court due to lack of subject matter jurisdiction by the Appellate Panel of the Workers' Compensation Commission. In addition to the fact that this issue has not been raised and is abandon on appeal by the Claimant, Defendants would also point out that the computation of time utilized by the Claimant's counsel is contradictory to that utilized by the Commission. (See *Generally S.C. Code of Regs. §67-209* which specifically states under: “Computation of Time.”

"A. The day of the event, after which a designated period of time begins, is excluded. The last day, of the designated time period, is included.""). This would be referred to generally as 'black letter law' specifically spelled out in the Regulations of the Commission, and opposing counsel failed to raise this argument to the Commission in the first instance. He now requests the Circuit Court to render a determination of the Appellate Panel of the Commission's subject matter jurisdiction to have heard the initial appeal, by utilizing a method of time calculation that violates the clear and express language of the Commission's own Regulations, in order to retroactively divest the Commission of subject matter jurisdiction to have previously heard this appeal.

The next ground of contention raised by the Claimant's attorney for requesting that the appeal be dismissed is because, he asserts, the Director of the State Accident Fund failed to personally notify the SCSAF of his intent to appeal the Order of the single Commissioner, prior to having actually filed an appeal. First, the Claimant's attorney never formally raised, argued or brief such issues to the Commission by way of an appeal, or motions filing. Secondly, this statute, §42-7-80 was clearly complied with via the undersigned's (panel counsel for the State Accident Fund's) own timely filing of a written appeal to the Appellate Panel of the full Commission. This statute does not create a separate or alternative appellate obligation or procedure for the State Accident Fund, and opposing counsel was notified of this, in writing, by the undersigned on July 31, 2015 and made no formal filing or motion for a determination of such by the Commission (See Exhibit 1 hereto). Lastly on this point, Counsel for Mr. Polansky failed appeal or formally file a motion to the Commission on this matter, even after being expressly informed by the staff counsel for the Workers' Compensation Commission that the Commission would not provide an advisory opinion to Mr. Polansky's counsel. (See Exhibit 2

hereto). However, the Claimant now requests for a formal determination of this statute for the first time on appeal by the Circuit Court. (And See Exhibit 2 hereto).

The Claimant also requests that the Defendants pay a 10% penalty on monies/awards not paid unto the Claimant within 14 days of the payment becoming due, pursuant to S.C. Code Ann. §42-9-90. Defendants/Appellant would contend that the Order of the Commission is clearly on appeal at this time, to this Circuit Court, and in compliance with the dictates of S.C. Code Ann. §42-17-60. Therefore, such award is not due and owing at this time, as this is not a final Order while it remains on appeal. Hence, it is inapplicable to apply a 10% penalty on the Defendants while the case is still on appeal and the Order is not final. The Defendants concede they may owe, at some point in the future if the Order - or certain aspects of the Order - are not overturned, post judgement interest on any unpaid portion or portions of the award of the Commission. Nevertheless, the unorthodox interpretation the Claimant requests of §42-9-90 – whereby a 10% penalty is awarded on top of an award that is not a final Order – would have the absurd and unintended result whereby one party obtains an award, which is successfully appealed, and overturned on appeal, yet the prevailing party who has the award overturned vacated on appeal, still owes (at least) 10% of the non-final-judgement/Order/award for failure to have paid it within 14 days of the original Order, despite the fact that such Order was overturned appeal and never became a final award, prior to such.

The Claimant's motion also raises arguments that, for pre-July 1, 2007 dates of accident such as this, weekly indemnity payments on awards beyond the full Commission must be paid upon the filing of further appeals and during the pendency of the appeal, while an award equal to or greater than the value of those ongoing weekly benefits is still pending and not overturned. These Defendants/Appellants concede that such weekly benefits – but not the balance of any

award, or back due accrued award – are payable during the pendency of the appeal. Defendants stipulate to start such benefits upon the filing of this reply motion, if such benefits have not already begun and back until the date of the time of the appeal earlier this month.

Lastly, the Claimant/Respondent/Cross-Appellant raises a request for payment of the award, and applicable appellate rights under S.C. Code Ann. §42-17-30. Defendants have previously, and herein continue, to contend that a request for relief or appellate rights by the Claimant under §42-17-30 is simply inapplicable as this Code section applies only to appointment of evaluating physicians by the Commission and is completely impertinent to the issues at bar.

For the foregoing reasons, and further grounds, to be argued at a motions hearing to be set at the applicable date and time by and before the Court, these Defendants/Appellants request that the motion of the Claimant to the Circuit Court in this matter be – Denied.

Respectfully Submitted



Peter P. Leventis, IV
McKay, Cauthen, Settana & Stublely
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorneys for the
Defendants/Appellants/Respondents
South Carolina Office of Attorney General
And South Carolina State Accident Fund

Columbia, South Carolina
December 29, 2015

Peter Leventis

From: Peter Leventis
Sent: Friday, July 31, 2015 6:34 PM
To: 'Bracy, Amy (abracy@wcc.sc.gov)'; sdebruhl@wcc.sc.gov
Cc: 'Kim Hinkle'; sdebruhl@wcc.sc.gov; Emily Spradley; Erin Farthing (efarthing@saf.sc.gov)
Subject: Ted Polansky vs. SC Attorney General's Office
Attachments: SCAN19186_000.pdf

Dear Director Bracy and All,

I am in receipt of attorney McDaniel's informal request earlier this afternoon to have my prior petition for judicial review dismissed for an alleged failure to comply with S.C. Code Ann. 42-7-80 (correspondence attached). I certainly appreciate and respect attorney McDaniel's passion for serving the interests of his clients and the zeal with which he litigates his claims. Nevertheless, if he would like to have the appeal dismissed for any alleged improper procedure, or failure to comply therewith – and he is subsequently willing to submit a formal motion and actually pay the requisite \$25.00 filing fee, I am happy to more formally respond and argue the point at any noticed proceedings before the Commission.

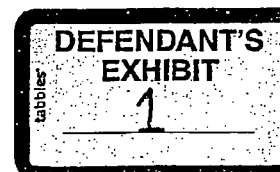
As to the merits of his allegations, forwarded to me at 5:15 PM this fine Friday afternoon, I would respectfully respond as follows. Attorney McDaniel's letter purports to expand S.C. Code Ann. 42-7-80 in some material and important ways that are not actually prescribed by the legislature in this statute.

Attorney McDaniel indicates that this notification to the Commission needs to be made: 1. In writing; 2. Prior to the time period of actual appeal being made/noticed/filed to the Commission; 3. That it must be done separate and distinctly from the notice requirements under 42-17-30 (which is listed in his letter, but presumably he means 42-17-50?), and 4. That such notice under 42-7-80 is "identical to the requirements [for notice] under S.C. Code Ann. 42-1-560."

First, as an agent of the SCSCAF and the Attorney General's office representing their interests as a fiduciary agent attorney, my timely notification to the Commission of the intention of the Defendants/Appellants to appeal this matter does suffice both the notification requirements of S.C. Code Ann. 42-7-80, which simply states in pertinent part that, "If the director intends to litigate or otherwise contest the award, he shall notify the commission of such intention," and the more formal, specified notice requirements prescribed by S.C. Code Ann. 42-17-50, for appellate review by the full Commission Panel.

Secondly, attorney McDaniel's position that this is a separate requirement that must be done distinctly apart and separate from the S.C. Code Ann. 42-17-50 notification of intent to appeal is without merit or citation to any binding legal authority of such. The party of the statute referenced by opposing counsel is actually written in juxtaposition to its operative language outlining the obligations of the Direct of the SCSCAF and the state's Comptroller in paying uncontested awards. Again, the additional obligation – as crafted and determined by attorney McDaniel – that this be done prior to the appeal notification itself, or that it be done in the "identical manner" to the nonfiction requirements of S.C. Code Ann. 42-1-560, is simply not accurate or required by statute. Of note, S.C. Code Ann. 42-1-560 actually requires notice to additional parties/entities above and beyond the Commission and specifically enumerates that such nonfiction (under 42-1-560) be done on a specified "form prescribed by the Commission." (See Generally 42-1-560 and S.C. Code of Regs. 67-203(B)(1)-(4) in re: Forms S-1, S-2, S-3 and S-4). If on the other hand he is talking about the "20 days letter" notice of the intent to transfer entitlement to sue/subrogate under 42-1-560, I am sure attorney McDaniel is well aware that it would be extremely difficult for the SCSCAF Direct – or anyone – to notify the Commission 20 days prior to its intent to appeal, and Form 30 filing, when the time line permitted for such appeals is only 14 days, and sometimes 19 when the 5 days for service by mail is tacked onto to that 14 days.

Sincerely,



Peter P. Leventis, IV
McKay, Cauthen, Settana & Stubley, P.A.
P.O. Box 7217
Columbia, SC 29202
Phone: (803) 256-4645
Fax: (803) 753-5705
Certified Circuit Court Mediator

Peter Leventis

From: Roberts, Keith <keroberts@wcc.sc.gov>
Sent: Tuesday, September 08, 2015 4:17 PM
To: preston@pfmcdlaw.com; Peter Leventis; Gregory, Harry
Cc: Bracy, Amy; Cannon, Gary; Emily Spradley
Subject: Request for Advisory Opinion

Dear Mr. McDaniel,

I am in receipt of your letter dated September 2nd, 2015 wherein you asked me for the Commission's position regarding § 42-7-80. Please be advised that the Commission cannot provide advisory opinions. For the Commission to make a ruling on a matter of law, you must raise the issue at a Hearing in order for it to be ruled upon by the appropriate Commissioner or Appellate Panel.

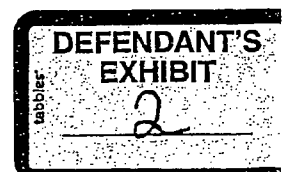
Sincerely,

J. Keith Roberts

Attorney at Law
South Carolina Workers' Compensation Commission
1333 Main Street - Suite 500
Columbia, South Carolina 29201
Direct: (803) 737-5701
KeRoberts@wcc.sc.gov

CONFIDENTIAL & PRIVILEGED

The preceding email message, including any attachments, may be confidential and/or protected by the attorney-client or other applicable privileges. It is intended for the sole use of the individual or entity named above. If the reader of this transmission is not the intended recipient, please notify the sender immediately and destroy any copies, electronic, paper or otherwise, that you may have of this communication. Any unauthorized review, use, disclosure or distribution is strictly prohibited and may be unlawful.



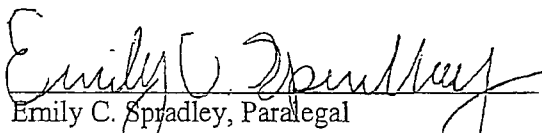
CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stublely, P.A, with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Defendant/Respondents' Reply to Claimant/Appellant's Motion for payment under award being appealed and to dismiss the appeal 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 29 day of December, 2015.

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

RICHLAND COUNTY
FILED
2015 DEC 31 PM 12:20
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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


Emily C. Spradley, Paralegal
McKay, Cauthen, Settana & Stublely, P.A.
Post Office Box 7817
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorneys for Defendants

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

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

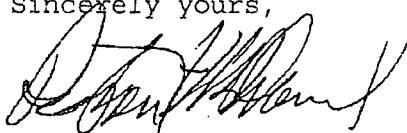
The Honorable Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit
P O Box 192
Columbia, SC 29202-0192

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Ms. McBride and Judge Lee:

Pursuant to Rule 40(h), this is to request that the Motion that is attached hereto for payment of the Award of the Workers' Compensation Commission and Motion to Dismiss be given priority status on the Motion Roster and be heard as soon after the 10 day period for response has transpired as possible. The reason for this request is this injured worker has been without benefits for over four (4) years and the Motion requests an Order mandating payment. Thank you for your assistance, and by copy of this letter, I am forwarding a copy of this request for priority status to Counsel for the Defendants.

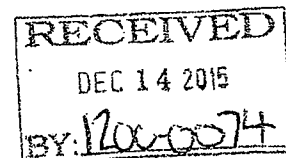
Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Amy Bracy, SC Workers' Compensation Commission
Peter P. Levenis, IV, Esquire ✓
Mr. Theodore P. Polansky



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

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Matthew Robertson

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Facsimile (803) 252-0709

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Madame Clerk:

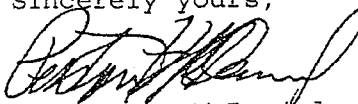
Please find enclosed for filing with the Circuit Court the PETITION AND NOTICE OF APPEAL in the above-referenced matter along with a Certificate of Service of the same on all concerned parties. Also attached is a MOTION FOR PAYMENT UNDER AWARD BEING APPEALED AND TO DISMISS THE APPEAL. There is also a request for priority status and hearing the Motion as soon as possible after the ten (10) day Motion period.

I would appreciate it if you would clock in and certify the additional copy and return it to me for my file. Enclosed is a check in the amount of \$150.00 for the filing fee and a stamped, self-addressed envelope for returning the copy to me.

Also by copy of this letter to the South Carolina Workers' Compensation Commission, I am requesting that they forward WCC File Nos.: 9922954 and 0024408 to you in readiness for this matter to be heard.

Thank you for your assistance. I hope this is sufficient for filing this matter with the Court; however, if additional information is needed, please feel free to contact me at your convenience.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Ms. Amy Bracy, SC Workers' Compensation Commission
Peter P. Leventis, IV, Esquire ✓
Mr. Ted Polansky

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THEODORE P. POLANSKY)

Plaintiff,)

vs.)

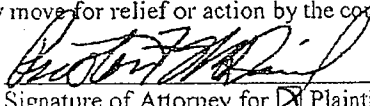
SC OFFICE OF THE ATTORNEY)
GENERAL, et. al.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: ____-CP-____-

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, SC 29201 Phone: 803-771-7211 Fax 803-252-0709 E-mail: preston@pfmcdlaw.com Other: _____		Defendant's Attorney: _____, Bar No. ____ Address: _____ Phone: _____ Fax _____ E-mail: _____ 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: Motion to Require Payment and to Dismiss Appeal Estimated Time Needed: 1.0 Court Reporter Needed: ☒ YES / ☐ NO			
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 _____			
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____ ☐ 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, SCRCF) ☐ 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. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

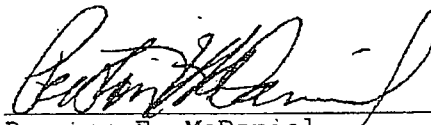
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel for the Movant may be heard, the Movant, the injured worker in the above-referenced matter will move before the Court for an Order requiring the payment immediately of all accrued weekly compensation and placing the Petitioner on a running Award under the Award made by the SC Workers' Compensation Commission affirming the Decision of the Hearing Commissioner for the reasons as more specifically set forth in the Memorandum attached hereto and incorporated herein by reference. The original Hearing Commissioner Order was issued on June 1, 2015, and the Full Commission Order was issued on November 10, 2015.

The Movant further moves to dismiss the appeal for a lack of jurisdiction of the Commission to hear the appeal from the Hearing Commissioner's Decision due to a failure to timely file and of the State Accident Fund's Executive Director to comply with the mandatory provisions of the Act, as set forth more fully in the Memorandum attached hereto and incorporated herein by reference.

Respectfully submitted,

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

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Movant

December 11, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

The Movant would respectfully show unto the Court as follows:

1. That pursuant to the Award made by Commissioner Susan Barden, filed June 1st, 2015, the Award specifically provided:

"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."

2. That SC Code §42-17-60 as amended through 2006 which is applicable to this 1999 and 2000 claim specifically requires that

an appeal is only a supersedes for thirty (30) days after the Award of the Commission and that thereafter the Employer is required to make "payment of the Award involved in the appeal . . ." until the appeal is resolved. In the case of Godfrey v. Mills Mill, 235 S.C. 401, 108 S.E.2d 587 (1959) as affirmed again by the Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), in a factual situation where the original Hearing Commissioner has made an Award and that Award is affirmed by the Full Commission, payment due under this statute is due from the date of the Award of the Hearing Commissioner. Based on the decisions of the Supreme Court and the statute, the Claimant has made demand for payment of the Award and as of November 10th, which is the date of the Award of the Full Commission affirming the Hearing Commissioner's Decision, the accrued temporary total disability owed to the Claimant is \$123,791.00. To that figure should be added all temporary total disability benefits that accrue until such time as weekly payments are started. If payment of the accrued Award is not made within seven (7) days of the date of demand, which was made on December 11th, interest is to be added pursuant to SC Code §42-9-230 and if not paid within 14 days of the date that it is due pursuant to §42-17-60, the 10% penalty imposed under §42-9-90 is to be added.

3. That as to the Motion to Dismiss as attached hereto and incorporated herein by reference, the Movant, the injured worker

in this matter, notified the SC Workers' Compensation Commission on July 31, 2015 that while he had received an appeal and request for Commission review, under §42-17-30 that he had not received a copy of the written notification from the Executive Director of the State Accident Fund to the Commission as is required by SC Code §42-7-80 that requires the Executive Director to notify the Commission of his intention to contest the Award that had been made. A copy of that Notice to the Commission was forwarded to both Counsel for the State Accident Fund and also to the Executive Director, Harry Gregory.

