THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2019-000613

James M. Stevenson, Claimant, Appellant

v.

Arnold Laney d/b/a Metal and Roofing Shingle Pros, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents

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INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

STATEMENT OF ISSUES ON APPEAL

I. **THE WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED THAT EMPLOYER WAS NOT SUBJECT TO TERMS AND PROVISIONS OF THE WORKER'S COMPENSATION ACT.**

II. **THE WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED, AS MATTERS OF FACT, THAT THE ALLEGED EMPLOYER'S TESTIMONY WAS CREDIBLE AND CLAIMANT'S TESTIMONY WAS NOT CREDIBLE.**

III. **IF THE COMMISSION ERRED IN DETERMINING THAT CLAIMANT WAS NOT AN EMPLOYEE UNDER S.C. CODE ANN. § 42-1-130, THE ERROR IS HARMLESS BECAUSE MR. LANEY IS NOT SUBJECT TO THE S.C. WORKERS' COMPENSATION ACT.**

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. James M. Stevenson (Appellant) filed a Form 50, Request for Hearing, on January 30, 2018. The South Carolina Workers' Compensation Uninsured Employers' Fund's (Respondent UEF) filed a Form 51, dated March 2, 2018, denying the claim. Arnold Laney d/b/a Metal & Roofing Shingle Pros (Employer) did not file a Form 51; therefore, a general denial was entered on his behalf per S.C. Code Ann. Reg. 67-603. Claimant alleged injuries to his right ankle, leg, and back as a result of a fall from a ladder on January 16, 2018.

The matter was heard by the Single Commissioner on May 1, 2018. The Single Commissioner issued his Order on June 29, 2018. The Single Commissioner found, *inter alia*, that the Employer was not subject to the terms and provisions of the South Carolina Workers' Compensation Act (the Act) because he did not, at any relevant time, regularly employ four (4) or more persons within South Carolina. The Single Commissioner further found as fact that the Employer's testimony was credible. Accordingly, Claimant's claims for benefits were denied.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp.*, 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004).

The appellate panel is the ultimate fact finder in Workers' Compensation cases, and it is not bound by the single commissioner's findings of fact. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The ultimate determination of a witness' credibly and the weight of such evidence is reserved to the appellate panel. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000). The existence of inconsistent conclusions that may be drawn from the evidence does not preclude the administrative agency's findings from being based on substantial evidence. *DuRant v. South Carolina Dep't of Health & Envtl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). When such conflicts in the evidence concerning a factual issue exist, the findings of the appellate panel are conclusive. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). However, if the factual issue before the Commission involves a jurisdictional question, this court's review is governed by the preponderance of evidence standard. *Nelson v. Yellow Cab Co.*, 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000) *aff'd* 349 S.C. 589, 564

S.E.2d 110 (2002). While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. *See Dawkins v. Jordan*, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000) (*citing Ford v. Allied Chem. Corp.*, 252 S.C. 561, 167 S.E.2d 564 (1969)).

STATEMENT OF FACTS

Claimant alleged that he was injured in the course and scope of his employment with Mr. Laney. R. ; Tr. p. 5, ll. 16 – 18. Claimant alleged that Mr. Laney was subject to the terms and provisions of the Act by regularly employing four (4) or more employees within South Carolina, but that he failed to acquire necessary workers' compensation coverage. R. ; Tr. p. 5, ll. 18 – 22. Respondent UEF asserted that Mr. Laney was not subject to the Act. Tr. p. 6, ll. 21 – 23.

The only evidence regarding the number of employees was gathered through the testimony of the Claimant and the Mr. Laney. Record as a whole. Claimant testified that he has been employed by Mr. Laney since April 17, 2017. R. ; Tr. p. 9, ll. 15. Claimant testified to only five (5) jobs worked with Mr. Laney. R. ; Tr. p. 10, l. 9; p. 12, l. 5; p. 12, ll. 14 – 15; p. 16, ll. 12 – 17; and p. 27, ll. 10 – 22.

As to the first job worked, Claimant testified as follows regarding the number of people on the job: "And we had – we had five guys and one lady . . . And if you want to count [Mr. Laney], that would be seven." R. ; Tr. p. 10, ll. 12 – 15. The Claimant did not say the names of the individuals on the job, nor did the Claimant testify as to whom employed the alleged other individuals on the job. Record as a whole.

