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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

CASE NO. 2012-213707

LATIKA BROWN.....APPELLANT,

v.

THE PANTRY, INC.....EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
RISK ENTERPRISE MANAGEMENT, LTD RESPONDENTS.

RECORD ON APPEAL

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0818970

LATIKA BROWN,

Employee,

Claimant,

vs.

THE PANTRY, INC.,

Employer,

AND

ACE AMERICAN INSURANCE
COMPANY c/o RISK ENTERPRISE
MANAGEMENT, LTD.,

Carrier,

Defendants.

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Summerville, South Carolina on April 20, 2012.

APPEARANCES:

Claimant appeared and represented by Donald H. Howe, Esquire of Howe & Wyndham, L.L.P. of Charleston, South Carolina.

Defendants represented by Amanda A. Mellard, Esquire of McAngus Goudelock & Courie, L.L.C. of Greenville, South Carolina.

PURPOSE OF THE HEARING: To determine all issues as set forth in Forms 50 and 51.

COMMISSIONER: Commissioner Gene McCaskill

FILED:

June 21, 2012

STIPULATIONS

The parties stipulated at the hearing to the following:

1. Notice of the hearing was timely and properly served upon all parties of interest;
2. The South Carolina Workers' Compensation Commission has jurisdiction of this claim;
3. Venue is proper in Summerville, South Carolina;
4. Claimant sustained an admittedly compensable injury to the bilateral knees on November 19, 2008 and previously settled her claim on a full and final clincher dated March 11, 2011;
5. The sole issue before the undersigned is whether Claimant is entitled to a reduction of the third party lien.

APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and regulations of the South Carolina Workers' Compensation Commission, the following records and documents were submitted into evidence:

Claimant submitted the following:

1. Charleston County EMS, dated 11/19/08, pages 1-4;
2. Charleston Memorial Hospital, dated 11/19/08, pages 5-29;
3. MUSC ER and Hospital, dated 11/19/08-5/4/09, pages 30-210;
4. Shane K. Woolf, M.D., MUSC Department of Orthopaedic Surgery, dated 11/19/08-1/27/11, pages 211-277;
5. Physical Therapy of MUSC, dated 3/2/09-11/30/09, pages 278-424;
6. L. Riley Cates, DMD, Express Dental Care, dated 4/28/09-6/2/09, pages 425-429;
7. Charles J. Beischel, M.D., MUSC Strom Eye Institute, dated 4/9/09, pages 430-434;

8. Aljoeson Walker, M.D., MUSC Neurology, dated 4/24/09-7/24/09, pages 435-461;
9. Jeffrey W. Buncher, M.D., Charleston Pain and Rehab, dated 12/21/09-present, pages 462-470;
10. J. Randolph Waid, PhD, dated 4/11/10-4/20/10, pages 471-479;
11. A. H. Trey Ginn, III, M.S., Rehabilitation Centers of Charleston, dated 10/12/10, pages 480-496;
12. CVS Pharmacy, dated 11/28/08-10/7/09, pages 497-502.

13. Claimant also proffered the report of Peter C. Devito, M.D, dated 3/5/12, pages 503-505. Defendants objected to this evidence as irrelevant on the basis that the evaluation was obtained after the settlement of the third party claim in September 2011. The undersigned sustained that objection, and the evidence was proffered.

Claimant's Exhibit A: Evaluation of damage by Edward Buckley, Jr., dated 4/5/11.

Defendants submitted the following:

14. Shane Woolf, M.D., MUSC Department of Orthopaedic Surgery, dated 11/20/08-11/29/10, pages 506-546;
15. John V. Custer, M.D., dated 11/16/10, page 547;
16. A. H. Trey Ginn, III, M.S., dated 10/12/10, pages 548-563;
17. Mark T. Wagner, PhD, MUSC Department of Neurology, dated 6/3/10, pages 564-577;
18. James R. Myers, Corvel Corporation, dated 4/29/10, pages 578-590;
19. Summons and Complaints, dated 6/10/11, pages 591-594;
20. Correspondence from Claimant's attorney regarding third party settlement, dated 9/8/11-9/21/11, pages 595-597;

21. Settlement Agreement/Form 19, pages 598-602;

22. Report of Jon Austen, dated 4/11/12, pages 603-605.

STATEMENT OF THE CASE

Claimant sustained admittedly compensable injuries to the bilateral legs as a result of an injury on November 19, 2008 when she was struck by a vehicle while walking through the employer's premises. Claimant received appropriate medical treatment and settled her claim on a full and final clincher as of March 11, 2011. Thereafter, in June 2011, she filed a Summons and Complaint against the at-fault driver who struck her on the day of the injury. Defendants were advised by Claimant's attorney on September 21, 2011 that Claimant had settled the third party claim for \$505,000.00 and now seek a reduction of Defendants' lien. Defendants have a lien on the third party proceeds of \$219,486.90.

Claimant contends that she is entitled to a reduction of the lien pursuant to Section 42-1-560 (f) and retained an expert who valued her total cognizable damages between \$1.25 million and \$1.45 million based on a number of factors. Claimant argued that because she recovered approximately one-third of her total cognizable damages, the Carrier's lien should be reduced proportionately in accordance with Section 42-1-560. In addition, she argued that Defendants should be responsible for attorney's fees and costs associated with obtaining the third party settlement.

Defendants deny that Claimant is entitled to any reduction of their lien and point specifically to Section 42-1-560 in support of their position that because Claimant did not first obtain the Carrier's approval, she is now barred from seeking any reduction of the lien. In addition, they point to the Kirkland v Allcraft Steel Co., 320 S.C. 289,496 S.E.2d 624 (1998)

case, and the factors listed by the Court to determine whether a claimant's lien should be reduced. The four factors listed in the Kirkland case are:

- a. the strength of the claimant's case;
- b. the likelihood of third party liability;
- c. the claimant's desire to settle; and
- d. the Carrier's unreasonable refusal to consent to said settlement.

First, Defendants contend that by Claimant's own admission, her case was very strong and, in fact, both experts retained in this matter by both Defendants and Claimant found that there was no question of third party liability and, in fact, agreed that Claimant had a very strong third party claim. Defendants' expert estimated her damages between \$750,000.00 and \$1 million. Both experts agreed that even in a conservative district such as Charleston, Claimant would like recover on the higher end of their estimates given the aggravated nature of her case.

Secondly, the likelihood of third party liability is almost guaranteed in this matter. Claimant was struck by the at-fault driver at an excessive speed while she was walking across the property of Defendant Employer. The at-fault driver cut the corner and sped through the parking lot, striking her. Therefore, Defendants argue that there was no question of third party liability.

Third, Defendants could not have unreasonably refused to consent to the settlement as they were never given an opportunity to consent prior to the settlement in September 2011. Based upon the statute, case law, and factors listed in the Kirkland case, Defendants argued that Claimant is not entitled to a reduction of the third party lien.

Additionally, Defendants argued that they should not be responsible for payment of attorney's fees. Section 42-1-560 (b) provides that the Carrier shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid, by such Carrier, less the reasonable and necessary expenses, including attorney's fees, incurred in effecting the recovery, and *to the extent the recovery shall be deemed to be for the benefit of the Carrier*. Defendants contend that the recovery in this matter was not to the benefit of the Carrier as Claimant did not recover the policy limits of \$525,000.00 but, instead, settled for \$505,000.00 when her case seemed to be very strong and where she did not obtain the written approval of the Carrier prior to the settlement. In addition, they argue that there is no evidence submitted in the record which supports that attorney's fees are reasonable in this particular matter. Therefore, they argue that their lien should be repaid in full.

EVIDENCE OF THE CASE

The parties agree that Claimant sustained compensable injuries to her bilateral lower extremities as well as psychological overlay as a result of her accident on November 19, 2008. She underwent extensive surgeries to both knees as well as counseling for psychological overlay and was released at maximum medical improvement by her authorized treating physicians. Thereafter, Claimant settled her Workers' Compensation claim on a full and final clincher in the amount of \$60,000.00. (APA p. 598)

Claimant then filed a third party suit against the at-fault driver in June 2011. (APA p. 592-594)

Thereafter, Claimant settled her third party claim for \$505,000.00 out of policy limits of \$525,000.00. No written approval was obtained by Claimant prior to settlement of the third party suit. (APA p. 595-597)

Defendants retained Jon Austen of Pratt-Thomas Walker as an expert to value Claimant's total cognizable damages in regards to her claim. After reviewing all of the medical evidence and other documentary evidence in connection with this claim, he opined that her total cognizable damages would be approximately \$750,000.00 to \$1 million. He noted that in this case, "the driver of the vehicle that struck Plaintiff Latika Brown was clearly negligent, possibly grossly negligent, but did not act with an intent to injure." He based his estimation of damages upon records indicating that Claimant was working at the time of her accident earning \$10.75 per hour. If she had continued to work 40 hours per week for every week of the year, she would yield an annual salary of \$22,360.00. He noted that she has now returned to work with Dunkin Donuts earning \$7.25 per hour but only working 18 hours per week by choice. A labor market survey was performed at the time of her Workers' Compensation injury indicating a number of jobs that she could have performed in the \$10.00 to \$12.00 range. Her physicians indicated that there were no restrictions on working 40 hours per week and, therefore, he concluded that once she had been cleared to work as of January 2010, she would have had no lost wages and no claim for same. Further, he noted that there is little evidence of an cognitive injury sustained by Claimant in this case and that it appears that she is coping with the psychological issues which may have been dredged up from her past. He specifically pointed to the opinion of Dr. Custer, a psychologist, who treated Claimant for psychological overlay and noted that Dr. Custer indicated improvement in her condition as well as a willingness to move on with the rest of her life. (APA p. 603-605)

Claimant retained an expert, Edward D. Buckley of Young Clement Rivers, to render an opinion regarding total cognizable damages. Mr. Buckley opined that Claimant's total damages totaled approximately \$1.25 million for \$1.45 million based upon a number of factors. Further, he noted that as a practical matter, his experience had been that because of the punitive damage threat, the case would settle in a mediation setting for not less than \$1.4 million and that, if tried, would render a verdict of actual and punitive damages of \$1.5 to \$2 million. (Claimant's Ex. A)

FINDINGS OF FACT

1. Based on the evidence submitted the parties, Claimant suffered admittedly compensable injuries as a result of an accident on November 19, 2008 for which she settled her claim as of March 11, 2011 with Defendants;
2. Based on the evidence submitted the parties, Claimant filed a third party action against the at-fault driver in June 2011 and settled that claim for \$505,000.00 in September 2011;
3. Based on the evidence submitted the parties, the policy limits available to Claimant were \$525,000.00;
4. Based on the evidence submitted the parties, Claimant did not obtain the written approval of Defendants prior to entering into the settlement with the third party as is required by statute;
5. Based on the evidence submitted the parties, Defendants have a lien totaling \$219,486.90 as a result of the Workers' Compensation claim filed by Claimant (File No. 0818970) on any third party proceeds;

6. Based on the evidence submitted the parties, Defendants seek repayment of their lien in full;
7. Based on the evidence submitted the parties, Jon Austen, as well as Edward Buckley, experts for both parties, agreed that Claimant's case for damages in civil court was very strong given her extensive injuries, lost time from work, and permanent injuries;
8. Based on the evidence submitted the parties, Jon Austen and Edward Buckley, experts for both parties, agreed that there was no question regarding third party liability;
9. Based on the evidence submitted the parties, Claimant did not present any evidence regarding reasonable justification as to why she did not obtain written approval from Defendants prior to entering into the settlement with the third party;
10. Based on the evidence submitted the parties, Claimant did not submit any evidence to support reasonableness of attorney's fees and assessment thereof;
11. Based on the evidence submitted the parties, reduction of a third party lien lies within the discretion of the Workers' Compensation Commission and any such reduction shall be based on a determination by the Commission that such reduction would be equitable to all parties concerned and serve the interest of justice;
12. Based on the evidence submitted the parties, a reduction in the third party lien would not be equitable to all parties concerned in this matter given that Claimant did not obtain written approval prior to settlement of the third party claim and given that the strength of her case and likelihood of third party liability was so great;

13. Based on the evidence submitted the parties, Defendants are entitled to payment of their lien in full.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act and Section 42-1-10, S.C. Code of Laws, *et. Seq.*, that:

1. Pursuant to Section 42-1-560, Defendants seek repayment of their lien in full from proceeds of the third party settlement;
2. Pursuant to Section 42-1-560, Claimant did not obtain written approval from Defendants prior to entering into the settlement with the third party;
3. Pursuant to Section 42-1-560 and the Kirkland case, both experts agree that Claimant had a very strong case against the third party for actual damages and possible punitive damages sustained as a result of her injury;
4. Pursuant to Section 42-1-560 and the Kirkland case, both experts agree that there was no question regarding third party liability;
5. Pursuant to Section 42-1-560, reduction of a third party lien lies within the discretion of the Commission and must be determined to be reasonable and equitable to all parties;
6. Pursuant to Section 42-1-560, Defendants are entitled to repayment of their lien in full.

ORDER

IT IS HEREBY ORDERED that the greater weight of the evidence supports a finding that Defendants are entitled to repayment of their lien from the third party proceeds in full.

AND IT IS SO ORDERED.


Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

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

June 21, 2012

By: Kellie Lindler, Administrative Assistant to Commissioner McCaskill

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

W.C.C. FILE NO: 0818970

Latika Brown

EMPLOYEE,
CLAIMANT/RESPONDENT

VS.

The Pantry, Inc.

EMPLOYER.

AND

ACE American Insurance Company c/o Risk
Enterprise Management, Ltd.

CARRIER,
DEFENDANTS/APPELLANTS.

Appellate Panel Review held in Columbia, South
Carolina, on October 23, 2012 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

12/3/12

APPEARANCES: Claimant/Appellant represented by Donald H. Howe, Esquire
Defendants/Respondents represented by Amanda A. Mellard

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill on April 20, 2012 in Columbia, South Carolina. On June 21, 2012, he issued the following Order:

IT IS HEREBY ORDERED that the greater weight of the evidence supports a finding that Defendants are entitled to repayment of their lien from the third party proceeds in full.

IT IS SO ORDERED.

Within the statutory period, counsel for Claimant filed an Application for Review in the case setting forth her reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on October 23, 2012. All proper testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since then under study and consideration. By Appeal, Claimant respectfully submits the following:

1. In a situation in which the Claimant settled her third party court action for \$505,000.00 out of \$525,000.00 of available insurance coverage, did the Hearing Commissioner err in ruling that the Claimant, by failing to give prior written notice of the settlement to the carrier, thereby forfeited a right to reduce the lien of the carrier by an amount reasonable attorney's fees and expenses and principals of equity as provided in §42-1-560?
2. Did the Hearing Commissioner fail to properly apply the guidelines pronounced by the South Carolina Supreme Court in Kirkland v. Allcraft Steel Co., 320 S.C. 289, 496 S.E. 2d 624 (1998) when he refused to reduce the lien of the Workers' Compensation Carrier by any amount?
3. Did the Hearing Commissioner err when he failed to follow the statutory language

of §42-1-560 and failing to provide for any amount of reasonable attorney's fees to be deducted from the amount of money ultimately awarded to the carrier for its lien?

4. Did the Hearing Commissioner err when he failed to reduce the amount of the Workers' Compensation carrier's lien by any amount based on the fact that no prior written notice was given to the carrier even though there was no prejudice to the carrier?
5. Did the Hearing Commissioner err in ruling that the third party settlement was "not the benefit of the carrier" pursuant to §42-1-560 despite the fact that he awarded the carrier \$219,486.90?
6. Did the Hearing Commissioner err when he failed to admit into evidence and consider medical evidence by Dr. Peter DeVito, a plastic surgeon, about future potential surgery available to the Claimant to improve her extensive scarring?

In an Appellant review, the Panel shall, pursuant to S.C. Ann. Code §42-17-50 (1985), review the award, weight the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Panel, by a majority vote, has determined all of the Hearing Commissioner findings of fact and rulings of law are correct as stated. Accordingly, they shall become and hereby are, the law of the case, and therefore, the Order is sustained in its entirety. The Panel finds as follows:

FINDINGS OF FACT

1. Based on the evidence submitted the parties, Claimant suffered admittedly compensable injuries as a result of an accident on November 19, 2008 for which she settled her claim as of March 11, 2011 with Defendants:

2. Based on the evidence submitted the parties, Claimant filed a third party action against the at-fault driver in June 2011 and settled that claim for \$505,000.00 in September 2011;
3. Based on the evidence submitted the parties, the policy limits available to Claimant were \$525,000.00;
4. Based on the evidence submitted the parties, Claimant did not obtain the written approval of Defendants prior to entering into the settlement with the third party as is required by statute;
5. Based on the evidence submitted the parties, Defendants have a lien totaling \$219,486.90 as a result of the Workers' Compensation claim filed by Claimant (File No. 0818970) on any third party proceeds;
6. Based on the evidence submitted the parties, Defendants seek repayment of their lien in full;
7. Based on the evidence submitted the parties, Jon Austen, as well as Edward Buckley, experts for both parties, agreed that Claimant's case for damages in civil court was very strong given her extensive injuries, lost time from work, and permanent injuries;
8. Based on the evidence submitted the parties, Jon Austen and Edward Buckley, experts for both parties, agreed that there was no question regarding third party liability;
9. Based on the evidence submitted the parties, Claimant did not present any evidence regarding reasonable justification as to why she did not obtain written approval from Defendants prior to entering into the settlement with the third party;

10. Based on the evidence submitted the parties, Claimant did not submit any evidence to support reasonableness of attorney's fees and assessment thereof;
11. Based on the evidence submitted the parties, reduction of a third party lien lies within the discretion of the Workers' Compensation Commission and any such reduction shall be based on a determination by the Commission that such reduction would be equitable to all parties concerned and serve the interest of justice;
12. Based on the evidence submitted the parties, a reduction in the third party lien would not be equitable to all parties concerned in this matter given that Claimant did not obtain written approval prior to settlement of the third party claim and given that the strength of her case and likelihood of third party liability was so great;
13. Based on the evidence submitted the parties, Defendants are entitled to payment of their lien in full.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Workers' Compensation Act and Section 42-1-10, S.C. Code of Laws, *et. Seq.*, that:

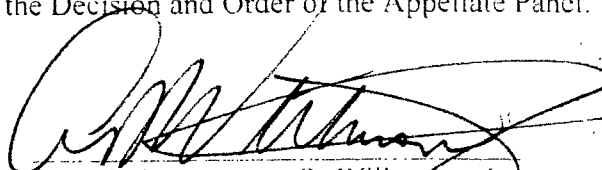
1. Pursuant to Section 42-1-560, Defendants seek repayment of their lien in full from proceeds of the third party settlement;
2. Pursuant to Section 42-1-560, Claimant did not obtain written approval from Defendants prior to entering into the settlement with the third party;
3. Pursuant to Section 42-1-560 and the Kirkland case, both experts agree that Claimant had a very strong case against the third party for actual damages and possible punitive damages sustained as a result of her injury;

4. Pursuant to Section 42-1-560 and the Kirkland case, both experts agree that there was no question regarding third party liability;
5. Pursuant to Section 42-1-560, reduction of a third party lien lies within the discretion of the Commission and must be determined to be reasonable and equitable to all parties;
6. Pursuant to Section 42-1-560, Defendants are entitled to repayment of their lien in full.

ORDER

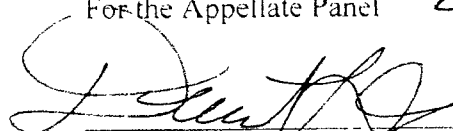
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order from the Single Commissioner filed in the above-captioned matter on July 21, 2012 is hereby affirmed by the Panel in its entirety and shall constitute the Decision and Order of the Appellate Panel.

SO ORDERED.

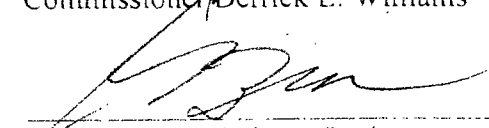


Commissioner Avery B. Wilkerson, Jr.
For the Appellate Panel

WE CONCUR:



Commissioner Derrick L. Williams



Commissioner T. Scott Beck

CERTIFICATE OF SERVICE

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

By Valerie Deller on December 3, 2012



Claimant's Name: Latika Brown SSN: 248-37-3998 Employer's Name: The Pantry, Inc.
Address: 32 North Enston Avenue Address: 305 Gregson Drive
City: Charleston State: SC Zip: 29403 City: Cary State: NC Zip: 27512
Home phone: (843) 926 - 8919 Work Phone: () - Insurance Carrier: ACE American Ins. Co c/o Risk Enterprise Management
Preparer's Name: Donald H. Howe Law Firm: Howe & Wyndham, LLP Preparer's Phone #: (843) 853 - 6121

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 1/19/08

☒ Injury ☐ Illness ☐ Repetitive Trauma

- 1a. The claimant sustained an injury to _____ (Part(s) of Body Injured) ON _____ (Month/Day/Year) in _____ county, state of _____.
- 1b. Body part(s) affected are: _____
Briefly describe how the accident occurred. _____
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on _____ (Month/Day/Year) in the following manner: _____

- ☐ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: _____
☐ (b) additional medical examination and treatment for: _____
- ☐ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: _____
- ☐ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☐ (2) Specific Disability: ☐ Total
☐ (3) Wage Loss ☐ Partial ☐ Partial
- ☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of: _____

- 10a. At the time of the injury, the Claimant was paid weekly wages of \$ _____, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: _____

11a. Further grounds or unusual aspects of claim: _____

Determination of Carrier's Lien Pursuant to 42-1-560.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: _____

11c. To the best of your knowledge, did you have any prior permanent disability? _____
If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. I am filing a claim. I am not requesting a hearing at this time.