Again by letter dated September 2, 2015 addressed to the General Counsel for the State Workers' Compensation, Counsel for the Movant contacted the SC Workers' Compensation Commission through its General Counsel and requested to be advised whether or not such Notice from the Executive Director had been received and whether or not the Commission would require compliance, which is mandatory pursuant to the provisions of SC Code §42-7-80. That request was also forwarded to Counsel for the Defendants and to the Executive Director concerning his mandatory compliance with the Act. A copy of that letter is attached hereto as Exhibit "A".

4. That the SC Supreme Court has previously held repeatedly and it constitutes a general principle of construction law in the area of workers' compensation, that the wording of the Act must be strictly construed and where the provisions of the

Act require that an action "shall" be done, the provisions are mandatory. See Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007).

5. That SC Code §42-17-40 provides the general requirements for appeal by any party in reference to an award made by a Workers' Compensation Commission Decision. That section requires appeal within 14 days, "from" the date of the Decision. It does not state 14 days after notice of the Decision. The Movant would first note that the Hearing Commissioner was filed and notice given on June 1st and that the request for Commission Review was not served by mail until June 15th, which is 15 days after the date of the Order instead of on or before the 14th day. The appeal was not timely filed. This requirement is jurisdictional and therefore the Commission had no jurisdiction to hear the appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011). In addition to this basis and the specific basis for this Motion is that in addition to the general appeal or request for review requirements of §42-17-40, SC Code §42-7-80 places a separate and specific statutory requirement on the Executive Director of the State Accident Fund where he intends to litigate or otherwise contest an Award made by the Commission to notify the Commission of that intent. That statute specifically provides that where the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, he, "shall notify the Commission of such

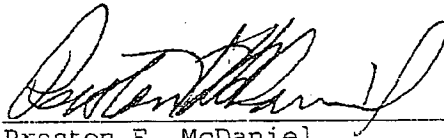
intention." This is a mandatory provision applicable to the Executive Director of the State Accident Fund and no such notice was filed in this matter. The Claimant/Movant would respectfully submit that a review of the Commission Record which will be filed with the Court by the Commission will establish this fact. In Callahan, supra, the defendants knew about the third party suit but the claimant had not filed the required mandatory notice.

6. That the SC Court of Appeals has specifically held in the case of Levi v. Northern Anderson Co. EMS that the Appellate Court shall dismiss an appeal even if jurisdiction and statutory compliance are not raised by the parties. The appealability of an Order and as to whether or not there was jurisdiction for the appeal is a matter of law. The Court held the right to appeal is a jurisdictional matter and even if the parties do not raise the issue of appealability, the Court must dismiss the appeal on its own Motion if the Court concludes that the Commission and the Court does not have jurisdiction over the appeal. Levi v. Northern Anderson Co. EMS, 409 S.C. 474, 762 S.E.2d 44 (SC App. 2014) (cert. den., 1/15/15).

WHEREFORE, the Movant would respectfully move for an Order of the Court ordering payment pursuant to the Award and if that payment has not been made within seven (7) days and fourteen (14) days of the date of the request for payment, and within the time that it is due pursuant to statute and the decisions of the SC Supreme Court, for interest and penalties as are applicable.

FURTHER, based on the failure of the Appellant, State Accident Fund, to timely file its appeal to the Full Commission and its failure to comply with the mandatory provisions of the Act requiring the Executive Director to specifically notify the Commission as to his intent to challenge the Decision of the Hearing Commissioner, which is a separate and distinct mandatory requirement placed on the Executive Director himself, separate and apart for an appeal notice required under §42-17-40, the Movant would respectfully move to have the appeal dismissed.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner.

December 11, 2015

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

Telephone (803) 771-7211

Facsimile (803) 252-0709

July 31, 2015

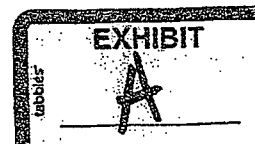
VIA EMAIL - sdebruhl@wcc.sc.gov
AND US MAIL
Chairman T. Scott Beck
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Ted Polansky vs. SC Attorney General's Office
WCC File No: 9922954 & 0024408

Dear Chairman Beck:

I am writing this to you and to the Judicial Director as the Chairman and the Judicial Director over compliance with judicial matters at the Workers' Compensation Commission. I received an Appeal in the above-referenced matter from the contract attorney for the State Accident Fund which was actually received by mail the day after the last date for filing a request for Commission review pursuant to §42-17-30. This is to request a copy of the written notification from the Executive Director of the State Accident Fund; that is required and is a mandatory requirement under SC Code §42-7-80 which requires that the Executive Director where, "the Director intends to litigate or otherwise contest the Award he shall notify the Commission of such intention." I have not and did not receive the mandatory statutory notice from the Director of a challenge to the Award. This notification is a specific and separate requirement than an appeal filed by an insurance company or self-insured or any individual employer under The Act. I am therefore requesting a copy of that written notification to the Commission filed prior to the time that the State Accident Fund made the decision to file a request for review in this matter.

Again, this is a specific mandatory statutory requirement and if such written notification from the Executive Director was not filed with the Commission, I am hereby requesting that the Appeal filed by the State Accident Fund be dismissed for failure to properly comply with the statutory requirements where the Director intends to contest an Award issued by the Commission.

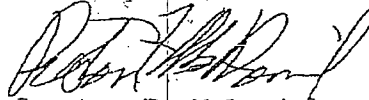


Chairman T. Scott Beck
July 31, 2015
Page 2

By copy of this letter, I am notifying the contract attorney for the State Accident Fund and the Executive Director of this notification and request for compliance with the statute and/or that the Appeal be dismissed.

I sincerely appreciate all the courtesies and kindnesses that the Commission always shows me in this and all matters and I look forward to receipt of a copy of the statutory notice or order dismissing the Appeal. This is identical to the requirements of SC Code §42-1-560.

Sincerely yours,



Preston F. McDaniel

PFM/abh

cc: Amy Bracy, Judicial Director (via email abracy@wcc.sc.gov)
Peter P. Leventis, IV, Attorney (via email pleventis@mckayfirm.com)
Ms. Gale DuBose (via email grdubose2@aol.com)
Harry Gregory, Executive Director, State Accident Fund (via US Mail)

Andrea Ham

From: Andrea Ham <aham@pfmcdlaw.com>
Sent: Friday, July 31, 2015 5:15 PM
To: 'sdebruhl@wcc.sc.gov'
Cc: 'abracy@wcc.sc.gov'; 'pleventis@mckayfirm.com'; 'Kim Hinkle'
Subject: Re: Ted Polansky vs. Sc Attorney General's Office
Attachments: SCAN19186_000.pdf

This email is being sent at the request of Preston McDaniel.

Thank you,
Andrea Ham
McDaniel Law Firm
(803)771-7211

Re. Polansky

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 2, 2015

VIA EMAIL - kroberts@wcc.sc.gov
AND US MAIL
Keith Roberts, Esquire
General Counsel
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Mandatory Filing Requirement of §42-7-80

Dear Keith:

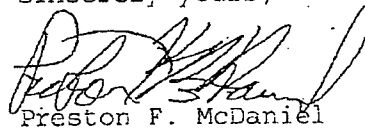
SC Code §42-7-80 requires that if the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, that he, "shall notify the Commission of such intention." I had previously written the Judicial Director about this and I would appreciate it if you would confirm the Commission's position on this mandatory statutory requirement. Also, if the Commission views this mandatory provision placing a specific statutory responsibility on the Director of the State Accident Fund as compared to §42-1-560(b) which places the mandatory requirement on a claimant that, "notice of the commencement of the action shall be given within 30 days thereafter to the Workers' Compensation Commission . . .", differently I would appreciate it if you could address the reasons for that. As you know under the legal principle that the wording of the Act must be strictly construed, the Supreme Court in Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007) held that if the claimant does not file that mandatory notice, it voids the claimant's right to benefits under the Act.

In making this request, please let me say I am absolutely sure this is a new issue for you and the Commission. I was aware of it when I was with the Attorney General's office and later when I was General Counsel for the State Accident Fund some 32 and 31 years ago and quite frankly, had forgotten about it until recently. It was part of the enabling Act in 1947 and has remained unchanged since 1974. The State Accident Fund is not an insurance company and this is one of many safeguards and differences within the Act.

.Keith Roberts, Esquire
September 2, 2015
Page 2 of 2

I look forward to hearing from you and sincerely appreciate your assistance and notification as General Counsel in this matter. Because this applies to the State Accident Fund in general and because it has arisen in a case being handled by a contract attorney for the State Accident Fund, I am copying both the Executive Director and Peter Leventis of this communication. As always, I appreciate all the courtesies and kindnesses shown to me by the Commission.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Peter P. Leventis, Esquire
Mr. Harry B. Gregory, Director, State Accident Fund

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Wednesday, September 02, 2015 4:02 PM
To: kroberts@wcc.sc.gov
Subject: Mandatory Filing Requirement of Section 42-7-80
Attachments: SCAN19477_000.pdf

Importance: High

The attached is being sent to you at the request of Preston F. McDaniel.

Kimberley T. Hinkle, Senior Paralegal
to Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
T: 803-771-7211
F: 803-252-0709



Please consider the environment before printing

NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender either by telephone (803-771-7211) or reply to this e-mail and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

THEODORE P. POLANSKY,

Plaintiff(s)

vs.

SC OFFICE OF ATTORNEY GENERAL, et. al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

Submitted By: Preston F. McDaniel, Esquire

Address: McDaniel Law Firm

1315 Elmwood Avenue

Columbia, SC 29201

SC Bar #: 3770

Telephone #: 803-771-7211

Fax #: 803-252-0709

Other:

E-mail: preston@pfmcdlaw.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)

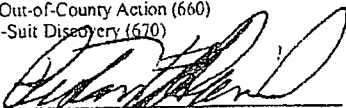
*If Action is Judgment/Settlement do not complete

- ☐ 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) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20__-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ 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 Drv. 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) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	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) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator (510)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of-State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature:



Date:

12/11/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (06/2015)

Page 1 of 2

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, 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.**

STATE OF SOUTH CAROLINA

RICHLAND COUNTY

THEODORE P. POLANSKY,
Plaintiff

vs.

SC OFFICE OF THE ATTORNEY GENERAL,
et. al.,

Defendants.

IN THE CIRCUIT COURT FOR THE

FIFTH JUDICIAL CIRCUIT

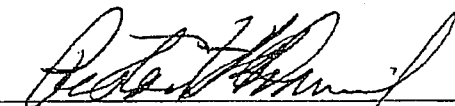
CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO.

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus or prohibition;
- ☒ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☐ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

Preston F. McDaniel, Esquire
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
803-771-7211
SC Bar#: 3770



Plaintiff/Attorney for Plaintiff

Defendant/Attorney(s) for Defendant(s)

Date: December 11, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
Employee,)
Claimant/Petitioner,)
v.)
SC OFFICE OF THE ATTORNEY)
GENERAL,)
Employer, and)
STATE ACCIDENT FUND,)
Carrier,)
Defendants.)

Docket No: _____

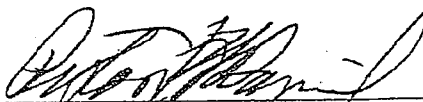
NOTICE AND CROSS-APPEAL
TO THE DEFENDANTS'
NOTICE OF INTENT TO APPEAL THE
FULL COMMISSION DECISION
PURSUANT TO SC CODE §42-17-60
SCACR, RULE 203(c)

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS,
AND THE SC WORKERS' COMPENSATION COMMISSION:

Based on the appeal of the Full Commission Order by the Defendants in the above-referenced matter, the Claimant hereby cross-appeals pursuant to the provisions of SC Code §42-17-60 (as amended through 2006). SC Code §42-17-60 specifically provides that if either party appeals the Decision of the Commission to the Court of Commons Pleas of the County in which the accident happened based on errors of law, that the appeal shall proceed, "under the same terms and conditions as govern appeals in ordinary civil actions". SCACR, Rule 203(c) provides the right to file a cross-appeal within five (5) days of the receipt of an Appeal. The Notice of Intent to Appeal dated December 9th was

received by the Claimant/Petitioner on December 10th by regular mail and this cross-appeal follows. The basis for the cross-appeal is attached hereto and incorporated herein by reference as is required by Statute.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner

December 11, 2015

ATTACHMENT TO CROSS-APPEAL

Theodore Polansky v. SC Office of Attorney General

WCC File Nos. 9922954 & 0024408

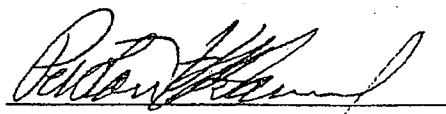
1. The Commission erred as a matter of law by failing to increase the compensation rate to fairly compensate this high wage earner, under the second paragraph of SC Code Section 42-1-40 and SC Code Section 42-9-10 and the decisions of the Supreme Court and Court of Appeals under those sections.

2. The Commission 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. The Commission 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 Commission 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.

Respectfully submitted by:



Preston F. McDaniel
Attorney for the Appellant

December 11, 2015

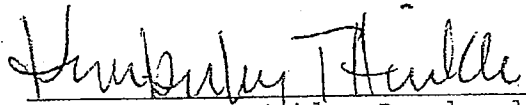
CERTIFICATE OF SERVICE

WCC File No. 9922954 & 0024408

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 MOTION TO REQUIREMENT PAYMENT PURSUANT TO SC CODE §42-17-60 OF THE AWARD AND TO DISMISS THE APPEAL OF THE DEFENDANTS, NOTICE OF CROSS-APPEAL TO THE DEFENDANTS' NOTICE OF INTENT TO APPEAL THE FULL COMMISSION DECISION PURSUANT TO SC CODE §42-17-60 SCACR, RULE 203(c) and MEMORANDUM IN SUPPORT OF SAME by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Ms. Amy Bracy
Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

Peter P. Leventis, IV, Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

11th day of December, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/18

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

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

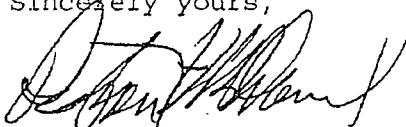
The Honorable Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit
P O Box 192
Columbia, SC 29202-0192

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Ms. McBride and Judge Lee:

Pursuant to Rule 40(h), this is to request that the Motion that is attached hereto for payment of the Award of the Workers' Compensation Commission and Motion to Dismiss be given priority status on the Motion Roster and be heard as soon after the 10 day period for response has transpired as possible. The reason for this request is this injured worker has been without benefits for over four (4) years and the Motion requests an Order mandating payment. Thank you for your assistance, and by copy of this letter, I am forwarding a copy of this request for priority status to Counsel for the Defendants.

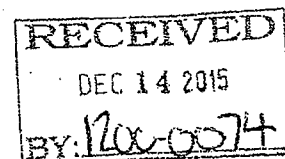
Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Amy Bracy, SC Workers' Compensation Commission
Peter P. Levenis, IV, Esquire ✓
Mr. Theodore P. Polansky



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

Telephone (803) 771-7211

Facsimile (803) 252-0709

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Madame Clerk:

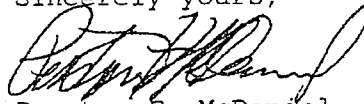
Please find enclosed for filing with the Circuit Court the PETITION AND NOTICE OF APPEAL in the above-referenced matter along with a Certificate of Service of the same on all concerned parties. Also attached is a MOTION FOR PAYMENT UNDER AWARD BEING APPEALED AND TO DISMISS THE APPEAL. There is also a request for priority status and hearing the Motion as soon as possible after the ten (10) day Motion period.

I would appreciate it if you would clock in and certify the additional copy and return it to me for my file. Enclosed is a check in the amount of \$150.00 for the filing fee and a stamped, self-addressed envelope for returning the copy to me.

Also by copy of this letter to the South Carolina Workers' Compensation Commission, I am requesting that they forward WCC File Nos.: 9922954 and 0024408 to you in readiness for this matter to be heard.

Thank you for your assistance. I hope this is sufficient for filing this matter with the Court; however, if additional information is needed, please feel free to contact me at your convenience.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Ms. Amy Bracy, SC Workers' Compensation Commission
Peter P. Leventis, IV, Esquire ✓
Mr. Ted Polansky

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THEODORE P. POLANSKY)

Plaintiff,)

vs.)

SC OFFICE OF THE ATTORNEY)
GENERAL, et. al.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: ____-CP-____-

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Preston F. McDaniel, Bar No. 3770

Address:

McDaniel Law Firm, 1315 Elmwood Avenue,
Columbia, SC 29201

Phone: 803-771-7211 Fax 803-252-0709

E-mail: preston@pfmcdlaw.com Other: _____

Defendant's Attorney:

_____, Bar No. _____

Address:

Phone: _____ Fax _____

E-mail: _____ 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: Motion to Require Payment and to Dismiss Appeal

Estimated Time Needed: 1.0

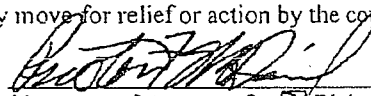
Court Reporter Needed: ☒ YES / ☐ NO

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 _____

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☐ 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, SCRCF)

☐ 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.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

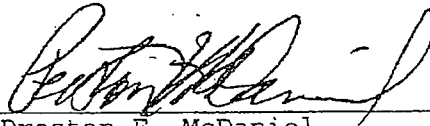
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel for the Movant may be heard, the Movant, the injured worker in the above-referenced matter will move before the Court for an Order requiring the payment immediately of all accrued weekly compensation and placing the Petitioner on a running Award under the Award made by the SC Workers' Compensation Commission affirming the Decision of the Hearing Commissioner for the reasons as more specifically set forth in the Memorandum attached hereto and incorporated herein by reference. The original Hearing Commissioner Order was issued on June 1, 2015, and the Full Commission Order was issued on November 10, 2015.

