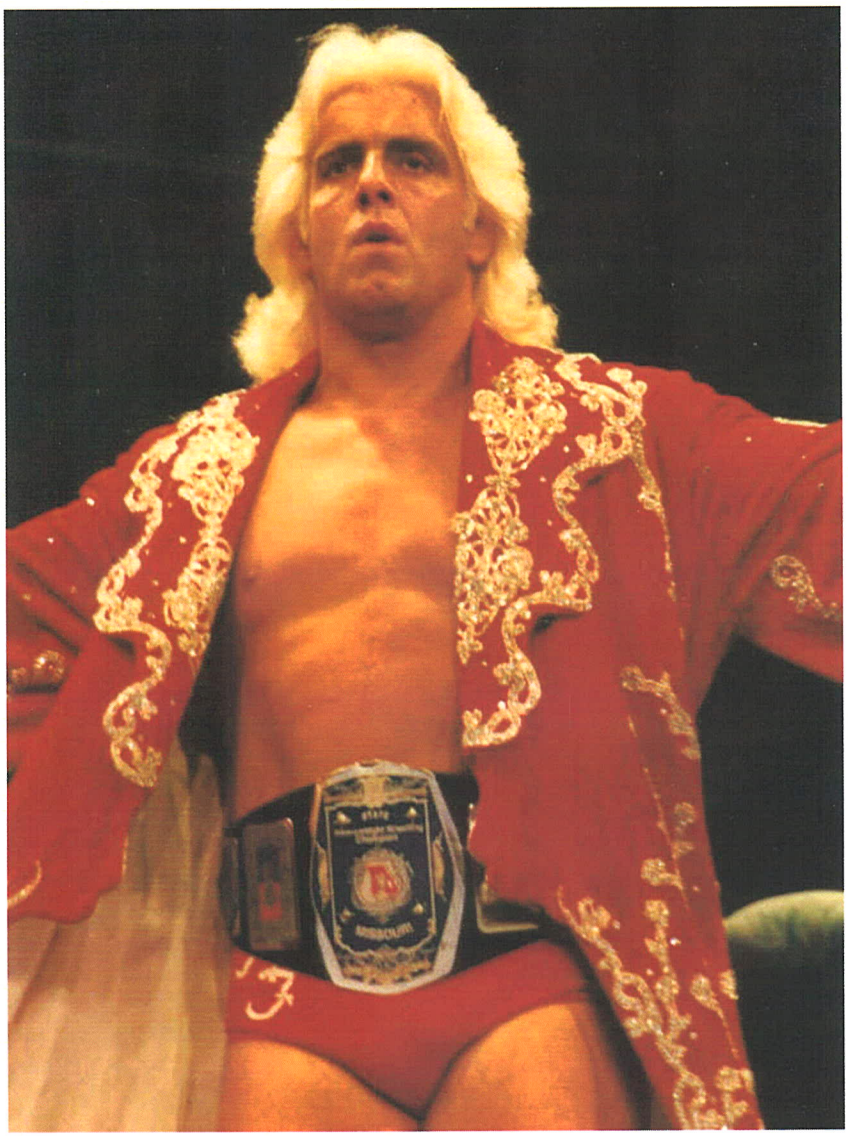
The Nature Boy's Tips to Grappling With The Work Comp Lien And Body Slamming the PI Investigation



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I. GRAPPLING WITH THE WORK COMP LIEN WHEN SETTLING A PERSONAL INJURY CLAIM: AVOIDING MALPRACTICE, MAXIMZING RECOVERY

- We start from the premise that when there is an underlying workers' compensation ("work comp") claim in a personal injury case (aka the "combined case"), there should be two simple yet abiding goals: (1) Avoiding Malpractice, and (2) Maximizing Recovery for your client. These two goals are generally aligned although the potential exists for them to be or to become divergent under certain circumstances.

    - Avoiding Malpractice: as in any other area of the law a certain level of proficiency is required in order to comply with the legal standard of care when handling the combined case (both the work comp and the personal injury case) or when handling the personal injury case when the client/plaintiff does not have a separate work comp attorney.

        - It is suggested that meeting or employing this required level of proficiency would require the attorney not to take any action in the personal injury case that prejudiced the client's work comp claim unless the impact of such actions were fully explained to and understood by the client.

        - Thus, taking some action that led to the termination of the client's work comp benefits could certainly fall below that standard if the claimant was unaware of the resulting consequences.

        - The most obvious example – as discussed below -- would be failing to obtain permission from the work comp carrier before settling the personal injury case which could terminate the client's entitlement to future work comp benefits and require a significantly higher repayment of the work comp lien.

    - Maximizing Recovery: The suggestion is that clients in combined cases do not care – or care less about – the gross amount of their personal injury settlement than their net recovery from the resolution of both cases and/or the effect receipt of personal injury proceeds will have on their ongoing work comp benefits.

        - For example, would the client be happier (1) settling his personal injury case for $250,000 if he only received net settlement proceeds of $50,000 and, after repayment of the work comp lien, faced having his work comp benefits terminated and having to pay for his future medical treatment out

of his own pocket, or (2) settling the personal injury case for $175,000 with a partial or complete corresponding settlement of the work comp case that allowed him to reduce the amount of the work comp lien he had to repay and keep his future medical benefits open without application of a credit?

- If you answered 1, the possibility exists that you may be more concerned with reporting big personal injury results and administering another notch in your belt rather than maximizing your client's recovery.

- In other words, maximizing recovery in combined cases requires consideration of how best to address the work comp lien and negotiate a recovery with the comp carrier that puts your client in the best possible solution.

- And this is where the twin goals of maximizing recovery and avoiding malpractice have the potential to diverge. If the attorney handling the personal injury case is singularly focused on obtaining the highest possible result in the personal injury case or obtaining the largest fee to the detriment or exclusion of the effect that result will have on the work comp claim then the issue becomes whether the attorney exercised the required level of proficiency.

- Subrogation lien: The Virginia Workers' Compensation Act, Va. Code § 65.2-100 *et seq.* ("The Act") permits a work comp client to have only one complete recovery. *Noblin v. Randolph Corp.*, 180 Va. 345, 358-59, 23 S.E.2d 209, 214 (1942). Thus, the employer/comp carrier have a subrogation lien against the proceeds of the personal injury case for all benefits paid to the claimant in the past and all benefits owed in the future.

- Basis for the lien: Va. Code § 65.2-309. KEY POINTS:

  - The statute used to create an equitable subrogation "interest." After an unfavorable decision that denied a carrier repayment [*Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc.*, 226 Va. 57, 580 S.E. 2d 812 (2003)], the statute was amended to specifically create a "lien" in 2004.

  - Pursuant to Va. Code § 65.2-309, the lien is created upon the claimant filing a claim, the claimant giving notice of a claim to his employer, the claimant's receipt of the payment of benefits, or the payment of medical expenses by the carrier to a

medical provider on behalf of the claimant. *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, 444 S.E.2d 3 (1994)

- The comp carrier can enforce lien in its own name if claimant doesn't pursue a claim.

- If the comp carrier pursues the case and recovers more than the lien, the remainder, goes to claimant less a share of attorney fees and costs.

- If the comp carrier pursues the claim in its own name, it cannot settle the case without the permission of the claimant.

- Likewise, if claimant pursues a personal injury case, permission must be obtained from the comp carrier to settle the case.

- If the claimant fails to repay the work comp subrogation lien, the comp carrier can both sue the claimant in a civil action to recover the amount owed on the lien and also likely avoid paying its pro rata share of attorney's fees and costs. Va. Code § 65.2-311(B).

- Obtain Permission to Settle: The most singularly important advice that can be communicated in combined case is that you MUST ALWAYS seek and obtain specific and unambiguous permission from the comp carrier to settle the personal injury case.

  - "[T]he employee may not pursue his common law remedy in such a manner or settle his claim to the prejudice of the employer's subrogation right and thereafter continue to receive workers' compensation benefits." *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, 397, 444 S.E.2d 3, 7 (1994) (emphasis added).

    - "The employee necessarily prejudices his employer's subrogation rights and, thus, is barred from obtaining or continuing to receive benefits under a workers' compensation award when an employee settles a third-party tort claim . . . without obtaining the consent of the employer." *Id.* (emphasis added).

  - If you think permission isn't required in your case or there is some exception that excuses the need for obtaining permission to settle the personal injury case, you are likely wrong, and thus not taking the necessary steps to avoid subjecting yourself to a malpractice claim. Examples where personal injury attorneys sometimes believe permission is not required:

- Permission is not required because the personal injury settlement is larger (or even MUCH larger) than the subrogation lien: NO! You still need permission.