☒ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: 30 minutes

I verify the contents of this form are accurate and true to the best of my knowledge.

Donald H. Howe
Preparer's Signature

Attorney for Claimant
Title

howewyndham@bellsouth.net
Email

January 20, 2012
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

SC Workers' Compensation Commission

1333 Main Street, suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
803)737-5723



Carrier File #: 571-0843228

Carrier Code #: 395

Employer FEIN #: 561574463

Latika Brown 248-37-3998

Claimant's Name SSN

35-A Allaway Street
Charleston, South Carolina 29403

Address City State Zip

(843) 926-8919

Home Phone #

Amanda A. Mellard

Preparer's Name

Work Phone #

McAngus Goudelock & Courie

Law Firm

The Pantry, Inc.

Employer's Name

305 Gregson Drive
Cary, North Carolina 27512

Address City State Zip

ACE American Insurance Company c/o Risk Enterprise
Management, Ltd.

Insurance Carrier

(864) 239-4007

Phone Number

Date of Accident: 11/19/08

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is **admitted** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: Claimant sustained admittedly compensable injuries, and the parties have settled her claim on a final clincher and release.
2. It is **admitted** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See No. 1 above.
3. It is **admitted** that the relationship of employer and employee existed at the time in question. The reasons for denial are: See No. 1 above.
4. It is **admitted** that at the time in question the employee was performing service growing out of and incidental to his employment. The reasons for denial are: See No. 1 above.
5. It is **admitted** that notice of injury was given to the employer. The reasons for denial are: See No. 1 above.
6. It is **denied** that the employee needs/is entitled to additional medical care as a result of the injury. The reasons for denial are: The parties previously settled this matter on a full and final clincher.
7. It is **denied** that the employee is entitled to temporary total disability for the period(s) of: The parties previously settled this matter on a full and final clincher.
8. It is **denied** that the employee is permanently disabled. The reasons for denial are: The parties have settled this matter on a full and final clincher.
9. It is **denied** that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of **\$336.60** applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: The parties previously settled this matter on a full and final clincher. Thereafter, Claimant filed a third-party claim against the at-fault driver and settled the third-party claim without the approval of the carrier. The carrier now seeks payment of the lien. Defendants contend that they are entitled to the full lien given the amount of the third party settlement and in light of the fact that Claimant did not seek or obtain approval of the third-party settlement from the carrier prior to same. Defendants deny that Claimant is entitled to a reduction of the lien pursuant to §42-1-560. See attached Addendum.
12. Estimated time needed for hearing: 30 minutes

I certify that I have served this document pursuant to R.67-211 by delivering a copy to:

Donald H. Howe, Esquire
Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, South Carolina 29402

Virginia Crocker, Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

on the 17th day of February, 2012 by ☒ first class mail; ☐ personal service; ☐ certified mail.

I verify the contents of this form are accurate and true to the best of my knowledge.

Amanda A. Mellard
Preparer's Signature

Attorney for Employer/Carrier amellard@mgclaw.com
Title Email

February 17, 2012
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

020

Addendum to Form 51

11. Defendants respectfully reserve the right to amend this Form 51 and claim any and all affirmative and specific defenses should facts be discovered during investigation which allow the defenses to be asserted in good faith, (see Reg. 67-603), including but not limited to Section 42-9-60, fraud in the application for employment, fraud in the inducement to sign Form 15, fraud in the initiation of the claim for benefits, pre-existing disability to allegedly injured members, election of remedies, intervening trauma; no compensable injury by accident under Section 42-1-160; degree of disability, if any, attributable to this injury needs to be determined; statute of limitations; notice; defendants reserve the right to amend this Answer and plead additional defenses.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0818970

Latika Brown,)
)
Claimant,)
)
vs.)
)
The Pantry, Inc., Employer,)
)
and)
)
Indemnity Insurance Company of)
North America, Carrier,)
)
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS
April 20, 2012

This hearing was held before Commissioner Gene McCaskill, reported by Kimberly T. Power, Court Reporter and Notary Public in and for the State of South Carolina; said proceedings were held at the South Carolina Workers' Compensation Commission, County Services Building, 500 North Main Street, Summerville, South Carolina, on Friday, April 20, 2012.

COPY

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1 (Claimant's Exhibit No. 1, Settlement
2 Agreement, was marked and entered into evidence.)

3 THE COURT: Today's date is April 20, 2012.
4 This is the case of Latika -- is that the correct
5 pronunciation?

6 MS. BROWN: Yes, sir.

7 THE COURT: Latika Brown vs. The Pantry, Inc.
8 The claimant is represented by Donald H. Howe, and the
9 carrier and the employer is represented by Amanda A.
10 Mellard. The carrier is Indemnity Insurance Company of
11 North America.

12 The claimant has an average weekly wage of
13 \$336.16 and a comp rate of \$224.41. And the date of the
14 accident was November 19, 2008, and this is an admitted
15 claim.

16 MS. MELLARD: It was admitted and we settled
17 it on a full and final clincher.

18 THE COURT: All right. Admitted claim that
19 settled on a full and final clincher. Are there
20 objections to jurisdiction, venue, and any APA
21 submissions?

22 MR. HOWE: None from the claimant.

23 MS. MELLARD: No objections to jurisdiction or
24 venue, but we do have an objection to APA No. 13 of the
25 claimant's brief which is a medical evaluation and record

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1 from Dr. DeVito. The basis of our objection being that
2 it was obtained in March of 2012 and since we are here to
3 determine whether there should be a reduction of the
4 third-party lien, it is our contention that that decision
5 and that evidence should be looked at the time of the
6 third-party settlement which was in September of 2011.
7 This medical record was obtained much later and is in
8 addition to evidence that was present at the time of the
9 third-party settlement and is, therefore, not relevant.

10 THE COURT: Mr. Howe, do you want to speak to
11 that on the record?

12 MR. HOWE: Yes, sir, Your Honor. My position
13 is that the statute allows -- this is Section 42-1-560.
14 The ultimate standard is that of cognizable damages, and
15 it doesn't put any particular limitation. The damages
16 she had which were scars to her knees, this is a plastic
17 surgery report, existed at the time of the settlement.
18 But the cognizable damages are the cognizable damages, I
19 would believe, at trial under the law and there wouldn't
20 be that time limitation to it. It's certainly -- had her
21 knees gotten worse for some reason or they were doing a
22 subsequent surgery after we clinchered the case, her case
23 would have been way more valuable. It wouldn't be
24 excluded because it happened later. This happened to
25 just be documented later, and we talked about it in the

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1 pretrial. The reason I didn't want to spend the money to
2 document it earlier was it wasn't particular relevant to
3 the comp case. And since we got basically all the
4 coverage, there wasn't any reason to spend that extra
5 expense at that time.

6 That's -- that's my position in that regard,
7 but I understand your ruling.

8 THE COURT: That APA No. 13 is out for
9 purposes of this proceeding. However, you're going to
10 proffer it so it's preserved for appeal. All right. The
11 Commission file becomes a part of the record with the
12 exception of self-serving declarations and unstipulated
13 medical reports.

14 Mr. Howe, would you please state the
15 claimant's position for the record.

16 MR. HOWE: Yes, sir, Your Honor. This is here
17 on a Form 50 pursuant to looking at Section 42-1-560. It
18 would occur to this case without any real controversy was
19 that the claimant was injured on the job. There is a
20 lien, and I'll let Amanda address the specific amount
21 because I can't seem to put my hands on it, but it's
22 about \$20,000. The claimant after clinchering the
23 workers' compensation, we pursued a third-party action.
24 It was determined that the total insurance available was
25 \$525,000. As is often the case, when you negotiate

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1 things, you give a slight discount to save sort of both
2 sides: Money, time, expenses, legal fees and that kind
3 of thing, and you will sometimes come out ahead by giving
4 a slight discount by getting basically 90 percent of
5 everything that was there which was done in this case.

6 My understanding and my reading of the statute
7 and in the Kirkland case and other cases, is there are
8 two steps to evaluating from the Commission's standpoint.
9 Number one is the statute itself allows that there is a
10 lien, and I do use the word "shall," in Section B,
11 42-1-560. "In such case, the carrier shall have a lien
12 on the proceeds of any recovery from a third-party
13 whether by judgment, settlement," settlement in this
14 case, "or otherwise to the extent of the total amount of
15 compensation including medical and other expenses paid or
16 to be paid by the carrier." That would be the 219 or 220
17 figure. "Less the reasonable and necessary expenses
18 including attorney's fees incurred in effecting the
19 recovery." And that would be the fees reflected, their
20 proportion of the fees reflected on the fees that I
21 charged in the exhibit that we put in today.

22 It later says in Section G that the -- I
23 believe it's G, that the Commission has the ability to --
24 I'm sorry. In F, "Notwithstanding the other provisions
25 of this item where an employer representative enters into

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1 a settlement with or obtains judgment from trial of a
2 third-party in an amount -- less the amount of the
3 employee's estimated total damages, the Commission may
4 reduce the amount of the carrier's lien on the proceeds
5 of such settlement in proportion that such settlement or
6 judgment bears to the Commission's evaluation of the
7 employee's total cognizable damages at law." In other
8 words, what would they have been entitled to in a tort
9 setting as opposed to a workers' compensation setting
10 because they are two absolutely different things.

11 "Any such reduction shall be based on a
12 determination by the Commission that such reduction would
13 be equitable to all parties concerned and serve the
14 interest of justice." And that's exactly what we're here
15 about. Our position is that this case was worth in
16 excess of the amount of insurance that was there and that
17 as a result, there should be some pro rata reduction.

18 You have in the materials submitted an expert
19 report from my expert, a guy named Edward Buckley who is
20 with Young Clement, and he gives a figure of about 1.4
21 million. There's an expert for Ms. Mellard's client,
22 Mr. John Alston who is with -- it's the old Wise firm.
23 They've changed their name so many times. But anyway,
24 both of these are excellent attorneys. They both -- her
25 expert gives a range of 750 to a million in terms of the

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1 value and says that based on some of the factors involved
2 that he thinks it would be in the higher end of that
3 range. So if you look at the total cognizable damages,
4 this is a lady that we feel should have received
5 something in those ranges and that will be up to you to
6 determine. But if you used, for example, a million
7 dollar figure, and I'm rounding, then she got about
8 50 percent. She recovered about 50 percent. And the way
9 that calculation then goes, as I understand it is you
10 look at the first part of the statute. They get their
11 money less their proportion of the approximate one-third
12 fees. That gets it to about 140 or 150. And then you
13 say, well, gosh, Ms. Brown got 50 percent of what she
14 should have recovered.

15 There is a lien based on a subrogation
16 interest. Basically, in other words, their rights are
17 subrogated to her rights and they're not supposed to get
18 any worse than Ms. Brown gets, but they're not supposed
19 to get any better than Ms. Brown gets. If Ms. Brown is
20 recovering 50 cents on the dollar in the case, then they
21 recover 50 cents on the dollar. She recovers 75 cents on
22 the dollar, they recover 75 cents on the dollar.

23 But it would not be equitable, and my position
24 with the Commission is it would be counter to everything
25 in the cases and in the statute for them to get

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1 100 percent is what Ms. Mellard -- and pay no attorney
2 fees and pay 100 percent and then after they've exhausted
3 and they've got 100 percent, then she ends up with like
4 20 percent. That's not what the statute is for. The
5 statute is to make sure there's equity done to all
6 parties. That is what the phrase "in the interest of
7 justice" is all about.

8 And so our position is when you look at these,
9 you'll come to some conclusion of the fair value of the
10 case and you will make those adjustments. And I think
11 basically -- oh, there was one -- I'll let her go and
12 then I'll answer the one other thing about the not
13 participating. I know she's got that. I think that's --
14 I'll stop there for now.

15 THE COURT: Ms. Mellard.

16 MS. MELLARD: Thank you, Commissioner. I want
17 to start just by completing the portion of the statute
18 that Mr. Howe read from initially. He said that the
19 carrier shall have a lien on the proceeds of any recovery
20 from the third-party whether by judgment, settlement, or
21 otherwise to the extent of the total amount of
22 compensation including medical and other expenses paid or
23 to be paid by such carrier less the reasonable and
24 necessary expenses including attorney fees incurred in
25 effecting the recovery and to the extent that recovery

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1 shall be deemed to be for the benefit of the carrier. So
2 there is that last portion of that sentence that says or
3 that gives the discretion to the Commission to determine
4 what amount is reasonable for those attorney's fees or
5 other costs incurred as a result of effecting the
6 settlement.

7 Defendant's position is that this lien --
8 third-party lien should not be reduced at all. And we
9 start with the premise of Section 42-1-560 which says
10 that the carrier is entitled to the full amount of our
11 lien and that later on in the statute it says the
12 Commission may, in other words they have the discretion,
13 to reduce that lien if certain factors are met. And
14 those factors come from the Kirkland case which we've
15 talked about briefly.

16 The Kirkland case admittedly does not give us
17 an exhaustive list of those factors, but it does give us
18 an indication of what those could be and those include
19 the strength of the claimant's case and the likelihood of
20 third-party liability. There is no question in this case
21 that the third-party was liable. There is no indication
22 that Ms. Brown was at all liable for her accident. So
23 there is no question here that the third-party was liable
24 for the entire accident.

25 And then as far as the strength of her case,

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1 as you've already been told, both experts opine that the
2 total value of this case ranges between \$750,000 and \$1.4
3 million. Both experts agree that she had a very good
4 case, she had a very strong case. She would have likely
5 have been awarded punitive damages in a district that
6 does not usually do that given the egregious nature of
7 the third-party in this case or in this matter.

8 And so when you look at those factors, this is
9 not, in other words, a case where Ms. Brown's case wasn't
10 very strong or that there was some question of her
11 liability which would have made going to trial risky for
12 her or really pose any risk that she would have gotten
13 less than the policy limits which in this case were
14 \$525,000. The policy limits were not obtained. The
15 third-party case settled for \$505,000. Our lien is
16 \$219,486.90. And so she got over and above our lien.
17 She did so obviously with the help of her attorney, but
18 they did not get our written approval, our being my
19 client, the carrier's written approval before coming to
20 that settlement. The statute requires that the claimant
21 has to obtain the written approval of the workers' comp
22 carrier before settling the third-party claim and that's
23 to protect the carrier's lien. That was not done in this
24 case. They did not obtain our approval, written or
25 otherwise, before settling and now they are seeking to

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1 reduce our lien dramatically even though we were not
2 given any say or any input in the settlement of the
3 third-party claim.

4 I think that pretty well sums up our position
5 and it's just, again, that the factors in the Kirkland
6 case do not point to a -- or should not point to a
7 conclusion that the lien should be reduced in this
8 matter. The carrier -- the whole purpose of the statute
9 is to allow for the claimant to receive immediate medical
10 benefits, immediate indemnity benefits, and then allows
11 the carrier to then recoup that money and those benefits
12 from the party who was actually at fault. And that is
13 what should be done here. Thank you.

14 THE COURT: Mr. Howe.

15 MR. HOWE: Yes, briefly. In terms of the
16 language, the last language which I did omit where it
17 says, "And to the extent the recovery shall be deemed for
18 the benefit of the carrier," obviously if I'm getting
19 them paid back whatever the number is, they are getting a
20 substantial benefit. That's what that's talking about.
21 I'm recovering from the third-party to the extent that it
22 can be a benefit for them. So I think that's more than
23 covered by the statute. We're well within that.

24 Number two, in terms of the Kirkland case, my
25 reading of the Kirkland case was the single Commissioner

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1 did basically what Ms. Mellard is asking you to do. The
2 Full Commission reversed him and did exactly what I'm
3 asking you to do. And the Court of Appeals or the
4 Supreme Court, I think actually in that case, affirmed
5 what happened. They said you have to look at the factors
6 that make it equitable.

7 Now, in the Kirkland case, there may have
8 been, and I don't remember, but sometimes as a
9 plaintiff's lawyer, we discount the value of a case for
10 settlement purposes because there are questions of
11 liability. Okay. And sometimes that's a factor that we
12 may debate with the carrier in terms of discounting the
13 lien later. There was not a factor in this case. I
14 agree there was good liability. The factor in this case
15 was coverage which meant I could go to trial, I could go
16 get a million dollar verdict, I could -- my fees could go
17 up from 33 to 40 percent, okay, and help my pocket, but
18 her pocket. And I could spend another 15 or 20 thousand
19 dollars in getting additional experts and economic
20 experts and all that stuff and I will look like a million
21 bucks and even got my name in the paper. And in the end,
22 she would have netted a whole lot less money.

23 And so what we did was we said, we don't want
24 to win the battle and lose the war. We'll take a little
25 bit less today so that we don't spend needless attorney

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1 fees and expenses. And once we do that, then we've got
2 to look at the equities. I've gone over the equities
3 with you.

4 The only other thing I would address that
5 Ms. Mellard has brought up is that they didn't get to
6 somehow participate. Number one, they knew I was doing a
7 third-party; and, number two, if they wanted more
8 participation, I was certainly available. And number
9 three, even if that's a fact for some reason, they've got
10 to show that they've been harmed to some extent. And the
11 worse harm they could ever imaginably contend would be
12 that there should have been some payment of the 525
13 instead of 505 because that's all there was that was
14 there. And I would point out that even their expert says
15 that in the context of that being the coverage, the 505
16 was an excellent result. So they can't really show any
17 damage. And to the contrary, their expert has said there
18 was an excellent result.

19 So if you put those things together, I think
20 the 505 is a reasonable figure. The question is, how do
21 you look at the -- how many cents on a dollar, how does
22 that pro rata share go. And I think that pretty much
23 sums up our argument. Thank you very much.

24 THE COURT: Ms. Mellard?

25 MS. MELLARD: I just have a few things. As

1 far as the Kirkland case goes, I believe what the Supreme
2 Court said was these are the factors and they remanded it
3 back so that the Full Commission could determine whether
4 or not the lien should be reduced. I just wanted to
5 clarify that point.

6 And then also to the extent that coverage was
7 an issue, which I believe was just brought up, we have no
8 evidence that coverage was ever an issue. I don't think
9 there's been any evidence submitted to you that coverage
10 in this case was ever an issue that would have had to be
11 borne out at a trial. To the extent that that is their
12 argument, we would just point out that this is the first
13 we're ever hearing about coverage being an issue. It
14 certainly isn't brought up in their expert's report or
15 any of their evidence. So maybe that wasn't what was
16 meant by that comment. But to the extent that it was, we
17 would just point that out. And that's all. Thank you.

18 THE COURT: Mr. Howe?

19 MR. HOWE: Even their own expert talks about
20 there being a coverage problem.

21 THE COURT: All right. What else, Mr. Howe?

22 MR. HOWE: That's all, Your Honor.

23 THE COURT: Anything else?

24 MS. MELLARD: Nothing from defendants.

25 THE COURT: Well, I think that concludes this

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #0818970

LATIKA BROWN	)	
	)	
CLAIMANT,	)	SC WORKERS' COMPENSATION COMMISSION
	)	
VS.	)	HEARING OF
	)	
THE PANTRY	)	LATIKA BROWN
	)	
EMPLOYER,	)	
	)	VS
AND	)	
	)	THE PANTRY
INDEMNITY INS CO OF	)	
NORTH AMERICA	)	
CARRIER.	)	

This is the Transcript of the South Carolina Workers' Compensation Hearing of Latika Brown versus The Pantry, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 10:15 A.M., Tuesday, October 23, 2012, at South Carolina Workers' Compensation Commission, 1333 Main Street Columbia, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

PALMETTO COURT REPORTING
321 Mac Circle Lexington, SC 29073
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036

STIPULATIONS

Commissioner Williams: Whenever you're ready, Gigi.

Court Reporter: Today is October the 23rd, 2012. This is South Carolina Workers' Compensation Case Number 0818970. This is the case of Latika Brown, Claimant, versus The Pantry, Employer, and Indemnity Insurance Company of North America is the carrier. The Appellant is the Claimant represented by Donald H. Howe. The Respondent is represented Amanda A. Mellard. Each side is allowed ten (10) minutes for oral argument and the Appellant three (3) minutes in reply. You are requested to argue the grounds of exception and stay within the record. The Single Hearing Commissioner was Commissioner McCaskill.

Commissioner Williams: All right. Mr. Howe.