On the second job discussed, Claimant testified that Billy Whitaker, Scott Faile, Claimant's father, and "another fella" were on the job. R. ; Tr. p. 12, ll. 5 – 8. On cross-examination, Claimant

testified there were "*about* seven people" on this job, though previously testified there were only five (5) people on the job. R. ; *Id.*; Tr. p. 29, l. 6 (emphasis added). He testified the seven (7) people working were the Mr. Laney (the alleged employer), Billy Whitaker, Scott Faile, Walt, Lonnie Laney (whom he later testified was the general contractor on this job), himself, and "another laborer." R. ; Tr. p. 29, ll. 14 – 16; p. 30, l. 21; R. ; Tr. p. 30, ll. 21 – 24.

Claimant also testified that Billy Whitaker would only work with Mr. Laney "whenever he wasn't working at his other job . . . ." R. ; Tr. p. 29, ll. 24 – 25. Claimant did not know Walt's last name. R. ; Tr. p. 30, l. 8. Subsequently, Claimant testified that Lonnie Laney had subcontracted this job to Mr. Laney. R. ; Tr. p. 30, ll. 21 – 24. Accordingly, Lonnie Laney couldn't be an employee of Mr. Laney where Lonnie Laney hired Mr. Laney to perform the work. Further, Claimant failed to testify as to who actually employed any these people; he only testified that they were present on the job site. Record as a whole.

On the third job discussed, Claimant testified that "there was five (5) *or so* on that job." R. ; Tr. p. 12, ll. 21 – 22 (emphasis added). Claimant gave no names of these individuals and didn't testify as to who employed them. Claimant only testified that they were present. Record as a whole.

The fourth job discussed was the one where the alleged accident occurred. Claimant testified, "it was me and my father and the other guys . . . . And then he [Mr. Laney] told me, the day before that, that I, you know, bring my brother in." R. ; Tr. p. 16, ll. 14 – 17. That is the extent of the testimony regarding number of people on the job. Record as a whole.

As to the fifth job discussed, Claimant testified there were "five to six people" on that job. R. ; Tr. p. 27, l. 20. Claimant didn't testify who employed those people, only that they were present. Record as a whole. That is the extent of the testimony regarding number of people on

the job. Record as a whole.

When asked about the regularity of the alleged employees, Claimant said, "Well, people come and go. I mean, I've worked on a few jobs with a few different people." R. ; Tr. p. 31, ll. 17 – 18. Subsequently, Claimant was asked, directly, "There were really no regular people who ever worked for Mr. Laney, were there?" Claimant replied, "I imagine so. Yeah. I mean, just like I did." R. ; Tr. p. 31, l. 24 – p. 32, l. 1.

On direct examination, Claimant testified that he's worked "[c]onstruction labor" "[p]retty much since I got out of high school." R. ; Tr. p. 9, ll. 6 – 9. On cross examination, Claimant admitted that, for the past twelve (12) years, he worked for water sprinkler companies. R. ; Tr. p. 21, l. 12 – p. 23, l. 5. Claimant said he done some side work in building construction, though, during that time. R. ; Tr. p. 23, ll. 3 – 5. When asked for whom he worked, Claimant responded, "Just this – this, you know, just people." R. ; Tr. p. 23, l. 7.

Claimant testified that, in the past ten (10) years, he has been convicted of four (4) crimes, including receiving stolen good, possession of marijuana and a controlled substance. R. ; Tr. p. 23, l. 25 – p. 24, l. 1.

Arnold Laney also testified. He testified he had been in the roofing business for forty-two (42) years. R. ; Tr. p. 42, l. 11. However, after this incident, he stopped doing any business whatsoever. R. ; Tr. p. 42, l. 13. Mr. Laney testified he normally worked "two or three [people] because I couldn't find nobody else to work. No good. Why work four laborers, five laborers, when they don't know how to do it? So that'd be crazy." R. ; Tr. p. 46, ll. 20 – 23. Mr. Laney further testified that, "I've not had regular employees, period. Ever." R. ; Tr. p. 47, l. 1. He testified that Claimant's father worked a few days a month. R. ; Tr. p. 47, ll. 4 – 5. Claimant's father also worked for someone else, a roofer. R. ; Tr. p. 47, ll. 9 – 11. Mr. Laney testified that

Scott Faile was a subcontractor rather than an employee. R. ; Tr. p. 47, l. 24. Even then, he only worked four (4) days per month. R. ; Tr. p. 53, l. 1. Mr. Laney testified that he "very seldom had four of my own people – now I have before – but not on a regular basis or nothing like that." R. ; Tr. p. 48, ll. 7 – 10.