- The comp carrier was sent a check for the full amount of their subrogation lien minus a reduction for fees and costs. NO! You still need permission.

- The comp carrier adjuster advised that it wouldn't be a problem and we would be able to work it out: NO! You still need permission.

- The liability carrier offered the policy limits and there were no other sources of coverage in the personal injury case: NO! You still need permission.

- The client had a different work comp attorney who it was assumed would handle those details: NO! You still need permission.

- The work comp case was already settled before the personal injury case: NO! You still need permission.

- The work comp case was already settled before the personal injury case, with settlement terms that permitted the personal injury attorney to settle the case at his discretion and included specific subrogation lien repayment terms: MAYBE! You should be able to escape an argument that you prejudiced the work comp claim if raised by the comp carrier, but I still recommend you get permission anyway.

- The defendant was uninsured and all of the personal injury proceeds came from the claimant's own UM/UIM coverage which is protected from the lien under Va. Code § 65.2-309.1: Although some disagree, you still need permission because the comp carrier could argue that its rights were prejudiced by language in the settlement release assigning the UM carrier the right to pursue a subrogation against the defendant.

- Form of Permission: Wile nothing specifically prohibits relying on verbal consent to settle, it is recommended that permission be obtained in writing or, at a minimum, that the attorney confirm the consent to settle in writing to the comp carrier.

- Permission should also be obtained for any agreements reached at mediation, for high-low agreements, and agreements to arbitrate, as such agreements arguably limit the comp carrier's potential recovery and thereby impair its subrogation rights.

- Failure to Obtain Permission: Because the comp carrier has a subrogation lien for past payments and because the amount of the personal injury settlement affects future work comp payments, settling the personal injury case without the comp carrier's permission prejudices the rights of the comp carrier.

  - The first penalty for failing to obtain permission from the comp carrier to settle the personal injury case is that the claimant/plaintiff forfeits the right to all future work comp benefits, including both indemnity benefits paid directly to the claimant and medical benefits paid to medical providers for treatment related to the injuries. *Wood v. Caudle-Hyatt, Inc.*, *supra*. *Also Safety Cleen Corp. v. Van Hoy*, 225 Va. 64, 300 S.E.2d 750 (1983).

    - The impact of this penalty on the claimant can be varied depending on whether he is entitled to any additional weekly work comp payments, is still receiving medical treatment, or has any treatment projected in the future.

    - If the client sustains a subsequent accident resulting in a personal injury claim seeking a recovery for injuries to the same body part(s) already the subject of a pending work comp claim, permission should be obtained from the comp carrier prior to settlement just as if the personal injury claim arose out of the same accident. *Green v. Warwick Plumbing & Heating*, 5 Va. App. 409, 364 S.E.2d 4 (1988). Two exceptions exist which limit the impact on the client's future work comp claim when consent to settle is not obtained from the comp carrier:

      - If the injuries caused in the second accident were minor in nature resulting in fleeting symptoms that did not materially alter the symptoms attributable to the work comp accident. *City of Newport News v. Blankenship*, 10 Va. App. 704, 396 S.E.2d 145 (1990).

      - If the second accident only resulted in aggravation to some of the injuries from the work comp claim, the prejudice to the comp carrier – and thus the bar against future compensation and medical expenses – is limited only to the overlapping injuries affected in

the subsequent accident. *United Airlines v. Hayes, Inc.*, 58 Va. App. 220, 708 S.E.2d 418 (2011).

- The second penalty resulting from a failure to obtain permission to settle the personal injury case, is that the claimant forfeits the right to reimbursement of a pro rata share of attorney's fees and costs under Va. Code § 65.2-311. *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001).

  - Although disputed, the facts as accepted by the Court of Appeals in *Skelly* were that a wrongful death case for a decedent who died while at work was settled not only without obtaining the permission of the comp carrier but after a letter from the comp carrier's attorney stating that the plaintiff's attorney was "not authorized to negotiate or settle the claim against third parties." *Id.*

  - As a result, the comp carrier was deprived "of the opportunity to protect or assert its subrogation rights against the third-party tort-feasor." *Id.*

  - Even though the settlement was for more than the comp carrier's maximum liability in the comp claim, the comp carrier retained an interest in the third party case because the amount of the settlement affected the carrier's *pro rata* share of attorney fees and costs. *Id.* Thus, settling the case without the consent of the comp carrier "foreclosed the possibility that [the comp carrier] could lessen its obligation by negotiating a higher settlement." *Id.*

  - The result was that the claimant's right to compensation in the form of reimbursement of attorney's fees and costs was barred. *Id.*

- Comp Carrier's Refusal to Consent: For decades, there was no specific remedy in instances where, because of strategic reasons or spite, the comp carrier refused to engage with the plaintiff's attorney or provide consent to settle the personal injury case.

  - This changed with the passage of Va. Code § 8.01-424.1, which allows the plaintiff to petition the Circuit Court for approval of a settlement offer that is fair and just to the parties where the comp carrier fails to consent to a settlement offer that is acceptable to the claimant.

  - Of note, the statute specifically prohibits the Circuit Court from reducing or compromising the subrogation lien.

- Calculating the Lien Repayment: Pursuant to Va. Code § 65.2-310, the comp carrier has a subrogation lien for compensation, medical expenses and funeral expenses paid to or on behalf of the claimant. Under Va. Code § 65.2-311 requires that reasonable attorney's fees and costs "shall" be apportioned pro rata between the comp carrier and the plaintiff. So what does that mean? *See* Appendix: Sample Calculation Of Work Comp Lien And Credit.

    - The first step is to confirm the amount of the claimed subrogation lien is correct. Many times, the personal injury attorney will receive a letter from the comp carrier or a third party subrogation entity hired by the comp carrier giving a total of the lien or else breaking it down between medical expenses and indemnity benefits paid to the claimant. Experience has shown that many times the comp carrier will include items in these liens that cannot properly be recovered under to Va. Code §§ 65.2-309 & 310. Suggestions for clarifying the lien amount:

        - Request an itemized lien: This can serve dual purposes. One, it allows you to insure that everything included by the comp carrier in the lien can be recovered, and two, it allows you to make sure you aren't missing any bills in the special damages you are claiming in the personal injury case.

        - Because subrogation liens are, as cited above, limited to compensation paid to the claimant, medical expenses, and funeral expenses, the following items – all of which comp carriers have attempted to include in subrogation liens in prior instances -- cannot be included in a subrogation lien and can thus be removed from the gross lien amount: nurse case manager charges, case management services, IME's expenses, vocational rehabilitation charges, attorney's fees, cost containment, record reviews, copying charges, and private investigators. *See Washington v. Miller& Rhoads*, 68 O.I.C. 250 (1989); *Lockwood v. Automatic Control of Tidewater*, 63 O.I.C. 219 (1984).

    - The next step is to calculate the pro rata share of attorney's fees and costs (or "offset ratio" or "recovery ratio") to determine the percentage the comp lien can be reduced. The easiest method of performing this calculation is to add the amount of the attorney's fee and the costs and divide that total by the amount of the gross third party settlement to produce the percentage by which the gross work comp subrogation lien can be reduced. To perform that calculation, multiply the gross subrogation lien by the percentage and subtract that amount from the gross subrogation lien.

- Example: $150,000 settlement, $50,000 fee, $2,500 costs, $75,000 gross comp lien: [$50,000 + $2,500] ÷ $150,000 = .35 (or 35%). Then, $75,000 comp lien x 35% = $26,250 reduction. $75,000 gross comp lien - $26,250 reduction = $48,750 net comp lien repayment amount.

- The subrogation lien attaches to payments received in the personal injury case from all defendants, liability policies or UM/UIM policies on vehicles owned or insured by the client's employer. Any payments made pursuant to settlements or verdicts that are made from UM/UIM policies paid for wholly by the client or by any other family members are exempt from the subrogation lien. Va. Code § 65.2-309.1.

    - In cases where payments are received from a combination of liability policies, UM/UIM on the employer's vehicle and UM/UIM on the client's personal vehicle it is recommended that the attorney prepare two separate Disbursement Statements, one for those funds that are subject to the subrogation lien and one for those funds that are not subject to the lien.

- There are no additional legal rights or remedies that allow the plaintiff to avoid, void or reduce the comp carrier's subrogation lien.

    - This can result in a hardship in cases where there are minimum coverage limits and the comp subrogation lien exceeds either the gross personal injury recovery or the net recovery after attorney's fees and costs. In these situations there is no legal authority to require the comp carrier to reduce its lien even where the client will receive nothing or minimal proceeds from the personal injury case.