ARGUMENT FOR THE APPELLANT

By Mr. Howe:

May it please the Commission? I may rattle a few more papers because I was about to get them straight out there a few minutes ago. My pen is going off already. Well, good morning. As -- as you know my name is Donald Howe and I represented Ms. Latika Brown. The hearing that this was about

1 was we had settled the comp case, we then settled
2 the liability case and then we went for a
3 reduction of the lien in front of Commissioner
4 McCaskill. The total amount of the lien was two
5 nineteen, four eighty-six, ninety (\$219,486.90);
6 so, around two hundred and twenty (\$220,000.00)
7 for -- for purposes of argument today. The
8 settlement was five hundred and five thousand
9 dollars (\$505,000.00) settlement on the third
10 (3rd) party out of a possible five hundred and
11 twenty-five thousand dollars (\$525,000.00) of
12 available insurance. So, you could sort of round,
13 I guess, at right at around five hundred thousand
14 dollars (\$500,000.00). The case basically -- it
15 factually was this lady worked at a gas station.
16 As she was walking back between the pumps and she
17 stepped out as a kid cut through and he hit her.
18 Bad damages: Three (3) -- three (3) surgeries on
19 one (1) knee, one (1) surgery on the other. It
20 really took this lady about two (2) years of -- of
21 twenty-four/seven (24/7) treatment. She had a
22 cadaver piece put in one (1) of her knees. So,
23 she was out for a long time, very bad damages.
24 Arguably -- and I went back and forth a little bit
25 with the liability carrier -- arguably some

1 problems with comparative because she's walking
2 and if she'd have been looking she could have seen
3 this guy but we felt, you know, overall the way
4 this works in the liability world is when you have
5 that kind of damages even if you have a
6 comparative argument the chances of getting over
7 the coverage and -- and what we call the Tiger
8 River situation of putting these -- this --
9 bankrupting this young guy who -- who hit her, we
10 were able to get most of the coverage. And, in
11 fact, the carrier's own expert says in his letter
12 that he thought I did an excellent job of getting
13 five hundred and five (\$505,000.00) out of the
14 five twenty-five (\$525,000.00). Commissioner
15 McCaskill essentially held that they were entitled
16 to every penny of their lien, period. No
17 attorney's fees, no equitable reduction, nothing.
18 We -- that we owe them two twenty (\$220,000.00)
19 out of two twenty (\$220,000.00). And he based it
20 basically on two (2) things. One (1), which was
21 clear error, okay, was he said that we didn't get
22 written permission. Well, you're required to get
23 written permission when it's less because then
24 obviously the pie is not big enough to go around.
25 But the statute, itself, says you only need

1 written permission when the -- when the settlement
2 is less than the lien. If we'd had settled for
3 two hundred (\$200,000.00) I would have needed to
4 get written permission; when you settle for five
5 oh five (\$505,000.00) you don't. Not only does
6 the statute say that but there is a case and it's
7 in my -- I put it in the package but it's Hardee
8 versus Bruce Trucking, which is in Section D of my
9 tab, and the Appeals Court specifically says --
10 and it's on page 8 of 9 of that little attachment
11 -- The Act does require the carrier's consent when
12 the settlement is less than the compensation
13 entitlement; however, this provision is
14 inapplicable to the present case since the
15 settlement was for more than the Claimant's total
16 entitlement. If you look at Commissioner
17 McCaskill's order he refused to reduce the lien at
18 all for basically two (2) reasons, and this is in
19 Section 12 of his findings. Based on the evidence
20 reduction of the lien is not equitable to all
21 parties given that Claimant did not obtain written
22 prior approval to the settlement and because the
23 liability was so clear. There's a couple of
24 things about that. Number one (1), it's just flat
25 wrong that I needed to get it and that was one (1)

1 of two (2) factors. Number two (2), he -- the
2 only other factor that he looks at is the strength
3 of the case and the fact that the liability was so
4 great. What he does is he takes one (1) of the
5 Kirkland factors and with one (1) Kirkland factor
6 and one (1) wrong factor he bases his entire
7 decision. He completely ignores the fact that in
8 addition to the factors in -- in Kirkland, the
9 Breeden Case talks about the fact that you have to
10 look at the -- the nature of the damages, how big
11 the claim is. And I tried to argue this and --
12 and I just didn't get anywhere. It's just an
13 equitable solution. All you're trying to say is,
14 what's the value of the case? What is -- how many
15 cents on the dollar is Latika Brown getting?
16 Let's treat the carrier the same. If she's
17 getting fifty cents (\$0.50) on the dollar (\$1.00),
18 let them get fifty cents (\$0.50) on the dollar.
19 If she's got to pay some attorney's fees, let's
20 let them pay a fair portion. I think this
21 exercise -- I don't do a lot of comp; I usually
22 get these worked out but -- but this is a fairly
23 common exercise and I think Commissioner McCaskill
24 just got his wires crossed. And so, that's --
25 number one (1) is when you look at those factors

1 he -- he went hard on the no notice, which wasn't
2 required. He then restricted everything else to
3 the -- to the strength of the case. And he never
4 looks at the nature and extent of the damages,
5 which Breeden sent it back to say this is a factor
6 that you have to look at. So, I think he got out
7 whack on that.

8 Commissioner Wilkerson: Did you all try to
9 mediate this before the hearing?

10 Mr. Howe: No, sir.

11 Commissioner Wilkerson: Okay.

12 Mr. Howe: The next thing was that I got a
13 report from a Plastic Surgeon you're probably
14 familiar with in Charleston, Peter Devito. And
15 the reason I got that was this lady has very bad
16 scars on her legs, real, I mean, long; this was
17 big, big surgery. And Commissioner McCaskill said
18 well, that's not coming in because you didn't get
19 that at the time that the comp thing was settled.
20 Well, I wasn't offering it in regards to the comp.
21 This was -- was cosmetic surgery that is very
22 relevant to the cognizable damages and obviously
23 has nothing to do because she's not entitled to
24 that under Workers' Comp. And my point was, you
25 know, here's a lady -- and I think this is one of

1 those equitable pieces of the puzzle that -- that
2 you gentleman can consider. Here's a -- a lady who
3 is finished with her comp case that if she wants
4 her scars fixed she's got to do that out of
5 pocket. You know, most of the time when you have
6 comp your medicals are all taken care of. Well,
7 if she wants these fixed this is going to be out
8 of her pocket. This is a little bit different.
9 He wouldn't even let it into evidence and I think
10 it was entitled to be weighed in the overall
11 picture. Now, what weight you give it obviously
12 is entirely up to you. Lastly, because I only ten
13 (10) minutes, you know, I always have to -- to
14 rush a little bit. There were two (2) experts in
15 terms of what the value of cognizable damages
16 were. My expert, I think, said one point five
17 (1.5) to two million (\$2,000,000.00); that was
18 with punitives. I think it was one point two-five
19 (1.25) to about one and a half (1 1/2) without
20 punitives. Their expert said he thought it was
21 worth between seven hundred and fifty
22 (\$750,000.00) and a million (\$1,000,000.00);
23 however, he said he thought -- and he -- I guess
24 he threw me a little bit of a bone based on my age
25 and experience that I would get in the upper range

1 of that and the upper range if you split it is
2 around eight twenty-five (\$825,000.00). So, even
3 their expert when he said the low said based on
4 the facts, other factors in the case and -- and
5 gave me a little credit that it wouldn't be as low
6 as seven fifty (\$750,000.00). What I did was, I
7 suggested a -- a sort of middle figure to -- to
8 this part of the Commission of one point two-five
9 (1.25) and it's in my brief. And I also worked a
10 number on the seven fifty (\$750,000.00) -- and if
11 I picked out the right piece of paper I would have
12 it. If you use the seven hundred and fifty
13 thousand dollar (\$750,000.00) figure you come out
14 at ninety-nine thousand, five hundred and sixty
15 (\$99,560.00), which is owed. If you use the one
16 point two-five million (\$125,000,000.00) my
17 calculations would be that it's fifty nine
18 thousand, seven sixty-five and fifty-nine cents
19 (\$59,765.59) and that's -- that's all in the --
20 the brief.

21 Commissioner Beck: And give me -- give me
22 those numbers again.

23 Mr. Howe: I'm sorry. I just lost my
24 figures.

25 Commissioner Wilkerson: I think you said

1 seven fifty (\$750,000.00) was ninety-nine thousand
2 five-sixty (\$99,560.00)?

3 Mr. Howe: Yes, sir.

4 Commissioner Wilkerson: Okay.

5 Mr. Howe: And then the one point two-five
6 (1.25) would be fifty nine thousand, seven
7 sixty-five, fifty-nine (\$59,765.59).

8 Commissioner Wilkerson: All right.

9 Commissioner Beck: Thank you.

10 Mr. Howe: But in closing I'll just say, you
11 know, the Breeden and Kirkland Case is pretty
12 clear; Breeden makes it extremely clear. This is
13 ultimately an exercise of equity. What are you
14 trying to do? Let's be fair to the Claimant.
15 Let's be fair to the Carrier. And for the
16 Claimant to have tremendous damages in terms of
17 disabilities that were not covered, pain and
18 suffering, emotional distress, and all the things
19 that went along with this injury that were not
20 covered by comp and to then go back and give the
21 carrier a hundred cents on the dollar, that's just
22 not equitable; there's no way to make that
23 equitable.

24 Commissioner Beck: Did you do a number on
25 the eight twenty-five (\$825,000.00)?

1 Mr. Howe: I did not and I'm -- I'm sorry.

2 Commissioner Williams: Let me ask this.

3 Under --

4 Mr. Howe: I didn't think of that until I was
5 on the way out.

6 Commissioner Williams: -- Mr. -- Mr. Howe,
7 under 42-1-560(F), I guess the sub --

8 Mr. Howe: Yes, sir.

9 Commissioner Williams: -- sub part of it,
10 says the Commission may reduce the amount of the
11 carrier's lien. So, he had great discretion in
12 the finding between any number or to do what he
13 did, which was award them full credit --

14 Mr. Howe: No.

15 Commissioner Williams: -- would you agree
16 with that?

17 Mr. Howe: Well, I don't agree with that
18 entirely.

19 Commissioner Williams: Okay.

20 Mr. Howe: It says -- because it says he may
21 do it but then it further says -- if I can find my
22 things -- he may do it but -- but it says you
23 should look at the equity to all parties.

24 Commissioner Williams: Fair enough.

25 Mr. Howe: Well, you -- we can do it but --

1 but assuming there's some equity there and my --
2 my position is there --

3 Commissioner Williams: Okay.

4 Mr. Howe: -- that's beyond anything that
5 would be equitable.

6 Commissioner Williams: All right. Fair
7 enough. All right. Ms. Mellard.

8 Commissioner Wilkerson: Ms. Mellard, let me
9 ask you a question. Have you done a calculation
10 on what he's told us on the seven fifty
11 (\$750,000.00) and the one point two-five (1.25)?

12 Ms. Mellard: I have not.

13 Commissioner Wilkerson: Okay. That's fine.
14 Okay. That's fine.

15 Mr. Howe: Please check my math because I --
16 yes.

17 Commissioner Wilkerson: Well, I just asked.

18 Mr. Howe: Yes.

19 Commissioner Williams: Ms. Mellard, the same
20 question. Did he have discretion to do what he
21 did in this case and was there any error?

22 ARGUMENT FOR THE RESPONDENT

23 By Ms. Mellard:

24 May it please the --

25 Commissioner Williams: And was there any

1 error?

2 Ms. Mellard: -- may it please the
3 Commission? Yes, he did have discretion and it
4 was not an error and I think that's the -- that's
5 the crux of this whole -- this whole case. And
6 the whole question before Commissioner McCaskill
7 is -- is based on that statute and the Commission
8 is --

9 Commissioner Beck: Is the lack of written
10 approval an error?

11 Ms. Mellard: -- the lack of written approval
12 is not an error and here's why. He did not find
13 that the Claimant is barred from seeking a
14 reduction because there was lack of -- of -- of
15 written consent. What that finding says, and I
16 will read you straight from it --

17 Commissioner Wilkerson: Yes, I circled it.

18 Ms. Mellard: -- this is his Finding of Fact
19 Number 12.

20 Commissioner Beck: Yes.

21 Commissioner Wilkerson: Yes.

22 Ms. Mellard: He says, "Based on the evidence
23 a reduction in the third (3rd) party lien would
24 not be equitable to all parties concerned in this
25 matter given that Claimant did not obtain written

1 approval to -- prior to settlement and given the
2 strength of her case in likelihood of third (3rd)
3 party ability."

4 Commissioner Beck: What's -- what's the
5 relevance of that though?

6 Ms. Mellard: The relevance is he took it
7 into consideration. He took it into consideration
8 when using his discretion that -- that here the
9 Claimant is, settles the third (3rd) party -- the
10 third (3rd) party case, does not seek written
11 approval -- does not seek approval, period, from
12 the --

13 Commissioner Beck: It doesn't -- it doesn't
14 require it.

15 Commissioner Wilkerson: Yes.

16 Ms. Mellard: -- it doesn't require it,
17 you're right.

18 Commissioner Wilkerson: Yes.

19 Ms. Mellard: But goes about the third (3rd)
20 party settlement and then turns around and says,
21 by the way, we don't want to give you anything
22 back on your lien. And, in fact, we don't want to
23 reduce it by a third (1/3), we want to reduce it
24 even more than that; we want to keep going with
25 it. And so, that -- it's just a factor. It was a

1 factor that Commissioner McCaskill considered in
2 determining that this reduction would not be
3 equitable to all parties. And the Kirkland case
4 and the Breeden Case are right on point with this.
5 The Kirkland Case lays out factors for the
6 Commission to consider when determining if it is
7 proper to use that discretion in order to find
8 that there -- there is no reduction or that there
9 is a reduction. One (1) of those is the -- the
10 strength of the Claimant's case. You have heard
11 her attorney tell you she was in a parking lot
12 walking out, a kid cut the corner, took her out.
13 She had three (3) surgeries to one knee, two (2)
14 to the other knee. Her damages were extensive,
15 there's no doubt no about that; there is
16 absolutely no doubt about that. She had extensive
17 injuries to both of her legs and psychological
18 overlay. She was out of work for quite some time.
19 She went through an extensive course of medical
20 treatment. And both -- both experts retained by
21 both sides found that the damages in this case
22 ranged between, I think it was one (1) -- one
23 million (\$1,000,000.00) and two million dollars
24 (\$2,000,000.00); so, obviously, a lot of damages.
25 She had a great case. The Kirkland Case and the

1 Breeden Case tell us -- the courts from those
2 cases tell us that when you got a great case that
3 weighs against a reduction, very plain and simple.
4 So, when you look at that one (1) factor in this
5 case, we've got a great case, we've got a lot of
6 damages, we've got extensive injuries, that's
7 going to weigh against a reduction. Secondly, you
8 look at the likelihood of -- of the Claimant's
9 liability. Both experts said, pretty clear, no
10 liability on the part of the Claimant. This was a
11 kid who cut the corner. She didn't see it coming.
12 There was nothing she could have done differently.
13 And -- and the liability is going to be on the
14 third (3rd) party in this case; again, the
15 Kirkland Case and the Breeden Case tell us that
16 weighs against a reduction of the lien. The third
17 (3rd) factor that the Kirkland Case gives us is
18 the Claimant's desire to settle. In this
19 particular case the Claimant did not testify. The
20 Claimant never provided any reason, whatsoever, as
21 to why she needed to settle her claim, her third
22 (3rd) party claim, quickly. She did not present
23 any evidence that she was having financial
24 troubles or that there was some reason that she
25 needed -- you know, even if it was psychologically

1 -- there was no reason given, whatsoever, as to
2 why she needed to hurry up and -- and settle this
3 case as opposed to proceeding to a trial or as
4 opposed to, you know, continuing on in -- in
5 negotiations even. There's no reason given; so we
6 don't know what the reason is. So, when there's
7 no reason given, and -- and, obviously, we don't
8 know what -- what, you know, caused her to want to
9 settle so quickly, that has to weigh against a
10 reduction. If -- if she had said, look, I -- I
11 can't pay my pills -- I can't pay my bills and I
12 can't do this and I can't do that, that may have
13 been a -- a reason to or a factor to weigh in
14 favor of a reduction but that's just not present
15 here. And then, lastly, the -- the Kirkland court
16 and the Breeden court look at the fourth (4th)
17 factor and this is not an exhaustive list; the
18 court is very specific about that but these are
19 the four (4) factors that they've looked at. The
20 last factor is the workers' Comp carrier's
21 unreasonableness to approve the settlement. Well,
22 that one is sort of null and void here because
23 it's not needed. It's not required under the
24 statute but in any event they -- they didn't do
25 that; so, that would maybe not weigh for against

1 but certainly would not weigh against a reduction.
2 So, when you look at those four (4) factors as
3 Commissioner McCaskill did, they all fall into the
4 slot against a reduction. This lady had extensive
5 damages, obviously. The policy limits were five
6 hundred and twenty-five dollars (\$525,000.00).
7 Two (2) experts said that her case was valued
8 between one (\$1,000,000.00) and two million
9 dollars (\$2,000,000.00). They didn't even get the
10 policy limits. And then they turn around and want
11 the carrier to bear the bulk of that burden. And
12 both the Kirkland Case and the -- and the Breeden
13 Case specifically point out that these subrogation
14 statutes, the whole point behind them, is to place
15 the burden on the wrong doer. The comp carrier
16 was not the wrong doer. The wrong doer was the
17 third (3rd) party who hit this lady as she walked
18 through the -- the gas station parking lot.
19 That's the whole point of the subrogation statute
20 of any subrogation statute. I want to speak on
21 the -- the report from Dr. Devito, and that is
22 that that report was obtained -- we -- we settled
23 the comp claim in March of 2011. The third (3rd)
24 party claim was settled in September of 2011. The
25 report from Dr. Devito was not obtained until

1 March of 2012. So, this is not just at the time
2 of the comp claim it wasn't there, it wasn't there
3 at the time that the third (3rd) party claim was
4 settled. And, in fact, we had already filed our
5 motion for payment of our lien by the time that
6 report was even obtained. So, it's clear that the
7 whole point of that report was to increase the
8 value of the overall claim and to prepare for a
9 hearing to discuss reduction of the lien, and
10 that's not what the statute intended. That's not
11 what any -- what our court has intended. You
12 certainly can't increase the value of your claim
13 after the third (3rd) party claim has already been
14 settled. That -- that's just -- there's -- that
15 would create a windfall for the Claimant to do so,
16 to settle her third (3rd) party claim and then go
17 back and -- and conduct additional discovery or
18 obtain additional evidence to increase the value
19 of her claim in order to reduce the carrier's
20 lien; that would create a windfall for the
21 Claimant. As far as attorney's fees go, again,
22 that's also within the discretion of the
23 Commission. The statute specifically provides
24 that attorney's fees may be paid by the carrier to
25 the extent the recovery shall be deemed to be for

1 the benefit of the carrier. And we would argue
2 that this -- this settlement was not to the
3 benefit of the carrier at all. There was
4 absolutely no evidence presented about
5 negotiations, about discovery that was performed
6 in preparation for the third (3rd) party
7 settlement. There is no evidence in the record to
8 suggest that there were any, you know, depositions
9 taken, that there were any -- there was anything
10 done, that there was discovery, whatsoever. We --
11 we don't have any knowledge of -- of settlement
12 negotiations. In fact, for all we know the offer
13 of five hundred and five thousand dollars
14 (\$505,000.00) from the carrier was the one (1) and
15 only offer made by the third (3rd) party carrier
16 and it was accepted by the Claimant. We don't
17 know because there was no evidence and it would be
18 pure speculation to -- to say that -- that, you
19 know, there was any additional discovery or
20 anything done. Certainly, Claimant's attorney has
21 worked for the benefit of his client and nobody is
22 saying that -- that he did not work for the
23 benefit of his client, but to the benefit of the
24 carrier is what the statute specifically points
25 out and we would argue that that was not done in

1 this case and so, therefore, the attorney's fees
2 are not warranted either. Just to sum up, it is
3 within the discretion of the Commission to award a
4 reduction if it is equitable to all parties, it is
5 not automatic, which is what the Claimant seems to
6 think in this case; it is certainly not automatic.
7 It is within the discretion that has been
8 confirmed and affirmed by our court numerous
9 times. The factors are laid out in both the
10 Kirkland Case and the Breeden Case. I have been
11 through those for you to show that they all weigh
12 against a reduction. And then the attorney's fee
13 is also within the discretion of the Commission if
14 it -- if the attorney acted within the benefit --
15 or to the benefit of the carrier and we do not
16 think that that was the case here. And then
17 lastly the report of Dr. Devito was not obtained
18 until after we had filed our motion for payment of
19 the lien in full and certainly the Claimant should
20 not be allowed to increase the value of her claim
21 even after settlement of the third (3rd) party
22 claim. Are there any questions?

23 Commissioner Beck: No.

24 Ms. Mellard: Thank you.

25 Commissioner Williams: Mr. Howe.

1 Mr. Howe: Yes.

2 Commissioner Beck: Mr. Howe, before you get
3 started, I've heard both of you indicate that your
4 respective experts came to -- to basically the
5 same conclusion albeit it some different numbers.

6 Mr. Howe: Right.

7 Commissioner Beck: And that was that the
8 case was worth significantly more than what you
9 settled it for.

10 Mr. Howe: Right.

11 Commissioner Beck: Ms. Mellard going through
12 three (3) of the four (4) Breeden/Kirkland factors
13 has argued that for her standpoint those all weigh
14 against a reduction. In your initial argument you
15 indicated that getting fifty cents (\$0.50) on a
16 dollar (\$1.00) she -- her lien should be reduced
17 to fifty cents (\$0.50) on a dollar (\$1.00). I'd
18 like to get a more clarification on your legal
19 basis for that argument.

20 Mr. Howe: Okay.

21 RESPONSE FOR THE APPELLANT

22 By Mr. Howe:

23 It's -- and that is the factor, okay? I
24 would agree with ninety-five percent (95%) of what
25 she said if there was two million dollars

1 (\$2,000,000.00) in coverage.

2 Commissioner Wilkerson: well, let me ask a
3 question.

4 Mr. Howe: The fact is there wasn't.

5 Commissioner Wilkerson: wait a minute.
6 whoa, whoa, whoa. What's coverage got to do with
7 recovery?

8 Mr. Howe: You have clearly never been a
9 Plaintiff's lawyer. It has everything in the
10 world to do with it, okay? I got --

11 Commissioner Wilkerson: I was an insurance
12 agent.

13 Mr. Howe: -- I got a --

14 Commissioner Wilkerson: I can't help they
15 didn't buy --

16 Mr. Howe: -- I got a million dollar
17 (\$1,000,000.00) --

18 Commissioner Wilkerson: -- enough coverage.

19 Mr. Howe: -- I got a million dollar
20 (\$1,000,000.00) verdict a number of years ago
21 against somebody with fifty thousand dollars
22 (\$50,000.00) of coverage. What did I collect?
23 Fifty thousand (\$50,000.00) in coverage and a
24 hundred fifty thousand dollar (\$150,000.00) IOU,
25 and tremendous expenses, all the discovery she

1 wanted me to do comes dollar for dollar out of my
2 client's pocket.