Mr. Laney testified that Claimant's brother only worked a "week or two" for him. R. ; Tr. p. 49, l. 9. He further explained, "when I say a week or two, I mean, like, four or five days." R. ; Tr. p. 49, ll. 12 – 13. Mr. Laney elaborated: "Like a day here and then two days there and then half day here – like that. I don't – I ain't never worked full time. In years, on nothing." R. ; Tr. p. 49, ll. 15 – 18. He said that Claimant would only work "a couple of days" per week. R. ; Tr. p. 51, l. 19. He added, "Sometimes they'd come in, sometimes they wouldn't." R. ; Tr. p. 51, ll. 22 – 23.

ARGUMENTS

I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED THAT MR. LANEY WAS NOT SUBJECT TO TERMS AND PROVISIONS OF THE WORKER'S COMPENSATION ACT.

It is axiomatic that the burden of proof is on the claimant to prove facts which will bring the injury under the coverage of the Workers' Compensation Act. *See, e.g., Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998); *Bartley v. Allendale County Sch. Dist.*, 381 S.C. 262, 272, 672 S.E.2d 809, 814 (Ct.App. 2009). The Claimant/Appellant herein produced only his own testimony regarding the number of employees Mr. Laney employed. The sole other witness was Mr. Laney, whose testimony debunked Claimant's.

S.C. Code Ann. § 42-1-150 defines "employment" to include "private employments in which four or more employees are regularly employed in the same business or establishment." Further, S.C. Code Ann. § 42-1-360(2) exempts from the Act all employers who regularly employ

fewer than four (4) employees within South Carolina. While the Courts have written that Workers' Compensation statutes are construed liberally in favor of coverage, "a construction should not be adopted that does violence to the specific provisions of the Act." *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720, 723 (1964). In a seminal opinion, this Court wrote:

> The controlling number of employees is determined in light of the employer's established mode or plan in the operation of its business. If it regularly employs the requisite number, the employer remains covered although the number employed falls temporarily below the minimum. Ordinarily only such employees as would themselves be subject to the act are included in the count. Details of interpretation should be controlled by the underlying purpose of the exemption, which is to avoid administrative inconvenience to very small employers.
>
> The most common problem under the usual wording of statutes conferring this type of exemption is the question of whether the employer "regularly" employs more than the minimum number. Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer cannot be allowed to oscillate between coverage and exemption as its labor force exceeds or falls below the minimum from day to day. . . . In all these cases, the fact that the number working at the exact time of injury was below the minimum is of course immaterial . . . .

Hernandez-Zuniga v. Tickle, 647 S.E.2d 691, 696, 374 S.C. 235 (Ct.App. 2007). This Court went on to write, "North Carolina Courts have interpreted 'regularly employed' as 'employment of the same number of persons throughout the period with some constancy." *Hernandez-Zuniga*, 647 S.E. at 698.

Mr. Laney is exactly the type of small employer that should be exempt from the Act. The testimony reflects that he worked infrequently, and when he did he hobbled together a rag-tag crew of a few guys to help him out. The Act isn't meant to dissuade people from engaging in business in the State or to giving work to those who can do it and need it. Requiring Mr. Laney – a man who the credible evidence shows did some roofing work a couple days a week, while putting two or three people to work along with him – to have Workers' Compensation insurance would dissuade him from engaging in business and employing South Carolinians. In fact, he has stopped

doing any work whatsoever since this incident. R. ; Tr. p. 42, l. 13.

In his Brief, Appellant asserts that Mr. Laney should be counted in the jurisdictional number ("Steven testified that on the first job he worked for Employer there were seven employees total, including Laney," Brief of Appellant, p. 3). However, this ignores that Mr. Laney was a sole proprietor, and sole proprietors *must* elect coverage under the Act to be covered ("Any sole proprietor . . . whose employees are eligible for benefits under this title *may elect to be included* as employees under the workers' compensation coverage . . . if they are actively engaged in the operation of the business and *if the insurer is notified of their election to be included.*"). S.C. Code Ann. § 42-1-130 (emphasis added). All parties agree that Mr. Laney was uninsured. Therefore, Mr. Laney did not elect to be covered. Further, the Act requires a "contract for hire" in order to establish an employment relationship. S.C. Code Ann. 42-1-130. A "contract of hire" is "an essential feature of the employment relation" 1B Arthur Larson, *The Law of Workmen's Compensation* § 47.10, at 8-302 (1992). Of course, Mr. Laney cannot contract with himself: by definition, a contract is "[a]n agreement between *two or more parties . . . .*" *Black's Law Dictionary* 318 (7th ed. 1999). Mr. Laney's operation was not incorporated or organized with the Secretary of State; therefore, the business is not a separate and distinct legal entity.[1]