    - In a wrongful death case, you cannot avoid the subrogation lien by directing all of the personal injury proceeds to a beneficiary who didn't qualify for benefits in the comp claim or by having a statutory beneficiary who received death benefits in the work comp claim renounce their right to share of the wrongful death recovery. *Liberty Mutual Insurance Co v. Fisher*, 263 Va. 78, 557, S.E. 2d 209 (2002).

- The comp carrier can file a petition to have the Circuit Court determine the lien and the pro rata share under Va. Code § 65.2-310. Many comp carriers will agree not to file the petition if you agree to recognize and protect their lien. That may require some horse-trading over items contained in the itemized lien.

- Reducing Your Fee: Many attorneys have suggested that to get around the effect of the comp lien on their client's net recovery they can reduce or even split their fee with their client, especially in circumstances where the comp lien either exceeds the personal injury recovery or else results in a minimal recovery to the client. Pursuing this strategy is strongly discouraged!

    - The repayment amount of the lien is based not on the amount of fee the lawyer can claim under the terms of the retainer BUT the amount of the fee actually taken from the settlement proceeds. Va. Code § 65.2-311 requires the reasonable expenses and reasonable attorney's fees of such claimant" to be apportioned on a pro rata basis.

    - Thus, reducing the attorney's fee in the personal injury case reduces the comp carrier's pro rata share of fees and costs, thereby requiring more of the settlement to be paid to the comp carrier. In other words, in circumstances where the work comp lien exceeds the personal injury recovery, the entire amount of any reduction in the attorney's fee would be required to be paid to the comp carrier in satisfaction of the lien.

    - Failure to recalculate the lien after reducing the attorney's fee in the personal injury case fee has the potential for significant adverse consequences by increasing the amount owed to the comp carrier for the past subrogation lien and reducing the payments owed to the claimant under the offset ratio.

        - The comp carrier could easily learn of the fee reduction by propounding discovery requiring production of the Disbursement Statement from the personal injury case in order to calculate the Third Party Order, the amount of the credit and the offset ratio. *See Benson v. Abbit Management, Inc.*, VWC File No. 192-08-58 (Aug. 2, 2006) (holding that the comp carrier is entitled a breakdown of the disbursements from the personal injury settlement to calculate its responsibility for payments under the offset ratio),

        - Upon discovering the attorney's fee had been, the comp carrier could file a claim for fraud under Va. Code § 65.2-712 or a claim seeking reimbursement for the entire pro rata share of attorney's fees and costs under of Va. Code § 65.2-311(B) which states that the comp carrier is not required to pay a pro rata share of attorney's fees and costs if required to institute an action against "any party to recover some or all of its lien . . .."

- A Gift?: On the other hand, no known legal authority prevents a caring and compassionate attorney who believes his client was poorly served by the workers comp and civil justice system from making a financial gift to a client in an amount of the attorney's choosing.

    - The personal injury attorney would bear the tax consequences for a gift unlike a reduced attorney's fee where taxes are only owed on the amount actually paid into the attorney's operating account as a fee.

    - While not legally tested, it is recommended that any attorney pursuing this course pay the full attorney's fee used as the basis for calculating the net subrogation lien Va. Code § 65.2-311 from the attorney's escrow account into the operating account, that any Disbursement Statement make clear that the full attorney's fee was collected, and that any transmittal documentation to the client clearly state that the payment represents a gift unrelated to the proceeds or attorney's fee associated with the personal injury claim.

- Impact Of Settlement On Future Work Comp Benefits: Under the terms of Va. Code § 65.2-313, any time the gross settlement amount in a personal injury claim exceeds the total past work comp subrogation lien, the comp carrier is entitled to a credit – or offset – for the amount of that difference.

    - Calculation of Credit: Gross personal injury settlement minus total work comp lien = comp carrier's credit.

        - Of note: the credit is difference is between the past work comp subrogation lien and the gross personal injury settlement not the client's net recovery.

        - Prior Example: $150,000 settlement, $50,000 fee, $2,500 costs, $75,000 gross comp lien: $150,000 settlement - $75,000 comp lien = $75,000 credit or offset.

        - If you successfully negotiate a reduction in the past work comp lien, the credit then becomes based on the reduced amount accepted by the comp carrier rather than the amount of the original gross work comp subrogation lien. Thus, when the comp carrier voluntarily reduced their lien, the effect is to increase the credit they are due against future work comp benefits.

McKnight v. Work Environment Associates, 43 Va. App. 189, 596 S.E.2d 573 (2004); *Toney v. Hertless Brothers Roofing, Inc.*, 09 WC UNP 2286010 (2009).

- Offset Ratio: Because the comp carrier also remains liable for a pro rata share of attorney's fees and costs for the amount of the future work comp benefits that are being offset, the comp carrier must reimburse or pay to the client "a percentage of each further entitlement as it is submitted equal to the ratio the total attorney's fees and costs bear to the total third party recovery until such time as the accrued post-recovery entitlement equals the sum which is the difference between the gross recovery and the employer's compensation lien." Va. Code § 65.2-313.

  - In English, please!:

    - The comp carrier gets to terminate all weekly work comp payments to the claimant and payment for all accident related medical expenses until those payments equal the difference between the gross personal injury recovery and the total subrogation lien.

    - That same percentage used to reduce the past subrogation lien now becomes the "offset ratio." (35% in our example).

    - The full amount of every weekly work comp check owed to the claimant and every accident related medical expense count against the credit (or offset) on a dollar for dollar basis. *Lee v. Allstate Insurance Co.*, JCN 2333734 (Oct. 24, 2012).

    - However, the comp carrier must pay the claimant the "offset ratio" for each weekly work comp check and every incurred medical expense that was owed "but for" the credit.

  - Prior example: Comp carrier's credit is $75,000, offset ratio of attorney's fees and costs is 35%. If claimant owed weekly compensation checks of $600 prior to the settlement, each week the credit is reduced by $600, and each week the comp carrier owes the claimant $210 ($600 x 35%). If the claimant requires a medical test or MRI costing $1,000, he must pay it out of pocket and then be reimbursed $350 ($1,000 x 35%) although the full $1,000 is then counted against the credit.

- After the personal injury settlement, the comp carrier will terminate payment of weekly work comp checks and medical expenses. Either the claimant or the comp carrier will then file a claim with the Commission for entry of a Third Party Order. *See* Appendix

- The Commission will thereafter enter a Third Party Order suspending the pending award and memorializing the amount of the personal injury recovery, the amount of the attorney's fees and costs, the resulting pro rata percentage used to reduce the past comp subrogation lien, the gross comp lien, the net payment owed on the work comp lien after application of the pro rata percentage, and the amount of the resulting offset due to the comp carrier. *See* Appendix.

- The payments owed the client under the offset ratio are due on a quarterly basis. Thus, every 12 weeks the comp carrier will owe the claimant a payment equal to the offset ratio multiplied by all work comp benefits the claimant would otherwise be entitled to receive and all out of pocket medical expenses paid by the claimant.

    - The comp carrier can voluntarily agree to continue to make the payments on a weekly or bi-weekly basis and at least one un-appealed deputy commissioner level opinion ordered the payments to be made on a weekly basis.

- Late or Unpaid Medical Bills: Sometimes when a client is continuing to receive medical treatment up through the date of the settlement some medical bills may "slip through the cracks" or otherwise not get paid before the personal injury case is settled.

    - Those bills are generally not included in the comp carrier's subrogation lien because they weren't paid before the personal injury settlement.

    - Such unpaid medical expenses are treated as future medical expenses (or "further entitlement" under Va. Code § 65.2-313) whereby the total amount of the bills count against the comp carrier's credit, the client must pay the bills himself (or from the personal injury proceeds) and then will receive a payment from the comp carrier representing the offset ratio based on the bill

amounts. *Emberton v. White Supply & Glass Co.*, 43 Va. App. 452, 598 S.E.2d 772 (2004)

- No Pain and Suffering: It has been argued – unsuccessfully – that by entitling the comp carrier to a dollar-for-dollar credit for the full amount of the difference between the gross personal injury recovery and the past gross subrogation lien, the client is thereby deprived of realizing any settlement proceeds for pain and suffering (or inconvenience, permanency, humiliation, etc.).

    - While logical, this argument has been specifically rejected by the Commission. *Knott v. Virginia Dept. of Transportation*, VWC File No. 235-26-07 (Jan. 13, 2010).

- Client Reaction: It is easy to see why client will get angry and resentful if the impact on their future work comp benefits is not fully explained to them when the attorney seeks authority to settle the personal injury case. $50,000 in net proceeds from the personal injury case when the client believes his weekly work comp checks will continue sounds much differently when he discovers those payments are terminated and he will only receive the offset ratio paid on a quarterly basis.

- Negotiating Reductions in Work Comp Liens: The first step is recognizing that there is no "silver bullet" or panacea for negotiating lien reductions. Likewise, there is not a "one size fits all" approach.