3 Commissioner Wilkerson: All right. Let me
4 ask --

5 Commissioner Beck: Wait a minute. But --

6 Commissioner Wilkerson: -- let me ask you a
7 question. You said the reason you didn't pursue
8 it any further against this young man was you did
9 not want to put him in bankruptcy. If --

10 Mr. Howe: Well, not --

11 Commissioner Wilkerson: -- wait, whoa. Let
12 me finish.

13 Mr. Howe: -- no recovery --

14 Commissioner Wilkerson: If he had had two
15 million dollars (\$2,000,000.00) worth of coverage
16 would you have continued to pursue it?

17 Mr. Howe: -- I would have gotten a lot
18 better settlement but -- but, yes, oh sure. It's
19 always a recoverability factor. You know, my life
20 as a Plaintiff's lawyer -- I hate to -- but you --
21 you know, everybody hears about the big verdicts
22 but my life as the Plaintiff's lawyer --

23 Commissioner Beck: But how does that factor
24 into the lien --

25 Mr. Howe: -- is twenty-five thousand dollars

1 (\$25,000.00).

2 Commissioner Wilkerson: -- how does that --
3 yes, how does that --

4 Commissioner Beck: -- how does that factor
5 into the lien reduction though?

6 Commissioner Wilkerson: -- that -- that's
7 what I want to know.

8 Mr. Howe: Because -- it factors in because
9 it would have been a futile effort to get a two
10 million dollar (\$2,000,000.00) verdict because I'd
11 have still -- the only thing I'd have gotten was
12 the same -- I might have gotten the five
13 twenty-five (\$525,000.00), but I would have gotten
14 deposition costs, appeals, other problems in the
15 case, and all of those things. And what I was
16 trying to do was keep my client's costs and keep
17 the speed up and the cost down; that's what I have
18 an ethical obligation to do. This exercise about
19 coverage is -- I mean, it's one I make twenty (20)
20 times a day. What's the liability? What's this?
21 How are the damages? Great case, what's the
22 coverage? Twenty-five thousand (\$25,000.00)
23 minimum. What do they have? An old pickup truck
24 and no job. Well, I guess we've got to take the
25 twenty-five (25) and move on. I mean, that's --

1 unfortunately it -- it's -- that's my life as a
2 Plaintiff's lawyer. That is an incredibly
3 important factor because that takes it from the
4 theoretical of the Kirkland four (4) to the
5 realistic of what are you really going to
6 accomplish for the client.

7 Commissioner Williams: Okay.

8 Mr. Howe: And my time is up.

9 Commissioner Williams: All right.

10 Mr. Howe: Thank you.

11 Commissioner Williams: That'll --

12 Commissioner Wilkerson: Thank you.

13 Commissioner Williams: -- conclude this
14 hearing.

15 (THERE BEING NO FURTHER ARGUMENTS, THE FULL COMMISSION
16 HEARING CONCLUDED AT 10:38 A. M.)

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0818970

LATIKA BROWN,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	
	)	
THE PANTRY, INC.,	)	
	)	NOTICE OF WITNESSES AND WRITTEN
Employer,	)	MEDICAL REPORTS TO BE INTRODUCED
	)	AS DIRECT EVIDENCE ON BEHALF OF
AND	)	THE CLAIMANT
	)	
ACE AMERICAN INSURANCE	)	
COMPANY c/o RISK ENTERPRISE	)	
MANAGEMENT, LTD.,	)	
	)	
Carrier/Defendant.	)	

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
AND AMANDA MELLARD, ATTORNEY FOR CARRIER

YOU ARE HEREBY NOTIFIED THAT THE Claimant, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330, (1976, as amended), herewith submits the following medical records and other documents as direct evidence on behalf of the Claimant:

<u>APA#</u>	<u>Doctor</u>	<u>Facility</u>	<u>Dates</u>	<u>Pages</u>
1.		Charleston County EMS	11/19/08	1 - 4
2.		Charleston Memorial Hospital	11/19/08	5 - 29
3.		MUSC ER & Hospital	11/19/08 - 5/4/09	30 - 210
4.	Shane K. Woolf	MUSC Dept Orthopaedic Surgery	11/19/08 - 1/27/11	211 - 277
5.	Physical Therapy	MUSC	3/2/09 - 11/30/09	278 - 424
6.	L. Riley Cates, DMD	Express Dental Care	4/28/09 - 6/2/09	425 - 429

7.	Charles J. Beischel, M.D.	MUSC Strom Eye Inst.	4/9/09	430 - 434
8.	Aljoeson Walker, M.D.	MUSC Neurology	4/24/09 - 7/24/09	435 - 461
9.	Jeffrey W. Buncher, M.D.	Charleston Pain & Rehab	12/21/09 & cont.	462 - 470
10.	J. Randolph Waid, Ph.D.		4/11/10 - 4/20/10	471 - 479
11.	A. H. Trey Ginn, III, MS	Rehabilitation Centers of Charleston	10/12/10	480 - 496
12.	CVS Pharmacy	Prescriptions	11/28/08 - 10/7/09	497 - 502
13.	Peter C. DeVito, M.D.		3/5/12	503 - 505

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examine or otherwise oppose this evidence and, should you desire to exercise this right, you are to promptly schedule the deposition of any provider whose records are submitted, for the purposes of cross-examination, or otherwise promptly submit opposing medical records into evidence.

YOU ARE FURTHER HEREBY NOTIFIED that these records, or photocopies of the same, will be provided to the South Carolina Workers' Compensation Commission for insertion in their file and for consideration as evidence on behalf of the Claimant.

YOU ARE FURTHER HEREBY NOTIFIED that the following witnesses may be called on behalf of the Claimant:

- a. Latika Brown (Claimant)
- b. Edward D. Buckley, Esquire (Expert)

HOWE & WYNDHAM, LLP
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: *Donald H. Howe*
Donald H. Howe
Attorney for Employee/Claimant

Dated: *April 5, 2012*

Radiology Results

Name: BROWN, LATIKA

Page: 1

Date Printed: 01/15/10

ID: 402582

SEX: F

AGE: 32

11/19/08 : 3:35pm

CT HEAD/BRAIN W/O CONTRAST

Accession number: 5438051

EXAMINATION: BRAIN CT

11/19/08 15:35:00

ACCESSION NUMBER: 5438051

INDICATION: HIT BY CAR

COMPARISON: None

TECHNIQUE: Multiple contiguous axial CT images of the brain without intravenous contrast.

FINDINGS: There is small subtle gyriform hyperdensity within the anterior right temporal region consistent with small subarachnoid hemorrhage. There are no signs of acute infarction. The ventricles are symmetrical. There is no evidence of fracture. The paranasal sinuses and mastoids are unremarkable.

IMPRESSION:

1. Small right temporal hyperdensity that most likely represents a tiny subarachnoid hemorrhage. No evidence of fractures.

VOICE DICTATED BY: Dr. Kwaku Obeng

I have reviewed the images and agree with the findings in this report.

AUTHENTICATING RADIOLOGIST: M, MATHEUS

HIT BY CAR

The Oaks Business Center
1459 Stuart Engals Blvd.
Suite 204-A
Mt. Pleasant, S.C. 29464

Telephone
(843) 881-2778
Fax
(843) 881-6878

REPORT OF NEUROPSYCHOLOGICAL EVALUATION
CONFIDENTIAL - FOR PROFESSIONAL USE ONLY

Name: Latika S. Brown
Age: 33 (DOB: 4/13/97)
Sex: Female
Handedness: Right
Dates of Evaluation: April 12 and 21st, 2010

Reason for Referral: Latika Brown is a 33-year-old, African-American female who is status post a head injury and multiple traumas sustained in a motor vehicle/pedestrian accident on November 19th, 2008. Ms. Brown was referred for neuropsychological evaluation by Jeffrey W. Buncher, MD as she continues to experience difficulties with concentration, forgetfulness, mood swings, and "spells of anger". There was also report of difficulty with disequilibrium. The evaluation was conducted to assess Ms. Brown's brain behavior and emotional functioning.

History of Presenting Difficulties: My understanding of Mr. Latika Brown's case was assisted by review of the following records:

1. Evaluation /treatment records from Jeffrey W. Buncher, MD
2. Charleston County EMS report
3. Medical records from the Medical University of SC
4. Treatment records from ophthalmology and neurology outpatient clinics, Medical University of SC

Review of records reveal that Ms. Brown was attended to at the scene of the accident by EMS. She reported being struck on the right side of her van. She was alert and responsive. Ms. Brown was provided a Glasgow Coma Scale Rating of 15. She was placed in c-spine mobilization and transported to the emergency room of Charleston Memorial Hospital. Review of records reveal that Ms. Brown was transferred to the MUSC Medical Center. While at Charleston Memorial Hospital there was complaint of headaches with neuroradiographic studies revealing a right temporal subarachnoid hemorrhage. Ms. Brown was also complaining of right knee pain. Ms. Brown was admitted to the MUSC trauma surgery floor undergoing consultation by neurosurgery who did not assess any need for surgical intervention of the subarachnoid hemorrhage. Orthopedic surgical consult led to MRI study that revealed a cruciate ligament tear as well as complete tear of the medial lateral ligament as well as partial disruption of the medial patella with lateral subluxation of the patella. There was also knee joint effusion as well as bone bruise of the left lateral femoral condyle affecting the left knee. There was evidence of right knee injury including anterior cruciate ligament tear and complex tear of the posterior horn of the lateral meniscus. There was plan for continuing orthopedic care including consideration of operative repair. Ms. Brown was discharged from the Medical University on 11/21/2008 with diagnoses of small right temporal subarachnoid hemorrhage; multiple knee injuries as outlined in MRI findings, bilateral with follow up care with the orthopedic clinic.

Records reveal that following discharge, Ms. Brown underwent multiple surgeries, two on the left knee and one on the right, directed by Dr. Wolff. She was also involved in physical therapy. While under the care of Shane Wolff, MD, orthopedic surgeon, Ms. Brown was seen by ophthalmology due to headaches with visual distortions. Examination took place on April 9th, 2009. Evaluation revealed the eye exam to be within normal limits. Symptoms were viewed as possibly due to migraine with aura. There was also assessment of refractory error. There was subsequent referral to neurology. Ms. Brown was seen by neurology on 4/24/09. Evaluation

revealed complaint of chronic daily headaches of tension type likely aggravated by daily use of NSAID's and pain medication. There was a treatment plan directed toward tapering of medications. She was also referred to family medicine due to mild hypertension. There was a follow up in late July, 2009. It was noted at the time that Ms. Brown had substantially reduced the amount of pain medication she was taking believing her headaches were significantly improved. Ms. Brown was to continue with the treatment plan as she was not yet headache free.

Ms. Brown commenced in intervention with Jefferey W. Buncher, MD in October, 2009. Initial assessment was one of elevated blood pressure; closed head injury with mild subarachnoid hemorrhage; concussion, headaches that were previously related to medication usage; and bilateral total knee replacement. There was plan to obtain medical records and pursue further evaluation and treatment. In April, 2010, Dr. Buncher provided correspondence to this office stating that Ms. Brown was under his care for multiple medical issues as a result of significant injuries sustained in the motor vehicle/pedestrian accident on November 9, 2008. Dr. Buncher stated that Ms. Brown continued to experience difficulties with concentration and forgetfulness, as well as mood swings and spells of anger. Dr. Buncher requested a neuropsychological evaluation.

Current Clinical Presentation: Ms. Brown was on time for her scheduled appointments. She presented appropriately attired with good personal hygiene. She engaged well with the evaluative procedures.

In interview, Ms. Brown reported that she continues to experience "lots of problems with the knees". She also reported that she has continuing treatment for migraines and high blood pressure including intervention at Dr. Buncher's clinic. There was concern regarding cognitive difficulties as Ms. Brown stated that her family members tell her that she "says the same things over and over again". Her family members have also expressed concerns regarding Ms. Brown's mood lability and easy anger/poor control of temper. She offered that her emotional reactivity/anger dyscontrol resulted in an arrest in April, 2009 as "my boyfriend and I got into it". Ms. Brown stated that currently she "tries to stay to myself as much as possible". Ms. Brown offered that this is the case because when she is with multiple people or a crowd, she does not "do as well". Ms. Brown stated that she has not returned to employment capacities.

Ms. Brown continues in intervention in Dr. Buncher's office. She knew that she was on pain medications but was not able to provide the names. Ms. Brown also stated that Dr. Wolff had prescribed Wellbutrin.

A structured symptom evaluation failed to reveal any complaints by Ms. Brown with regard to olfactory or gustatory senses. Ms. Brown reported experiencing blurred vision secondary to head pain. There was no report of diplopia. She denied auditory acuity difficulties or tinnitus.

With regard to motor functioning, there was no complaint of paralysis or lateralized weakness. There was report of discomfort and cramping affecting the knees. There was also report of mild balance problems. She experiences some numbness at the knee incisions. There was no report of paresthesias.

Ms. Brown reported that she continues to experience pain and discomfort affecting both of the knees with occasional swelling. Pain is aggravated by prolonged standing, ambulation, or involvement in physically exerting activities. Reportedly, she obtains relief by taking a Lortab and "lying down". There was also report of persistent headaches generally with pain located in the right parietal region. When experiencing head pain, there is associated "blurred vision". Ms. Brown acknowledged that she had previously been referred to ophthalmology. Head pain is aggravated by exposure to lights or noise. She also experiences an intensification of head pain when involved in "conversations with multiple people".

Ms. Brown did not report being highly compromised by dizziness/vertigo. There was no report of posttraumatic seizures.

With regard to cognitive functioning, Ms. Brown readily identified having attention/concentration difficulties. She stated "I used to be able to multi-task real good. I notice the difference when I'm in the kitchen". There was also complaint of an easy distractibility. Ms. Brown also expressed concern regarding increased forgetfulness/memory problems.

With regard to psychological functioning, Ms. Brown stated "I have my good days and bad days" with regard to whether she is depressed. There was complaint of sleep disturbance including middle-night awakenings as well as restricted hours of sleep. She denied being disrupted by nightmares. There was report of being more anxious than she appreciated before the accident. There was also complaint of social executive changes to her personality rendering her more irritable, impatient, with episodes of anger dyscontrol. Energy level was characterized as variable as "some days I'm up and other days I don't want to get out of bed". Ms. Brown stated that it is hard for her to trust anybody though evaluation failed to reveal active paranoid ideation or delusional thinking. Ms. Brown reported that she tends to be socially withdrawn and isolated offering "my room is my comfort zone". She continues to be fearful and vigilant fearing the reoccurrence of an accident, particularly being cautious "at crosswalks and other settings when I have to deal with vehicles". There was no report of hallucinatory activity or evidence of psychotic symptomatology. Appetite was characterized as "diminished". Libido was described as "reduced".

Medical History: Ms. Brown denied previous head or neck injury. She denied previous surgical procedures. She reported experiencing seasonal allergies. Ms. Brown is hypertensive with use of antihypertensive medication. There is no history of serious infections or diabetes. She acknowledged having the sickle cell trait but without disruptive symptoms. There was no report of a previous stroke. There was no report of a history of migraine or tension headache difficulties.

Ms. Brown denied history of psychiatric illness or need for formal treatment. She reported being a social consumer of alcohol without history of problematic involvement in the use of alcohol. She denied illicit drug usage. There has been no history for formal substance abuse treatment. Ms. Brown does continue in the use of tobacco products.

Family History: Noncontributory for psychiatric illness or substance abuse problems.

Psychosocial History: Ms. Latika Brown reported that she quit school during her sophomore year. Subsequently, she did obtain a GED. She has been attending Trident Tech though subsequent to her involvement in the accident, she experienced a decrease in her academic performance. Some educational records were available for review depicting Ms. Brown's performance on achievement testing as well as the PSAT. Review revealed her to perform in the average range without evidence of underachievement other than weakness with regard to spelling.

Ms. Brown reported that she was employed at the Pantry on East Bay Street. Ms. Brown was employed at that setting for 3+ years. She was at that setting when she was hit by the vehicle. Ms. Brown is single and has a daughter, age 16 and a son, age 13. She lives with her children and boyfriend. She also has custody of a cousin.

Procedures: Wechsler Adult Intelligence Scale-III, Wechsler Memory Scale-III, California Verbal Learning Test-II, Stroop Test, Judgment of Line Orientation Test, Conners Continuous Performance Test-II, Wisconsin Card Sorting Test, Trail Making Test, Controlled Oral Word Association Test, Category Fluency Test, Paced Auditory Serial Addition Test, Seashore Rhythm Test, Speech Sounds Perception Test, Tactual Performance Test, Sensory Perceptual Examination, Behavioral Dyscontrol Scale, Test of Memory Malingering, Personality Assessment Inventory, Frontal System Behavior Scale.

Examination Results: Most test scores in this report are expressed in statistical terms including *Standard Scores (SS)*, *T-Scores*, *Scaled Scores*, *Percentile Rankings(%ile)*, and *Composite/Index Scores*. The following is a general guide to assist in interpretation:

<u>Standard Score:</u>	<u>T-Scores:</u>	<u>Composite/ Index Score:</u>	<u>Scaled Score:</u>	<u>%ile</u>	<u>Descriptor:</u>
130+	70+	130+	18+	98+	Very Superior
120-129	63-69	120-129	16-17	90-97	Superior
110-119	57-62	110-119	13-15	75-89	High Average
90-109	44-56	90-109	8-12	25-74	Average
80- 89	37-43	80- 89	7	10-24	Low Average
70- 79	31-36	70- 79	3- 6	3- 9	Borderline
< 70	< 31	< 70	< 3	< 3	Deficient

Neurobehavioral Observations: Ms. Latika Brown presented appropriately attired and well groomed. Ms. Brown is a large woman who engaged well with the evaluative procedures. There was maintenance of appropriate eye contact. Ms. Brown arrived 30 minutes late for the evaluative session on 4/21/10 stating she was afraid of driving but had to drive herself to the testing on that date. She ambulated in a relaxed manner without evidence of a gait disturbance. There was no disruptive psychomotor retardation or excitement. Ms. Brown was cooperative and well mannered in her interactions with the examiner. There was some adjustment of the lighting during testing as Ms. Brown stated that the glare "bothered her". She appeared to have no difficulty understanding instructional sets. She was assessed as mildly anxious but functional factors did not appear to interfere with her ability to meet the demands of testing. Ms. Brown was observed to put forth good testing effort.

Specific assessment of Ms. Brown's testing effort or potential to feign cognitive impairment was assessed via administration of a symptom validity test as well as review of validity indices embedded within the battery of the neuropsychological tests. Ms. Brown's performance on the Test of Memory Malingering (TOMM), including an errorless performance on criterion trial 2 was consistent with provision of good effort. Ms. Brown's errorless performance on the long delay, forced choice recognition test of the CVLT-II was consistent with provision of good effort. Similarly, Ms. Brown's performance on the digit span test (Reliable Digit Span) was consistent with provision of good effort. The obtained test results are viewed as a valid and reliable assessment of Ms. Brown's current functioning.

Language Functions: There was no aphasic or agnostic symptomatology. Ms. Brown's conversational speech was prosodic, fluent, of normal rate and tone. During testing, she was observed to be somewhat hesitant in responding to verbal items. Yet, during the interview, Ms. Brown was responsive to the examiner's inquiries without tangentiality, derailment, or disruptive word finding difficulties. Ms. Brown's performance on executive functioning tests involving letter (T=53) and category (T=49) fluency was in the average range. There was no evidence of receptive language dysfunction.

Sensory Perceptual/Motor Functioning: Evaluation failed to reveal any imperceptions or suppressions affecting tactile, auditory, or visual modalities during unilateral and bilateral stimulation paradigms. Ms. Brown performed errorlessly on a tactile finger recognition test with a few unsystematic errors on a test of graphesthesia. Ms. Brown was able to correctly identify gross tactile forms in each of her extremities.

Ms. Brown reported being right hand dominant. She was observed to ambulate without evidence of difficulties. Ms. Brown was without complaint of motor difficulties other than mild balance problems. Formal motor testing was not conducted in the current evaluation.

Attention/Memory Functioning: Ms. Brown was errorless in his performance on an extended test of information and orientation. Ms. Brown had no difficulty correctly estimating the time of day without observing a clock.

Ms. Brown's performance on the Stroop Test revealed slow/impaired processing speed for word (T=25) and color (T=35) stimuli. Ms. Brown performed in the low average range, without added decrement, on the Stroop divided attention test (T = 43). Ms. Brown performed in the average range on attentional tests demanding discrimination of rhythmic sounds (T = 50) and discrimination of speech sounds and matching them to their phonemes (T=51). Ms. Brown performed in the low to below average range on working memory tests including the letter/number sequencing test (25th percentile), digit span test (16th percentile), and spatial span test (16th percentile). Ms. Brown was administered the Paced Auditory Serial Addition Test (PASAT), a measure of information processing speed and attentional regulation. Observation of test performance revealed a significantly below average initial trial. Yet, Ms. Brown performed without decrement on trials 2 and 3 which were more rapid and demanding. She did demonstrate a significant decrement on trial 4 which is the most rapid and demanding. Yet, utilizing Heaton et al (2004) norms, Ms. Brown's total recall score on the PASAT was within the average (T = 47) for an individual of her age and educational level.

Ms. Brown was administered the Conners Continuous Performance Test-II to further assess her attentional capacities. Observation of test performance revealed Ms. Brown to generally be erratic in her responding, indicative of poor attention capacities. Reaction times were assessed as slow. Ms. Brown did demonstrate a good ability to

sustain her vigilance to the demands of the test. Yet, overall, her performance on the continuous performance test was classified as poor and consistent with potential attention problems.