The Movant further moves to dismiss the appeal for a lack of jurisdiction of the Commission to hear the appeal from the Hearing Commissioner's Decision due to a failure to timely file and of the State Accident Fund's Executive Director to comply with the mandatory provisions of the Act, as set forth more fully in the Memorandum attached hereto and incorporated herein by reference.

Respectfully submitted,

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

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Movant

December 11, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

The Movant would respectfully show unto the Court as follows:

1. That pursuant to the Award made by Commissioner Susan Barden, filed June 1st, 2015, the Award specifically provided:

"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."

2. That SC Code §42-17-60 as amended through 2006 which is applicable to this 1999 and 2000 claim specifically requires that

an appeal is only a supersedes for thirty (30) days after the Award of the Commission and that thereafter the Employer is required to make "payment of the Award involved in the appeal . . ." until the appeal is resolved.' In the case of Godfrey v. Mills Mill, 235 S.C. 401, 108 S.E.2d 587 (1959) as affirmed again by the Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), in a factual situation where the original Hearing Commissioner has made an Award and that Award is affirmed by the Full Commission, payment due under this statute is due from the date of the Award of the Hearing Commissioner. Based on the decisions of the Supreme Court and the statute, the Claimant has made demand for payment of the Award and as of November 10th, which is the date of the Award of the Full Commission affirming the Hearing Commissioner's Decision, the accrued temporary total disability owed to the Claimant is \$123,791.00. To that figure should be added all temporary total disability benefits that accrue until such time as weekly payments are started. If payment of the accrued Award is not made within seven (7) days of the date of demand, which was made on December 11th, interest is to be added pursuant to SC Code §42-9-230 and if not paid within 14 days of the date that it is due pursuant to §42-17-60, the 10% penalty imposed under §42-9-90 is to be added.

3. That as to the Motion to Dismiss as attached hereto and incorporated herein by reference, the Movant, the injured worker

in this matter, notified the SC Workers' Compensation Commission on July 31, 2015 that while he had received an appeal and request for Commission review, under §42-17-30 that he had not received a copy of the written notification from the Executive Director of the State Accident Fund to the Commission as is required by SC Code §42-7-80 that requires the Executive Director to notify the Commission of his intention to contest the Award that had been made. A copy of that Notice to the Commission was forwarded to both Counsel for the State Accident Fund and also to the Executive Director, Harry Gregory.

Again by letter dated September 2, 2015 addressed to the General Counsel for the State Workers' Compensation, Counsel for the Movant contacted the SC Workers' Compensation Commission through its General Counsel and requested to be advised whether or not such Notice from the Executive Director had been received and whether or not the Commission would require compliance, which is mandatory pursuant to the provisions of SC Code §42-7-80. That request was also forwarded to Counsel for the Defendants and to the Executive Director concerning his mandatory compliance with the Act. A copy of that letter is attached hereto as Exhibit "A".

4. That the SC Supreme Court has previously held repeatedly and it constitutes a general principle of construction law in the area of workers' compensation, that the wording of the Act must be strictly construed and where the provisions of the

Act require that an action "shall" be done, the provisions are mandatory. See Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007).

5. That SC Code §42-17-40 provides the general requirements for appeal by any party in reference to an award made by a Workers' Compensation Commission Decision. That section requires appeal within 14 days, "from" the date of the Decision.

It does not state 14 days after notice of the Decision. The Movant would first note that the Hearing Commissioner was filed and notice given on June 1st and that the request for Commission Review was not served by mail until June 15th, which is 15 days after the date of the Order instead of on or before the 14th day. The appeal was not timely filed. This requirement is jurisdictional and therefore the Commission had no jurisdiction to hear the appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011). In addition to this basis and the specific basis for this Motion is that in addition to the general appeal or request for review requirements of §42-17-40, SC Code §42-7-80 places a separate and specific statutory requirement on the Executive Director of the State Accident Fund where he intends to litigate or otherwise contest an Award made by the Commission to notify the Commission of that intent. That statute specifically provides that where the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, he, "shall notify the Commission of such

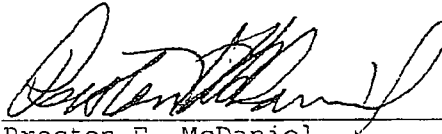
intention." This is a mandatory provision applicable to the Executive Director of the State Accident Fund and no such notice was filed in this matter. The Claimant/Movant would respectfully submit that a review of the Commission Record which will be filed with the Court by the Commission will establish this fact. In Callahan, supra, the defendants knew about the third party suit but the claimant had not filed the required mandatory notice.

6. That the SC Court of Appeals has specifically held in the case of Levi v. Northern Anderson Co. EMS that the Appellate Court shall dismiss an appeal even if jurisdiction and statutory compliance are not raised by the parties. The appealability of an Order and as to whether or not there was jurisdiction for the appeal is a matter of law. The Court held the right to appeal is a jurisdictional matter and even if the parties do not raise the issue of appealability, the Court must dismiss the appeal on its own Motion if the Court concludes that the Commission and the Court does not have jurisdiction over the appeal. Levi v. Northern Anderson Co. EMS, 409 S.C. 474, 762 S.E.2d 44 (SC App. 2014) (cert. den., 1/15/15).

WHEREFORE, the Movant would respectfully move for an Order of the Court ordering payment pursuant to the Award and if that payment has not been made within seven (7) days and fourteen (14) days of the date of the request for payment, and within the time that it is due pursuant to statute and the decisions of the SC Supreme Court, for interest and penalties as are applicable.

FURTHER, based on the failure of the Appellant, State Accident Fund, to timely file its appeal to the Full Commission and its failure to comply with the mandatory provisions of the Act requiring the Executive Director to specifically notify the Commission as to his intent to challenge the Decision of the Hearing Commissioner, which is a separate and distinct mandatory requirement placed on the Executive Director himself, separate and apart for an appeal notice required under §42-17-40, the Movant would respectfully move to have the appeal dismissed.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner

December 11, 2015

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

Telephone (803) 771-7211

Facsimile (803) 252-0709

July 31, 2015

VIA EMAIL - sdebruhl@wcc.sc.gov

AND US MAIL

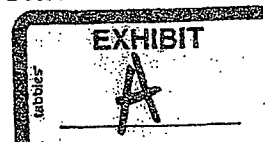
Chairman T. Scott Beck
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Ted Polansky vs. SC Attorney General's Office
WCC File No: 9922954 & 0024408

Dear Chairman Beck:

I am writing this to you and to the Judicial Director as the Chairman and the Judicial Director over compliance with judicial matters at the Workers' Compensation Commission. I received an Appeal in the above-referenced matter from the contract attorney for the State Accident Fund which was actually received by mail the day after the last date for filing a request for Commission review pursuant to §42-17-30. This is to request a copy of the written notification from the Executive Director of the State Accident Fund; that is required and is a mandatory requirement under SC Code §42-7-80 which requires that the Executive Director where, "the Director intends to litigate or otherwise contest the Award he shall notify the Commission of such intention." I have not and did not receive the mandatory statutory notice from the Director of a challenge to the Award. This notification is a specific and separate requirement than an appeal filed by an insurance company or self-insured or any individual employer under The Act. I am therefore requesting a copy of that written notification to the Commission filed prior to the time that the State Accident Fund made the decision to file a request for review in this matter.

Again, this is a specific mandatory statutory requirement and if such written notification from the Executive Director was not filed with the Commission, I am hereby requesting that the Appeal filed by the State Accident Fund be dismissed for failure to properly comply with the statutory requirements where the Director intends to contest an Award issued by the Commission.

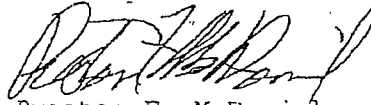


Chairman T. Scott Beck
July 31, 2015
Page 2

By copy of this letter, I am notifying the contract attorney for the State Accident Fund and the Executive Director of this notification and request for compliance with the statute and/or that the Appeal be dismissed.

I sincerely appreciate all the courtesies and kindnesses that the Commission always shows me in this and all matters and I look forward to receipt of a copy of the statutory notice or order dismissing the Appeal. This is identical to the requirements of SC Code §42-1-560.

Sincerely yours,



Preston F. McDaniel

PFM/abh

cc: Amy Bracy, Judicial Director (via email abracy@wcc.sc.gov)
Peter P. Leventis, IV, Attorney (via email pleventis@mckayfirm.com)
Ms. Gale DuBose (via email grdubose2@aol.com)
Harry Gregory, Executive Director, State Accident Fund (via US Mail)

Andrea Ham

From: Andrea Ham <aham@pfmcdlaw.com>
Sent: Friday, July 31, 2015 5:15 PM
To: 'sdebruhl@wcc.sc.gov'
Cc: 'abracy@wcc.sc.gov'; 'pleventis@mckayfirm.com'; 'Kim Hinkle'
Subject: Re: Ted Polansky vs. Sc Attorney General's Office
Attachments: SCAN19186_000.pdf

This email is being sent at the request of Preston McDaniel.

Thank you,
Andrea Ham
McDaniel Law Firm
(803)771-7211

Re: Polansky

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 2, 2015

VIA EMAIL - kroberts@wcc.sc.gov
AND US MAIL
Keith Roberts, Esquire
General Counsel
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Mandatory Filing Requirement of §42-7-80

Dear Keith:

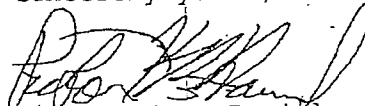
SC Code §42-7-80 requires that if the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, that he, "shall notify the Commission of such intention." I had previously written the Judicial Director about this and I would appreciate it if you would confirm the Commission's position on this mandatory statutory requirement. Also if the Commission views this mandatory provision placing a specific statutory responsibility on the Director of the State Accident Fund as compared to §42-1-560(b) which places the mandatory requirement on a claimant that, "notice of the commencement of the action shall be given within 30 days thereafter to the Workers' Compensation Commission . . .", differently I would appreciate it if you could address the reasons for that. As you know under the legal principle that the wording of the Act must be strictly construed, the Supreme Court in Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007) held that if the claimant does not file that mandatory notice, it voids the claimant's right to benefits under the Act.

In making this request, please let me say I am absolutely sure this is a new issue for you and the Commission. I was aware of it when I was with the Attorney General's office and later when I was General Counsel for the State Accident Fund some 32 and 31 years ago and quite frankly, had forgotten about it until recently. It was part of the enabling Act in 1947 and has remained unchanged since 1974. The State Accident Fund is not an insurance company and this is one of many safeguards and differences within the Act.

Keith Roberts, Esquire
September 2, 2015
Page 2 of 2

I look forward to hearing from you and sincerely appreciate your assistance and notification as General Counsel in this matter. Because this applies to the State Accident Fund in general and because it has arisen in a case being handled by a contract attorney for the State Accident Fund, I am copying both the Executive Director and Peter Leventis of this communication. As always, I appreciate all the courtesies and kindnesses shown to me by the Commission.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Peter P. Leventis, Esquire
Mr. Harry B. Gregory, Director, State Accident Fund

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Wednesday, September 02, 2015 4:02 PM
To: kroberts@wcc.sc.gov
Subject: Mandatory Filing Requirement of Section 42-7-80
Attachments: SCAN19477_000.pdf

Importance: High

The attached is being sent to you at the request of Preston F. McDaniel.

Kimberley T. Hinkle, Senior Paralegal
to Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
T: 803-771-7211
F: 803-252-0709



Please consider the environment before printing

NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender either by telephone (803-771-7211) or reply to this e-mail and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

THEODORE P. POLANSKY,

Plaintiff(s)

vs.

SC OFFICE OF ATTORNEY GENERAL, et. al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

Submitted By: Preston F. McDaniel, Esquire

Address: McDaniel Law Firm

1315 Elmwood Avenue

Columbia, SC 29201

SC Bar #: 3770

Telephone #: 803-771-7211

Fax #: 803-252-0709

Other:

E-mail: preston@pfmcdlaw.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.

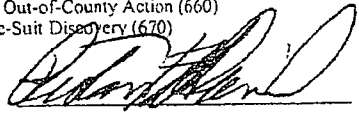
DOCKETING INFORMATION (Check all that apply)

*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	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Conversion (310)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Motor Vehicle Accident (320)	☐ Condemnation (410)
☐ General (130)	☐ Medical Malpractice (220)	☐ Premises Liability (330)	☐ Foreclosure (420)
☐ Breach of Contract (140)	Previous Notice of Intent Case #	☐ Products Liability (340)	☐ Mechanic's Lien (430)
☐ Fraud/Bad Faith (150)	20 -NJ-	☐ Personal Injury (350)	☐ Partition (440)
☐ Failure to Deliver/ Warranty (160)	☐ Notice/ File Med Mal (230)	☐ Wrongful Death (360)	☐ Possession (450)
☐ Employment Discrim (170)	☐ Other (299)	☐ Assault/Battery (370)	☐ Building Code Violation (460)
☐ Employment (180)		☐ Slander/Libel (380)	☐ Other (499)
☐ Other (199)		☐ Other (399)	
Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☒ Worker's Comp (960)
Special/Complex /Other		☐ Confession of Judgment (770)	☐ Zoning Board (970)
☐ Environmental (600)	☐ Pharmaceuticals (630)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Public Service Comm. (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Other (799)	☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Other (999)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
☐ Sexual Predator (510)	☐ Pre-Suit Discovery (670)		

Submitting Party Signature: 

Date: 12/11/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (06/2015)

Page 1 of 2

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, 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.

STATE OF SOUTH CAROLINA

RICHLAND COUNTY

THEODORE P. POLANSKY,
Plaintiff

vs.

SC OFFICE OF THE ATTORNEY GENERAL,
et. al.,

Defendants.

IN THE CIRCUIT COURT FOR THE

FIFTH JUDICIAL CIRCUIT

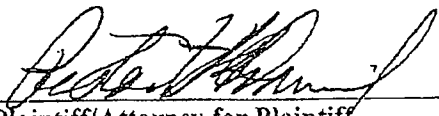
CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO. _____

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☒ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☐ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

Preston F. McDaniel, Esquire
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
803-771-7211
SC Bar#: 3770



Plaintiff/Attorney for Plaintiff

Defendant/Attorney(s) for Defendant(s)

Date: December 11, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)
Employee,)
Claimant/Petitioner,)
v.)
SC OFFICE OF THE ATTORNEY)
GENERAL,)
Employer, and)
STATE ACCIDENT FUND,)
Carrier,)
Defendants.)

Docket No: _____

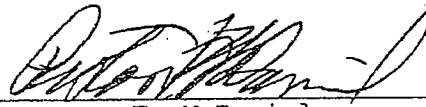
NOTICE AND CROSS-APPEAL
TO THE DEFENDANTS'
NOTICE OF INTENT TO APPEAL THE
FULL COMMISSION DECISION
PURSUANT TO SC CODE §42-17-60
SCACR, RULE 203(c)

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS,
AND THE SC WORKERS' COMPENSATION COMMISSION:

Based on the appeal of the Full Commission Order by the Defendants in the above-referenced matter, the Claimant hereby cross-appeals pursuant to the provisions of SC Code §42-17-60 (as amended through 2006). SC Code §42-17-60 specifically provides that if either party appeals the Decision of the Commission to the Court of Commons Pleas of the County in which the accident happened based on errors of law, that the appeal shall proceed, "under the same terms and conditions as govern appeals in ordinary civil actions". SCACR, Rule 203(c) provides the right to file a cross-appeal within five (5) days of the receipt of an Appeal. The Notice of Intent to Appeal dated December 9th was

received by the Claimant/Petitioner on December 10th by regular mail and this cross-appeal follows. The basis for the cross-appeal is attached hereto and incorporated herein by reference as is required by Statute.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner

December 11, 2015

ATTACHMENT TO CROSS-APPEAL

Theodore Polansky v. SC Office of Attorney General

WCC File Nos. 9922954 & 0024408

1. The Commission 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. The Commission 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. The Commission 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 Commission 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.

Respectfully submitted by:



Preston F. McDaniel
Attorney for the Appellant

December 11, 2015

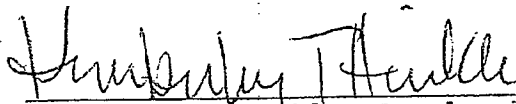
CERTIFICATE OF SERVICE

WCC File No. 9922954 & 0024408

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 MOTION TO REQUIREMENT PAYMENT PURSUANT TO SC CODE §42-17-60 OF THE AWARD AND TO DISMISS THE APPEAL OF THE DEFENDANTS, NOTICE OF CROSS-APPEAL TO THE DEFENDANTS' NOTICE OF INTENT TO APPEAL THE FULL COMMISSION DECISION PURSUANT TO SC CODE §42-17-60 SCACR, RULE 203(c) and MEMORANDUM IN SUPPORT OF SAME by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Ms. Amy Bracy
Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

Peter P. Leventis, IV, Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

11th day of December, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/18

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

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

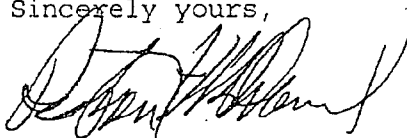
The Honorable Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit
P O Box 192
Columbia, SC 29202-0192

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Ms. McBride and Judge Lee:

Pursuant to Rule 40(h), this is to request that the Motion that is attached hereto for payment of the Award of the Workers' Compensation Commission and Motion to Dismiss be given priority status on the Motion Roster and be heard as soon after the 10 day period for response has transpired as possible. The reason for this request is this injured worker has been without benefits for over four (4) years and the Motion requests an Order mandating payment. Thank you for your assistance, and by copy of this letter, I am forwarding a copy of this request for priority status to Counsel for the Defendants.