    - Strategies to employ can depend on an number of variables including: (1) your client's need for future medical care, (2) the amount of coverage or recovery in the personal injury case, (3) the amount of the comp carrier's credit, (4) the size of the offset ratio, (5) your client's risk tolerance for waiving his entitlement to future wage and medical benefits and (6) the willingness of the carrier to negotiate.

        - The final variable is probably the most important because, remember, by statute the comp carrier does not have to compromise the lien beyond reducing it for a pro rata share of attorney's fees and costs pursuant to Va. Code § 65.2-313.

        - However, most comp carriers want to close out claims to eliminate uncertainties and liabilities. That said, you don't have the luxury of

threatening the comp carrier with a home run jury verdict when negotiating a lien. Rather, you will have to use more carrot and less stick to get something worked out.

- Minimal Coverage Cases: In cases where the coverage in the personal injury case is less than the past subrogation lien, the client would receive nothing from the personal injury case absent a negotiated compromise with the comp carrier. In those cases, one starting point is to propose the comp carrier agree to the "Principle of Thirdsies" whereby whatever personal injury recovery is divided in thirds: 1/3 to the attorney for fees and costs (thereby agreeing to reduce the attorney's fee so that the fees and costs together equal 1/3), 1/3 to the comp carrier, and 1/3 to the client.

    - That equation could also be altered in favor of demanding "50% - 50% on the net," whereby the carrier and the client split the net proceeds after the attorney takes a full fee and costs.

    - In exchange for this deal the comp carrier will want something in return, which usually involves requiring the client to waive some portion or all of their future work comp benefits so the comp carrier can close out the file.

        - If the client has little to no future expectation for medical treatment or work comp entitlement, this can be a reasonable compromise.

        - If the client remains disabled from work and is still receiving benefits or has significant future medical needs this could well be a poor result, as it could require the client to give up a lot more than is being received.

- The Nuclear Option: Threatening to Drop the Case: In some cases stubborn or intransigent comp carriers or their subrogation vendors refuse to make any deals even if it means the client gets nothing from the proceeds of the personal injury case.

    - In such circumstances the only real options are to (1) go forward with the case with the knowledge that you are working for your own fee and to reimburse the comp carrier (almost universally unacceptable to clients) (2) propose that the carrier allow you to split your fee with the client without having it affect the pro rata share of attorney's fees and costs and the

resulting offset ratio; or (3) "go nuclear" and threaten to drop the personal injury case so that no one gets paid.

- The theory on the nuclear option is that if the comp carrier is going to be so recalcitrant and uncompromising then you are not going to work for the comp carrier alone if your client cannot realize a reasonable benefits.

- This option takes great fortitude and willingness to walk away from a potentially lucrative attorney's fee because the comp carrier will think the stance is a bluff because, in the carrier's mind, all trial lawyers are greedy bastards who would never walk away from a potential attorney's fee.

- If pursuing this option, put your position in writing to the comp carrier, indicate that the plaintiff withdraws permission to pursue the case in his/her name and explain your previous efforts to compromise. Copy the letter or communicate the facts of the stalemate to the comp adjuster's claims manager.

- The comp carrier will likely respond to the threat that under Va. Code § 65.2-309 they will simply hire their own attorney and pursue the case in their own name.

- Trump Card: You do have a trump card in this strategy. Va. Code § 65.2-309(C) prohibits a comp carrier pursing a subrogation claim from settling the case without the approval of "the Commission and the injured employee . . . first being obtained."

    - Thus, I make clear to the comp carrier that if we drop the case and they pursue it, it will have to be in their own name and the case will have to be tried because we will never give approval or permission to settle no matter how much the settlement offer.

    - Remind the comp carrier also, that Va. Code § 8.01-424.1 only allows the Circuit Court to give permission when the comp carrier refuses to agree to the proposed settlement and does not work when the claimant won't consent.

- Settling Portions or All of the Comp Claim: In practice, the nuclear option doesn't happen that often. More often, the comp carrier is willing to reduce the comp

subrogation in exchange for the client waiving all or portions of his work comp claim.

- In catastrophic or substantial injury cases where the client will require ongoing and future medical treatment, having to pay for all of that treatment out of pocket and then submit the records and bills on a quarterly basis to obtain the offset ratio reimbursement can range from a headache to an insurmountable challenge. In those cases, then, securing additional reduction of the lien can be less important than insuring continuity and ease of future medical treatment.

    - In those cases, a standard proposal is that (1) the client will agree to repay the comp subrogation lien with only a modest reduction beyond the statutory pro rata reduction (e.g. 50%), (2) the client will waive all entitlement to future work comp payments for work disability or permanency rating, and in exchange, (3) the comp carrier will agree to keep the client's future medical benefits open without application of the credit or offset ratio under Va. Code § 65.2-313.

    - Some comp carriers are incentivized to agree to this deal because it eliminates future indemnity payments, allows them to show a substantial subrogation recovery on their books and eliminates the administrative problems of processing reimbursements for offset ratio payments on a quarterly basis.

    - Just as important, it can actually save the comp carrier money. Under Va. Code § 65.2-605, the comp carrier is responsible for paying medical expenses based on the "prevailing community rate" when the treatment is paid for by the injured person, which are, naturally, substantially higher than the negotiated provider agreements that comp carrier's enter into with most medical providers and networks. Thus, it may be cheaper for the comp carrier to pay for all of the claimant's medical treatment at its negotiated rate than to pay the offset ratio percentage of the non-negotiated billed to the client when he gets the treatment himself.

    - If the client pays more than the prevailing community rate, however, the comp carrier could seek to limit offset ratio payments to a lower amount of incurred medical expenses.

- In many cases the comp carrier will still be willing to reduce the subrogation lien repayment (or waive it completely or waive it and pay a lump sum on top of the waiver depending on value of the claim) in exchange for a full and final settlement completely resolving the work comp claim.

    - Determining whether the proposed compromise is beneficial to the client requires the attorney to analyze the value of the future work comp benefits and medical expenses.

        - Remember, however, that the value of the work comp claim is impacted by the credit such that the comp carrier's future comp liability is limited to the offset ratio until the credit is exhausted.

        - In other words, if you calculate that the client's future comp payments are worth $150,000 and the future medical benefits have a value of $75,000 but the comp carrier has a $300,000 credit and an offset ration of 33.3%, then the value of the carrier's future exposure is $75,000, not $225,000 ($225,000 x 33.3% offset ratio = $75,000).

    - Thus, for example, the comp carrier's offer to waive a $25,000 subrogation lien repayment is a reasonable result for the client if the comp carrier's liability for future comp benefits paid out over time according to the offset ratio is $35,000 but an unfavorable result if the comp carrier's future liability is $100,000.

- Mediations: If a mediation is proposed in the personal injury case, give the comp carrier plenty of advance notice and ask a representative to attend in order to resolve all of these issues at once. The mediator or defense attorney can even insist the comp carrier attend as a condition for mediating the personal injury case.

    - Experience has shown mediators can be just as effective obtaining concessions from the comp carrier at the mediation as from the parties to the personal injury case.

- In some instance the defendant and plaintiff even align together to exert additional pressure on the comp carrier in an effort to extract concessions or a compromise.

- If the comp carrier does not attend the mediation, make sure that any settlement or agreement reached is made SUBJECT TO obtaining permission from the comp carrier for the terms of the personal injury settlement. A proposed settlement at mediation could also be made subject not only to obtaining permission to settle from the comp carrier but agreement to satisfactory terms resolving the subrogation lien or the work comp case.

- Settling the Comp Claim Before the Personal injury Case: A debate exists regarding whether there is any advantage to settling the work comp claim earlier in the process prior to settlement negotiations in the personal injury cases.

  - Certainly exigent circumstances could develop where settling the work comp case earlier is necessary, such as an unexpectedly vigorous defense to the work comp claim or threats of one or more IME's that could damage the personal injury case.

  - In most circumstances however it is suggested that the client can obtain more value via subrogation lien reduction, lump sum payment, or both by pursuing a global simultaneous settlement of the personal injury case and the work comp claim.

  - Settling the work comp claim prior to the personal injury case without negotiating favorable settlement terms for the repayment of the subrogation lien removes most incentive for the comp carrier to later compromise its subrogation lien even where refusal to do so could prevent acceptance of an otherwise favorable settlement offer.

  - To limit the damage to subsequent personal injury negotiations include "sliding scale" repayment language in the work comp settlement such as "the claimant will repay the carrier 50% of the gross subrogation lien not to exceed 33.3% of the gross personal injury recovery."