Ms. Brown was administered the Wechsler Memory Scale-III (WMS-III) to assess different components of anterograde memory. Ms. Brown performed in the average range on WMS-III tests assessing immediate auditory memory (63rd percentile) and immediate visual memory (42nd percentile). Ms. Brown demonstrated an adequate ability to retain and recall previously learned auditory (55th percentile) information after a period of delay. Ms. Brown was efficient in her ability to retain and recall previously learned visual information (88th percentile) after a period of delay.

Analysis of separate WMS-III scale performance revealed Ms. Brown to be above average in her ability to immediately learn and recall orally presented narrative passages (84th percentile). Ms. Brown's performance on the verbal paired associates test placed her at the 37th percentile. Ms. Brown performed in the average range on visual memory tests involving facial recognition skills (50th percentile) and free recall of family pictorial stimuli (37th percentile). She demonstrated a good ability to retain and recall previously learned narrative passages after a period of delay (percent retention = 89/75th percentile). She demonstrated an average ability to retain and recall previously learned verbal paired associates (percent retention = 83/37th percentile). Ms. Brown was impaired in her performance on a visual memory test involving the immediate learning and reproduction of visual designs (9th percentile). She demonstrated an excellent ability to retain and reconstruct previously learned visual designs after a period of delay (percent retention = 99/95th percentile). Ms. Brown also demonstrated an intact ability to retain and recall previously learned facial stimuli (percent retention = 100) and family pictorial stimuli (percent retention = 100) after a period of delay.

Ms. Brown's anterograde memory functioning was further assessed via administration of the California Verbal Learning Test-II (CVLT-II), a repetitive word list learning test. Ms. Brown's total recall score after five administrations of the word list placed her at the 18th percentile compared to age-related peers. Observation of test performance revealed a significantly below average initial trial but with a good ability to profit from repetitive administrations of the word list as Ms. Brown demonstrated an expected learning curve. Ms. Brown demonstrated difficulties learning a new word list after repetitive administrations of a previous word list. Yet, she demonstrated an adequate ability to retain and recall previously learned words in a short and long delay, free and cued recall process. Assessment of learning characteristics revealed heavy reliance on recall of words from the recency region of the word list. Ms. Brown did not demonstrate excessive intrusive errors. She was mildly below average in her performance on a recognition test demanding that she discriminate target from nontarget words but without an excessive rate of false positive errors.

Visual Spatial/Visual Constructional Functions: There was no evidence of visual inattention or neglect processes. Nor was there evidence of constructional dyspraxia. Ms. Brown performed in the average range on WAIS-III tests assessing perceptual organizational skills 58th percentile. Indeed, she was efficient in her performance on tests demanding attention to visual detail in the tangible environment (75th percentile) and matrix reasoning (84th percentile). Ms. Brown was less efficient in her performance on the block design test (16th percentile). On a test demanding fine discriminations of lines in space, Ms. Brown's performance was in the average range (40th percentile). The pattern of her errors suggested that concentration difficulties were causal rather than spatial impairment. On a visuographic sequencing test involving the serial processing of numbers, Ms. Brown's performance was slow and in the mild to moderately impaired range (T = 33). When the task became more demanding involving alternation between numbers and letters in sequential fashion, Ms. Brown's performance was in the low average range (T = 42) but without set shifting error.

Executive/Higher Reasoning Abilities: Ms. Brown was able to inhibit and sequence fine motor movements on go-no go types of tasks. Ms. Brown performed in the average range on executive functioning tests involving letter and category fluency. Ms. Brown was able to meet the set shifting skills associated with Trail Making Test-Part B. Ms. Brown had a relatively low rate of perseverative errors in her performance on the Wisconsin Card Sorting Test, a finding that placed her within the average range (T = 45) for an individual of her age and educational level.

In the current evaluation, Ms. Brown was administered the Wechsler Adult Intelligence Scale-III (WAIS-III) classifying her intellectual functioning to be in the average range with a Full Scale IQ of 94, a Verbal IQ of 92,

and a Performance IQ of 97. Ms. Brown's Full Scale IQ places her at the 34th percentile compared to age-related peers. There was a nonsignificant discrepancy in her performance on verbal, educationally-oriented tests (30th percentile) compared to visual spatial integration tests (42nd percentile).

WAIS-III analysis revealed Ms. Brown to perform in the average range on tests assessing perceptual organizational skills (58th percentile). Ms. Brown also performed in the average range on tests assessing verbal comprehension abilities (32nd percentile). She demonstrated relative weakness in her performance on tests assessing working memory (25th percentile) and processing speed (18th percentile).

Review of Ms. Brown's performance on WAIS-III verbal and nonverbal tests demanding reasoning and problem-solving abilities revealed her to generally perform within average limits. Her abilities were further assessed via administration of the Wisconsin Card Sorting Test and Tactual Performance Test.

On the Wisconsin Card Sorting Test, Ms. Brown demonstrated an adequate ability to generate and discover the correct solution sets as well as to shift the basis of her responding when the externally imposed demands of the task necessitated this. It was noted that attention/concentration difficulties likely interfered with her ability to sustain the correct solution set across changing visual arrays. Ms. Brown obtained 5 out of the expected 6 categories with an acceptable rate of perseverative errors (10%) and two failures to maintain set.

Ms. Brown was administered the Tactual Performance Test (TPT) which demands keen kinesthetic/proprioceptive abilities as well as organizational/planning skills. Ms. Brown's initial dominant hand performance was in the average range (T=51). Yet, she had difficulties profiting from the initial learning trial during the second trial, nondominant hand performance (T=42). Ms. Brown did profit from the previous learning trials during the third trial, both hands performance (T=44). Ms. Brown's total time performance on the TPT was in the low average range (T=44). Her incidental memory score (T=62) as well as her location score (T=61) were above average.

Emotional/Behavioral Functioning: Ms. Latika Brown reported that she continues to have to cope with bilateral knee pain and swelling. There is also a persistence of headache. Emotionally, she appears to experience problems with dysphoria as well as social executive changes to her personality rendering her more irritable and impatient. There is continuing fearfulness regarding the reoccurrence of an accident. Ms. Brown amply stated "my room is my comfort zone".

In the current evaluation, Ms. Brown was administered the Personality Assessment Inventory (PAI) to further assess her emotional/behavioral functioning. Ms. Brown's response set (validity scales) to the PAI indicated that she presented herself in an honest, straightforward fashion. The PAI clinical profile revealed an individual who reported being anxious, sensitive and tense as well as having some difficulties with hostility and suspiciousness. Separate scale elevations revealed Ms. Brown to report experiencing a discomforting level of anxiety and tension. She is likely to be plagued by worry to the degree that her ability to concentrate and attend may be compromised. Affectively, she feels a great deal of tension, has difficulty relaxing, and likely experiences fatigue as a result of high perceived stress. Ms. Brown did report having significant suspiciousness and hostility in her relations with others. She appears to be a sensitive individual who often questions and mistrusts the motives of those around her. Ms. Brown discussed how she is mistrustful of others in clinical interview.

Ms. Brown reported that her thought processes are marked by confusion, distractibility, and difficulties concentrating. There is ongoing concern regarding pain and somatic symptoms. There was also report of being emotionally reactive, manifesting rapid and extreme mood swings, and potentially experiencing episodes of poorly controlled anger.

Ms. Brown also reported a number of difficulties consistent with a significant depressive experience. Although she does not appear to feel hopeless and her self-esteem appears largely intact, she does manifest affective and physiological signs of depression. Ms. Brown reported feeling sad, with a loss of interest in normal activities, and a loss of sense of pleasure in things that were previously enjoyed. There may be disturbance in sleep pattern and decrease in level of energy and sexual interest.

Ms. Brown also reported experiencing specific fears or anxieties surrounding certain situations. This is consistent with clinical interview where Ms. Brown revealed being quite cautious and fearful of a reoccurrence of an accident.

Ms. Brown's self-concept appears to involve a self-evaluation that has both positive and negative aspects. Her attitudes about herself may vary from states of pessimism and self-doubt to periods of relative self-confidence and self-satisfaction. She described an interpersonal style of being modest and unpretentious.

Review of other scales revealed Ms. Brown to acknowledge that she is someone who tends to be easily angered. She also reported experiencing periodic and perhaps transient thoughts of self-harm. Ms. Brown denied active suicidal ideation at the time of the evaluation.

Overall, the PAI revealed Ms. Brown to acknowledge ongoing pain and somatic symptoms as well as fears and anxieties, depression, as well as increased emotional reactivity. She appears to be quite mistrustful of others.

Ms. Brown responded to the Frontal System Behavior Scale. The Frontal System Behavior Scale assesses for behavior changes commonly associated with injury to the frontal lobes of the brain. The Frontal System Behavior Scale assesses individuals pre and post injury with regard to apathy, disinhibition, and executive dysfunction.

Ms. Brown's responses to the Frontal System Behavior Scale failed to reveal complaint of disruption prior to the sustainment of injury with regard to apathy, disinhibition, or executive dysfunction.

With regard to post accident functioning, Ms. Brown viewed herself as being quite disrupted with regard apathetic changes to her personality (T=104) executive dysfunction (T=89), as well as disinhibition (T=92).

Elevated scores on the apathy subscale reflect problems with lack of initiation, drive, reduced spontaneity, reduced pursuit of interests, fatigue/lethargy, and blunted affective expression.

Elevated scores on the disinhibition subscale reflect problems with irritability, impatience, low frustration, and emotional lability.

Elevated scores on the executive dysfunction subscale reflect problems with sustainment of attention/concentration, working memory, sequencing, planning, mental flexibility, and self-monitoring of behaviors.

Summary/Case Discussion: Ms. Latika Brown is a 33-year-old, African-American female who sustained a traumatic brain injury as well as other orthopedic injuries as a result of her involvement in a pedestrian/motor vehicle accident on November 19th, 2008. Review of records reveal that neuroradiographic study of the brain revealed a right temporal hemorrhage consistent with physical injury of the brain. Ms. Brown also underwent multiple knee surgeries.

The current evaluation revealed Ms. Brown to be functioning in the average range of intellectual abilities. Intellectual testing highlighted Ms. Brown's strength with regard to right hemispheric, visual spatial skills. There was evidence of weakness with regard to working memory and processing speed. Neuropsychological evaluation was generally favorable but did reveal a cluster of neurocognitive impairments primarily involving Ms. Brown's capacity to effectively sustain attention/concentration with slower mentation and reduced processing abilities. Anterograde memory functioning appeared to be generally intact though Ms. Brown did experience difficulties with a word list learning test. There was no evidence of specific impairment affecting visual spatial skills. Sensory perceptual functioning appeared to be intact though Ms. Brown complained of blurred vision associated with head pain. Ms. Brown's reasoning and problem-solving abilities appeared to be generally intact. There was evidence of mild executive dysfunction more affecting the emotional domain. Ms. Brown's motor functioning appeared to be intact though there was complaint of mild balance problems.

Assessment of emotional functioning revealed an individual who appears to be experiencing social executive changes to her personality rendering her more irritable, impatient, with episodes of anger dyscontrol. Ms.

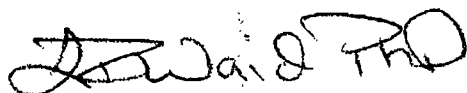
Brown also appears to be experiencing secondary depression as well as sleep disturbance. There is residual fear of a reoccurrence of the accident rendering her to be more cautious and vigilant in her day-to-day pursuits. Ms. Brown also appears to be somewhat mistrustful and suspicious of the motives of others.

Ms. Brown is experiencing a decreased capacity for attention/processing of information that results in her being forgetful in day-to-day pursuits. It is evident that there are significant functional factors on board that likely serve to further disrupt her brain behavior functioning in day-to-day pursuits. Indeed, depression, sleep disturbance, and emotional lability appear to be present and disruptive. I believe Ms. Brown's psychological disruption warrants referral for more aggressive psychiatric/psychological intervention including consideration for the use of psychotropic medications.

Utilizing the DSM-IV-TR, the following multi-axial assessment is provided:

- | | |
|----------|--|
| Axis I | Mood Disorder with Depressive Features (293.83) secondary to chronic pain and residuals of a traumatic brain injury
Personality Change, mixed apathetic/ labile type (310.1) due to residuals of a traumatic brain injury and the interfering effects of chronic pain.
Pain Disorder associated with both psychological factors and a general medical condition (307.89)
Cognitive Disorder, NOS (294.9) primarily affecting attentional/executive abilities due to the sustainment of a mild traumatic brain injury as well as the interfering effects of pain/somatic symptoms; psychological disruption; and sleep disturbance/fatigue |
| Axis II | No Diagnosis (V71.09) |
| Axis III | Status post traumatic brain injury; status post multiple surgeries of the knees with residual pain and swelling; posttraumatic headaches; episodic balance problems; hypertension |
| Axis IV | Need for continuing pain management intervention; need for referral for psychiatric/psychological intervention; Worker's Compensation |
| Axis V | GAF = 56 (Current) |

Thank you for allowing me to participate in the evaluation of Ms. Latika Brown. Ms. Brown has made a favorable recovery cognitively but continues with residual neurocognitive and emotional impairments as a result of the sustainment of a mild traumatic brain injury as well as the interfering effects of pain and psychological symptoms. I believe Ms. Brown would profit from referral for psychiatric/psychological intervention including potential use of psychotropic medications to assist her with her mood state functioning. Please feel free to contact me if you have any questions regarding the evaluation or report conducted on Ms. Latika Brown.



L. Randolph Waid, Ph.D.
Licensed Clinical Psychologist (SC License # 333)
Clinical Associate Professor in Psychiatry and Neurology/MUSC

C: Jeffrey Buncher, MD
Donald Howe, Esq.

LRW/tms

Progress Notes

Page: 1

Date Printed: 12/10/10

ID: 402582

SEX: F AGE: 33

Name: BROWN, LATIKA

11/29/10 : 00:00am

MUSC ORTHOPAEDICS FOLLOW-UP NOTE - MT PLEASANT

D99

CHIEF COMPLAINT: Post left knee arthroscopic chondroplasty, release of adhesions, and partial lateral meniscectomy

HISTORY OF PRESENT ILLNESS: Latika is back to follow up now close to 3 months out from surgery and is doing well. She is not having instability. She feels the knee is gaining in motion and strength, and she is back to most of her usual activities. She is not using a brace and not typically using an assistive device. She does return with a functional capacity evaluation during which she gave good effort, and the results were validated.

PHYSICAL EXAMINATION: Measured range of motion on the right is 1 degree short of neutral extension to 122 degrees and on the left is 5 to 115. She has mild valgus opening at zero and 30 degrees on the left knee of about 1+ with firm endpoint, mild varus opening on the right of about 1+ with firm endpoint and firm endpoint with Lachman, anterior drawer and posterior drawer tests on both knees. Her calves are nontender. She is neurovascularly intact. She walks without a varus thrust.

IMPRESSION:

1. Post left knee arthroscopic debridement.
2. Post bilateral knee dislocation reconstruction, healed.

PLAN: She is doing quite well and was placed at MMI last visit. We will calculate a rating from the AMA Guides, sixth edition, based on today's measurements as well as previous radiographs and her diagnosis of bilateral knee dislocations.

In all medical probability, both knees will likely develop earlier arthritic changes than she would otherwise have experienced perhaps in the next 15 to 20 years because of the severity of the dislocations she sustained and associated chondral injury. I doubt that she will need additional instability surgery because of her progress at this point and relative stability.

Her functional capacity evaluation indicated that she is capable of working at the light to medium physical demand for an 8-hour job. In addition, she could tolerate occasional back lifting up to 30 pounds, lag lifting of 25 pounds, power lifting 30, shoulder lifting of 25, and overhead of 15. 2-hand carry of 30 pounds and 1-hand carry of zero pounds. She can push or pull occasionally up to 50 pounds when she is walking but not standing. It is not recommended that she do any squatting or ladder climbing and only infrequent kneeling. She can do occasional stair climbing and crawling and occasional standing and walking during her 8-hour shift.

Otherwise, Latika can follow up with me on an as-needed basis should any problems develop.

Shane Woolf, MD
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SW/AM:1609
3204080

cc: Donna Phillips RN, CCM, Workman's Compensation, Carolina Case Management and Rehab Services

SIGNED BY SHANE K WOLF, M.D. (ATTENDING) (D99) 12/08/2010 03:26PM

Progress Notes

Page: 1

Date Printed: 07/22/10

Name: BROWN, LATIKA

ID: 402582

SEX: F AGE: 33

06/24/10 : 00:00am

MUSC ORTHOPAEDICS FOLLOW-UP NOTE-BONE AND JOINT CENTER

D99

CHIEF COMPLAINT: Left knee pain.

HISTORY OF PRESENT ILLNESS: Latika is back to follow up about her left knee and make a decision on how best to proceed at this point. Recall that she has recovered from her bilateral knee dislocation reconstructions and is continuing to have crepitation and significant pain in the left patellofemoral area. This has affected her final stage of recovery and the pain is worsening. According to Ms. Brown, Workman's Compensation has authorized proceeding with surgery if that becomes necessary.

PHYSICAL EXAMINATION: Her crepitation of the patellofemoral joint remains, and range of motion is zero to 120. She remains with slight opening to valgus stress at 30 degrees with a reasonable endpoint. 1+ Lachman again with firm endpoint. Normal patellar tracking. Calf is soft and nontender. She is neurovascularly intact.

IMPRESSION:

1. Post reconstruction, left medial collateral ligament.
2. Patellofemoral knee pain.
3. Significant chondral defect medial facet patella, left knee.
4. Small posterolateral femoral condyle chondral injury.

PLAN: I think surgery is appropriate for her, and we would consider arthroscopic chondroplasty with abrasion of the medial facet of the patella as necessary. Microfracture would be an option if it is a smaller defect and mini-open OATS procedure would also be a reasonable option. If it was a severe defect, then I think the only alternative for her if it is exceptionally large would be resurface and arthroplasty, which could be done with an Arthosurface device. I suspect we will be able to manage her with minimally invasive treatment, although her prognosis long term for the patellofemoral joint regardless of what is done is less favorable given the MRI findings. She understands after surgery she would be in a brace ambulating in extension for a period of time depending on the size of the lesion and the actual treatment rendered. We would have CPM, which she has used before, postoperatively for at least a few weeks to promote chondral healing. She is aware of the risks and benefits including but not limited to bleeding; infection; injury to nerves and vessels; stiffness; weakness; loss of strength, motion, or function of the knee; progressive arthrosis; the need for reoperation in the future; possibility of making an open incision to complete the osteochondral grafting or potentially resurfacing and our goal of trying to provide her with most direct approach to achieve a satisfactory result for the long term with one operation if possible. Risks of surgery and anesthesia in general were discussed as well. She understands and wants to proceed. A posting slip, consent, and history and physical were completed.

Shane Woolf, MD
Assistant Professor
Department of Orthopaedic Surgery
Medical University of South Carolina
96 Jonathan Lucas Street, Suite CSB 708
Charleston, South Carolina 29425
Telephone: 843 792-0404
Facsimile: 843 792-3843

SW/AM:1609
2649624

cc: Workers' Compensation

SIGNED BY SHANE K WOOLF, M.D. (ATTENDING) (D99) 07/08/2010 06:15PM

Progress Notes

Page: 1

Date Printed: 05/26/10

ID: 402582 SEX: F AGE: 33

Name: BROWN, LATIKA

05/20/10 : 00:00am

MUSC ORTHOPAEDICS FOLLOW-UP NOTE-BONE AND JOINT CENTER

D99

CHIEF COMPLAINT: Left knee grinding and giving way.

HISTORY OF PRESENT ILLNESS: Latika is back today on followup of her MRI, continues to have the same symptoms mostly centered around the kneecap.

PHYSICAL EXAMINATION: She has frank crepitation with range of motion, which is zero to 120. She has slight valgus opening of about 1+ at zero degrees and 2+ at 30 degrees with firm endpoint relatively unchanged. Lachman again is 1+ with firm endpoint. Posterior drawer is negative. Patellofemoral crepitation is painful and also audible, but the patella seems to track normally otherwise, and glide is about a quadrant.

IMAGING: MR arthrogram shows her meniscal repair is healed. The debridement appears stable. ACL is partially ruptured but most of the ligament is intact as is the PCL. The chondral surface of the medial and lateral compartments generally looks okay except for a small defect in the posterior aspect of the lateral femoral condyle. The medial facet of the patella has significant chondral loss with subchondral bone exposed. There is a small defect in the trochlea as well.

IMPRESSION:

1. Post reconstruction of the left medial collateral ligament.
2. Patellofemoral left knee pain.
3. Significant chondral defect medial facet of the patella, left knee.
4. Small posterolateral femoral condyle chondral injury.

PLAN: I do not have a good explanation for her patella chondral lesion other than the possibility that it was from the original injury and finally manifesting at this point. The MRI is quite impressive with a large defect, which I think is causing her pain and crepitation. In general, she has some laxity of her reconstructed MCL but not much different than her contralateral side, which is doing great. I think she has a reasonable endpoint and stability for day-to-day function. I think the principle issue is her patellofemoral joint now, and I offered to try a course of physical therapy or injection, which I am not optimistic would help her. I do think it would be reasonable to pursue chondroplasty, abrasion arthroplasty of the microfracture and if the defect is large on the patella consider a mini-open OATS procedure. She is relatively young, and this is a substantial problem that probably will not improve on its own. We are going to await word from Workman's Compensation on whether they would authorize additional work on her knee. Specifically, it would be arthroscopic assessment of the patellofemoral joint, chondroplasty or abrasion versus microfracture of a small patellar defect, and if it is a large defect, then I think osteochondral plug grafting through a mini-open approach would offer her the most reliable result and could be done as a single procedure. Again, this just depends on the quality of the defect and the size. She will need to be scheduled and have a workup completed if surgery is approved.