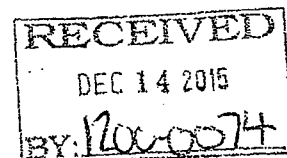
Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Amy Bracy, SC Workers' Compensation Commission
Peter P. Levenis, IV, Esquire ✓
Mr. Theodore P. Polansky



McDANIEL LAW FIRM
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Facsimile (803) 252-0709

December 11, 2015

Honorable Jeanette McBride
Clerk of Court
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

RE: Theodore P. Polansky v. SC Office of the Attorney General
WCC File Nos: 9922954 & 0024408

Dear Madame Clerk:

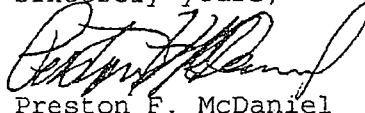
Please find enclosed for filing with the Circuit Court the PETITION AND NOTICE OF APPEAL in the above-referenced matter along with a Certificate of Service of the same on all concerned parties. Also attached is a MOTION FOR PAYMENT UNDER AWARD BEING APPEALED AND TO DISMISS THE APPEAL. There is also a request for priority status and hearing the Motion as soon as possible after the ten (10) day Motion period.

I would appreciate it if you would clock in and certify the additional copy and return it to me for my file. Enclosed is a check in the amount of \$150.00 for the filing fee and a stamped, self-addressed envelope for returning the copy to me.

Also by copy of this letter to the South Carolina Workers' Compensation Commission, I am requesting that they forward WCC File Nos.: 9922954 and 0024408 to you in readiness for this matter to be heard.

Thank you for your assistance. I hope this is sufficient for filing this matter with the Court; however, if additional information is needed, please feel free to contact me at your convenience.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Ms. Amy Bracy, SC Workers' Compensation Commission
Peter P. Leventis, IV, Esquire ✓
Mr. Ted Polansky

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THEODORE P. POLANSKY)

Plaintiff,)

vs.)

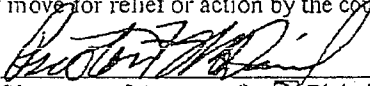
SC OFFICE OF THE ATTORNEY)
GENERAL, et. al.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: ____-CP-____-

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Preston F. McDaniel, Bar No. 3770 Address: McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, SC 29201 Phone: 803-771-7211 Fax 803-252-0709 E-mail: preston@pfmcdlaw.com Other: _____		Defendant's Attorney: _____, Bar No. ____ Address: _____ Phone: _____ Fax _____ E-mail: _____ 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: Motion to Require Payment and to Dismiss Appeal Estimated Time Needed: 1.0 Court Reporter Needed: ☒ YES/ ☐ NO			
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 _____			
SECTION III: Motion Fee ☐ PAID - AMOUNT: \$ _____ ☐ 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. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

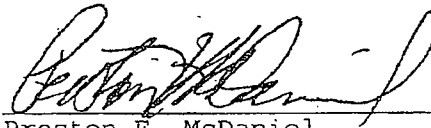
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof or as soon thereafter as Counsel for the Movant may be heard, the Movant, the injured worker in the above-referenced matter will move before the Court for an Order requiring the payment immediately of all accrued weekly compensation and placing the Petitioner on a running Award under the Award made by the SC Workers' Compensation Commission affirming the Decision of the Hearing Commissioner for the reasons as more specifically set forth in the Memorandum attached hereto and incorporated herein by reference. The original Hearing Commissioner Order was issued on June 1, 2015, and the Full Commission Order was issued on November 10, 2015.

The Movant further moves to dismiss the appeal for a lack of jurisdiction of the Commission to hear the appeal from the Hearing Commissioner's Decision due to a failure to timely file and of the State Accident Fund's Executive Director to comply with the mandatory provisions of the Act, as set forth more fully in the Memorandum attached hereto and incorporated herein by reference.

Respectfully submitted,

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

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Movant

December 11, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

THEODORE P. POLANSKY,)

Employee,)

Claimant/Petitioner,)

v.)

SC OFFICE OF THE ATTORNEY)
GENERAL,)

Employer, and)

STATE ACCIDENT FUND,)

Carrier,)

Defendants.)

Docket No: _____

MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE PAYMENT
PURSUANT TO SC CODE §42-17-60
OF THE AWARD AND TO DISMISS
THE APPEAL OF THE DEFENDANTS

The Movant would respectfully show unto the Court as follows:

1. That pursuant to the Award made by Commissioner Susan Barden, filed June 1st, 2015, the Award specifically provided:

"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."

2. That SC Code §42-17-60 as amended through 2006 which is applicable to this 1999 and 2000 claim specifically requires that

an appeal is only a supersedes for thirty (30) days after the Award of the Commission and that thereafter the Employer is required to make "payment of the Award involved in the appeal . . ." until the appeal is resolved. In the case of Godfrey v. Mills Mill, 235 S.C. 401, 108 S.E.2d 587 (1959) as affirmed again by the Supreme Court in the case of Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960), in a factual situation where the original Hearing Commissioner has made an Award and that Award is affirmed by the Full Commission, payment due under this statute is due from the date of the Award of the Hearing Commissioner. Based on the decisions of the Supreme Court and the statute, the Claimant has made demand for payment of the Award and as of November 10th, which is the date of the Award of the Full Commission affirming the Hearing Commissioner's Decision, the accrued temporary total disability owed to the Claimant is \$123,791.00. To that figure should be added all temporary total disability benefits that accrue until such time as weekly payments are started. If payment of the accrued Award is not made within seven (7) days of the date of demand, which was made on December 11th, interest is to be added pursuant to SC Code §42-9-230 and if not paid within 14 days of the date that it is due pursuant to §42-17-60, the 10% penalty imposed under §42-9-90 is to be added.

3. That as to the Motion to Dismiss as attached hereto and incorporated herein by reference, the Movant, the injured worker

in this matter, notified the SC Workers' Compensation Commission on July 31, 2015 that while he had received an appeal and request for Commission review, under §42-17-30 that he had not received a copy of the written notification from the Executive Director of the State Accident Fund to the Commission as is required by SC Code §42-7-80 that requires the Executive Director to notify the Commission of his intention to contest the Award that had been made. A copy of that Notice to the Commission was forwarded to both Counsel for the State Accident Fund and also to the Executive Director, Harry Gregory.

Again by letter dated September 2, 2015 addressed to the General Counsel for the State Workers' Compensation, Counsel for the Movant contacted the SC Workers' Compensation Commission through its General Counsel and requested to be advised whether or not such Notice from the Executive Director had been received and whether or not the Commission would require compliance, which is mandatory pursuant to the provisions of SC Code §42-7-80. That request was also forwarded to Counsel for the Defendants and to the Executive Director concerning his mandatory compliance with the Act. A copy of that letter is attached hereto as Exhibit "A".

4. That the SC Supreme Court has previously held repeatedly and it constitutes a general principle of construction law in the area of workers' compensation, that the wording of the Act must be strictly construed and where the provisions of the

Act require that an action "shall" be done, the provisions are mandatory. See Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007).

5. That SC Code §42-17-40 provides the general requirements for appeal by any party in reference to an award made by a Workers' Compensation Commission Decision. That section requires appeal within 14 days, "from" the date of the Decision. It does not state 14 days after notice of the Decision. The Movant would first note that the Hearing Commissioner was filed and notice given on June 1st and that the request for Commission Review was not served by mail until June 15th, which is 15 days after the date of the Order instead of on or before the 14th day. The appeal was not timely filed. This requirement is jurisdictional and therefore the Commission had no jurisdiction to hear the appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011). In addition to this basis and the specific basis for this Motion is that in addition to the general appeal or request for review requirements of §42-17-40, SC Code §42-7-80 places a separate and specific statutory requirement on the Executive Director of the State Accident Fund where he intends to litigate or otherwise contest an Award made by the Commission to notify the Commission of that intent. That statute specifically provides that where the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, he, "shall notify the Commission of such

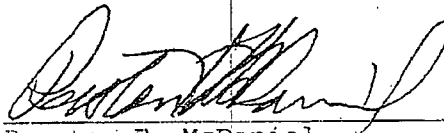
intention." This is a mandatory provision applicable to the Executive Director of the State Accident Fund and no such notice was filed in this matter. The Claimant/Movant would respectfully submit that a review of the Commission Record which will be filed with the Court by the Commission will establish this fact. In Callahan, supra, the defendants knew about the third party suit but the claimant had not filed the required mandatory notice.

6. That the SC Court of Appeals has specifically held in the case of Levi v. Northern Anderson Co. EMS that the Appellate Court shall dismiss an appeal even if jurisdiction and statutory compliance are not raised by the parties. The appealability of an Order and as to whether or not there was jurisdiction for the appeal is a matter of law. The Court held the right to appeal is a jurisdictional matter and even if the parties do not raise the issue of appealability, the Court must dismiss the appeal on its own Motion if the Court concludes that the Commission and the Court does not have jurisdiction over the appeal. Levi v. Northern Anderson Co. EMS, 409 S.C. 474, 762 S.E.2d 44 (SC App. 2014) (cert. den., 1/15/15).

WHEREFORE, the Movant would respectfully move for an Order of the Court ordering payment pursuant to the Award and if that payment has not been made within seven (7) days and fourteen (14) days of the date of the request for payment, and within the time that it is due pursuant to statute and the decisions of the SC Supreme Court, for interest and penalties as are applicable.

FURTHER, based on the failure of the Appellant, State Accident Fund, to timely file its appeal to the Full Commission and its failure to comply with the mandatory provisions of the Act requiring the Executive Director to specifically notify the Commission as to his intent to challenge the Decision of the Hearing Commissioner, which is a separate and distinct mandatory requirement placed on the Executive Director himself, separate and apart for an appeal notice required under §42-17-40, the Movant would respectfully move to have the appeal dismissed.

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner

December 11, 2015

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

Telephone (803) 771-7211

Facsimile (803) 252-0709

July 31, 2015

VIA EMAIL - sdebruhl@wcc.sc.gov
AND US MAIL

Chairman 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 Chairman Beck:

I am writing this to you and to the Judicial Director as the Chairman and the Judicial Director over compliance with judicial matters at the Workers' Compensation Commission. I received an Appeal in the above-referenced matter from the contract attorney for the State Accident Fund which was actually received by mail the day after the last date for filing a request for Commission review pursuant to §42-17-30. This is to request a copy of the written notification from the Executive Director of the State Accident Fund; that is required and is a mandatory requirement under SC Code §42-7-80 which requires that the Executive Director where, "the Director intends to litigate or otherwise contest the Award he shall notify the Commission of such intention." I have not and did not receive the mandatory statutory notice from the Director of a challenge to the Award. This notification is a specific and separate requirement than an appeal filed by an insurance company or self-insured or any individual employer under The Act. I am therefore requesting a copy of that written notification to the Commission filed prior to the time that the State Accident Fund made the decision to file a request for review in this matter.

Again, this is a specific mandatory statutory requirement and if such written notification from the Executive Director was not filed with the Commission, I am hereby requesting that the Appeal filed by the State Accident Fund be dismissed for failure to properly comply with the statutory requirements where the Director intends to contest an Award issued by the Commission.

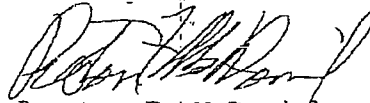


Chairman T. Scott Beck
July 31, 2015
Page 2

By copy of this letter, I am notifying the contract attorney for the State Accident Fund and the Executive Director of this notification and request for compliance with the statute and/or that the Appeal be dismissed.

I sincerely appreciate all the courtesies and kindnesses that the Commission always shows me in this and all matters and I look forward to receipt of a copy of the statutory notice or order dismissing the Appeal. This is identical to the requirements of SC Code §42-1-560.

Sincerely yours,



Preston F. McDaniel

PFM/abh

cc: Amy Bracy, Judicial Director (via email abracy@wcc.sc.gov)
Peter P. Leventis, IV, Attorney (via email pleventis@mckayfirm.com)
Ms. Gale DuBose (via email grdubose2@aol.com)
Harry Gregory, Executive Director, State Accident Fund (via US Mail)

Andrea Ham

From: Andrea Ham <aham@pfmcdlaw.com>
Sent: Friday, July 31, 2015 5:15 PM
To: 'sdebruhl@wcc.sc.gov'
Cc: 'abracy@wcc.sc.gov'; 'pleventis@mckayfirm.com'; 'Kim Hinkle'
Subject: Re: Ted Polansky vs. Sc Attorney General's Office
Attachments: SCAN19186_000.pdf

This email is being sent at the request of Preston McDaniel.

Thank you,
Andrea Ham
McDaniel Law Firm
(803)771-7211

Re: Potensky

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

Telephone (803) 771-7211

Facsimile (803) 252-0709

September 2, 2015

VIA EMAIL - [kroberts@wcc.sc.gov](mailto: kroberts@wcc.sc.gov)
AND US MAIL
Keith Roberts, Esquire
General Counsel
SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Mandatory Filing Requirement of §42-7-80

Dear Keith:

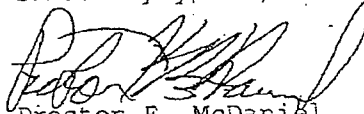
SC Code §42-7-80 requires that if the Director of the State Accident Fund intends to litigate or otherwise contest an Award made by the Commission, that he, "shall notify the Commission of such intention." I had previously written the Judicial Director about this and I would appreciate it if you would confirm the Commission's position on this mandatory statutory requirement. Also if the Commission views this mandatory provision placing a specific statutory responsibility on the Director of the State Accident Fund as compared to §42-1-560(b) which places the mandatory requirement on a claimant that, "notice of the commencement of the action shall be given within 30 days thereafter to the Workers' Compensation Commission . . .", differently I would appreciate it if you could address the reasons for that. As you know under the legal principle that the wording of the Act must be strictly construed, the Supreme Court in Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 311 (2007) held that if the claimant does not file that mandatory notice, it voids the claimant's right to benefits under the Act.

In making this request, please let me say I am absolutely sure this is a new issue for you and the Commission. I was aware of it when I was with the Attorney General's office and later when I was General Counsel for the State Accident Fund some 32 and 31 years ago and quite frankly, had forgotten about it until recently. It was part of the enabling Act in 1947 and has remained unchanged since 1974. The State Accident Fund is not an insurance company and this is one of many safeguards and differences within the Act.

Keith Roberts, Esquire
September 2, 2015
Page 2 of 2

I look forward to hearing from you and sincerely appreciate your assistance and notification as General Counsel in this matter. Because this applies to the State Accident Fund in general and because it has arisen in a case being handled by a contract attorney for the State Accident Fund, I am copying both the Executive Director and Peter Leventis of this communication. As always, I appreciate all the courtesies and kindnesses shown to me by the Commission.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Peter P. Leventis, Esquire
Mr. Harry B. Gregory, Director, State Accident Fund

Kim Hinkle

From: Kim Hinkle <kim@pfmcdlaw.com>
Sent: Wednesday, September 02, 2015 4:02 PM
To: kroberts@wcc.sc.gov
Subject: Mandatory Filing Requirement of Section 42-7-80
Attachments: SCAN19477_000.pdf

Importance: High

The attached is being sent to you at the request of Preston F. McDaniel.

Kimberley T. Hinkle, Senior Paralegal
to Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
T: 803-771-7211
F: 803-252-0709



Please consider the environment before printing

NOTICE: This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender either by telephone (803-771-7211) or reply to this e-mail and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

THEODORE P. POLANSKY,

Plaintiff(s)

vs.

SC OFFICE OF ATTORNEY GENERAL, et. al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

Submitted By: Preston F. McDaniel, Esquire

Address: McDaniel Law Firm

1315 Elmwood Avenue

Columbia, SC 29201

SC Bar #: 3770

Telephone #: 803-771-7211

Fax #: 803-252-0709

Other:

E-mail: preston@pfmedlaw.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)

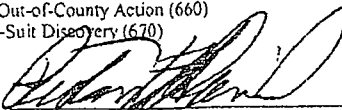
*If Action is Judgment/Settlement do not complete

- ☐ 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	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Conversion (310)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Motor Vehicle Accident (320)	☐ Condemnation (410)
☐ General (130)	☐ Medical Malpractice (220)	☐ Premises Liability (330)	☐ Foreclosure (420)
☐ Breach of Contract (140)	Previous Notice of Intent Case #	☐ Products Liability (340)	☐ Mechanic's Lien (430)
☐ Fraud/Bad Faith (150)	20__-NJ-_____	☐ Personal Injury (350)	☐ Partition (440)
☐ Failure to Deliver/ Warranty (160)	☐ Notice/ File Med Mal (230)	☐ Wrongful Death (360)	☐ Possession (450)
☐ Employment Discrim (170)	☐ Other (299)	☐ Assault/Battery (370)	☐ Building Code Violation (460)
☐ Employment (180)		☐ Slander/Libel (380)	☐ Other (499)
☐ Other (199)		☐ Other (399)	
Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☒ Worker's Comp (960)
Special/Complex /Other		☐ Confession of Judgment (770)	☐ Zoning Board (970)
☐ Environmental (600)	☐ Pharmaceuticals (630)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Public Service Comm. (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Other (799)	☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		☐ Other (999)
☐ Sexual Predator (510)	☐ Pre-Suit Discovery (670)		

Submitting Party Signature:



Date:

12/11/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (06/2015)

Page 1 of 2

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, 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.