  - Such language locks in the maximum and minimum repayment amounts on the subrogation lien so that the comp carrier can recover up to 50% of its lien assuming a favorable recovery in the personal injury case but limits

the comp carrier to no more than one-third of the gross personal injury recovery if difficulties with liability or damages compel acceptance of a lower settlement, thus insuring the client receives a reasonable share of the personal injury proceeds.

- Commission Approval: Any agreement to compromise the underlying subrogation lien that limits or impairs some or all of the client's work comp benefits must be specifically approved by the Commission via submission of a Petition and Order.

    - Attorney's Fees: The Commission must approve all fees taken for any work relative to the work comp claim.

    - The Commission will generally approve a fee equal to 20% of any lump sum paid to the claimant and up to 20% of any reduction in the past subrogation lien beyond that mandated by Va. Code § 65.2-311.

    - A specific fee request signed by the client must be submitted with the Petition and Order, and the Order must contain a blank for the Commission to enter the fee to be awarded.

- Medicare Issues: Are beyond the scope of this presentation other than to say the personal injury attorney must be aware of Medicare's requirements and guidelines which are more exacting than in work comp cases including a requirement that any settlement with a value over $25,000 that impairs the Medicare client's medical benefits in the work comp claim ought to be specifically reviewed and approved by the Center for Medicare and Medicaid Services

II. USING THE WORK COMP CLAIM TO BODY SLAM YOUR PERSONAL INJURY INVESTIGATION

- Premise: When there is both a workers' compensation claim and a personal injury claim arising out of the same accident, the workers' compensation claim generally gets filed and litigated first.

    - While many personal injury attorneys can rightfully become concerned that litigation in the work comp case may damage their potentially more valuable personal injury case, the filing of the work comp claim also presents an opportunity to use the force of judicial process to conduct significant investigation into the personal injury claim that can provide a head start on collecting evidence and a leg up on the defense.

    - Discovery can be used to obtain documents, including manuals, bills of lading and other documents related to the investigation of a possible products liability case; obtain witness statements taken by the employer; inspect premises or machines on the employer's – or even a third party's – premises; conduct depositions to lock in testimony without the third party defense counsel present in motor vehicle accident, products liability, slip and fall, or even medical malpractice cases; obtain photographs and damage estimates where the plaintiff was riding in his employer's vehicle.

- The Workers' Compensation Act authorizes the Commission to create rules necessary to administer the Act. Va. Code § 65.2-201(A)

- Regarding discovery to be used in claims, Va. Code § 65.2-703(A) specifically authorizes parties to serve interrogatories and take depositions, with the requirement that all "discovery shall conform to rules governing discovery promulgated by the Commission."

- Va. Code § 65.2-703(b) then requires that the Commission "shall adopt rules governing discovery conforming as nearly as practicable to Part Four of the Rules of the Virginia Supreme Court."

    - Thus, the Commission's discovery rules are premised upon or patterned after the discovery rules found in the rules of the Supreme Court of Virginia.

    - The Commission has held, however, that "the formal rules of evidence and procedure set out in the Code of Virginia and Rules of the Virginia Supreme Court do not strictly apply to matters before the Commission, and [the Commission] may still exercise reasonable discretion in such matters as maybe

suggested by the facts of a particular case." *Magana v. Sosa*, 79 Va. WC 136 (2000).

- For instance: (1) requests for admission are not automatically deemed admitted if not answered, but must be made the subject of a motion to compel and order for sanctions; and (2) only depositions of parties and treating doctors being as of right with leave of the Commission required for additional witnesses.

- The Commission thereafter promulgated discovery rules and procedures combined under Rule 1.8 of the Rules of the Commission. Rule 1.8 permits multiple forms of discovery including oral and written deposition (1.8(G)), interrogatories (1.8(H)), production of documents and things (1.8(A)), requests for admission (1.8(I)), inspection of premises (1.8(A)), subpoenas *duces tecum* (1.8(F)(2)), and "other means of inquiry approved by the Commission (1.8(A)).

- Under Rule 1.8(A), the scope of discovery under the Act is limited to "matters that are relevant to issues pending before the Commission." *Moschler v. Kenco Group, Inc.*, 14 WC UNP VA02000006266 (2014).

- The question, then, is whether a claimant or a comp carrier can use the discovery tools under Rule 1.8 to conduct discovery that is solely related to investigating or gathering evidence in the third party personal injury case? The answer is a solid "yes."

- The legal basis for permitting discovery limited to investigating the third party case is (1) the existence of the comp carrier's subrogation lien against the proceeds of a third party case -- and an independent right to pursue such a case (Va. Code § 65.2-309) and (2) the effect a recovery in a third party case has on an award of compensation under the Act by virtue of the resulting off-set (or credit) and corresponding recovery ratio (Va. Code § 65.2-313), make the discovery "relevant to issues pending before the Commission."

- Subpoena *Duces Tecum*: The Full Commission of the Virginia Workers' Compensation Commission specifically ruled that a party can issue a subpoena *duces tecum* to obtain documents from a third party even when there are no disputed matters in the workers' compensation claim even where the subpoena is being issued solely to investigate a potential third party case. *Johnson v. Laurel Trucking, Inc.*, 01WC UNP 2001825 (2001).

  - In *Johnson*, the comp carrier issued a subpoena *duces tecum* to Clinchfield Coal Co. to obtain documents and tangible things for purposes of investigating "the subrogation issue" for an employee who had sustained an electrical shock injury.

Clinchfield Coal objected on the grounds that the subpoena was outside the discovery enabling statute and Rules and thus exceeded the Commission's jurisdiction because there were no pending issues in the claim and because the intent of the subpoena was to investigate an action that the employer would be required to file in Circuit Court rather than before the Commission.

- The Commission reversed the deputy commissioner's ruling quashing the subpoena holding that "[w]hile it is true that the employer's action would be filed in circuit court, the right that it seeks to enforce, its employer's subrogation right against a potential third-party tort feasor, emanates from Code § 65.2-309 of the Workers' Compensation Act. Moreover, a recovery can affect our Award in accordance with Code § 65.2-313. Accordingly, we find that the Commission does have jurisdiction to issue the subpoena in question."

- Written Discovery: Three months after *Johnson*, the Commission took the next logical step of ruling that the same rationale permits a party to propound written discovery to a party in the work comp case that is solely intended to investigate a third party personal injury case even where there was no pending claim or disputed issue pending before the Commission. *Fields v. Labor Ready, Inc.*, 01 WC UNP 2037099 (2001).

  - In *Fields*, the claimant/plaintiff served the employer with interrogatories created to discover information about and investigate a possible products liability case including obtaining the identity of witnesses, copies of investigation reports, the identity of the manufacturer of the product, purchase documents, etc.

  - When the deputy commissioner granted a motion to compel the production, the employer filed a Request for Review alleging that while the employer was – naturally – happy to cooperate with the personal injury case, the discovery was not relevant to any pending matter before the Commission because they had accepted the claim and paid all benefits. Thus, the employer argued, it should not be "burdened with the responsibility of responding to the interrogatories" because it was improper to use the work comp case to elicit information from the employer related to the viability of the personal injury claim.

  - In rejecting this argument and affirming the deputy commissioner, the Commission applied the holding in *Johnson* to find that the Commission had jurisdiction to allow "discovery designed to discover facts concerning an accident and a possible third party claim."

- Inspections of Premises and Products: Rule 1.8(A) specifically permits "production of . . . things [and] inspection of premises" which has been held to include viewing and photographing machinery used or located at an employer's premises. *E.g. Carr v. Kraft Foods, Inc.*, 04 WC UNP 2134871 (2004).

- Mechanics of a Product Inspection: to investigate a product liability case, the following steps are recommended:

    - File a motion seeking an order requiring the employer to permit the inspection.

    - Insist on an order specifically requiring the employer to preserve and maintain the product, machine or device in question so that it can be inspected (either by the attorney alone or with an expert). A letter to the employer demanding the product be preserved is NOT good enough.

    - Why get an order? SPOLIATION, that's why, as demonstrated by the cautionary tale of *Austin v. Consolidation Coal Company*, 256 Va. 78, 501 S.E.2d 161 (1998).

        - In *Austin*, a plaintiff injured by a burst hose filed a work comp claim and sought to pursue a products liability claim against the manufacturer and distributor of the hose. The employer refused to provide the name of the manufacturer or allow the hose to be examined by plaintiff's expert despite providing access to the manufacturer's expert, and the plaintiff filed a state court action against his employer to obtain that information and inspect the hose. In a hearing, the trial judge required an employer's representative be made available for deposition to obtain the information and indicated that nothing should be done to affect the integrity of the hose. No order was ever entered, however, and the employer thereafter destroyed the hose. Investigation revealed the distributor was an affiliate of the plaintiff's employer.