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Assistant Professor
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SW/AM:1609
2517789

Progress Notes

Page: 1

Date Printed: 01/28/10

ID: 402582

SEX: F

AGE: 32

Name: BROWN, LATIKA

11/23/09 1:00:00am

MUSC ORTHOPAEDICS FOLLOW-UP NOTE-JAMES ISLAND
D99

CHIEF COMPLAINT: Post bilateral knee ligament reconstructions.

HISTORY OF PRESENT ILLNESS: Latika is back one year out from right knee surgery and about six to seven months out from left knee surgery. She has made steady improvement. She was recently ill and has had some swelling about the knees, but that is resolving. She is not yet back to work and apparently has lost her job because of her long recovery from her work-related injuries.

PHYSICAL EXAMINATION: Her range of motion today is about 8 degrees to 140 bilaterally. No swelling about either knee. Her wounds are all well healed. She has no atrophy, and she is completely neurovascularly intact. Strength in extension and flexion is 5. She walks with barely perceptible limp and no assistive device. She has excellent balance standing on either side. No thrust noted.

Left knee exam shows 1+ valgus opening at zero, 2+ at 30 both with firm endpoints. This is similar to the contralateral side. Lachman again is 1+ with firm endpoint. Posterior drawer negative.

Right knee exam shows 1+ varus opening at zero, 2+ at 30 degrees, both with firm endpoints, minimal valgus opening of 1+ again with firm endpoint. Lachman, anterior and posterior drawer are all negative.

IMPRESSION:

1. Post reconstruction bilateral knee dislocations.
2. Post revision repair of the medial collateral ligament reconstruction.

PLAN: She has reached maximal improvement. She has made significant recovery in recent months, and I think at this point can return to work. I would only restrict her climbing from less than four rungs on a ladder or a step up. Otherwise, she can do all the normal activities she has done before. I do recommend that she take a 10- to 15-minute sitting break every four hours to rest the knee, as I think that will induce swelling and discomfort. In my best medical judgement, she is likely going to require additional surgery on the knees sooner in the future than would otherwise have been the case had she not had the traumatic injuries. There was chondral damage related to the dislocations that will manifest over decades. It is difficult to predict when that would happen, but I explained to her that she may eventually need additional work. Otherwise, I would like her to follow up in six months for assessment of the left knee at the one-year anniversary from surgery.

We can establish an impairment rating based on today's exam and sixth edition Guide for the Evaluation of Permanent Impairment.

Shane Woolf, MD
Assistant Professor
Department of Orthopaedic Surgery
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96 Jonathan Lucas Street, Suite CSB 708
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SW/AM:1609
1942020

cc: Workers' Compensation

SIGNED BY SHANE K WOOLF, M.D. (ATTENDING) (D99)

11/25/2009 01:44PM

076

Progress Notes

Page: 1

Date Printed: 01/28/10

ID: 402582

SEX: F

AGE: 32

Name: BROWN, LATIKA

11/23/09 : 00:01am

MUSC ORTHOPAEDICS FOLLOW-UP NOTE-JAMES ISLAND
D99

Based on maximal medical improvement achieved on today's clinic visit and the physical exam documented in today's record, an impairment rating was calculated according to the American Medical Association Guides for Evaluation of Permanent Impairment, sixth edition. Concerning the right lower extremity with instability noted, range of motion as noted and her limp according to the knee regional grid, table 16-3, a 16% impairment was modified for minimal limp and minimal loss of motion (class 1) to a total 14% impairment. Similarly for the left lower extremity a class 2 impairment with collateral and cruciate ligament moderate instability is 22%, and tables 16-5 and 16-6 for class 1 gait and class 1 range of motion impairment is modified to a total of 20% left lower extremity impairment.

Appendix A, the combined values chart, further modifies this to a 31% combined value impairment for the left and right knee injuries.

Shane Woolf, MD
Assistant Professor
Department of Orthopaedic Surgery
Medical University of South Carolina
96 Jonathan Lucas Street, Suite CSB 708
Charleston, South Carolina 29425
Telephone: 843 792-0404
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SW/AM:1609
2114096



Practice Partner Note

Patient: BROWN, LATIKA

Attending:

MRN: 000402582

Date: 9/28/09 12:00 AM

Status: INITIAL

Date: 09/28/09 : 00:00am

Title: MUSC ORTHOPAEDICS FOLLOW-UP NOTE-JAMES ISLAND

Providers: D99

CHIEF COMPLAINT: Post bilateral knee ligament reconstructions.

HISTORY OF PRESENT ILLNESS: Ms. Brown is back for her five-month visit on the left knee, and she is about 10 months out from surgery on the right. She is generally doing well, walking better each day, and is working on stairs with Amy Mauer in physical therapy. She is having virtually no instability and only minimal pain. She feels she has made excellent progress.

PHYSICAL EXAMINATION: Range of motion of the knees is now about 6 degrees hyperextension to 135. On the right, she has 1+ varus opening at zero degrees and 2+ at 30 degrees with good endpoint. She has slight opening with valgus and a firm endpoint. Lachman is zero. Anterior drawer and posterior drawer are zero.

The left knee has 1+ valgus opening at zero degrees, 2+ at 30 degrees with firm endpoint. She has 1+ varus opening with firm endpoint in each direction. Lachman is 1+ on the left, anterior drawer 1+, posterior drawer negative. Her calf is nontender, and she is otherwise neurovascularly intact. Knee extension strength is 5- bilaterally.

IMPRESSION:

1. Post reconstruction bilateral knee dislocation.
2. Revision repair of left medial collateral ligament.

PLAN: She is still working on safe negotiation of stairs in physical therapy. She still does not have the balance and proprioception we would like her to have at this point. I think a few more weeks is warranted. I would like to see her back in three or four weeks and at that point likely will apply MMI with a rating based on the diagnostic criteria of knee dislocations. She has some instability of both knees and hyperextension, which I think is probably baseline for her. When she ambulates both walking away and returning, the knees are in excellent alignment. There is no varus or valgus thrust and no apparent instability. She otherwise looks significantly improved and is pleased with her progress. Follow up in about a month.

Shane Woolf, MD

Assistant Professor

Department of Orthopaedic Surgery

Medical University of South Carolina

96 Jonathan Lucas Street, Suite CSB 708

Charleston, South Carolina 29425

Telephone: 843 792-0404

Facsimile: 843 792-3843

This document should not be filed in the paper medical record and should be confidentially destroyed when it is no longer needed.

078

Printed by: JONES, NORMA

Date Printed: 10/17/2009

CORVEL

200 Center Point Circle
Suite 290
Columbia, SC 29210
Telephone: 843-650-0653
Facsimile: 843-650-4941

Initial Vocational Evaluation
Date of Report: 04/29/10
Date of Referral: 04/16/10

Claimant Name: Latika Brown
Claimant Address: 35-A Allaway Street
City, State, Zip: Charleston, SC 29403

DOI: 11/19/08

Employer: The Pantry Inc.
Employer Address: P. O. Box 1410
Employer City, State, Zip: Sanford, NC 27730

Plaintiff Attorney: Donald H. Howe, ESQ
Plaintiff Address: P. O. Box 598
Plaintiff City, State, Zip: Charleston, SC 29402

Defense Attorney: Amanda Mellard, Esq.
Defense Address: 75 Beattie Place
Defense City, State, Zip: Greenville, SC 29402

Treating Physician: Dr. Shane Woolf	Claimant Phone #: 843-926-8919
Physician Address: 96 Johnathan Lucas	Employer Phone #: 919-774-6700
Physician City, State, Zip: Charleston, SC 29425	Physician Phone #: 843-792-2300

SUMMARY AND RECOMMENDATIONS:

Overview/Summary of Case:

Ms. Brown's reported work related injury occurred on November 11, 2008. On the day of the incident, Ms. Brown reported while walking to the pump to help a customer she was hit by a truck. The driver failed to stop at a stop sign. Ms. Brown reported being transported by ambulance to Community Hospital in Charleston, SC. X-rays were taken, Ms. Brown was provided with crutches and medications prescribed. Further testing revealed some bleeding on the brain and she was transferred to MUSC in Charleston SC. Ms. Brown reported being in the hospital for one week and surgery to her knees was deferred until the swelling went down. Ms. Brown underwent bilateral knee surgery on 12/02/08 and was subsequently placed in home physical therapy for approximately two months followed by Physical Therapy at MUSC. Ms. Brown reported continuing complaints and Dr. Woolf recommended surgical intervention on the left knee and replaced a ligament with

CORVEL

donor tissue. Ms. Brown returned to therapy and reported being in therapy up until she was released by Dr. Woolf. Dr. Woolf is currently treating Ms. Brown conservatively. Dr. Woolf placed her at MMI on 01/12/10 and subsequently released Ms. Brown to light duty with no climbing on ladders or steps (over 4). Ms. Brown was also limited to not standing for over 40 minutes without resting. Ms. Brown is also seeing a neurologist for her migraines and reported the medications prescribed by the neurologist seemed to be helping.

Identify Potential Barriers:

Ms. Brown is performing at a light physical demand, per the recommendations of Dr. Woolf. The claimant has not attempted to return to work since her injury.

MEDICAL ASSESSMENT:

Date of Diagnosis and symptoms started:

11/19/08 –Reported work related injury while being struck by a vehicle while walking to a gas pump to help a customer.

Treatment history to include hospitalizations and diagnostic testing:

Physical therapy, MRI, X-rays, medications, surgery and conservative treatment

Current symptoms:

Ms. Brown reported having pain in both legs but more pronounced in the left than the right.

Current treatment:

Conservative, medications prescribed by Dr. Woolf.

Claimant's perception of limitations for work and activities of daily living:

Would like to re-enter the work force, Ms. Brown reported limited mobility would hinder her ability to sustain standing for prolonged periods of time for an eight hour day. Ms. Brown also reported her work related injury has caused difficulty performing routine tasks at home.

Personal and family medical history:

Ms. Brown reported having childhood asthma and still has a bronchilator which she has not used in several months. There are no other medical problems which would hinder rehabilitation development. Ms. Brown reported family history of cancer and diabetes.

Medications:

Medication	Dose/Frequency	Purpose
Meloxicam	7.5 mg x 2 daily	Pain
Hydrocodone	5/500 mg x 6 daily	Pain

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Latika S. Brown

Plaintiff(s)

vs.

John Hamlet Dubose

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011 - CP - 10 - 447

(Please Print)

Submitted By: Donald H. Howe

Howe & Wyndham, LLP

Address: 47 State Street

Charleston, SC 29401

SC Bar #: 02690

Telephone #: 843-853-6121

Fax #: 843-853-6124

Other:

E-mail: howewyndham@bellsouth.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

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 Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|--|--|
| ☐ Contracts | ☐ Torts - Professional Malpractice | ☐ Torts - Personal Injury | ☐ Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Stander/Label (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☒ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Other (299) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Other (399) | ☐ Building Code Violation (460) |
| | | | ☐ Other (499) |
| ☐ Inmate Petitions | ☐ Judgments/Settlements | ☐ Administrative Law/Relief | ☐ Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstatement Driver's License (800) | ☐ Arbitration (900) |
| ☐ Sexual Predator (510) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Mandamus (520) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Habeas Corpus (530) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| ☐ Other (599) | ☐ Transcript Judgment (740) | ☐ Forfeiture (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Other (899) | ☐ SCDOT (950) |
| | ☐ Other (799) | | ☐ Worker's Comp (960) |
| ☐ Special/Complex /Other | | | ☐ Zoning Board (970) |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) | | ☐ Administrative Law Judge (980) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) | | ☐ Public Service Commission (990) |
| ☐ Medical (620) | ☐ Other (699) | | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |

Submitting Party Signature: 

Date: June 10, 2011

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.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LATIKA S. BROWN,

Plaintiff,

-versus-

JOHN HAMLET DUBOSE,

Defendant.

IN THE COURT OF COMMONS PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-4147

COMPLAINT

FILED
2011 JUN 13 AM 11:54
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff, above named, complaining of the Defendants above named, alleges and says unto this Honorable Court as follows:

1. Plaintiff is a resident and citizen of the County of Charleston, State of South Carolina.
2. That the Defendant is a resident and citizen of the County of Charleston, State of South Carolina.
3. That on November 19, 2008 the Defendant was driving a 2009 Chevrolet and was traveling through a Shell service station area at 588 East Bay Street in the City of Charleston, County of Charleston, State of South Carolina.
4. That Plaintiff was a pedestrian who was walking in the area of the gas pumps when she was struck by Defendant's vehicle. This collision being the result of the negligence, carelessness, willfulness and wantonness of the Defendant as hereinafter more fully set forth.
5. That the negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, consisted, among other things, of the following:

- a) In failing to keep a proper lookout;
- b) In traveling too fast for conditions;

- c) In failing to stop for the stop sign controlling traffic in the area; and
- d) In failing to use that degree of care which a person of ordinary prudence would have used under the same or similar circumstances.

6. That by reason of the negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, and as a direct and proximate result thereof, the Plaintiff sustained numerous and various injuries for which she incurred medical bills she would not otherwise have incurred, received extensive medical treatment, including numerous surgeries, she would not otherwise have undergone; she lost wages she would have otherwise made; she has been permanently injured and her health has been permanently impaired; suffered great pain, suffering, and she will continue to so suffer; she has suffered great emotional distress and will continue to suffer and was deprived of the enjoyments of life of persons similarly situated, all to his damage; her ability to earn a living has been compromised and will continue to be so compromised; she has been deprived of the enjoyments of life of persons of the same or similar circumstances and will continue to be so deprived, all to her damage.

WHEREFORE, Plaintiff prays for a judgment of actual and punitive damages to be determined by a jury, together with the cost of this action.

HOWE & WYNDHAM, L.L.P.
Post Office Box 598
Charleston, SC 29402
843-853-6121

BY: Donald H. Howe

Donald H. Howe
Attorney for Plaintiff

Dated: June 16, 2011

1691

5710843228

HOWE & WYNDHAM L.L.P.

Attorneys at Law

DONALD H. HOWE
ROBERT J. WYNDHAM

47 STATE STREET
POST OFFICE BOX 598
CHARLESTON, S.C. 29402

TELEPHONE
(843) 853-6121
FAX (843) 853-6124
E-mail: howewyndham@bellsouth.net

September 8, 2011

BY FAX TO: 1-770-325-5064

Ms. Carm Cappuccilli
Risk Enterprise Management Limited
P. O. Box 105026
Atlanta, GA 30348-5026

Re: Claimant: Latika Brown
Employer: The Pantry, Inc.
Date of Accident: November 19, 2008
Your Claim No.: 571-0843228-185

Dear Ms. Cappuccilli:

As you know, I represent Latika Brown. I have been in touch with the liability carrier about settlement. There is a total of \$525,000.00 of liability coverage available but there are arguably problems of comparative negligence. It is my (guardedly optimistic) belief that the liability carriers may pay \$475,000.00 to settle the claim. Based on the severe injuries, life time disability, lost wages, etc., I would value the case at a minimum of 1.5 million without its liability issues. Assuming a settlement of \$475,000.00, that is a recovery of approximately one-third of the full value. Following that logic, your company's pro rata share after attorneys' fees would be \$48,799.25 (A short worksheet is attached for your reference). Would you be willing to accept that amount in settlement of your lien assuming I can get \$475,000.00? Please let me know. Thanks.

With kindest regards, I am

Sincerely,

Donald H. Howe

Donald H. Howe

DHH:tgw
Attachment

Re: Claimant: Latika Brown
Employer: The Pantry, Inc.
Date of Accident: November 19, 2008
Your Claim No.: 571-0843228-185

Total Workers' Compensation Lien:	\$219,486.90
One-Third:	\$73,162.30
One-Third (Attorneys' Fees):	\$48,799.25

169A

5710843228

HOWE & WYNDHAM L.L.P.

Attorneys at Law

DONALD H. HOWE
ROBERT J. WYNDHAM

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September 21, 2011

BY USPS AND FAX TO: 1-770-325-5064

Ms. Carm Cappuccilli
Risk Enterprise Management Limited
P. O. Box 105026
Atlanta, GA 30348-5026

RECEIVED

SEP 21 2011

REM ATLANTA

Re: Claimant: Latika Brown
Employer: The Pantry, Inc.
Date of Accident: November 19, 2008
Your Claim No.: 571-0843228-185

Dear Ms. Cappuccilli:

I have been able to settle the above matter for \$505,000.00. This is actually a bit better than I had expected and so I am very pleased with the result. I would like to discuss with you the settlement of the comp lien. Please give me a call when you get a chance.

I had sent you a letter on September 8, 2011. I think the argument for the reduction of the lien outlined therein is appropriate. I am attaching it again for your reference.

With kindest regards, I am

Sincerely,



Donald H. Howe

DHH:tgw
Attachment

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0818970

LATIKA BROWN,

Employee,

Claimant,

vs.

THE PANTRY, INC.,

Employer,

AND

ACE AMERICAN INSURANCE
COMPANY C/O RISK ENTERPRISE
MANAGEMENT, LTD.,

Carrier,

Defendants.

RECEIVED
SETTLEMENT

MAR 11 2011

Division of Claims
SC Worker's Comp. Comm.

**SETTLEMENT AGREEMENT
AND RELEASE**

Latika Brown "Claimant" alleges to have injured her head, brain, both knees and psychological overlay, by accident arising out of and in the course of her employment with The Pantry, Inc. "Employer" on or about November 19, 2008 when she was allegedly struck by a vehicle in the parking lot.

Claimant's average weekly wage is \$336.60; and the compensation rate is \$224.41.

Claimant contends that she sustained an accidental injury arising out of and in the course of employment; and Defendants dispute the Claimant's allegations and deny that any benefits are due.

Claimant has been treated and/or evaluated by Shane Woolf, M.D., who has rated the Claimant's permanent impairment at fifteen percent (15%) of the left knee and twenty-two percent (22%) of the right knee on September 23, 2010, by Dr. Charles Beischel, who did not rate the Claimant's permanent impairment, by Jeffrey W. Buncher, M.D., who did not rate the Claimant's permanent impairment, by Storm Eye Institute, who did not rate the Claimant's permanent impairment, by Aljoesen Walker, M.D., who did not rate the Claimant's permanent impairment, by L. Randolph Waid, Ph.D., who did not rate the Claimant's permanent impairment by Mark T. Wagner, PhD, who did not rate the Claimant's permanent impairment, by John V. Custer, M.D., who has rated the Claimant's permanent impairment as five percent (5%) of the psyche.

In consideration of the sum of Sixty Thousand Dollars and No Cents (\$60,000.00), Claimant does hereby release and forever discharge Defendants from any and all claims, demands, actions or causes of action under the South Carolina Workers' Compensation Act, on account of any and all injuries, disability, disfigurement, specific loss, death, operations, medical, hospital or like expense, continuances, recurrences, aggravations, changes of condition, ailments, illnesses, and diseases or other damages, consequences or results, past, present or future in any way connected with, or arising from the alleged injury sustained by Claimant on or about November 19, 2008, and does hereby acknowledge that Defendants have fully, finally and completely paid and discharged all of their obligations, liabilities and responsibilities under the South Carolina Workers' Compensation Act, and that the sum set forth above is being paid to, and received by, Claimant in full and final satisfaction of all claims whatsoever as a result of the alleged accident described above and that Defendants shall not be liable for any additional payments whatsoever.

Claimant asserts that she is not receiving Social Security Disability Benefits and is not a Medicare beneficiary at the time of this settlement. She also asserts that she has no reasonable expectation of becoming a Medicare beneficiary within thirty (30) months of her settlement date. Additionally, under current Medicare review thresholds, Claimant's settlement does not meet the criteria for review and approval by the Center for Medicare Submissions (CMS). Claimant understands that Medicare is considered a secondary payer and agrees to use the settlement proceeds to cover her future medical expenses, causally related to her workers' compensation claim. The parties have considered Medicare's interests and determined that no Medicare set-aside or CMS submission are needed to protect those interests. Claimant specifically agrees that Medicare shall not be and is not responsible for her causally related medical expenses and agrees not to shift such medical burden to Medicare.

Defendants have paid or have agreed to pay authorized medical expenses through February 15, 2011 incurred as a result of the alleged accident described above, in such amounts as may be approved by the South Carolina Workers' Compensation Commission.

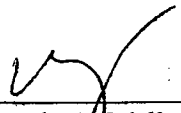
Claimant and her attorney represent that Claimant has been fully advised of her rights under the South Carolina Workers' Compensation Act and that they are of the opinion that the proposed settlement is reasonable and fair. Claimant's attorney represents that he has reviewed the settlement and has explained the terms fully to Claimant and Claimant voluntarily and without coercion agreed to the terms.

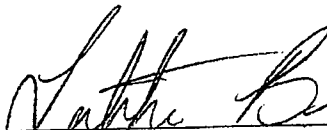
Claimant hereby relinquishes and releases each and every *workers compensation* *JD* claim which she or anyone on her behalf now has, or may hereafter have, so that she shall not have any other or future claim or demand of any kind or nature as a result of the alleged accident described above.

The parties are hereby filing this SETTLEMENT AGREEMENT AND RELEASE with the South Carolina Workers' Compensation Commission as required by S.C. Code Ann. § 42-9-390.

WE CONSENT:

McAngus Goudelock & Courie, L.L.C.