STATE OF SOUTH CAROLINA

RICHLAND COUNTY

THEODORE P. POLANSKY,
Plaintiff

vs.

SC OFFICE OF THE ATTORNEY GENERAL,
et. al.,

Defendants.

IN THE CIRCUIT COURT FOR THE

FIFTH JUDICIAL CIRCUIT

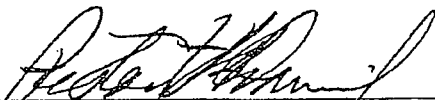
CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO.

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☒ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☐ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

Preston F. McDaniel, Esquire
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
803-771-7211
SC Bar#: 3770



Plaintiff/Attorney for Plaintiff

Defendant/Attorney(s) for Defendant(s)

Date: December 11, 2015

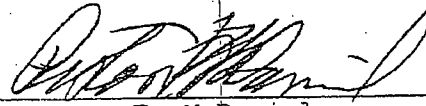
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	OF THE FIFTH JUDICIAL CIRCUIT
THEODORE P. POLANSKY,	)	
	)	
Employee,	)	Docket No: _____
	)	
Claimant/Petitioner,	)	
	)	
v.	)	NOTICE AND CROSS-APPEAL
	)	TO THE DEFENDANTS'
SC OFFICE OF THE ATTORNEY	)	NOTICE OF INTENT TO APPEAL THE
GENERAL,	)	FULL COMMISSION DECISION
	)	PURSUANT TO SC CODE §42-17-60
Employer, and	)	SCACR, RULE 203(c)
	)	
STATE ACCIDENT FUND,	)	
	)	
Carrier,	)	
	)	
Defendants.	)	
	)	

TO: PETER P. LEVENTIS, IV, ESQUIRE, ATTORNEY FOR THE DEFENDANTS,
AND THE SC WORKERS' COMPENSATION COMMISSION:

Based on the appeal of the Full Commission Order by the Defendants in the above-referenced matter, the Claimant hereby cross-appeals pursuant to the provisions of SC Code §42-17-60 (as amended through 2006). SC Code §42-17-60 specifically provides that if either party appeals the Decision of the Commission to the Court of Commons Pleas of the County in which the accident happened based on errors of law, that the appeal shall proceed, "under the same terms and conditions as govern appeals in ordinary civil actions". SCACR, Rule 203(c) provides the right to file a cross-appeal within five (5) days of the receipt of an Appeal. The Notice of Intent to Appeal dated December 9th was

received by the Claimant/Petitioner on December 10th by regular mail and this cross-appeal follows. The basis for the cross-appeal is attached hereto and incorporated herein by reference as is required by Statute..

Respectfully submitted,



Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Claimant/Petitioner

December 11, 2015

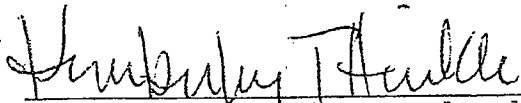
CERTIFICATE OF SERVICE

WCC File No. 9922954 & 0024408

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 MOTION TO REQUIREMENT PAYMENT PURSUANT TO SC CODE §42-17-60 OF THE AWARD AND TO DISMISS THE APPEAL OF THE DEFENDANTS, NOTICE OF CROSS-APPEAL TO THE DEFENDANTS' NOTICE OF INTENT TO APPEAL THE FULL COMMISSION DECISION PURSUANT TO SC CODE §42-17-60 SCACR, RULE 203(c) and MEMORANDUM IN SUPPORT OF SAME by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Ms. Amy Bracy
Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

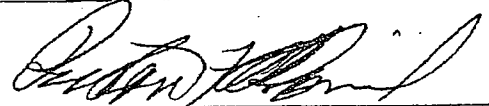
Peter P. Leventis, IV, Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201



Kimberley T. Hinkle, Paralegal

SWORN TO BEFORE ME this

11th day of December, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/18

ATTACHMENT TO CROSS-APPEAL

Theodore Polansky v. SC Office of Attorney General

WCC File Nos. 9922954 & 0024408

1. The Commission 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. The Commission 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. The Commission 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 Commission 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.

Respectfully submitted by:



Preston F. McDaniel
Attorney for the Appellant

December 11, 2015

Julius W. McKay, II
Mark D. Cauthen
Daniel R. Settana, Jr.
M. Stephen Stuble
Janet Brooks Holmes
Peter P. Leventis, IV
Kelli L. Sullivan*

Law Offices
McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.

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*S.C. Certified Mediator
+ Also licensed in N.C.

George D. Gallagher*
Temus C. Miles, Jr.
David M. Bornemann
Brandon P. Jones
James E. L. Fickling+
Richard E. Marsh, III
Courtney R. Pawley
Charles A. Kinney Jr.

September 8, 2015

VIA ECASE UPLOAD

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

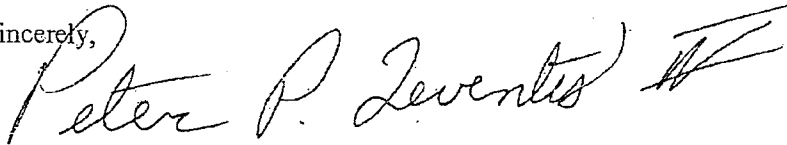
RE: *Theodore Polansky v. SC Attorney General*
WCC No.: 9922954 & 0024408
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Ms. Bracy:

Enclosed for filing are an original and four (4) copies of the Appellants' Brief with attached Order, from which the appeal arises, in the above-mentioned claim. Please forward a clocked in copy to our office in the enclosed self-addressed stamped envelope.

By copy of this letter to the claimant's attorney, Preston F. McDaniel, Esquire, I am serving him with a copy of the Brief.

Sincerely,



Peter P. Leventis, IV

PPL/ecs

cc: Preston F. McDaniel, Esquire (w/encl)
Meggan Damiano (w/encl)

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	WORKERS' COMPENSATION
COUNTY OF RICHLAND	)	COMMISSION
	)	
Theodore Polansky,	)	WCC FILE NO. 9922954 & 0024408
	)	
Claimant/Respondent/	)	
Appellant,	)	
vs.	)	Brief of the Appellants/
	)	Respondents, SC Office of Attorney Gen.
SC Office of Attorney General,	)	Employer, and SC State Accident Fund
	)	In Support of the Form 30 Issues Raised
Employer,	)	By the Defendants
	)	
and	)	
	)	
South Carolina State Accident Fund,	)	
	)	
Carrier,	)	
	)	
Defendants/Appellants,	)	
Respondents.	)	

STATEMENT OF THE CASE

The Claimant, Theodore Polansky, suffered from two separate work related injuries in 1999 and 2000. These claims were admitted for the Claimant's back, left knee (resulting in RSD), and psychological injury. Through March of 2011, the Claimant was paid 500 weeks of temporary total disability benefits. The Claimant subsequently filed a Form 50 hearing request that was ultimately heard at proceedings before the single Commissioner on March 6, 2015. Since 2002, the Claimant has been paid weekly benefits at the maximum compensation rate for the year of his second/subsequent injury or \$507.34, which ceased approximately four years ago, after payment of 500 weeks of benefits were made.

After the Claimant's second admitted injury in 2000, he was taking the prescription drug Seroquel as part of his treatment for his admitted psychological injury, by aggravation of numerous

pre-existing psychological conditions. In February of 2002, the Claimant had to be hospitalized, purportedly due to a drug-drug interaction between the prescription drug Seroquel, and some other prescription medication the Claimant was taking at that time.

Subsequent to the March 6, 2015 hearing, in a June 1, 2015 Order, the Claimant was awarded life time indemnity benefits under S.C. Code Ann. §42-9-10 for a physical brain injury. Among other things in dispute at the March 6, 2015 hearing were: a) Whether or not the Claimant had suffered permanent physical brain injury entitling him to life time indemnity benefits; b) Even if the Claimant had otherwise suffered a permanent physical brain injury, if such injury rose to the level of physical brain injury for permanent life time indemnity benefits as envisioned by the General Assembly in promulgating S.C. Code Ann. §42-9-10, and related case law from the S.C. Supreme Court; c) Even if otherwise compensable, if such benefits of lifetime indemnity proceeds would be barred by the equitable doctrine of *laches*, due to the ten years' long intervening delay in requesting such benefits after the date of the alleged brain injury, resulting in material prejudice to these Defendants; and, d) Certain procedural issues as to the admission of the reports of Dr. Avie Rainwater into evidence; and the setting of the hearing on a Form 50 hearing request made approximately three years prior to the date of the proceedings March 2015 proceedings in this matter.

The single Commissioner ultimately overruled any objection by the Defendants to the reports of Dr. Avie Rainwater, and as to the procedural flaw of holding the hearing on a Form 50 Hearing Request/Complaint originally filed requesting a hearing several years prior. The single Commissioner also ruled that the Claimant has indeed suffered a physical brain injury in this matter, which entitled him to life time benefits, and which was not barred by the equitable doctrine of *laches*, nor for any other reason. The Defendants appealed the findings and conclusions of the

single Commissioner on twelve (12) separate grounds, including the finding of a permanent physical brain injury. The Claimant crossed appealed on the issue of whether or not the compensation rate in this matter should be raised above the maximum compensation rate for the year 2000. The Defendants, as Respondents, have already submitted responsive appellate briefs as to the disputed issues over the average weekly wage and compensation rate for this claim. As to the Defendants appellate grounds for judicial review as cross Appellants in this matter, the Employer/Carrier submit the following arguments on the grounds for exception as outlined below and raised in the prior Form 30 and addendum filed in this matter.

ISSUES PRESENTED IN THE DEFENDANTS APPEAL

(AS PRESENTED IN THE FORM 30 ADDENDUM OF THESE DEFENDANTS)

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 concluding 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 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, and 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 medical 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 life time 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 life time 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).

ARGUMENT

Did the single Commissioner err in overruling the Defendants objection to the inclusion of the updated medical reports of Dr. Avie Rainwater; in holding that Dr. Rainwater as “an authorized treating physician,” and concluding that Dr. Rainwater’s medical opinions were not pivotal or necessary to the single Commissioner’s determination of permanent physical brain damage? (Defendants’ Appellate Grounds No. “1,” “7,” “11,” and “12”).

The record of the parties and APA submissions include medical reports spanning over 15 years due to the initial date of injury in this matter (1999), and the date of the proceedings which

give rise to this appeal, in March of 2015. (See Generally the APA submission No. 4 of the Claimant at pp. 20-30, of Dr. A. Rainwater from October 10, 2001 to July 24, 2014). Defendants raised objection at the hearing before Commissioner Barden as to the inclusion of the updated records of Dr. Rainwater from 2011 forward, and specifically APA p. 20-23, with updated reports and opinions of the Claimant's condition pursuant to the medical reasoning of Dr. Rainwater.

The basis for the objection to the updated medical reports of Dr. Rainwater into the record, are because Dr. Rainwater, and the Defendant Carrier in this matter, are adverse litigants in a contested legal matter between the carrier and Dr. Rainwater as litigants to separate civil legal dispute which did result in the filing of legal suits in the Court of Common Pleas. (See Defendants Exhibit 44, a copy of certain pleadings filed between Dr. Avie Rainwater and the S.C. State Accident Fund). On this point, the single Commissioner held that, "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 not only was Dr. Rainwater involved in this case beginning in 2001 but that his evaluation and testing of which the Defendants complain was in fact conducted on March 22, 2011. Whereas the earliest pleading that was filed in that matter concerning the dispute between the Fund and Dr. Rainwater was filed on October 10, 2011. It would be patently unfair to the Claimant to disregard this authorized treating medical provider's opinion particularly where there is no evidence of any bias or prejudice or that any payments due to Dr. Rainwater were at issue in this case."

First, the Defendants refute the assertion by the single Commissioner that Dr. Rainwater is the authorized treating physician in this matter. The first evaluation of the Claimant by Dr.

Rainwater was in October of 2001. The only purpose for this evaluation was as referral by the treating pain management physician to Dr. Rainwater for his determination if the Claimant was, psychologically, an appropriate candidate for a spinal cord stimulator. The Defendants have no objection to this prior report. (Claimant's APA 4 at pp. 25-30). The next report was in March 2011, starting with the opening line that the Claimant is a 53 year male "kindly referred by his attorney..." (Claimant's APA 4 at p. 21). This sequence of evaluations does not make Dr. Rainwater an authorized treating physician in this matter. If anything, he was a onetime evaluator for the limited purpose of determining if a spinal cord stimulator was appropriate back in 2001, and subsequently, upon referral by his own attorney in 2011, would have been considered an independent medical evaluator. Of note, he never truly really treated the Claimant. Again, the Defendants did not object to the 2001 report coming into the record.

Furthermore, Defendants contend that the objection to the updated records should have been sustained. Per the objection, and as substantiated by Exhibit 44, the Defendants in this matter, and Dr. Rainwater are adverse parties in a law suit on another matter. Defendants assert this would *per se* cause Dr. Rainwater's opinion to be tainted as to the Defendants in this matter. To presume that one person or entity would be in pitched litigation with, or considering filing legal action against, another person or entity, but would similarly be fair and unbiased in rendering simultaneous opinions about that adverse person or entity in other matters strains credulity. By counter example, Defendants contend that no Judge or Commissioner would purport to be able to rule fairly and objectively in a law suit between two parties, if that Judge or Commissioner was in being sued by or contemplating suing one of the parties to the action before him or her. An attorney who did not request that the Judge or Commissioner recuse themselves under these circumstances would have likely breached their fiduciary duty protect the interests of their client. The appearance

of a conflict is so apparent in such an example that the Defendants believe it would warrant such recusal. Similarly, it should have warranted in this same situation, the sustaining of the objection, to exclude the updated records of Dr. Rainwater from the record.

While these Defendants would concede it is certainly *possible* that a Judge, Doctor, or Commissioner may be able to be sue, or be sued by, another for in excess of \$75,000.00 (See APA at p. 859), and still objectively make determinations that materially impact or affect that person in another matter, but it is not the most likely outcome. To simply give Dr. Rainwater's professional ethics 'the benefits of the doubt' is alternatively give the detriment of the issues to the Defendants – on an issue that in balance, is more likely than not, one where the average person would not be able to be fair and objective, hence the appearance of conflict in the first instance.

The Commissioner also indicated that because the date of the civil Complaint of Dr. Rainwater against the Defendant Carrier in this matter was in October of 2011, and the date of the report of Dr. Rainwater objected to by these Defendant was in March of 2011, the lawsuit was not material to any prejudice Dr. Rainwater may have had at that time, March 2011. Nevertheless, even the exhibits to the law suit of Dr. Rainwater, are for allegedly breached contracts in 2005 and forward.

The single Commissioner also indicated on this point in finding numbered "23" and "24" that; 23. [...Notwithstanding any dispute between Dr. Rainwater and the carrier, I find the opinions of Dr. Forsthoefel to be the most compelling of all the evidence. (See Defendants' APA #44; Claimant's APA #1, page 7).

24. Dr. Rainwater's opinion is not pivotal or necessary in this case, and I can completely disregard it and reach the same conclusion as far as physical brain damage is concerned.

However, Defendants contend that Dr. Forsthoefel actually relied on the reports and testing results of Dr. Rainwater in coming to his opinion that the Claimant's cognitive decline was purportedly related to the alleged 2002 drug-drug interaction, and not to the Claimant's own, very significant pre-existing depression, obsessive compulsive disorder, bi-polar disorder and schizoaffective disorder, or some other degenerative disorder – such as Alzheimer's unrelated to any drug-drug interaction of the Claimant in 2002. (See Hearing Transcript at p. 28 line 24 – p. 29 line 9) (Also references to Dr. Forsthoefel's review and reliance on Dr. A. Rainwater's records at APA 1 p. 3 and APA 1 p. 7). One of the difficulties in this matter from the Defendants standpoint is fettering out the difference between the Claimant's ongoing pre-existing psychological conditions, and the alleged brain injury condition. Dr. Forsthoefel points out in his testimony that he believes the fact that it is related to a brain injury is validated "with his [Dr. Rainwater's] testing..." (Hearing Transcript at p. 30). The Defendants assert that Dr. Rainwater's testing in 2011 was used by Dr. Forsthoefel, and perhaps others, to substantiate the medical opinion that the claimant had a permanent physical brain injury – allegedly separate and apart from – his ongoing pre-existing mental and psychological conditions. The Defendant contend it was reversible error to permit the updated 2011 opinions of Dr. Rainwater into the record, and that such opinions did affect the weight of the evidence necessary to argue the Claimant suffered and suffers from a permanent physical brain injury.