        - Plaintiff filed a spoliation action against the employer in federal court in the Southern District of West Virginia. The District Court then certified to the Virginia Supreme Court the question of whether Virginia law recognized as an independent tort a claim for negligent or intentional interference with a prospective civil action by spoliation of evidence.

        - The Court indicated the issue of whether an employer has a duty to preserve evidence for the benefit of the employee's potential tort action

was a question of first impression although guided by the legal elements of a tort action which included a legal obligation of the defendant to the plaintiff. Because courts speak through their orders and the trial judge had not entered an order requiring preservation of the hose, the employer had no legal duty to preserve it.

- The author is currently involved in a case similar to *Austin* where the plaintiff suffered third degree burns after spark was emitted from a warehouse space heater, leading to the following chain of events: (1) an initial letter was sent to the employer to preserve the product, (2) an order was sought from the Commission permitting the inspection, (3) the employer's attorney indicated the employer agreed to the motion, (4) leading the Commission to hold that the issue was moot in light of the employer's agreement to permit the inspection, (5) after which the employer then admitted it had "mistakenly" thrown out the product, and (6) resulting in a Complaint currently pending against the employer alleging negligent spoliation of evidence. *See* Appendix

- Inspection on Third Party Premises: Can the Commission require a third party to permit entry onto land or premises for purposes of conducting an inspection?

  - Can arise where the employer is a temp agency or the injured plaintiff was injured while assigned to duties at a third party site.

  - The Commission's Rule 1.8(F) is patterned after Rule 4:9A which requires a non-party to permit entry onto land to "inspect . . . test, or sample any designated tangible things . . . which are in the possession, custody or control of such person to whom the subpoena is directed."

  - File a motion at the Commission asking for leave to inspect and examine the product on the third party's premises.

  - Also serve the third party with a subpoena *duces tecum* requiring the premises and product be opened for inspection and testing tracking the language of Rule 4:9A.

  - Although there is no decision from the Full Commission expressly permitting an inspection on a third party's premises or use of a subpoena *duces tecum* to test and inspect a product as opposed to simply obtaining documents, it falls within the logic of the holdings in *Johnson v. Laurel Trucking, Inc.* and *Fields v. Labor Ready, Inc., supra.*

- At least one deputy commissioner accepted this argument and entered an order requiring a foam manufacturer to permit entry onto its premises and inspection of a machine that injured the claimant who had been assigned to work at the plant by his employer, a temporary agency (*See* Appendix).

- Depositions: Rule 1.8(G) requires leave of the Commission to depose witnesses who are not parties or physician, which such leaving generally being liberally granted. Thus, where the employer refuses access to witness statements or to permit interviews with witnesses, they can be deposed in the work comp case without the attorney who will later defend the personal injury case present to cross-examine or question the witnesses, thereby allowing their testimony and version of events to be locked in prior to filing suit.

  - Current case: plaintiff struck by passing truck while a pedestrian, and driver tells police plaintiff was in the lane of travel. No independent witnesses located by investigator who actually saw impact or plaintiff's location. Discovery from work comp case revealed statements indicating plaintiff behind the lane markings when struck.

  - Over objection by employer, motion to depose for purposes of the personal injury case granted. *See* Appendix.

- Limits on Subpoenas and Written Discovery: The right to use the work comp claim to conduct discovery does not invalidate or overcome normal work product protections. *Estate of Linnin v. Hartman Walsh Painting Co.*, 03 WC UNP 2133639 (2003)

  - In *Linnin*, the claimant's Estate served a subpoena *duces tecum* on Busch Gardens seeking investigation reports and statements. When the deputy commissioner ordered production of those materials, counsel for Busch Gardens filed for a request for Review.

  - The Full Commission held that Busch Gardens met its burden of proof to establish that the materials sought by the claimant were either prepared in anticipation of litigation and constituted protected work product or were prepared at the direction of Busch Garden attorneys and protected by attorney client privilege. The deputy commissioner was overruled and the subpoena was quashed.

  - The limit then seems to be that discovery can be used to obtain any non-privileged materials with the objecting party or entity bearing the burden to establish that the materials constituted work product or were protected by attorney client privilege.

APPENDIX

1. Sample calculations for determining work comp lien and credit

2. Motion to suspend work comp award and determine recovery ratio

3. Commission's Third Party Order

Cases:

4. *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001)

5. *Moschler v. Kenco Group, Inc.*, 14 WC UNP VA02000006266 (2014)

6. *Johnson v. Laurel Trucking, Inc.*, 01WC UNP 2001825 (2001)

7. *Fields v. Labor Ready, Inc.*, 01 WC UNP 2037099 (2001)

8. *Austin v. Consolidation Coal Company*, 256 Va. 78, 501 S.E.2d 161 (1998)

9. *Estate of Linnin v. Hartman Walsh Painting Co.*, 03 WC UNP 2133639 (2003)

Rules

10. Rule 1.8, Rules of the Commission

Pleadings/Filings:

11. Subpoenas *duces tecum* to Virginia OSHA (Virginia Department of Labor & Industry)

12. Subpoenas *duces tecum* to investigating police department

13. Subpoenas *duces tecum* to third party plant or facility for documents

14. Potential defendant's Motion to Quash subpoena *duces tecum*

15. Order denying motion to quash

16. Interrogatories and request for production to obtain information for personal injury case

17. Letters to employer to preserve evidence

18. Motion to order employer to preserve and allow plaintiff to inspect and photograph employer's vehicle involved in accident

19. Order requiring preservation of evidence and granting leave to inspect and photograph employer's vehicle involved in accident

20. Motions to preserve evidence and produce machine for inspection and testing

21. Order requiring machine to be preserved and made available for testing

22. Letter from defense attorney agreeing to motion to inspect

23. Order from Commission indicating motion moot because employer agreed to inspection

24. Motion to depose employer's employees who witnessed plaintiff's accident for work comp case and to investigate personal injury case

25. Defense counsel's objection to depositions to investigate personal injury case

26. Reply to defense counsel's objection to depositions to investigate personal injury case

27. Order permitting depositions for use in work comp claim and to investigate personal injury case

28. Motions and replies to inspect machine at third party plant where plaintiff assigned to work

29. Order permitting plaintiff to inspect product

30. Subpoena *duces tecum* to third party manufacturer to produce machine for testing and inspection

31. Order permitting inspection and testing at third party plant pursuant to motion and Subpoena *duces tecum*

32. Complaint for spoliation, destruction of product by employer

Sample Calculation Of Work Comp Lien And Credit

A. SETTLEMENT TERMS:

Settlement	$150,000
Atty Fee	$ 50,000
Costs	$ 2,500
Total Work Comp Lien	$ 75,000

B. LIEN REDUCTION AMOUNT

Formula: Fees + costs divided by gross settlement = recovery ratio (carrier's pro rata reduction share)

1. $50,000 fee + $2,500 costs = $52,500
2. $52,500 ÷ $150,000 = .35 (so 35% is the carrier's pro rata share of fees & costs)
3. $75,000 lien x 35% = $26,250 (the carrier's quantified pro rata share of fees & costs)
4. $75,000 lien - $26,250 pro rata off set = $48,750 (lien payback amount)

C. SAMPLE DISBURSEMENT STATEMENT:

Settlement Amount	$150,000
Atty Fee & Costs	$52,500
Work Comp Lien (35% reduction)	$48,750
Net Recovery to Client	$48,750

D. WORK COMP CARRIER'S FUTURE CREDIT

Formula: Total personal injury recovery – past work comp lien = credit

Example: $150,000 settlement - $75,000 = $75,000 credit to carrier

Recovery Ratio: 35% applied to credit

Application: Every dollar claimant owed for comp or charges for medical expenses counts against credit until exhausted BUT carrier continues to owe 35% of those payments due on a quarterly basis. For instance, if claimant owed $500 per week in comp benefits, each week credit reduced by $600, but carrier owes $210 for each week ($600 x 35%), payable on quarterly basis. Or, if claimant gets MRI that costs $1,000, claimant must pay that bill and that amount gets deducted from credit. Then claimant gets reimbursed $350 at end of quarter ($1000 x 35%)

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·· CRAIG B. DAVIS
PHILIP S. MARSTILLER JR.

· ALSO ADMITTED IN THE DISTRICT OF COLUMBIA

·· ALSO ADMITTED IN WEST VIRGINIA

December 3, 2012

Via WebFile

Marjorie P. Platt, Clerk
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: Kandy Lee Carter v. Regis Corp.
VWC File No.: 237-11-01

Dear Ms. Platt:

Please accept this letter as claimant's **Application for Hearing** seeking the following relief:

(1) Suspend the current TTD award on the basis of the claimant's settlement of her underlying 3rd party claim for $575,000.00;

(2) A determination of the amount of the carrier's subrogation lien pursuant to Va. Code § 65.2-309;

(3) A determination of the ratio of the total attorney's fees and costs to the total third-party recovery under the Va. Code § 65.2-311; and

(4) A determination of the amount of the employer's off set pursuant to Va. Code §65.2-313.