Amanda A. Mellard
Attorney for Defendants


Latika Brown
Claimant


Donald H. Howe, Esquire
Attorney for Claimant

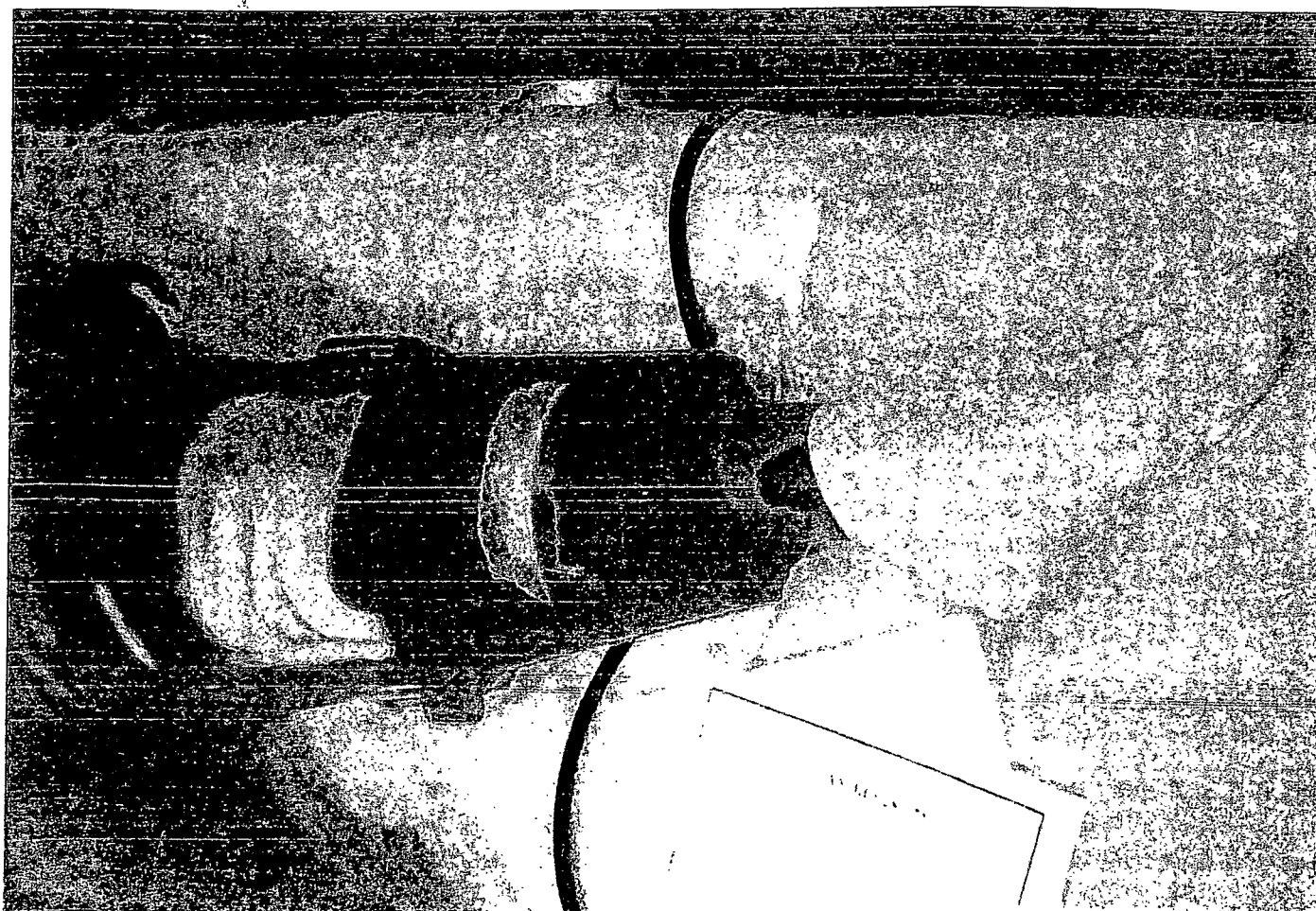
Greenville, South Carolina
Date: 3/4/11

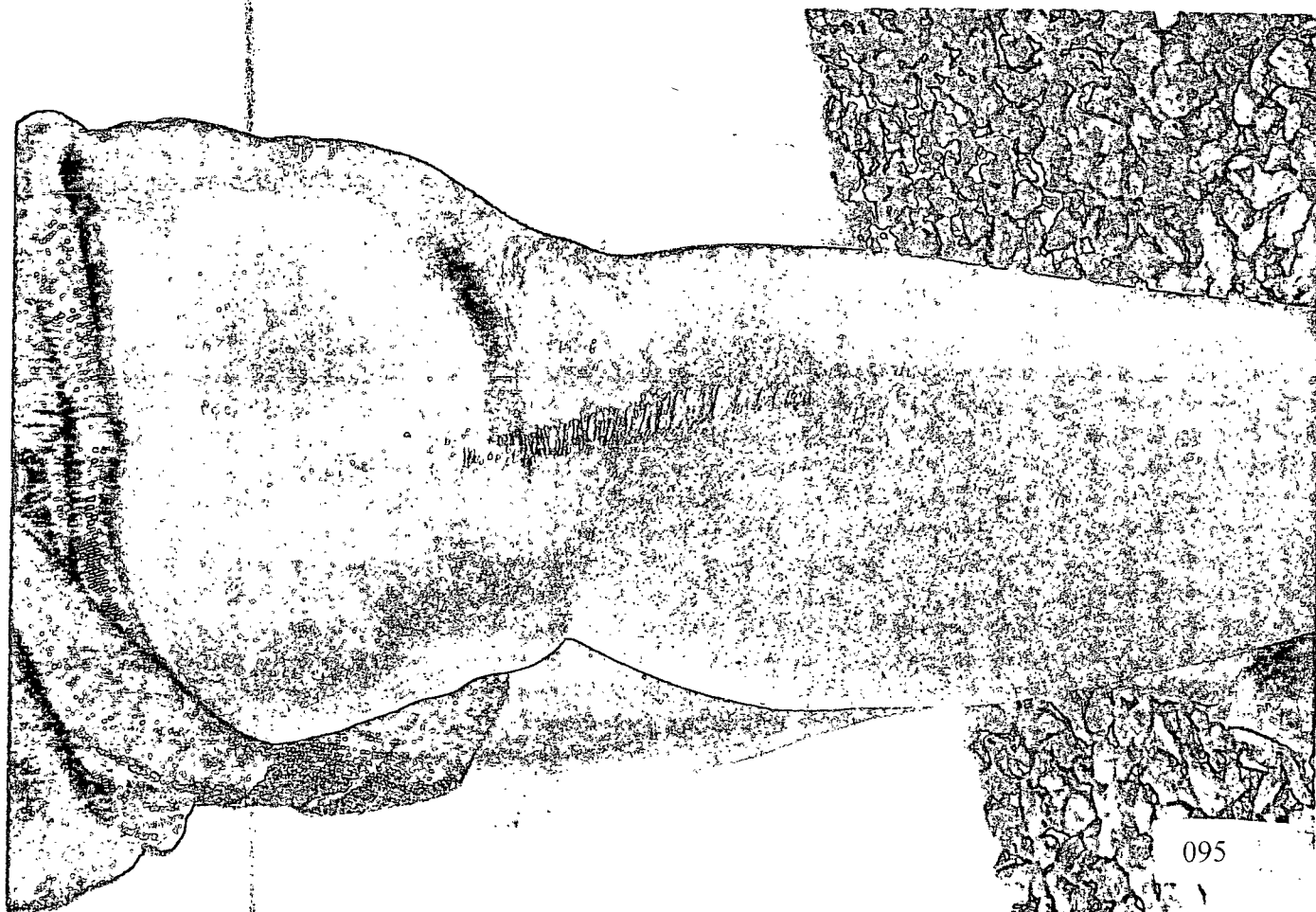
FEE SUBJECT TO FORM 61

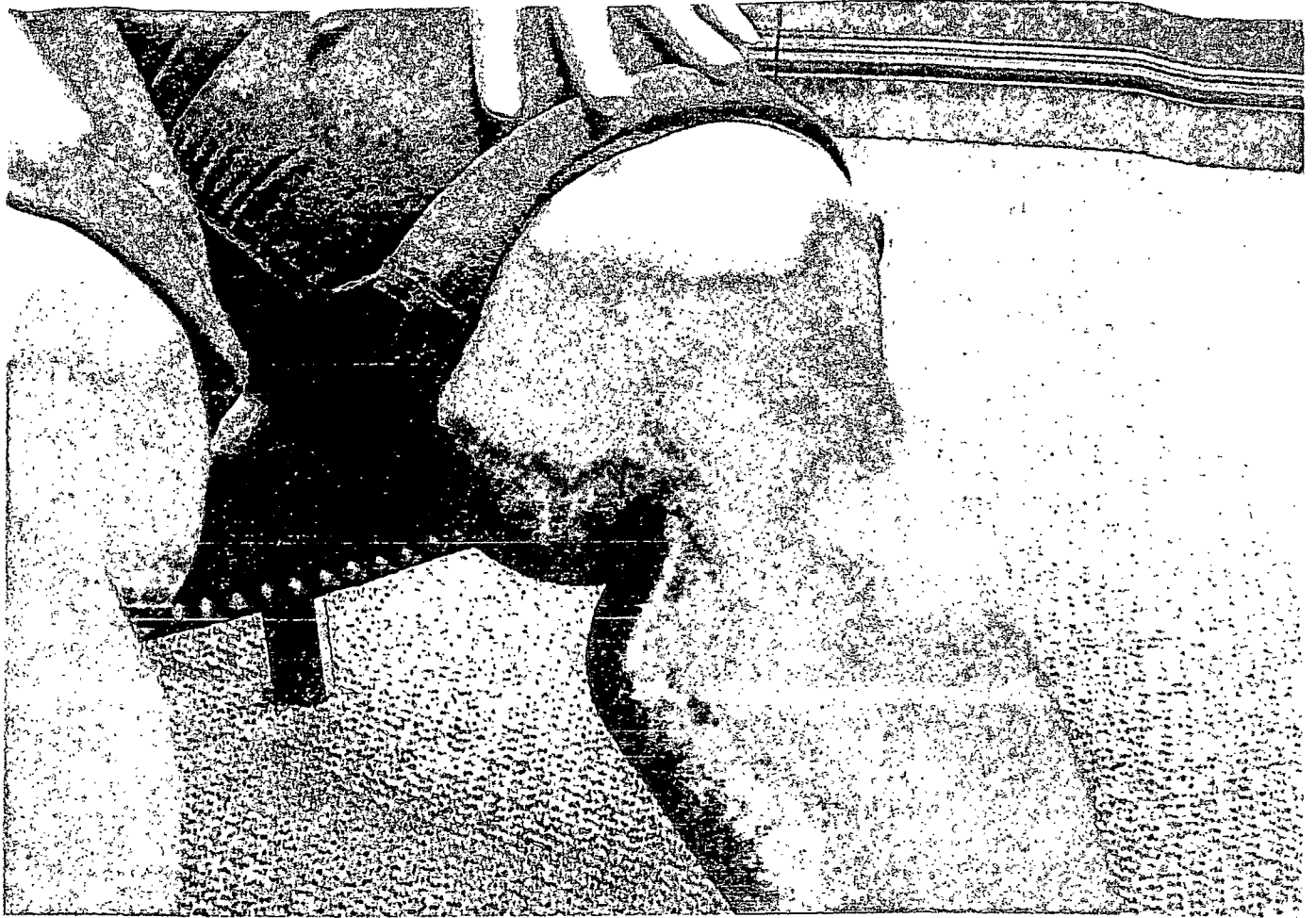


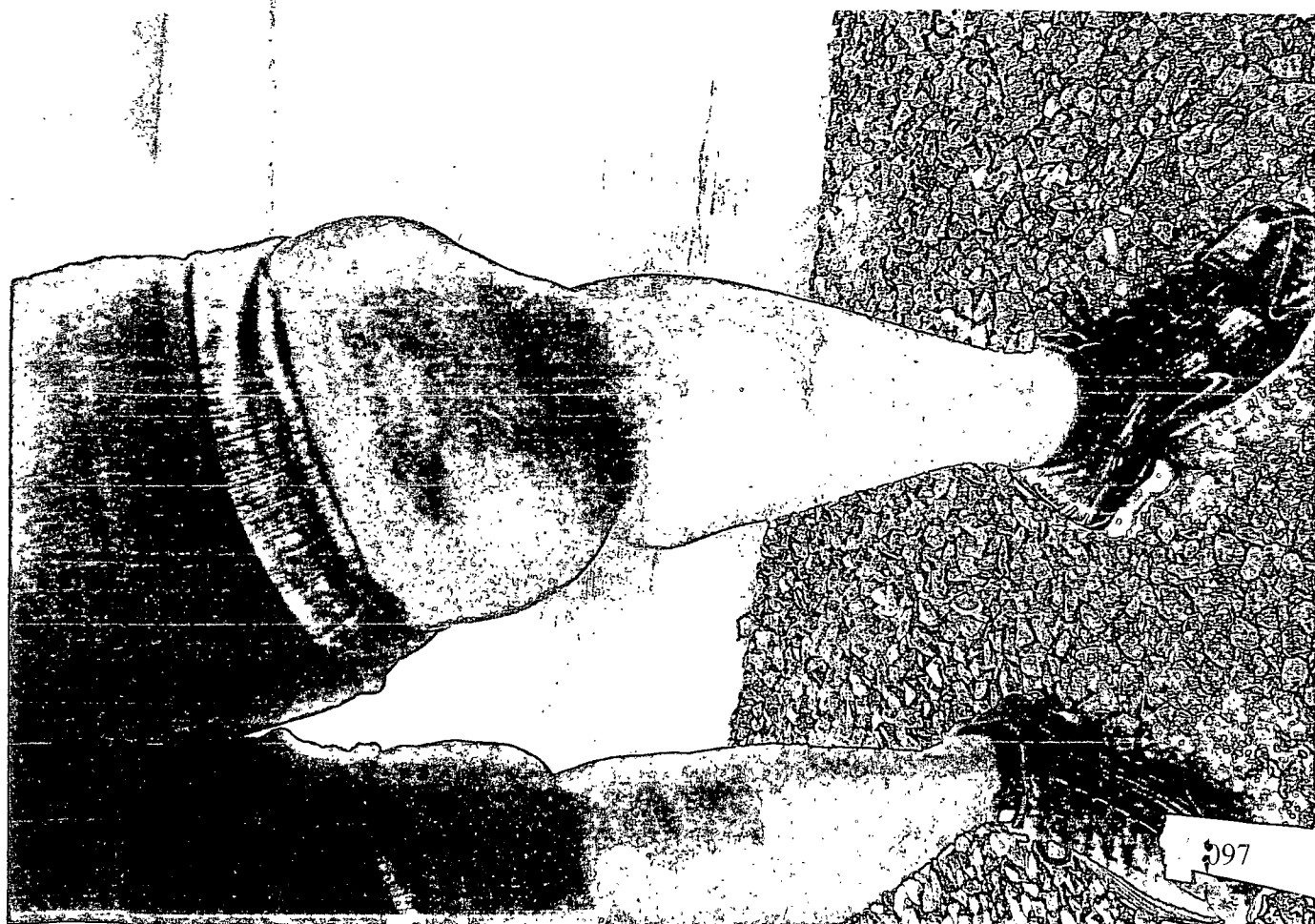
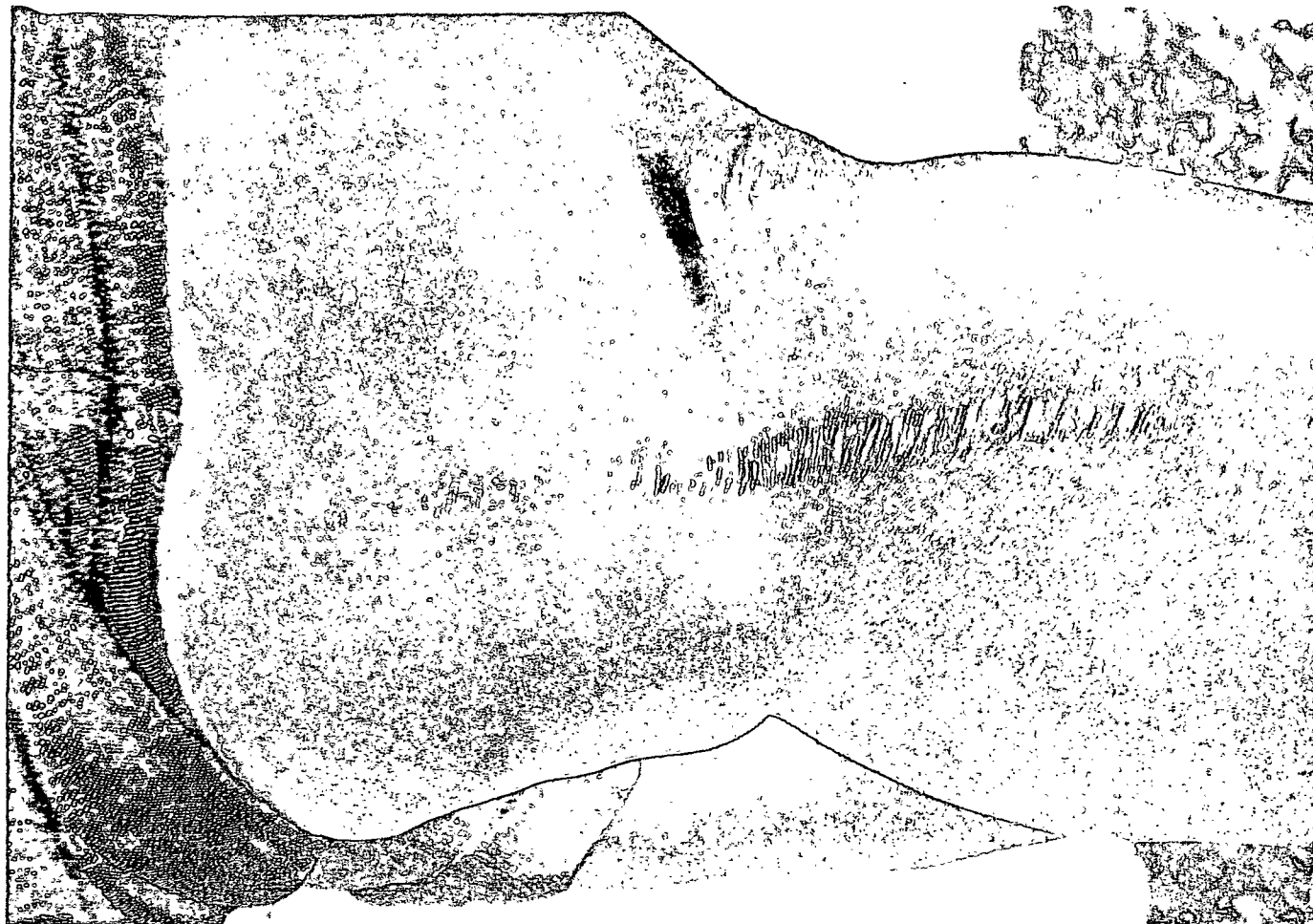
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PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403PO DRAWER 22247
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April 11, 2012

E DOUGLAS PRATT-THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

DON L AUSTEN

LINDSAY K SMITH-YANCEY (SC, NC)

THOMAS H. HESSE (SC, GA)

IAN W. FREEMAN (SC, CA)

DANIEL S. MCQUEENEY JR

KATHLEEN FOWLER MONROE

VIA EMAIL

Amanda Mellard
PO Box 2980
Greenville, SC 29602

Re: Latika Brown

Dear Ms. Mellard:

I want to thank you for asking me to review this file and give my opinion regarding liability and damages in this case. I probably need to set forth my credentials for you. I graduated from Wake Forest University Law School in 1986. I have practiced in Charleston South Carolina for the past 25 years. The first 15 years of my practice, I was predominately a defense attorney in civil matters. For the past 10 years I have acted as a litigator, doing plaintiffs work, defense work and acting as a mediator. I have mediated well over a 1,000 cases. I work with attorneys on a daily basis to evaluate and settle claims. I am rated AV by Martindale-Hubbell. I am a member of the American Board of Trial Advocates. I have been named as a Super Lawyer for 2012 in the field of mediation.

I have reviewed the extensive medical and treatment records you provided me regarding Latika Brown. Ms. Brown was struck by a vehicle while working for The Pantry on November 19, 2008. It's my understanding that there is a video tape of the incident, which I have not been able to review. It's my understanding the video tape shows the vehicle traveling through the parking lot of The Pantry after ignoring a stop sign and striking Ms. Brown as she returns to the store. It appears that liability of the third defendant driver is clear.

Ms. Brown was examined at the scene by an EMS attendant and found to have a Glasgow Coma Scale of 15/15. She was transported to the Medical University of South Carolina emergency room where she was treated for extensive injuries to her knees. Over the next two years, she underwent four (4) surgeries. One in December of 2008 to her right knee and three surgeries to her left knee. Considering the serious nature of the injuries, Ms. Brown has recovered remarkably well. Her surgeon, Shane Wolfe gave her a 14% impairment to the right knee and 20% impairment to the left knee in January, 2010. Dr. Wolfe placed minimal restrictions on Ms. Brown stating that she is capable of working in a light to medium physical demand for an eight hour job. In his January 28, 2010 report Dr. Wolfe stated:

She has made significant recovery in recent months and I think at this point she can return to work. I would only restrict her climbing from less than four runs on a ladder or a step up. Otherwise, she can do all normal activities as she has done before. I do recommend that she take a ten to fifteen minute sitting break every four hours to rest the knee as I think it will induce swelling and discomfort.

The modest restrictions on Ms. Brown's activities indicate that she had a good recovery.