The Commission determined, as a fact, that Mr. Laney did not, at any time relevant hereto, regularly employ the requisite number. The Commission only had the testimony of the interested parties on which to rely. The Commission determined that one witnesses' testimony was credible, while simultaneously determining that the other witnesses' testimony was not credible. Further, even if the Commission had made the opposite determination, Claimant didn't testify as to whom actually employed anyone else on the jobs he worked. We are left to speculate as to whom was

[1] If this matter were to be found to be compensable, Mr. Laney would be personally liable for the payment of benefits under S.C. Code Ann. § 42-7-200.

their employer, and we are left to speculate as to whether or not anyone employed them. These omissions in the testimony are made even more glaring when Claimant counted both Mr. Laney (a sole proprietor who cannot be his own employee, as an employment relationship requires a contract for hire) and Lonnie Laney (the individual who hired Mr. Laney to do the work) as some of the people on the jobs. R. ; Tr. p. 29, ll. 14 – 16; p. 30, l. 21; *See* S.C. Code Ann. § 42-1-130.

Therefore, for the reasons set forth herein and those that may be presented at oral arguments of this matter, the UEF respectfully requests that the Order of the Workers' Compensation Commission be affirmed.

II. THE WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINED, AS MATTERS OF FACT, THAT THE ALLEGED MR. LANEY'S TESTIMONY WAS CREDIBLE AND CLAIMANT'S TESTIMONY WAS NOT CREDIBLE.

It is well established that the Full Commission is the ultimate finder of fact and is free to make its own findings of fact and reach its own conclusions of law. In this case, the Commission found Mr. Laney's testimony to be credible. Finding of Fact Two (2) ("Arnold Laney . . . did not have four or more regularly employed employees, and therefore, was not subject to the Act. This finding is based on the credible testimony of Mr. Laney and also the Claimant's testimony that failed to establish the same."). R. ; The Commission also determined that Mr. Laney's testimony was more believable that the vague and convoluted testimony of the Claimant. Claimant was unable to give the names of other alleged employees (Walt Last Name Unknown, "another laborer", "the other guys"); Claimant failed to testify regarding Mr. Laney's alleged employment relationship with any other individual, save that Mr. Laney was hired by Lonnie Laney. As the Commissioner noted in the Order, when Claimant was asked for particular information regarding alleged co-employees, he was unable to give any definite information. For example, he was asked how many jobs Billy Whitaker had worked with him. Claimant responded, "whenever he wasn't

working at his other job." R. ; Tr. p. 29, ll. 24 – 25. Ultimately, Claimant testified, "Well, people come and go. I mean, I've worked a few jobs with a few different people." R. ; Tr. p. 31, ll. 17 – 18.

Mr. Laney testified that he did not have four (4) or more employees regularly employed at any time. Mr. Laney testified that his business was a bit hit or miss, and that finding help was difficult. Mr. Laney testified that Scott Faile and Claimant's father would work with him on weekends. He testified that there were normally only two (2) or three (3) people on his jobs. R. ; Tr. p. 46, ll. 20 – 22. He also testified that he subcontracted work out to Scott Faile. R. ; Tr. p. 53, l. 1. In his Brief, Claimant asserts that, "Stevenson's criminal record was submitted over Stevenson's objection . . . ." Brief of Appellant, p. 16. It should be noted that this issue was not preserved for appeal as it wasn't addressed in the Brief to the Appellate Panel of the Full Commission. R. ; Appellants' Brief to the Appellate Panel. Further, it does not appear in Appellant's Notice of Appeal to this Court. As this Court wrote in 2001:

> In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal. See Rule 208(b)(1)(B), SCACR; *Silvester v. Spring Valley Country Club,* 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001). An appellate brief must be divided into as many parts as there are issues to be argued, and an issue is not preserved for appeal if appellant's brief does not conform to these requirements. See Rule 208(b)(1)(D), SCACR; *Watson v. Chapman,* 343 S.C. 471, 540 S.E.2d 484 (Ct. App. 2000). Further, it is error for the appellate court to consider issues not properly raised to it. *First Sav. Bank v. McLean,* 314 S.C. 361, 444 S.E.2d 513 (1994).