In support of the requested relief the claimant states as follows: She resolved her third-party case for $575,000.00. The carrier and employer have a past subrogation lien of $321,281.52. The ratio of attorney's fees and expenses to the third-party recovery is 45.25%. Application of the *pro rata* ratio entitles the carrier and employer to a repayment of $175,901.63 of the past subrogation lien. The post-recovery off-set against the claimant's future entitlement is $253,718.48 based on the difference between the third-party recovery and the past subrogation lien. TTD benefits were paid by the carrier and employer through November 27, 2012.

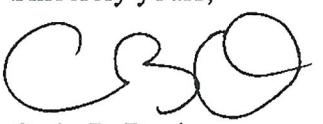
Attached hereto in support of the proposed application please find the following:

(1) A letter notifying counsel for the defendants of the settlement of the third-party claim;
(2) A copy of the litigation expenses sheet from Emroch & Kilduff, LLP;
(3) A copy of the litigation expenses sheet from my co-counsel, Charles Stacy; and
(4) A copy of the Disbursement Sheet depicting payment of the proceeds from the third-party action.

Finally, I am attaching hereto a draft order reflecting what I believe are the Commission's findings based upon the figures cited above and the corresponding code sections. I have taken the liberty of signing the Order in advance. If defense counsel agrees to entry of the award, I ask that he please sign where indicated and submit the order for endorsement via webfile. Otherwise, please refer this matter for a hearing.

Thank you in advance for your consideration.

Sincerely yours,



Craig B. Davis

CBD/mjc
Enclosures

cc: Cecil H. Creasey, Jr., Esquire
Charles A. Stacey, Esquire
Kandy Lee Carter

COMMONWEALTH OF VIRGINIA
VIRGINIA WORKERS' COMPENSATION COMMISSION
1000 DMV DRIVE, RICHMOND VA 23220
www.workcomp.virginia.gov
1-877-664-2566

Third Party Order

Date of this Award Order: December 18, 2012

KANDY CARTER v. REGIS
HARTFORD CASUALTY INS CO, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. 2371101
Claim Administrator File No. 0118459242000101109
Date of Injury September 5, 2007

To All Interested Parties:

The Virginia Workers' Compensation Commission has been advised that a third party recovery has been received on this claim. The total recovery was $575,000.00 on November 29, 2012. The employer's statutory lien at the time of the recovery was $321,281.52. As required by §65.2-311, the employer/carrier is responsible for a pro rata of expenses and attorney's fees. At settlement, the employer/carrier received $175,901.63 in satisfaction of the employer/carrier's lien amount to date.

Pursuant to §65.2-313, Code of Virginia, the employer/carrier is entitled to a credit in the amount of $253,718.48 against its liability for additional compensation payments and medical expenses, after which its responsibility to make such payments shall resume.

The Injured Worker remains entitled to a reimbursement of attorney fees and expenses at the rate of 45.25% of any additional compensation and/or medical entitlements as they are incurred. Such reimbursement shall be paid by the carrier/employer directly to the Injured Worker on a quarterly basis from the date of this award. The Injured Worker must provide the carrier/employer with medical bills when a pro rata reimbursement is sought.

If any party wishes to dispute this Award Order, a Request for Review (appeal) must be filed within 30 days of the date of this Order. If there are any questions regarding information contained in this Order, please contact the Commission toll free at 1-877-664-2566.

Virginia Workers' Compensation Commission

CSD/dcr

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington, KY 40512-4663

Interested Parties

Claim Administrator Attorney:

Cecil H. Creasey Jr.
1508 Willow Lawn Dr Ste 210
Richmond , VA 23230-3421

Injured Worker:

KANDY CARTER
12167 Main St
Stony Creek , VA 23882-3343

Insurance Carrier:

HARTFORD CASUALTY INS CO
Alexander Rodriquez
PO Box 14473
Lexington , KY 405124473

Claimant Attorney:

Craig B Davis
Po Box 6856
Richmond , VA 23230-0856

Claim Administrator:

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington , KY 40512-4663

Skelly v. Hertz Equipment Rental Corp., 35 Va. App. 689, 547 S.E.2d 551 (2001)

IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT RICHMOND, VIRGINIA

SHANNON P. SKELLY AND SARAH E. SKELLY, AS BENEFICIARIES OF MICHAEL L. SKELLY, DECEASED
v.
HERTZ EQUIPMENT RENTAL CORPORATION AND RELIANCE NATIONAL INDEMNITY COMPANY

Record No. 2358-00-2
Decided: June 26, 2001

Present: Judges Willis, Elder and Bray

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION [00 WC UNP 1826040 (2000)]

Affirmed. **[Page 691]**

COUNSEL

Louis D. Snesil (Louis D. Snesil, P.C., on brief), for appellants.

R. Ferrell Newman (Thompson, Smithers, Newman, Wade & Childress, on brief), for appellees.

OPINION

WILLIS, J. — The statutory beneficiaries of Michael L. Skelly (claimants) appeal a decision of the Workers' Compensation Commission holding that Hertz Equipment Rental Corporation and its insurance carrier (together Hertz) were not responsible for the payment of attorney's fees and costs related to the settlement of a third-party tort claim. The claimants contend that the commission erred in finding (1) that they settled a third-party tort claim without Hertz's consent or knowledge, and (2) that the settlement prejudiced Hertz's right of subrogation against the third-party tort-feasor. Finding no error, we affirm the commission's decision.

I. *BACKGROUND*

On appeal, we view the evidence in the light most favorable to the party prevailing below. *See R.G. Moore Bldg. Corp. v. Mullins*, 10 Va. App. 211, 212, 390 S.E.2d 788, 788 (1990). The commission's factual findings will be upheld on appeal if supported by credible evidence. *See James v. Capitol Steel Constr. Co.*, 8 Va. App. 512, 515, 382 S.E.2d 487, 488 (1989). **[Page 692]**

On October 7, 1996, Michael Skelly was killed in an automobile accident that arose out of and in the course of his employment by Hertz. John Shea, an attorney with the law firm of Marks and Harrison, was employed by the claimants to assert a wrongful death claim and a workers' compensation claim. There were three potential claimants, the deceased's wife, Shannon Skelly, and two infants, Sarah Skelly and Taunnie Skelly. Hertz employed the law firm of Sands, Anderson, Marks and Miller to represent its interests. Cecil Creasey and Michael DeCamps of that firm represented Hertz. Had the claimants sought it, an award of $248,000 (500 weeks at $496 per week) plus funeral expenses could have been entered in their favor under the Workers' Compensation Act. However, no award was entered. Hertz paid no compensation. The claimants proceeded directly with their third-party wrongful death claim.

Skelly's estate filed a wrongful death suit against the driver of the other vehicle, Charles Franklin, and his employer, Metzler Brothers, Inc. In preparing for trial, the estate hired investigators, engaged in written discovery, motions and hearings, hired experts, and conducted depositions. Trial was set for April 29, 1997, but on April 22, 1997, the claimants accepted a settlement in the amount of $725,000. Thereafter, they sought from Hertz reimbursement of *pro rata* attorney's fees and costs incurred in the third-party litigation, pursuant to Code § 65.2-311.

In October and November, 1996, Mr. Shea and Mr. Creasey had several telephone conversations and corresponded by letter regarding how to proceed with the third-party tort claim and the workers' compensation claim.

On October 17, 1996, Mr. Creasey wrote:

> [Hertz], as you know, pursuant to 65.2-309, *et seq.*, holds an assignment of any right to recover damages against the third parties responsible for the death of Mr. Skelly. Of course, [Hertz] may pursue such right in its own name or that of the personal representative. [Hertz] fully intends to **[Page 693]** pursue its statutory interests against the third parties and is presently weighing the options on methodology.