Of note, these Defendants further objected to the inclusion of the Dr. Rainwater testing because 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, where the Claimant has failed to submit to the neuropsychological testing and evaluation agreed up in the prior Consent Order in this claim. (See Generally Exhibits Tabs 36, 39 and 40 of the Defendants). This also should have been an additional grounds for sustaining the objection to the 2011 report of Dr. Avie Rainwater.

Did the single Commissioner err in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant suffered physical brain damage in relation to his two work related injuries in 1999 and 2000, or related treatment, (Barden Order, Finding of Fact No. 17, at p. 41); and in finding that such brain injury was among "those 'serious' and 'severe' cases contemplated by *Crisp* and *Sparks* [Supreme Court Decisions]" (Barden Order, Findings of Fact No. 18-19, at pp. 41-42); thereby entitling the Claimant to life time indemnity benefits (Barden Order Finding of Fact No. 28, at p. 44; Conclusion of Law No. 2 at pp. 46-47; Award at pp. 50-51). (Defendants' Appellate Grounds No. "2," "4," "5," and "8-10.")

First and foremost, these Defendants would contend that the Claimant's alleged brain injury is not one that rises to the level of severity contemplated by the General Assembly in promulgating the potential benefits of life time awards pursuant to S.C. Code Ann. §42-9-10 (c), and as interpreted by the South Carolina Supreme Court in the cases of *Crisp v. SouthCo. Inc.* 401 S.C. 627, 738 S.E.2d 835 (2013) and *Sparks v. Palmetto Hardwood Inc.* 406 S.C. 124, 750 S.E.2d 61 (2013). The Claimant's contention is that he suffered a significant and severe, and ultimately permanent, physical brain injury from his drug-drug interaction and hospitalization in February of 2002, and he has had several psychologist and psychiatrist opine that is the case over a decade later. The fact of the matter is, however, that after the alleged injury to the brain from the drug/drug interaction had subsided - the presumed problematic medication was removed from the Claimant's system - and the Claimant went back to normal. Notably, prior to the 2002 drug/drug interaction, the Claimant had admittedly suffered from very significant and severe psychological conditions and mental disorders, which even as late as 2001, just months prior to the February 2002 hospitalization, had led him to be treated both as an inpatient and monitored outpatient in relation

to psychological breaks, hallucination and hearing voices in relation to his significant pre-existing depression, bi-polar disorder, schizoaffective disorder, anxiety, oppressive compulsive disorder, memory loss/aphasia and other disorders. Again, prior to the 2002 accident, Dr. Forsthoefel notes that "dynamically it may be that Ted's earlier sexual abuse laid the groundwork for his future psychotic decompensation with stress." (Claimant's APA 1 at p. 10). Again prior to the 2002 hospitalization, Dr. Forsthoefel's March 3, 2011 letter references that in October of 2001 even Dr. Rainwater documented "Ted's concentration as 'grossly disruptive, loses his train of thought readily. Tangential thinking.' And Ted's memory as 'impaired.'" (at *Id.*).

After the 2002 drug-drug interaction, the Claimant made a full recovery. (See Defendants APA 19, at p. 713 normal KEG testing). In a letter to Jeanne Beard in March of 2002, only weeks after the hospitalization, Dr. Forsthoefel references the fact that the Claimant's "Clinical and cognitive deterioration has fully remitted[,] and "[h]is neuropsychological testing after this remission [from the Seroquel reaction] is entirely within normal limits as is hi EEG and brain scan." (Defendants APA 24 at p. 731). And indicating that the Claimant's read[ing] skills, comprehension, and memory retention have all returned to normal limits from its deterioration prior to the hospital use of Seroquel. "It is clear to me that this earlier two month deterioration, prior to the hospitalization, was caused by his own confusion due to problems with compliance and probably over medication." at *Id.*

In 2004, Dr. Julian Adam, MD, evaluated the psychological and neurological complaints of the Claimant. In addition to "probably malingering" Dr. Adams found that since the 2002 drug-drug interaction the Claimant had had "multiple tests on his head in the past such as MRI scans, EEGs, etc. All of them have been normal. I do not think they need repeating at the present time." (Defendants APA at p. 716).

At the hearing, Dr. Forsthoefel testified on behalf of the Claimant, and rather than point to a specific diagnostic test, or a specific battery of psychological tests, he indicated that the Claimant had very severe cognitive deficits prefaced on a mood disorder rating scale from the DSM. When asked about the fact that the Claimant also suffered from depression and other pre-existing mood disorders, which could also affect and/or contribute to the DSM's rating, and put the Claimant at between a "30-40" the same DSM score Dr. Forsthoefel indicated he knew the 30-40 score was for brain injury because, "that's a clinical finding. Those are based upon my clinical background." (Hearing Transcript at p. 64). Dr. Forsthoefel's opinion was also that this physical brain injury in 2002 resulted in dementia, when asked his basis for this, he indicated "clinical findings, supported by the testing findings of Dr. Rainwater...so my reasoning is firmly grounded in other -- with other consultant's opinions as well." (Hearing Transcript at p. 61). However, Dr. Forsthoefel also indicated that the Claimant's cognitive decline took place over many years and began *before* the 2002 drug-drug interaction. Attorney Leventis, "Is that -- you say a pre-existing cognitive decline. Do you mean prior to the 2002 drug-drug interaction?" Dr. Forsthoefel, "Right, yeah." (Hearing Transcript at p. 61, lines 22-24).

Dr. Forsthoefel also conceded that the Claimant "had a lot of short term memor[y]" and functional problems prior to 2002. (Hearing Transcript at p. 69 lines 6-10). When pressed again on page 69 and 70 of the Hearing Transcript about how Dr. Forsthoefel could fetter out the pre- and post-2002 disability and cognitive functioning deficits, he continually indicated "those are clinical findings." Defendants contend that the greater weight of the evidence does not support the findings of the single Commissioner that the Claimant's dementia and diagnosis of degenerating brain function, which was definitively diagnosed nine years after the 2002 drug interaction, are sufficient to support a finding of permanent physical brain injury – causally relating

back to the original 1999 and 2000 injuries. Moreover, even if otherwise supported, Defendants further assert that such a brain injury, if compensable, is of such severity as to rise to the level of entitling the Claimant to a life time indemnity award under S.C. Code Ann. §42-9-10(c). Therefore, the findings and conclusions of the single Commissioner on these issues should be reversed.

Did the single Commissioner err in finding that the Defendants should have been on notice of a physical brain injury – related to these accidents and subsequent treatments prefaced upon references made to the record in Findings of Fact No's 10-16? (Barden Order at pp. 39-41). Did the single Commissioner err in failing to find that the Claimant's request for benefits for a permanent physical brain injury, was barred under the equitable doctrine of *laches* (Barden Order Finding of Fact No. 23 at p. 43; Conclusion of Law No. 5, at pp. 47-50). (Defendants' Appellate Ground No. "3" and "6").

Defendants assert that this claim for benefits should be barred under the equitable doctrine of *laches*. Defendants did raise the issue of *laches* at the original hearing before the single Commissioner. Defendants respectfully submit that these rulings by the single Commissioner misapprehended the appropriate application of the equitable doctrine of *laches* to this claim. "*Laches* is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). Whether a claim is barred by *laches* is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute *laches*. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E. (2d) 357 (Ct. App. 1985). In sum, to prove *laches*, a party must show delay that was unreasonable, that resulted in prejudice to that parties' defense of the claim. *Hallums v. Hallums* 296 S.C. 195, 71 S.E.2d 525 (1988). Defendants contend all of the aspects of *laches* are met in this claim, and should bar the Claimant's request for benefits at this time.

In the single Commissioner's findings as to *laches*, the Commissioner found that the Defendants had paid for treatment for a hospital visit "for the encephalopathy (brain injury) [parenthesis in the original Order] in 2002. From 2002 to 2004 they paid for medical care which included constant reference to increasing problems with cognitive function." (Barden Order at p. 47). The Order goes on for several paragraphs explaining treatment needs of the Claimant that were paid for by the Defendants, which purportedly meant they knew or should have known all of this treatment was for a compensable physical brain injury. Importantly, it should be pointed out that even according to Mr. Polansky's own testifying medical expert at the hearing, his treatment regimen stayed the same before and after the 2002 hospitalization, and not even Dr. Forsthoefel himself was aware when the exact same treatment – which had been for mood disorders – apparently became treatment for a permanent and severe physical brain injury.

Furthermore, despite the Commissioner's findings that the Defendants were on notice of the brain injury, and apparently were knowingly providing treatment for such since sometime after 2002, the Claimant himself only became aware of his brain injury approximately 2009 and filed for a determination of the compensability of such in 2011 as soon as Dr. Forsthoefel and Dr. Rainwater became aware and opined about the physical brain injury. (Barden Order at p. 48). Instead the Commissioner found that the Defendants knowingly paid for all of the 'brain injury' related treatment from 2002-2011. If true, this showed great prescience on the part of Defendants who apparently paid for brain injury related treatment for the Claimant prior to the knowledge of such brain injury by the Claimant or his own doctors. Notably, the Claimant suffered from very significant pre-existing mood related disorders, and had been treated in 2001 both in patient and out patient for similar psychological breaks and dysfunction, including but not limited to hearing

voices and hallucinations. References in the record to dementia, which Dr. Forsthoefel later attributed to 2002 hospitalization in 2011.

In conjunction with the arguments as to the equitable defense of *laches*, argued herein below, Defendants assert the single Commissioner's ruling that they were on notice of the brain injury claim as outlined in her Order Findings, was in error. The single Commissioner held in part that the Defendants were on notice of the Claimant's cognitive decline and increasing mental issues since the 2002 drug-drug interaction. The Commissioner also pointed out that the Defendant has been providing payment for treatment for the Claimant's physical brain injury her Order for several years, and that medical records show the Claimant was suffering from significant memory complaints after the 2002 accident. (See Generally, Barden Order, Findings of Fact Numbered 10-16). Notably, the Claimant had significant memory complaints even before the 2002 drug-drug interaction. In 2001 his memory was diagnosed as "impaired" and Mr. Polansky had to "keep lists" of things that were important to him. (APA 4 at p. 28). Mr. Polansky, prior to 2002, already had issues with remembering which medications to take, and which medication not to take and when to take them, these pre-existing memory deficits are admittedly what lead to the drug-drug interaction that put him in the hospital in 2002.

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

Attorney Leventis: "Okay. As far as – were you still treating him medication-wise, even though you changed the Seroquel, for the same symptoms after 2002 that you were treating him

for before 2002?" Dr. Forsthoefel "Yes" (Hearing Transcript at p. 76 lines 19-23). This makes it very difficult for the Defendants to realize or have realized, that apparently the same medications and treatment regimen were being prescribed, but at some point in time, it was not longer for the very significant mood and psychological disorders of the Claimant, but rather for his 'permanent physical brain injury' instead.

When Dr. Forsthoefel was asked directly how a person would know which the Claimant was being treated for (a brain injury or his mood disorders) since the treatment was the same both before and after 2002 – save that Seroquel was taken away – even Dr. Forsthoefel seemed unclear. By attorney Leventis, "For me as a layperson, would there be any way to know if your treating him [before or after 2002] specifically for a physical brain injury versus mood disorders you were already providing similar or the same medication for?" (Hearing Transcript at p. 76 line 24 - p. 77 line 3). Dr. Forsthoefel, "Really I wasn't really – I wasn't really aware...[] But going back to your question - - I'm wondering myself." (Hearing Transcript at p. 77 lines 4, 18 - 19).

This puts a Defendant Employer/Carrier in a rather precarious and somewhat impossible situation. The Claimant was treating for mood disorder, and chronic pain and problems both before and after his February 2002 hospitalization. The treatment the Defendants were providing was the same treatment regimen the entire time (save the exclusion of Seroquel). Apparently, even the treating physicians were not clear at what point such treatment changed from being for the Claimant's mood disorder, and apparently became for treatment of Mr. Polansky's brain injury instead of – or in addition to – treatment for his mood disorder.

Defendants contend the Commissioner made incongruent findings to hold that *laches* applied to the Defendants because they provided, and did not deny treatment for a physical brain injury back in 2002 and ongoing, but in the obverse, logically incongruently, that the Claimant

only became aware of a brain injury in 2009 or 2011, and filed shortly thereafter for a hearing on the matter. Of note, on March 15, 2011, the Claimant filed a Form 40 with an attached motion for expedited care/treatment of the Claimant and does not reference – among all other referenced injuries/conditions – the fact that the Claimant has a brain injury. If the position is truly that the Defendants were providing/accepting and treating a physical brain injury since 2002, and certainly as of 2011, why would this not be referenced in the Claimant's own Form 40 filing and motion. (See Generally Def. Exhibits 25).

If indeed the Claimant had ongoing cognitive decline – purportedly related to his alleged brain injury in 2002, why did not choose to bring or allege it prior to 2011. 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 never raised this issues 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. If the Claimant was in need of treatment for his brain, he could have similarly filed a Form 40 over a decade ago, or a Form 50 on the merits of the alleged brain injury and its compensability back at that time.

Further, this unreasonable delay took place while the Claimant clearly had the ability and the opportunity to act sooner in asserting his rights, as noted the Claimant filed his own Form 40 hearing request for expedited consideration of medical treatment on other issues in March of 2011, for example, and was represented by legal counsel. Lastly, 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 other third party causes of action under Title 15 of the S.C. Code Ann. – See Gen. §15-3-350), or providers who may have been at fault for the drug-drug interaction which took place.

Furthermore, this time period is even beyond the statute of repose for the Defendants to file for indemnification, reimbursement or any other cause of action against the actual at fault medical provider, physician, pharmacist and/or drug manufacturer, pharmacist, or party(s) (See Gen. §15-3-454). Of note, in his March 2011 letter to opposing counsel, Dr. Forsthoefel indicated “having check with the research division of Astra/Zeneca, I learned there has been no record of Seroquel alone causing encephalopathy.” (Claimant’s APA at p. 9). 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, and the Claimant's failure to previously raise this issue or prosecute this claim, may necessarily have damaged or foreclosed these Defendants' recovery rights this matter to the SC Second Injury Fund. Even if otherwise compensable, due to the Claimant's 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. The Claimant actually received an evaluation in relation to his alleged issues/injury 2004 with Dr. Julian Adams. However, Dr. Adams found that all of the Claimant's objective diagnostic testing at that time was essentially normal and did not call for updated testing at that time.

Defendants assert that the hearing Commissioner erred in finding that the Defendants were effectively estopped from raising the Defense of *laches*, and in actuality, pursuant to the above outlined arguments, the Claimant, due to his unreasonable delay in pursuing the alleged brain injury, which has resulted in material prejudice to the Defendants, should be barred from a finding of compensability at this time.

CONCLUSION

For the reasons outlined hereinabove, and as to the specific points outlined herein above, these Defendants request that the Order of the single Commissioner reversed, or modified as requested and remanded for additional proceedings in relation therewith.

Respectfully Submitted



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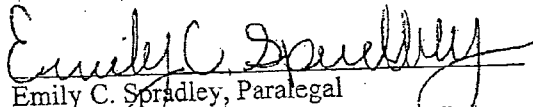
Columbia, South Carolina
September 8, 2015

CERTIFICATE OF SERVICE

I, Emily C. Spradley, being first duly sworn, states that she is a paralegal for the firm of McKay, Cauthen, Settana & Stublely, P.A., with offices in Columbia, South Carolina. This is to certify that a copy of the foregoing Appellants' Brief 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 8th day of September, 2015.

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
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Attorneys for Defendants

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

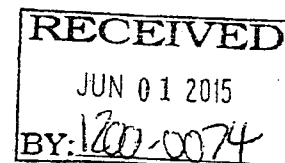
Defendants represented by
Peter P. Leventis, IV, Esquire

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 Forsthoefer, 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.

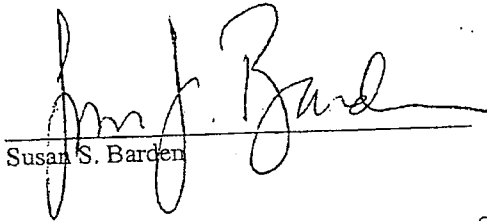
IT IS FURTHER ORDERED that the Claimant is entitled to lifetime medical care pursuant to the mediated Settlement Agreement through the authorized treating physicians Dr. Forsthoefel, Dr. Jonet, Dr. Riber and Dr. Beasley and such other medical providers as those physicians deem necessary and to include 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

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for over 30 years.

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September 17, 2015

VIA eCASE UPLOAD
Amy Bracy, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

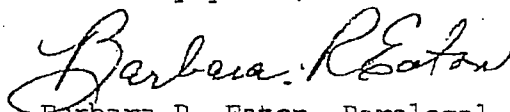
RE: Theodore Polansky v. SC Office of the Attorney General
WCC File Nos.: 0024408 and 992254

Dear Ms. Bracy:

Please find enclosed for filing with the Commission the
Respondent's Brief to the Full Commission. I am, by copy of this
letter, serving opposing counsel with a copy of each.

I hope this is sufficient for filing with the Commission,
however, if additional information is needed, please feel free to
contact me at your convenience.