Langehans v. Smith, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001).

The Commission found Mr. Laney's testimony more credible and more believable than that of the Claimant. Where you have only two witnesses on which to rely, a finder of fact must rely on one over the other. Simply because the Act favors inclusion does not lighten Claimant's burden of proof: he must still prove by a preponderance of the evidence that Mr. Laney regularly

employed the jurisdictional number. Claimant failed to do so here. Accordingly, Respondent UEF respectfully requests that the Commission's judgments be given great weight, and that the Order of the Commission be affirmed.

III. IF THE COMMISSION ERRED IN DETERMINING THAT CLAIMANT WAS NOT AN EMPLOYEE UNDER S.C. CODE ANN. § 42-1-130, THE ERROR IS HARMLESS BECAUSE MR. LANEY IS NOT SUBJECT TO THE S.C. WORKERS' COMPENSATION ACT.

The Single Commissioner and Appellate Panel concluded, as a matter of law, the Claimant was not an employee per S.C. Code Ann. § 42-1-130. R. ; Single Commissioner's Order p. 6; Appellate Panel Order p. 4. However, these conclusions were preceded by findings that Mr. Laney was not subject to the Act. *Id.* Therefore, if this conclusion was in error, the error was harmless, as Claimant is not entitled to benefits under the Act regardless of his employment status.

This Court need not address this issue because the Claimant failed to prove by a preponderance of the evidence that Mr. Laney was subject to the Act.. *By Hossenlopp v. Cannon,* 285 S.C. 367, 329 S.E.2d 438 (1985).

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PROOF OF SERVICE

I hereby certify that I have served Respondent UEF's Initial Brief and Designation of Matter to be included in the Record on Appeal of the attorney for Appellant and Respondent Employer by placing them in the U.S. Mail, sufficient post pre-paid, on August 14, 2019, addressed as follows:

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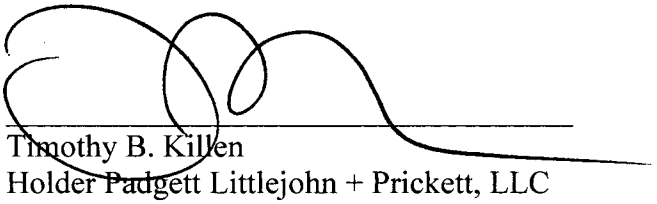
CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent UEF respectfully requests that this Honorable Court affirm the Decision and Order of the South Carolina Workers' Compensation Commission in full.

RESPECTFULLY SUBMITTED,



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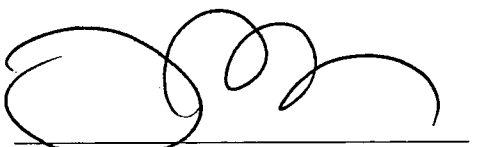
CERTIFICATE OF COUNSEL

I hereby certify on this 14th day of August, 2019, that the Respondent UEF's Designation of Matter to be Included in the Record on Appeal contains no matter which is not relevant to the appeal.

August 14, 2019



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August 14, 2019

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
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Re: James M Stevenson, Claimant, Appellant,
v.
Arnold Laney D/B/A Metal & Roofing Shingle Pros, Employer, and South Carolina Workers' Compensation Uninsured Employers' Fund, Defendants, Respondents.
Appellate Case No: 2019-000613

Dear Ms. Kitchings:

I am enclosing herewith the following documents to be filed in your office:

1. One copy of the Initial Brief of the Respondent South Carolina Workers' Compensation Uninsured Employers' Fund; and

2. Respondent South Carolina Workers' Compensation Uninsured Employers' Fund 's Designation of Matter to be Included in Record on Appeal; and

3. Certificate of Counsel; and

4. Proof of Service upon counsel for the Appellant and Respondent Arnold Laney D/B/A Metal & Roofing Shingle Pros.

Respectfully,

HOLDER PADGETT LITTLEJOHN + PRICKETT

Timothy B. Killen

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