Dr. Wolfe's opinions were further supported by a functional capacity evaluation. Dr. Wolfe cites the FCE margin in his December 10, 2010 notes which states:

Her functional capacity evaluation indicated she is capable of working the light to medium physical demand for an 8 hour job. In addition, she could tolerate occasional back lifting up to 30 lbs., leg lifting 25 lbs., powerlifting 30 lbs., shoulder lifting 25 lbs., and overhead of 15 lbs. Two hand carry of 30 lbs. and a one hand carry of 0 lbs. She can push or pull occasionally up to 50 lbs. when she is walking but not standing. It is not recommended she do any squatting or ladder climbing and only infrequent kneeling. She can do occasional stair climbing and crawling and occasional standing and walking during her 8 hour shift

Initially, it appeared that Latika Brown may have sustained a closed head injury. An early CT scan showed a "tiny right temporal sub arachnoid hemorrhage." However, she was reported as having a 15/15 on the Glasgow Coma Score when examined at the scene of the accident. Subsequent cognitive testing done a year and half later, was well within normal limits. Unfortunately, the Plaintiff has a significant pre-existing history of traumatic psychological events for which she has never received treatment. These included an incident in 2008 when she was hit by a tornado that tore her van apart while driving. She claims to have persistent flashbacks and avoidance of storms. In 2008 she witnessed the death of her grandmother and continues to be haunted by these memories. In 2007 she was robbed at gunpoint in a convenient store and reports flashbacks from this event. She had been in a physically abusive relationship with a boyfriend for 4 years and also was molested as a 6 year old for approximately one year. All these terrible life experiences have caused her problems in the past and continue to cause her problems. This automobile accident is another one of many traumatic stressors in the plaintiff's life. It is difficult to determine if the plaintiff suffers additional psychological issues because of this accident. The plaintiff did receive some psychological treatment from Dr. John Custer. Dr. Custer helped Ms. Brown with developing coping skills for her anxiety. Ms. Brown made improvement with Dr. Custer and indicated that she is ready to move on with the rest of her life. There is little evidence of any cognitive injury sustained by the plaintiff in this case. It appears she is coping with the psychological issues that this accident may have dredged up from her past.

The records indicate that the plaintiff was working for \$10.75 an hour at the time of the incident. If the plaintiff were to work 40 hours a week for every week of the year, this would give her an annual salary of \$22,360.00. The plaintiff has now returned to work with Dunkin Donuts, earning \$7.25 an hour, but working only 18 hours a week. It appears that the plaintiff is working part time by her choice. The records indicate that a labor market survey was done indicating a number of jobs the plaintiff could do in the \$10-\$12 an hour range. Her physicians indicate there are no restrictions on her working 40 hours a week. Therefore, I conclude that once the plaintiff was cleared to return to work in January of 2010, she should have no wage claim. There certainly is no permanent claim for lost wages.

This case was brought in Charleston County. Charleston County has a reputation for being a very conservative jury venue. Even in cases with significant medical bills and injuries, it is rare for a jury in Charleston to award a verdict of over half a million dollars. The plaintiff's attorney, Donald Howe did an

excellent job for his clients in obtaining a settlement of \$505,000 out of a \$525,000 potential recovery of available insurance.

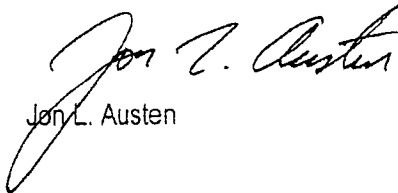
Another potential aspect of this case is the threat of punitive damages. Generally, Charleston juries are reluctant to award punitive damages. In order to receive an award of punitive damages, a plaintiff must show by clear and convincing evidence that the defendant was willful, wanton, reckless or grossly negligent in some manner. Usually, Charleston County juries award punitive damages in extreme cases where there was intent to harm. In this case, the driver of the vehicle that struck plaintiff Latika Brown was clearly negligent, possibly grossly negligent, but did not act with intent to injure. I see no evidence that the defendant was under the influence of alcohol or drugs. There are no facts that the defendant had any animus toward the plaintiff. It is possible that the jury could award a verdict of punitive damages, but I believe it unlikely.

It is my opinion the total cognizable damages would be approximately \$750,000 to \$1,000,000. I would note that Donald Howe is an excellent attorney. I would anticipate he would be able to render a verdict closer to the higher end of the scale.

I hope that you find this helpful, please call me if you have any questions.

With kindest regards, I remain,

PRATT-THOMAS WALKER, P.A.



Jon L. Austen

JLA/tew

April 5, 2012

Donald H. Howe, Esquire
Howe & Wyndham, LLP
P. O. Box 598
Charleston SC 29402

Re: Latika Brown

Dear Mr. Howe:

At your request, I have reviewed the medical records involving the care and treatment of Latika Brown who was struck by a car while at work on November 19, 2008. I have also reviewed the videotape of the incident, the deposition of Ms. Brown, and have met briefly with Ms. Brown in person to examine her permanent scarring and to evaluate her as a potential Plaintiff/witness.

Regarding my credentials I would relate the following. I am a partner in the firm of Young Clement Rivers, LLP, having practiced law in Charleston since 1983. My practice primarily consists of civil litigation in state and federal courts. My firm and I principally represent the defendants in litigation matters. In that role, I am regularly required to value injury and other claims and have done so for more than 28 years. I have handled several thousand personal injury claims of various nature over the course of my career.

Regarding the facts of the case I would first comment that the liability in the case was not only clear, but aggravated. The video from the security camera depicts a horrific accident which would certainly have a very strong impact on the jury. The putative defendant was cutting a corner to avoid traffic and passed through the parking lots of two businesses to bypass traffic to proceed north of East Bay Street. He ignored a stop sign between the two parking lots and struck Ms. Brown at a high rate of speed, throwing her like a ragdoll 15-20 feet in the air.

Next, my meeting with Ms. Latika Brown revealed a very likeable plaintiff on a number of levels. First of all, she is an extremely personable and articulate lady. She comes across as a very sympathetic person whom I believe almost any juror would have a strong identification with. The fact that she was working at the same location for approximately six years despite two changes in ownership (i.e. 3 separate employers) demonstrates a stable and decent wage earner that a jury would like. Additionally she was attending Trident Technical College at the time of the accident trying to further her education and qualification for better employment opportunities.

Ms. Brown was making approximately \$11.00 per hour working 40 hours per week (occasional overtime) at the time of the time of the accident. Her last job at Dunkin Doughnuts was at \$7.75 per hour.

Ms. Brown underwent four surgical procedures as a result of the accident. One was on the right knee. Three were on her left knee. The first surgeries were in early December of 2008. In connection with her first surgery the following preoperative diagnosis is reflected in the operative note:

1. Bilateral knee dislocation
2. Left lateral meniscus tear
3. Left medial collateral ligament tear
4. Left patellar chondromalacia
5. Left anterior cruciate ligament tear
6. Right medial and lateral meniscus tear
7. Right lateral ligament tear
8. Right anterior cruciate ligament tear
9. Right posterior lateral cornu injury

Ms. Brown underwent surgery and the following procedures were performed:

1. Arthroscopic partial left lateral meniscectomy
2. Arthroscopic left patellar chondroplasty
3. Open left medial collateral ligament repair (primary)
4. Arthroscopic right medial meniscus repair
5. Open right lateral meniscus repair
6. Open lateral collateral ligament reconstruction with allograft
7. Popliteus tendon posterior lateral cornu reconstruction with allograft

After an initial recovery period of six months she had to undergo another major surgical intervention on her left knee in May of 2009 for a filed medial collateral ligament repair and overgrowth of scar cartilage, left patellar. I use the term "major" because the operative note describes significant reconstruction and references "tourniquet time" of 111 minutes. The reconstruction involved significant scar tissue removal as well as an achilles allo graft reconstruction, in which they actually transplanted a tendon from a cadaver. A third surgery was

accomplished on the left knee in August of 2010. Fortunately this was arthroscopic surgery but it did involve three procedures:

1. Arthroscopic left knee chondroplasty patellofemoral joint and lateral tibial plateau.
2. Partial lateral meniscectomy
3. Arthroscopic release of adhesions and arthrofibrotic tissue

The operative notes again describe significant scar tissue related to the continuing dysfunction of her knee. She was thereafter rated at 14% to the right knee and 20% to the left knee by her treating orthopaedic surgeon, Shane Woolf on January 12, 2012.

Ms. Brown is significantly impaired as a result of the accident. She has trouble with steps, being on her feet for long periods, walking long distances. She could certainly never return to the job where she worked at the time of the accident (I should perhaps note that I am well acquainted with the accident location) because of stairs between the store and gas pump area.

In addition to the functional limitations that impact both her ability to work and carry out normal daily living requirements, she has significant permanent scarring that is not just unsightly but somewhat shocking in appearance.

Ms. Brown had a documented subarachnoid hemorrhage on her CT scan at the emergency room. She continues to experience mild closed head injury symptoms which are permanent in nature. I have quite extensive experience with traumatic brain injuries and have spent hours discussing those injuries with physicians whose practices focus on their treatment. I have learned that patients with poor scans can have good recoveries, while patients with good scans, can have poor recoveries. Ms. Brown has experienced a good recovery, but she will never be the same person she was immediately prior to her injury.

Ms. Brown was 31 years old at the time of the accident which would have given her a life expectancy of 50 years pursuant to Section 19-1-150 of the S.C. Code of Laws.

Although the case pending in Charleston County generally means a somewhat conservative jury venue, the aggravated nature of the liability and her personality would, in my estimation, offset that factor significantly. Indeed, I would not be surprised if she were awarded punitive damages in an amount of 25 - 50% of her actual damages. In this regard, I would note that I have observed her attorney, Donald Howe, in court and he would more than likely obtain a significant award of punitives in a case such as this.

As for her damages, it is my opinion that the total cognizable damages (from an actual damages standpoint) would be approximately \$1,250,000 - \$1,450,000 based on the following:

1. Past Medical Expenses
2. Past Lost Wages
3. Past Pain and Suffering
4. Past Emotional Distress
5. Past Loss of Enjoyment of Life
6. Future Medicals (scar revision)
7. Past Disfigurement
8. Future Disfigurement
9. Future Pain and Suffering
10. Future Emotional Distress
11. Future Loss of Enjoyment of Life
12. Future Loss of Earnings

As a practical matter, my experience has been, and my opinion is, that because of the punitive damage threat, this case would be settled in a mediation setting for not less than 1.4 million dollars and that, if tried, would render a verdict of actual and punitive damages of 1.5 to 2.0 million dollars.

With kind regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Edward D. Buckley, Jr.

EDB/lrb

MEDICAL PACKAGE

Latika Brown v. John H. Dubose
Automobile/Pedestrian Accident on November 19, 2008

PROVIDER:	COSTS:
1. Charleston County EMS (11/19/08)	\$389.00
2. Charleston Memorial Hospital (11/19/08)	\$3,509.00
3. MUSC (11/19/08 - 11/22/08)	\$12,630.01
(12/2/08 - 12/4/08) Bilateral Knee Surgery	\$55,488.25
(1/15/09) X-Ray	\$466.00
(4/16/09) X-Ray Knees	\$466.00
(5/1/09 - 5/4/09) Left Knee Surgery	\$24,511.80
(5/11/10) MRI Knee	\$1,684.00
(8/13/10) Left knee Surgery	\$17,774.80
4. University Medical Associates (11/19/08 - 9/28/09)	\$53,366.00
(10/26/09 - 9/23/10)	\$15,022.00
Shane K. Woolf, M.D. MUSC - Department of Orthopaedic Surgery (11/24/08 - 9/23/10) 1/12/10 Impairment Rating 14% Right Knee & 20% Left Knee	
5. MUSC Physical Therapy (3/2/09 - 11/30/09)	\$9,907.00
(9/1/10 - 9/30/10)	\$1,707.00
6. L. Riley Cates, D.M.D. Express Dental Care, LLC (4/28/09 - 6/22/09)	\$1,916.00
7. Charles J. Beischel, M.D., Ph.D. MUSC Storm Eye Institute (4/9/09)	\$45.00

Re: Latika Brown
Page Two

- | | | |
|-----|---|-----------------|
| 8. | Aljoeson Walker, M.D.
MUSC Department of Adult Neurology
(4/24/09 - 7/24/09) | \$90.00 |
| 9. | Jeffrey W. Buncher, M.D.
Charleston Pain and Rehabilitation
(10/1/09 - 12/8/09) IME Blood Pressure
(12/21/09 - 7/15/11 and continuing) Knees | \$3,320.59 |
| 10. | L. Randolph Waid, Ph.D.
(4/12/10 - 4/21/10) | \$1,500.00 |
| 11. | A. H. Trey Ginn, III
Rehabilitation Centers of Charleston
(10/12/10) FCE | \$450.00 |
| 12. | Prescriptions - CVS Pharmacy
(11/21/08 - 10/7/09) | \$504.68 |
| 13. | Peter C. DeVito, M.D.
(3/5/11) | <u>\$500.00</u> |

TOTAL MEDICALS TO DATE: \$205,247.07

OFFICE NOTE:

March 5, 2011

BROWN, LATIKA

Latkia Brown is a very pleasant 34 years old woman who was struck by a truck while she was working at a service station near a gasoline dispensing pump on November 19, 2008. The patient was struck from her left side and was lifted into the air and thrown onto her head. The patient was rendered unconscious. She apparently did have intracerebral bleeding and edema. Her injuries required emergency transfer to the Medical University Trauma Center where she remained hospitalized for over week. The patient sustained severe injuries to both of her knees. Apparently, the blow to the lateral aspect of her knees resulted in multi support ligament disruption requiring extensive surgical reconstruction. The patient exhibits an extremely wide surgical cicatrix along the lateral aspect of the right thigh, knee, and lower leg and a similar scar across the medial left thigh knee and lower leg. Apparently, through these large exposure, surgical incisions extensive reconstruction was required to repair the ligaments such as the anterior cruciate. The patient believes her meniscus was also repaired. She states that she does have plates and screws in both legs and knees. The left leg required two more procedures, the third one apparently being laparoscopic type surgery. The previous procedures were open procedures. Although the patient is able to ambulate and her reconstructive orthopedic surgeons are to be congratulated on splendid care, the patient is left with unavoidable problems. She states the scarring itself was extremely thick, burningly painful and pruritic. These scars apparently developed into extremely hypertrophic scars bordering on keloid formation. The scarring is extremely disfiguring and it is symptomatic. Eventually, scar reconstruction will be required to help narrow the width of these scars and incorporation of z or w plasty across the joint space areas will help to relieve binding tension. Scar reconstruction should be deferred however until it is certain that the patient will not require further open exploration and for either additional or removal of orthopedic hardware. These scars would benefit from treatment with intralesional corticosteroids. This would help to soften the scars and make them soft and pliable in preparation for eventual scar reconstruction. Although improvement in both appearance and function can be anticipated, the patient will most likely be left with knee symptoms to include pain, ankylosis and limitation in range of motion indefinitely.

The patient will most likely have persistent residua from the closed head injury with headache symptomatology.

Peter C. de Vito, M.D.

Peter C. de Vito, M.D., F.A.C.S.
DBNR

PCD:ths

Peter C. de Vito, M.D.
PLASTIC AND RECONSTRUCTIVE SURGERY
1050 ST. ANDREWS BLVD.
CHARLESTON, SOUTH CAROLINA 29407

TELEPHONE (843) 571-2350

03/20/12

Donald Howe, Esquire
P O Box 598,
Charleston SC, 29402

RE: Latika Brown

Dear Mr. Howe

This letter is regarding the future medical treatment required to assist Latika Brown; these are a direct result of the accident which occurred on November 19, 2008, when my patient sustained severe injuries. The following treatments and fees would be recommended:

The surgical fee for scar revision of the right leg would be-\$2,500.00. The hospital, operating room, and anesthesia fees could range from \$4,000.00 to \$8,000.00 or more depending upon the length of stay, etc.

The surgical fee for scar revision of the left leg would be-\$2,500.00. The hospital, operating room, and anesthesia fees could range from \$4,000.00 to \$8,000.00 or more depending upon the length of stay, etc.

It should be understood, however, that while these procedures will improve the scarring, the patient will still be left with noticeable scars due to the nature of the injury.

If further information is needed to assist my patient, please do not hesitate to contact my office.

Very truly yours,

Peter C. de Vito, M.D.

Peter C. de Vito, M.D., F.A.C.S.
DBNR

PCD:ths

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

COMMISSIONERS WILKERSON, WILLIAMS AND BECK

APPELLATE CASE NUMBER: 2012-213707

LATIKA BROWN,

Appellant,

v.

THE PANTRY, INC.

Respondent,

AND

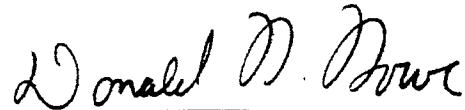
ACE AMERICAN INSURANCE COMPANY
c/o RISK ENTERPRISE MANAGEMENT, LTD.

Respondents.

AMENDED NOTICE OF APPEAL

Latika Brown appeals the decision of the South Carolina Workers' Compensation Commission dated December 3, 2012. Appellant received a copy of this decision December 3, 2012. Notice of Appeal was filed by Appellant on December 21, 2012.

January 15, 2013



Donald H. Howe
Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402-6121
Attorney for Appellant
SC Bar#2690

Other Counsel of Record:
Amanda A. Mellard
McAngus Goudelock & Courie
Post Office Box 2980
Greenville, SC 29602
(864)239-4000
Attorney for Respondent

THE STATE OF SOUTH CAROLINA	)	
IN THE COURT OF APPEALS	)	
	)	APPELLANT/CLAIMANT'S
WCC FILE NUMBER: 0818970	)	ENUMERATION OF ERROR
	)	
LATIKA BROWN,	)	Appellant,
v.	)	
THE PANTRY, INC.,	)	Respondent.

The claimant will base her appeal on the following errors of the three member panel of Commissioners of the South Carolina Workers Compensation Commission:

1. In a situation in which the Claimant settled her third-party tort action for \$505,000.00 out of \$525,000.00 of available insurance coverage, The South Carolina Workers Compensation Commission erred in ruling that the Claimant, by failing to give prior written notice of the settlement to the carrier, thereby forfeited her rights to reduce the lien of the carrier by an amount of reasonable attorneys' fees and expenses and principles of equity as provided in 42-1-560.
2. The South Carolina Workers Compensation Commission failed to properly apply the guidelines pronounced by the South Carolina Supreme Court in Kirkland v. Allcraft Steel Co., 320 S.C. 289, 496 S.E.2d 624 (1998) when it refused to reduce the lien of the workers' compensation carrier by any amount.
3. The South Carolina Workers Compensation Commission erred when it failed to follow the statutory language of 42-1-560 in failing to provide for any amount of reasonable attorneys' fees to be deducted from the amount of money ultimately awarded to the carrier for its lien.
4. The South Carolina Workers Compensation Commission erred when it failed to reduce the amount of the workers' compensation carrier's lien by any amount based on the fact that no prior written notice was given to the carrier even though there was no prejudice to the carrier.
5. The South Carolina Workers Compensation Commission erred in affirming the ruling of the original commission that the third party settlement was "not to the benefit of the carrier" pursuant to 42-1-560 despite the fact that he awarded the carrier \$219,496.90.

6. The South Carolina Workers Compensation Commission erred when it failed to admit into evidence and consider medical evidence by Dr. Peter DeVito, a plastic surgeon, about future potential surgery available to the Claimant to improve her extensive scarring.

December 21, 2012



Donald H. Howe
Howe & Wyndham, L.L.P.
Post Office Box 598
Charleston, SC 29402-0598
(843) 853-6121
Attorney for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NO. 2012-213707

LATIKA BROWN,.....APPELLANT,

v.

THE PANTRY, INC.,.....EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
RISK ENTERPRISE MANAGEMENT, LTD, ...RESPONDENTS.

CERTIFICATE OF COUNSEL

Appellant, Latika Brown, hereby certifies pursuant to South Carolina Rules of Appellate Procedure 210(g) that the Record on appeal contains all material proposed to be included by any of the parties and not any other material.

LAW OFFICES OF DONALD H. HOWE, LLC



Donald H. Howe, Esquire
47 State Street
P. O. Box 598
Charleston, SC 29402
(843) 853-6121

August 1, 2013

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NO. 2012-213707

LATIKA BROWN,.....APPELLANT,

v.

THE PANTRY, INC.,.....EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
RISK ENTERPRISE MANAGEMENT, LTD, ...RESPONDENTS.

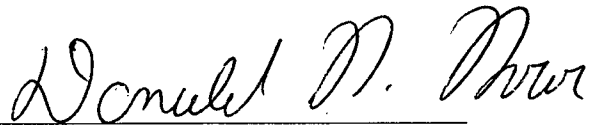
PROOF OF SERVICE OF RECORD ON APPEAL

I hereby certify that on the 2 day of August, 2013, I served a copy of the Record on Appeal upon opposing counsel by mailing a copy of the same in the United States Mail, with sufficient postage affixed as follows:

Weston Adams, III
M. McMullen Taylor
McAngus Goudelock & Courie, LLC
Meridian 10th Floor
1320 Main Street
Post Office Box 12519
Columbia, SC 29211-2519

Helen F. Hiser
735 Johnnie Dodds Boulevard, Suite 200
Post Office Box 650007
Mt. Pleasant, SC 29465

LAW OFFICES OF DONALD H. HOWE, LLC

A handwritten signature in cursive script, reading "Donald H. Howe", written over a horizontal line.

Donald H. Howe, Esquire
47 State Street
P. O. Box 598
Charleston, SC 29402
(843) 853-6121

August 2, 2013.

ATTORNEY FOR APPELLANT