Sincerely yours,


Barbara R. Eaton, Paralegal

BRE/abh
Enclosures

cc: Ellen Goodwin, Attorney
Peter P. Leventis, IV ✓

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	WORKERS' COMPENSATION COMMISSION
COUNTY OF RICHLAND	)	WCC File Nos: 9922954 & 0024408
THEODORE POLANSKY,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
SOUTH CAROLINA OFFICE OF	)	RESPONDENT'S BRIEF
ATTORNEY GENERAL,	)	TO THE FULL COMMISSION
	)	
as Employer, and	)	
	)	
SOUTH CAROLINA STATE	)	
ACCIDENT FUND,	)	
	)	
as Carrier,	)	
	)	
<u>Appellants.</u>	)	

STATEMENT OF THE CASE

From the first injury in 1999 and through Commissioner Barden's Order in 2015 and continuing at this time, the Defendants have provided without question all treatment, evaluation and care for all problems related to his injuries specifically including: the brain; back; legs; RDS; sexual, urinary and bowel dysfunctions and psychological. Since 2002 when Mr. Polansky suffered a major encephalopathy, severe swelling of the brain, requiring hospitalization for 25 days (paid for by the Defendants), the Defendants have known, accepted, and paid for treatment, evaluation and care for that brain, "injury".

All of the authorized treating physicians and psychological professionals, Dr. Frank Forsthoefel, M.D., treating psychiatrist, (2001 to present¹), (APA pp. 42-181; 334); Dr. C. Jean Jonet, Ph.D., treating psychologist, (2004 to present), (APA pp. 341-607); and Dr. Ezra Riber, M.D., chronic pain specialist, (2001 to present), (APA pp. 182-340LLL), have all beginning in 2011 stated the opinion Mr. Polansky has severe permanent brain "damage" stemming from the 2002 brain "injury".² In addition, Dr. Nicholas Lind, Ph.D. authorized to perform neuropsychological tests in 2008 (APA pp. 31-41) has also stated this opinion. Dr. Avie Rainwater, Ph.D. authorized (specifically in 2001) who performed the same identical neuropsychological testing in 2011 that he had performed in 2001 before the brain "injury" in 2002 stated this same opinion (APA pp. 20-30).

In addition to the numerous opinions and evaluations concerning "organic" brain problems³ between 2004 and 2009⁴, in

¹ 2005 to 2009 Mr. Polansky was treated by Dr. Marturano, M.D. when Dr. Forsthoefel had retired from private practice. (APA, p. 683).

² Dr. Beasley has also been an authorized treating doctor for Mr. Polansky for sexual, bladder, and bowel dysfunctions since 2002.

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

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

2009 Claimant's Counsel in a letter to the State Accident Fund Attorney Mary Sowell, dated May 11, 2009 stated (quoting in pertinent part):

"Back in 2002 ..., Ted was hospitalized due to a réaction from a prescribed psychological prescription that resulted in a chemical encephalopathy of the brain. He was hospitalized and the doctors have said that he has suffered physical brain injury as a result of that chemical encephalopathy. I would appreciate it if you would let me know or if you could check with them and see if we are going to have any problems with Ted receiving lifetime disability benefits due to this physical BRAIN injury..." (APA, p. 699).

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

In the Mediation Agreement signed November 12, 2014:

"1. Claimant is permanently and totally disabled."

The only issue left open as to the brain injury was:

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

There was no reservation of any affirmative defenses or procedural defenses listed in the Agreement. A detailed chronological outline from 1999 to 2014 pertinent to this appeal is attached to this Brief.

ARGUMENTS

- I. THE HEARING COMMISSIONER DID NOT ERR BY ADMITTING THE REPORTS OF DR. AVIE RAINWATER; BY REFERRING TO DR. RAINWATER AS AN AUTHORIZED TREATING PHYSICIAN; AND/OR BY CONCLUDING THAT DR. RAINWATER'S MEDICAL OPINIONS WERE NOT PIVOTAL AND NECESSARY TO COMMISSIONER BARDEN'S DETERMINATION OF PERMANENT BRAIN DAMAGE.

Before the physical brain injury (encephalopathy) in February of 2002, on October 10th and 15th of 2001, Dr. Avie Rainwater, Ph.D. performed neuropsychological testing on Mr. Polansky which was, "authorized" and paid for by the State Accident Fund as part of authorized treatment for Mr. Polansky. On March 22, 2011, Dr. Rainwater performed a re-evaluation performing the same identical neuropsychological testing on Mr. Polansky. (APA, pp. 21-30). On May 16, 2011 five (5) days after receiving the report of the authorized treating psychiatrist, Dr. Frank Forsthoefel, stating that the Claimant was totally and permanently disabled due to his cognitive dysfunction caused by his 2002 physical brain injury (encephalopathy), the Claimant filed a claim for total and permanent disability benefits for -physical brain damage due to that brain injury. -

Although knowing about Dr. Rainwater's opinion in 2011, in 2011, 2012, 2013, 2014 and 2015, the Defendants never took Dr. Rainwater's deposition. At the hearing, over objection, the Defendants were allowed to place into the Record pleadings concerning litigation between the State Accident Fund and Dr. Rainwater's group, totally unrelated to this claim, and with the

earliest pleading being filed on October 10, 2011 (seven (7) months after the retesting). Besides the fact that the basis for the objection to these pleadings is that they are rank hearsay which do not fit under any of the exceptions for admissibility of documents such as the Business Records Act, the only possible basis for their consideration as evidence would be to establish bias which does not go to admissibility but instead goes to the weight that should be given the doctor's 2011 report; again assuming the pleadings should have been admitted. Trial Handbook S.C. Lawyers 5th Edition §25:7 "Impeachment By Proof of Bias ..." The purpose of any expert or medical evidence is to aid the Commission in coming to the correct conclusion and the Commission determines the weight and credit to be given to any expert testimony once admitted. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). Commissioner Barden properly admitted the 2011 report and assigned it appropriate weight. [Respondent would ask the Commission to note Defendants do not cite any authority for the proposition that this written evidence Dr. Rainwater's 2011 report, should not have been submitted into evidence, on any basis, or on the issue of its weight.

Also under this part of the argument, the Defendants argue that because there is litigation going on between Dr. Rainwater and the State Accident Fund, or at least there was at some point in time seven (7) months after the report, that this would skew

Dr. Rainwater's opinion in this case. Outside of that assertion being outrageous, it is rank speculation and calls for an assumption and would make the Commission's decision the subject of speculation and innuendo. Again, this issue was first raised in August 2014, six (6) months before the hearing in February 2015. The Defendants had every right to take Dr. Rainwater's deposition since 2011 and again for the six (6) months before the hearing and did not do so and this argument is patently without merit. Also under this part of the argument, the Defendants allege that the Claimant refused to submit to neuropsychological testing which is a bold faced untruth. Since present Defense Counsel only became involved ten (10) days before this matter was reset pursuant to the Order of Commissioner Wilkerson which was issued based on Defendants' failure to have an agreed upon (by Consent Agreement and Order) Independent Medical Examination performed, Counsel will not move for this improper argument to be stricken or for sanctions. As is set out in the Commission Record, an agreement and a draft Consent Agreement was entered into and submitted to Defense Counsel on April 16, 2013 agreeing to have the Claimant seen and evaluated by Dr. Richard Frierson at the USC School of Medicine Neurology Clinic which was finally signed and submitted on September 5, 2013 and ordered by Commissioner Taylor on November 7, 2013. That Consent Order specifically provided:

"Such examination shall include any and all testing and examination felt to be necessary by Dr. Frierson. . . ."

Exactly one (1) year after the Agreement and with no examination having been set, the Claimant moved for a hearing which was granted. Claimant's Counsel would beg the Commission to read his letter to Defense Counsel found at Claimant's APA, pp. 732-733 and question current Counsel at oral argument on the raising of this argument.

The second basis for the argument is the Hearing Commissioner erred by referring to Dr. Rainwater as an authorized medical provider. The first and very simple answer to this argument is that the Defendants do not dispute that at one point Dr. Rainwater was an authorized medical provider. Further, again this reference does not affect the admissibility but goes to the weight to be given. Also and very importantly at page 7 and 8 of the Transcript, the Hearing Commissioner in admitting the contested report specifically noted as to when Dr. Rainwater was an authorized medical provider and noted:

"My response to that, based upon hearing the arguments of the parties, is that Dr. Rainwater, prior to any kind of dispute or claim or controversy between Dr. Rainwater and the Fund, Dr. Rainwater was, in fact, involved in this case, and I believe that in weighing the respected equities of the parties and the arguments, that it would be grossly unfair to the Claimant to have this expert or to be relying on this expert and then to be no longer able to use this expert. . . ." (Emphasis added).

Finally, in the final argument on this issue the Defendants really argue again as to the weight that the Commissioner gave to Dr. Rainwater's test results. As she stated in comparison to the other evidence and particularly the testimony, reports and evidence from Dr. Forsthoefel, the treating psychiatrist, from 2004 and continuing at this time she gave it little weight. The Defendants do not point out the testimony on p. 29 of Dr. Forsthoefel wherein he specifically states that the only effect it had on his opinion was that Dr. Rainwater's retesting results in 2011 as compared to his 2001 testing results in reference to Dr. Forsthoefel's opinion were nothing more than,

"There were additional findings at that time consistent with my additional findings after the hospitalization in 2002 for the drug-drug encephalopathy, that my findings became increasingly obvious to me that there was something else going on in Ted's mind other than his psychiatric condition and what became evident to me and to Dr. Rainwater as well, is that there was something organic, physical going on in his brain, and that is very well documented ..." (Emphasis added).

Dr. Forsthoefel referred specifically to his findings stretching all the way from 2002 through 2011. Also his opinion that the brain injury in 2002 caused his organic physical brain damage, was first stated in a report dated March 3, 2011 before Dr. Rainwater's testing on March 22, 2011. (APA p. 9-10).

Then on p. 61, Dr. Forsthoefel again states specifically that his opinion is based on his findings and his treatment of Mr. Polansky and that after review of considering the findings

of, in addition to Dr. Rainwater, Dr. Lind, and the opinions by Dr. Adams and Dr. Carnes he notes that these opinions are all consistent with his, "reasoning" which is, "firmly grounded" based on his treatment and, "also" these other opinions. (Tr., p. 61).

The issue is without merit and does not go to the admissibility but goes to the weight and the Commissioner assigned such weight as she deemed appropriate.

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

Outside of the fact that there is absolutely no contradictory medical opinion evidence or other evidence in the Record to the evidence that the Claimant sustained serious and severe permanent physical brain damage, the assertion that Mr. Polansky's brain damage when reviewed by this Commission, as was reviewed by the Hearing Commissioner, does not meet the standard of Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) quite frankly is beyond belief. The standard as set forth in Crisp and Sparks is simply and plainly that the physical brain damage as contemplated by those decisions and the Act is physical brain damage that is consonant with, "a meaning consonant with §42-9-400(d) of physical damage to the brain" and that the brain damage is, "of such seriousness as to constitute

a hindrance or obstacle to employment or to obtaining re-employment". The uncontested medical and expert opinion evidence from all of Mr. Polansky's medical treatment doctors and providers is that Mr. Polansky is totally and permanently disabled from his physical brain damage and that his brain damage is severe and serious enough to constitute an obstacle and hindrance to employment. Opinion of Dr. Forsthoefel, authorized treating psychiatrist beginning in 2001 and presently (APA, pp. 2-3); Dr. Riber, authorized chronic pain specialist, 2001 to the present and continuing (APA, pp. 12-13); Dr. C. Jean Jonet, Ph.D., authorized treating psychologist since 2004 and continuing (APA, pp. 16-17). In addition, Dr. Nicholas Lind, Ph.D., authorized clinical psychologist, found severe cognitive deficits in his evaluation and testing. (APA, pp. 31-41).

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

"Mr. Polansky is college educated yet he cannot write a check, cannot count change, cannot use tools or perform household chores or repairs. . . . He frequently becomes derailed while talking, requires re-direction and prompts. Sometimes he just stares off into space. He is enormously forgetful, takes notes and loses them. . . ." (Tr., p. 18).

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

"He cannot read and understand the newspaper. While he can read the paper wherein it will take

his a day to completely read one article in the paper, he then cannot tell you what he read and he has so much trouble actually reading the article word for word, that he has to have somebody read an article that would take person, such as Ms. DuBose, a few minutes to read. However, he then does not understand what she has read to him. He can perform minimal, simple, repetitive or pattern tasks such as driving from one specific place to another, or feed the dog daily, but if you give him directions to any other place or even tell him to go to a place where he has been before but a long time ago, there is no way he can accomplish that. He has no memory of trips and has no memory away from structured, patterned responses. Remote memories for trips and one thing to another are terrible. He cannot write or count; he is incompetent to handle his financial affairs." (Tr., quoted language contained between pp. 37-45; 50-56).

Then in relation to all of these problems and considering his severe problems in reference to memory and his severe problems due to his inability to read, write, and count (which is even to the point to where he cannot write a check), and based on her observations of Mr. Polansky in the Courtroom and after hearing Dr. Forsthoefel's testimony, Commissioner Barden from the Bench appointed Ms. DuBose as Mr. Polansky's Guardian ad litem because in her opinion his ability to testify was extremely compromised. (Tr., p. 46). In addition, after explaining all these severe cognitive deficits, Dr. Forsthoefel stated the opinion in reference to how severe these deficits alone were as to Mr. Polansky's disability as follows:

"Q: Okay. Alright. Now let's say that Ted didn't have RSD, didn't have a spinal cord stimulator, and doesn't have the severe

problems he has with his back and all of these other physical problems that he has, in your opinion based on purely his cognitive brain injury and the cognitive deficits he has, is he employable or not employable?

A: Unemployable.

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

A: Totally incapable."

(Tr., p. 56, ll. 2-14). (Emphasis added).

Under the uncontested medical and expert opinion evidence in addition to all of the other testimony and evidence submitted, the Claimant's physical brain damage alone renders him totally disabled. There is no contrary evidence to this fact in the Record. Therefore, not only does the brain damage which Mr. Polansky has meet the standard of Crisp and Sparks, which is that his brain damage must be severe enough that in and of itself it would constitute a hindrance or obstacle to employment, (that is the Crisp and Sparks standard and that is the wording that the Supreme Court has stated is to be applied), in this case, not only is that standard met, but more importantly, the uncontested expert medical opinion evidence and all the evidence in the Record establishes that he is totally incapable of employment and is not even sufficiently competent enough to testify due purely and strictly to his brain damage. The issue is without merit.

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

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

a claim ran from that point. In this claim, medical care was paid for both the 2002 hospitalization for brain "injury" and for all care thereafter for the brain "injury" but the Claimant was not definitively diagnosed with physical, "brain damage" until May 11, 2011 and on May 16th, he filed a claim for permanent brain damage.

Next, as to this argument and the element of notice, both parties had the same notice from 2002 to 2011 concerning the Claimant's, "injury," to his brain. There is no question that in 2002 Mr. Polansky sustained a physical brain, "injury" in the form of an encephalopathy. In addition to the treatment records and the rehab nurse's notes which were being provided to the carrier between 2002 after the hospitalization for the brain injury and through 2004, in 2004 and 2005 Dr. Forsthoefel and three (3) other doctors found that Mr. Polansky needed neurological evaluation and testing for, "organic mental condition"; Dr. Ezra Riber, "comprehensive neurological evaluation" (APA, p. 283); Dr. Marturano on September 19, 2005, "complete neurological workup by a neurologist . . . , neurological evaluation should include EEG testing . . . , also recommend neuropsychological testing of Mr. Polansky" (APA, p. 653); and Dr. Julian Adams, "if the memory loss is a major contributing factor in your investigation of his problem that he have psychological testing". In addition there were numerous communications in 2004 and 2005 (APA, pp. 684-697) to the

adjuster both from the Claimant and from, and with the concurrence of, the rehab nurses requesting authorization for neuropsychological testing. That testing was delayed by the Defendants and was only and finally authorized and performed in late 2007 and was concluded in 2008; but again as authorized by the Defendants. (APA, p. 698). Then in 2009, the Claimant contacted the Defendants stating the belief, and again the belief, that he had sustained, "permanent" physical brain injury as a result of the original brain "injury" in 2002 and that he was entitled to compensation. Therefore both parties were on notice and had the same notice throughout this entire time of a brain, "injury," for which the Defendants were providing treatment and evaluation for that original physical brain "injury" with both parties trying to determine whether or not there was a physical brain problem, as compared to a psychological or functional problem causing the Claimant's problems. The Defendants delayed providing neurological tests from 2004 to 2008, not the Claimant. Then in 2008 when they authorized testing they did not even send the medical records and Dr. Lind stated that at that time had he had those that he would have found that the Claimant was suffering from physical brain damage, which he did opine in 2012 after being provided the records of the 2002 brain injury. (APA, pp. 31-32). Therefore, there is no question that the Defendants were on notice of a physical brain "injury" and the request for a

determination was to whether or not there had been some permanent consequence from that physical brain injury in 2002 from 2002 to 2011. Thus the Defendants had notice.

As to the defense of laches and the element of delay, it simply does not apply because there was no delay in filing a claim for physical brain damage. There was not a definitive diagnosis of permanent brain damage until 2011 based on a medical opinion [the Claimant would hope that the Defendants would agree that this is a medically complex issue requiring expert opinion evidence as the Hearing Commissioner found], and the Claimant filed his claim one week after that diagnosis; there was no delay.

However, if one applies the doctrine of laches to this claim, the Full Commission as the Hearing Commissioner did, should apply that doctrine to the actions of the Defendants. The Defendants love to cite to the case of Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999), and while the Claimant will set out hereinafter the later case which applied laches to the Defendants in a much less egregious case than this one as far as the provision of medical care and then a denial of benefits, let's apply the doctrine of laches as set out in the Muir case. Under the doctrine of laches, if a party knowing his rights, does not timely assert them and by an unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position then equity will normally

refuse to enforce those rights. That equitable principle applies to the rights of both sides; claims and defenses. (Emphasis added). In Muir the Court specifically noted that delay alone (if that existed at all in this case) does not establish laches and that so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to assert facts, there can be no laches. The Court specifically noted that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to have acted sooner, and also material prejudice. Not only are all of these elements not found in this case, but none of them are.

Both parties knew the Claimant had sustained physical brain, "injury" but neither until the opinion of Dr. Forsthoefel knew that he had sustained, in the opinion of a doctor, permanent physical, "brain damage". Both parties were investigating this; both parties were trying to find out if there was any damage from a physical standpoint, and if there was any delay in that process, it was from the Defendants not the Claimant, who was responsible to provide medical care and evaluation which was requested repeatedly all those years. Once he knew of his right, or in other words, that he had permanent physical brain damage as definitively determined by his treating physician, one week later he filed a claim for benefits. There

has been no detrimental change in the Defendants' position, nor have the Defendants incurred any expenses as a result of any alleged delay. There was no refusal to embrace the opportunity to ascertain the facts as the Claimant, repeatedly from 2004 through 2011, was requesting evaluations concerning physical brain damage and also was receiving treatment specifically related to physical brain injury. Therefore he was trying to, "ascertain the facts" throughout this entire time.

Again, laches does not even attach until there is a reason to assert a claim. There was no reason to assert a claim until there was a definitive diagnosis that the Claimant had sustained permanent physical brain damage.

In addition, there is absolutely no material prejudice. The Defendants have known about the physical brain injury ever since 2002; have provided treatment and evaluation; have seen the same medical reports that the Claimant has seen; and has never questioned nor not paid for anything in reference to the Claimant's physical brain injury or requests concerning the cognitive dysfunctions that he is having. The Defendants since 2002 and specifically after 2009 when the Claimant placed them on notice that he thought he had sustained a permanent physical brain injury entitling him to lifetime benefits, never raised a question prior to the filing of the Form 50. Even in the Form 51 in 2011 the defense of laches was not raised and was not raised until approximately a year later in the second Form 51

filed. Therefore the Defendants in no way have been materially prejudiced. Further, this element is not even reached in reference to the laches doctrine if there is a failure as to any of the other elements that apply prior to that determination applying. As the Court said in Muir, you only reach the material prejudice element once you have reached and established all the other elements, which have not been established by the Defendants through the evidence and which do not apply in this case.

Further, the Defendants fail to note their responsibility and never cite to the case of Jervey v. Martinet Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (SC App. 2013). In that case the Supreme Court at 406 S.C. 210 750 S.E.2nd 90 (2013) found that the doctrine of laches applied to the defendants and that it was dispositive in that case. In that case, the Defendants paid benefits for 450 days before raising an issue of compensability. In this case, the Defendants paid benefits for physical brain injury from 2002 until 2009. The reason the Claimant says 2009 is because in 2009 the Claimant specifically placed the Defendants on notice that based on the physical brain injury in 2002 and the evidence available at that time that he felt he was entitled to an award for permanent brain damage and wanted to know whether or not the Defendants would accept that without him having to prove that and litigate that issue. The Defendants continued to pay for all medical care in reference to

the Claimant's physical brain injury thereafter and never questioned that issue until the Claimant filed a formal claim after receiving the opinion of the authorized treating psychiatrist in 2011. The Defendants therefore should be estopped and the doctrine of laches should be applied, as the Hearing Commissioner did, to them in this case.

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

records of the 2002 brain injury, encephalopathy. The Defendants thus failed to, "embrace the opportunity to ascertain facts" and there is no question that the Claimant was materially prejudiced by the Defendants failure to assert their defense. Therefore, if you apply the equitable doctrine of laches to this situation, there is no question that the Hearing Commissioner could very well have found that the doctrine of laches should be applied to the Defendants in this case.

On a final note, the Claimant finds it quite humorous in reading this (and other briefs) that the Defendants never seem to know about nor do they refer to the other equitable doctrines that apply to any individual seeking Equity. Those are (as any attorney who is serving on or with the Commission will unbiasedly confirm to anyone must be applied in any equitable situation), "one who seeks equity must do equity" and if one seeks equity, one must come into Court with, "clean hands". Under those equitable principles which must be applied along with the equitable defense of laches, how in the world can the State Accident Fund come into Court and claim that it has, "done equity" knowing that: 1) the authorized treating physicians for years were requesting evaluation from neurologists and neurological testing; 2) that they failed to provide those; 3) where they failed to provide the records to the doctor who was authorized to perform those tests finally; 4) by then asserting that defense against the Claimant while paying for all of that

treatment and evaluation; 5) by asking for the Claimant's help in obtaining Second Injury Fund assistance; and 6) then by coming into Court and claiming that the Claimant is barred? One who seeks equity must do equity.

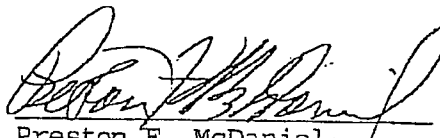
Next, how can the State Accident Fund even think that they can assert "clean hands" when they have caused all the delay in evaluation but provided all the years of care, never questioned the claim and specifically after 2009, and then when the very doctors and medical providers that they have authorized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

CONCLUSION

For all the foregoing reasons, the opinion of the Hearing Commissioner should be AFFIRMED. The objection to the evidence of Dr. Rainwater went to the weight, not to admissibility and the Commissioner assigned it such weight as was appropriate. The uncontradicted medical evidence establishes not only that the Claimant sustained severe permanent brain damage that was sufficient enough to constitute a hindrance or obstacle to employment, but in fact establishes that he was totally and permanently unemployable due purely and only to his physical

brain damage which prevents him from even being able to write a check or testify at his own hearing. There is no laches in this case because the Claimant applied for benefits one week after he was notified definitively of the medical opinion that he had sustained permanent physical brain damage, and in addition the Defendants provided treatment for physical brain injury for ten (10) years without ever questioning that injury and delayed making a determination concerning whether or not that physical brain injury had resulted in permanent physical brain damage. The doctrine of laches simply does not apply nor have any of the elements been met. In addition if it is applied, it should be applied to the Defendants for their failure to raise this defense affirmatively to the Claimant for ten (10) years in reference to physical brain injury and at least three (3) years in reference to and knowing of his position that he probably sustained physical brain damage and would make a claim for that if the evidence supported it.

Respectfully submitted,



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September 17, 2015

CHRONOLOGICAL STATEMENT

- 1999 - Severe injury to the leg with surgery and the development of RSD in the entire leg and hip area. Case accepted. All medical care provided. Mr. Polansky continues to work with chronic pain and RSD.
- 2000 - Second back injury while moving boxes; severe back pain including radiculopathy and spread of RSD into the back and increase in psychological problems due to chronic pain. Mr. Polansky continues to work.
- 2001 - Numerous hospitalizations. Placed under the care of Dr. Riber for severe chronic pain and RSD and placed under the care of Dr. Forsthoefel for worsening psychological problems. Mr. Polansky goes out of work due to severe problems. Dr. Rainwater, Ph.D. performs battery of neuropsychological tests as authorized by the State Accident Fund.
- February 2002 - Mr. Polansky is hospitalized for severe encephalopathy (brain injury) due to a drug-drug interaction. Swelling of the brain extensive and so severe during hospitalization he was incoherent hallucinating without the ability to effectively speak and communicate; severe memory deficits; failure to remember the current President or do simple subtraction or identify the day of the week. All medical care including treatment for encephalopathy authorized. Temporary total disability benefits continued.
- 2002 to 2004 - Continuing treatment authorized and provided by Dr. Forsthoefel, Dr. Riber and Dr. Beasley. (Dr. Beasley brought in to treat Mr. Polansky for bladder, bowel and sexual dysfunction). Spinal cord stimulator implanted and both Dr. Riber and Dr. Forsthoefel record increasing and continual problems with memory loss, concentration, executive functioning, in other words, specific brain functioning issues.
- 2004 - Dr. Forsthoefel recommends neurological and neuropsychological evaluation for cognitive dysfunction and refers to Dr. Ngo. Dr. Riber recommends neurological/neuropsychological evaluation. State Accident Fund over objection instead sets up evaluation with Dr. Adams but Dr.

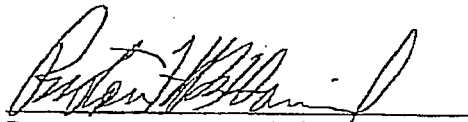
Adams also recommends that since memory is the issue, neuropsychological testing.

Also, in 2004, Mr. Polansky placed under continual weekly care for psychological counseling with Dr. Jean Jonet, Ph.D.

- 2005 - Dr. Marturano, psychiatrist (treatment transferred due to Dr. Forsthoefel's anticipated retirement from private practice) repeatedly records severe problems with memory, executive functioning and attention and other specific cognitive deficits and requests neurological evaluation, EEG and neuropsychological testing.
- 2004-2008 - All care continued to be authorized by the State Accident Fund including specific treatment for brain dysfunction. Repeated requests made for neuropsychological testing at the request of all treating physicians, but no neuropsychological testing authorized. Temporary total disability benefits and all medical care continue to be authorized by State Accident Fund.
- 2008 - Finally neuropsychological testing authorized and approved late fall 2007 with Dr. Nicholas Lind, Ph.D. at Post Trauma Resources. However, no records provided to Dr. Lind; test results were inconclusive due to interference of medications and severe memory and cognitive deficits as recorded in the tests that were performed including severe memory loss in all areas, executive functioning, concentration and specific brain functioning being severely limited. After several months of trying to obtain records and gathering information to explain the severe cognitive dysfunction, Dr. Lind issues his report on February 28, 2008. He specifically suspected injury to the brain and permanent damage (atrophy) (APA p. 36).
- 2009 - State Accident Fund specifically requests the assistance of the Claimant in obtaining Second Injury Fund coverage. All assistance provided including notification to the State Accident Fund specifically of his position that he had permanent brain injury as related to his accepted 2002 brain injury and asked to be advised as to whether the Fund agreed based on what the doctors were saying. All benefits continue.

- March 2011 - After repeated requests for voluntary resolution of the benefits for brain damage, March 3, 2011, Dr. Forsthoefel expresses opinion he believes 2002 brain injury is cause of severe cognitive problems. Mr. Polansky was re-tested by Dr. Avie Rainwater on March 22, 2011 (specifically because Dr. Rainwater was the only psychologist that had performed and who had performed neuropsychological testing on Mr. Polansky prior to the encephalopathy). His results were transmitted to all treating physicians.
- May 5, 2012 - Dr. Forsthoefel states the definitive expert medical opinion that Mr. Polansky had sustained permanent organic brain damage as a result of the drug-drug interaction brain injury in 2002.
- May 12, 2011 - All benefits have continued uninterrupted through this date including specific treatment and medications to treat organic brain dysfunction including Aricept, Topamax and Geodon. Claimant files for a hearing for his entitlement to benefits for having sustained permanent brain damage - lifetime compensation.
- June 11, 2011 - Defendants file responsive Form 51 alleging only as a defense "extent of injury to and other body parts affected are denied."
- August 2011 - Form 50 withdrawn due to necessity for re-implantation of the spinal cord stimulator as ordered by this Commission by one of the developers and foremost experts in neurospinal stimulators in Colorado.
- January 2012 - Form 50 for Hearing refiled and Form 51 filed at which time Counsel for the State Accident Fund raises for the first time the defense of laches.
- April 2013 - Agreement reached to settle Circuit Court case and Consent Agreement drafted for independent medical evaluation. State Accident Fund chooses Dr. Frierson to perform an independent medical evaluation and A Consent Agreement and Order of Confirmation drafted.
- September/November 2013 - Consent Agreement signed and sent to Commissioner. Signed by Commissioner Taylor two (2) months later in November, 2013.

- April 2014 - The State Accident Fund still had not had the independent medical evaluation performed by Dr. Frierson and Claimant files a Motion to have the case put back on the hearing docket, which is granted by Commissioner Wilkerson by Order dated May 7, 2014.
- September 2014 - This matter is set for hearing before Commissioner Campbell. It is moved to the end of September and ten (10) days before that hearing and in direct contradiction of the Order of Commissioner Wilkerson, this matter is transferred to mediation.



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September 17, 2015

CERTIFICATE OF SERVICE

Theodore Polansky v.
South Carolina Office of Attorney General

WCC File Nos. 9922954 & 0024408

I HEREBY CERTIFY that on this date:

I uploaded a copy of Respondent's Brief to the Full Commission
only to:

VIA eCASE

Amy Bracy, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

And I mailed a copy of the Respondent's Brief to the Full
Commission via US MAIL ONLY to:

VIA FIRST CLASS MAIL ONLY

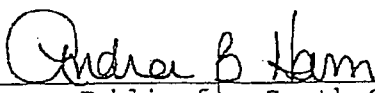
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Barbara R. Eaton, Paralegal

SWORN TO BEFORE ME this

17th day of September, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2-27-24

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June 15, 2015

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SC Workers Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

RE: Ted Polansky vs. SC Attorney General's Office
WCC File Nos.: 9922954 & 0024408
Cross, Application Review To Any Review Filed
By The Defendants

Dear Amy:

In the event that the Defendants file a Request for Review, please find enclosed our Cross Appeal, i.e. our Request for Review as to the issues that we want reviewed by the Commission. Please note, this is being filed as a Cross-Appeal and in the event the Defendants do not file an Appeal, we are satisfied with the Commissioner's Decision and would request that we be allowed to withdraw this appeal and it be returned to us, along with the required filing fee which is also enclosed.

I had previously advised defense counsel that this appeal would be filed if a decision was made to appeal. This being the last date to timely file and having heard nothing, I am filing this with the Commission at this time. A self-addressed stamped envelope is enclosed for returning this to us in the event the Defendants do not appeal. Of course if this cannot be accomplished in this manner and if no appeal is received by the Defendants, please so notify me and we will request that the appeal be dismissed.

By copy of this letter, I am notifying and serving counsel for the Defendants with a copy of this Cross-Appeal.

Sincerely yours,



Preston F. McDaniel

PFM/abh/kth
Enclosures

cc: Ellen Goodwin, Attorney
Peter P. Leventis, Esquire

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 Polansky SSN: _____ Employer's Name: SC Office of Attorney General
Address: _____ Address: Post Office Box 11549
City: Columbia State: SC Zip: 29223 City: Columbia State: SC Zip: 29211
Home Phone: () - Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Preston F. McDaniel Law Firm: McDaniel Law Firm Preparer's Phone #: (803) 771-7211

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 10/19/1999 & 05/30/2000
(m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

SEE ATTACHMENT.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Peter P. Leventis, IV, Esquire
Name

McKay Law Firm, 1303 Blanding Street, Columbia, South Carolina 29201
Address

on the 15th day of June, 2015 by ☒ first class mail ☐ personal service ☐ certified mail.

Preston F. McDaniel Attorney for Claimant/Appellant June 15, 2015
Preparer's Signature Title Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

ATTACHMENT TO FORM 30

Theodore Polansky v. SC Office of Attorney General

WCC File Nos. 9922954 & 0024408

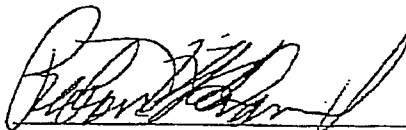
1. Hearing Commissioner erred as a matter of law by failing to increase the compensation rate to fairly compensate this high wage earner, under the second paragraph of SC Code Section 42-1-40 and SC Code Section 42-9-10 and the decisions of the Supreme Court and Court of Appeals under those sections.

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.

Respectfully submitted by:



Preston F. McDaniel

Attorney for the Appellant

CERTIFICATE OF SERVICE BY MAIL

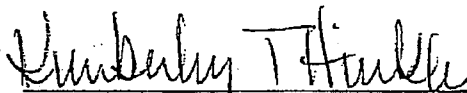
WCC File No. 9922954 & 0024408

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 FORM 30 - REQUEST FOR COMMISSION REVIEW by depositing the same in the United States Mail, with adequate postage thereon, addressed as follows:

Ms. Amy Bracy
Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

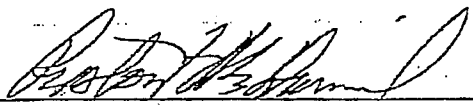
Peter P. Leventis, IV, Esquire
McKay Law firm
1303 Blanding Street
Columbia, South Carolina 29201

I also hereby certify that a regular communication by mail exists.



Kimberley T. Hinkle

SWORN TO BEFORE ME this
15TH day of June, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/18

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 Forsthoefer, 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