On October 22, 1996, Mr. Creasey wrote Mr. Shea to advise him that Hertz was weighing alternatives and asked for any "thoughts on that issue." Mr. Shea and Mr. Creasey spoke on the telephone on October 24, 1996, and Mr. Creasey followed up that conversation with a letter, which stated in pertinent part:

> [Hertz] has elected to exercise its right to pursue its own interest against the defendants, but we are willing to work with you toward a mutually agreeable recovery. I understand that you have filed suit against the defendants in the U.S. District Court for the Eastern District of Virginia. Thank you for sending me a courtesy copy of your complaint. . . .
>
> [Hertz's] exposure in this matter is in excess of a quarter of a million dollars ($496 x 500 weeks = $248,000 plus cost of living, funeral, and other expenses). Consequently, [Hertz] does intend to pursue the assigned right to recover and would receive first dollar from such recovery. I only assume you expect there is a case to be made for recovery in excess of [Hertz's] exposure, and your representation is particularly for that purpose. As we discussed, there may be some problems that develop, but I believe we should be able to work them out satisfactorily toward our common goal. . . .
>
> Regardless, [Hertz] would like to cooperate with you in this matter. Toward this end, [Hertz] does not want to be blindsided at some point down the road with respect to distribution of recovery and/or attorneys fees. It is not [Hertz's] desire to interfere with your representation of Mrs. Skelly and the minor child(ren). . . . [Hertz] is glad to share the litigation expenses. . . . In assisting us to evaluate how best to effect [Hertz's] interests, including whether to file a separate suit, please let me know how you view the relative rights in this matter, particularly with respect to the distribution of any recovery ultimately obtained from the defendants. **[Page 694]**

Mr. Shea testified that he read the October 17 and October 24 letters "together to lead [him] to believe that [Mr. Creasey] did not countenance or agree with the personal representative's right to pursue the action which had already been filed and that's when [he] last wrote [Mr. Creasey] . . . and said, well, apparently good lawyers can have differences of opinion." According to Mr. Shea, Mr. Creasey's position regarding the wrongful death case was that Hertz had an assignment of any right to recover damages against the third-party and Hertz would "have the right to be reimbursed for the first dollar recovered."

On November 4, 1996, Mr. Shea wrote a letter stating:

> We have filed and will pursue to a full recovery the cause of action against Franklin and Metzler Brothers. Under these circumstances, the filing of any separate action or claim by [Hertz] . . . against Franklin and Metzler Brothers would be unauthorized and wholly unnecessary. Moreover, there is no need for [Hertz] or your firm to incur any expenses or attorney's fees in connection with the action and recovery against Franklin and Metzler Brothers.
>
> Although we appreciate your offer to share in the litigation expenses, the plaintiff and our firm will bear all litigation expenses necessary to pursue the action. Our firm will provide all attorney and related services necessary to recover this cause of action. Your client's subrogation rights are fully protected by statute. There is no need for your firm to provide any services or expenses of any kind in connection with the cause of action against Franklin and Metzler Brothers. . . .
>
> Although I will keep you informed regarding the progress of our action, we do not require a "shared endeavor" in the sense that you seem to mean. The Plaintiff and our firm will provide the expenses and attorney services necessary to pursue the plaintiff's cause of action to a full recovery, and will claim the right to be reimbursed by the employer (by deduction from the amount of the employer's subrogation rights) for the full proportionate share of the Plaintiff's expenses and attorney's fees. **[Page 695]**

Mr. Shea stated that any attorney fees or expenses incurred by Hertz would be wholly superfluous, duplicative, and unnecessary to the pursuit of the action and recovery, were not requested or authorized by his client, and would not alter the statutory distribution of the recovery.

On November 5, 1996, Mr. Creasey responded by letter, reminding Mr. Shea "that [he is] not authorized to negotiate or settle the claim against third parties." Mr. Creasey expressed his concern that Hertz's rights would be prejudiced if it were not allowed to participate in the suit.

Mr. Shea testified that, for litigation strategy purposes, he was concerned about letting the jury know that Hertz was involved in the case. He did not, however, object to Hertz intervening by a petition or motion to intervene, informing the court of its interests under the Workers' Compensation Act. He stated that he "didn't want . . . [Hertz] to go find another courthouse and file another lawsuit." He testified further that he told Mr. Creasey on November 8, 1996, to take whatever steps he thought necessary, and he promised to protect Hertz's subrogation rights in the wrongful death settlement.

In light of the position taken by Mr. Shea, Hertz continued to employ Mr. Creasey's law firm to protect its subrogation interest. Due to the strained relationship that developed between Mr. Shea and Mr. Creasey, Michael DeCamps of Sands, Anderson, Marks and Miller assumed responsibility for the matter on behalf of Hertz.

On April 10, 1997, Mr. Shea received a settlement offer of $200,000 from the third-party tort-feasor. He replied on April 13, 1997, demanding $1,375,000. Mr. Shea testified that he tried to keep Mr. DeCamps informed of the settlement negotiations. On April 14, 1997, he wrote Mr. DeCamps, stating:

> Obviously, time is going to be of the essence. Therefore, I am trying to keep you and Hertz advised as carefully as I can of the settlement negotiations. Although it is not clear to me under the law whether or not I need Hertz's permission to settle a wrongful death action when no benefits have been paid, I certainly anticipate seeking **[Page 696]** hope you will keep Hertz advised so that a quick decision can be made in the event that a favorable offer is extended.

An April 22, 1997 letter from Mr. Shea to Taunnie Skelly's attorney stated that his client would instruct him to accept an offer of $700,000. In this letter, Mr. Shea noted that he understood from Mr. DeCamps that "Hertz's only reservation about agreeing to this settlement was the uncertainty that surrounds their subrogation interest as it relates to Taunnie." That same day, April 22, 1997, Mr. Shea accepted the third-party tort-feasor's offer of $725,000. A copy of Mr. Shea's letter accepting settlement was sent to Mr. DeCamps.

According to Mr. Shea, Mr. DeCamps was satisfied with any settlement because negotiations had gone beyond the $250,000 lien of Hertz. However, Mr. Shea did not seek Mr. DeCamps' permission to settle the third-party claim. Mr. Shea testified:

> We [Mr. Shea and Mr. DeCamps] talked in terms of where we were and if Hertz had any questions about it, and as I've indicated, [he] was like, well, I mean, you're so far beyond two fifty, I don't know what reservation they could have, but if there's any, you know, anything comes up, I will let you know, and he never got back to me. . . . And then [the third-party tort-feasor] went to seven twenty-five and having told them that I was right around seven hundred and I called my client back and she said, please take it, and I took it.

On May 9, 1997, Mr. Shea wrote Mr. Creasey, confirming that other counsel was now representing Shannon and Sarah Skelly individually. This letter also reminded Mr. Creasey about an upcoming hearing "regarding the status of Taunnie L. Skelly as a statutory beneficiary in the wrongful death case." The letter further stated that it was his hope that they would "be able to seek Court approval of the wrongful death action at that time, and that [they could] then turn [their] attention to the subrogation interest of [Hertz]."

At the settlement hearing, the judge approved the settlement and asked for briefs on the only issue left to be settled, whether Taunnie Skelly should share in the distribution. An **[Page 697]** agreement was reached on that issue and a December 23, 1997 order distributed the settlement money.

Mr. Creasey testified that he and Mr. Shea disagreed about "the extent of Hertz's rights with respect to the assignment of the right to recover against a third party." According to Mr. Creasey, he "specifically asked [Mr. Shea if] . . . he [was] in the position or was he willing to assume the representation of [Hertz] at the time against the third parties and his response was an unequivocal no."

Mr. DeCamps testified that he attended depositions, participated in consultation with expert witnesses and offered some suggestions regarding their direction, reviewed correspondence and pleadings, offered suggestions about the direction of the case, and provided an "in" for Mr. Shea to get information from Hertz. He acknowledged that Mr. Shea apprised him of the ongoing negotiations and that he and Mr. Shea had two conversations on April 22, 1997. He testified that, during those conversations, Mr. Shea asked him to "get in touch with Hertz to see if they would be on watch so to speak for whatever number they ultimately arrived at so that they could bless it or not bless it." He testified that he tried to contact Hertz but no one with settlement authority was available that day. Therefore, he stated that he and Mr. Creasey called Mr. Shea to tell him that Hertz could not approve a settlement that day and that Mr. Shea told them at that time that an offer of $725,000 had been made and accepted. Mr. DeCamps denied that he told Mr. Shea that he would tell him if Hertz objected to the settlement.

The deputy commissioner held that Hertz had not consented to the third-party settlement, that the parties had no agreement regarding attorney's fees, that "the claimants had 'one full recovery' and were not entitled to any additional benefits under the Workers' Compensation Act, and, further, that the settlement of the third-party claim without the consent of [Hertz], prejudiced [Hertz], and as a result thereof, the claimant is barred from benefits." The full commission affirmed. The record supports those findings. **[Page 698]**

II. *HERTZ'S SUBROGATION RIGHT*

An employee injured in the course of employment by a negligent third party may pursue a common law remedy against the tort-feasor and a claim for compensation benefits under the Workers' Compensation Act, but may obtain only one full recovery for the injury. *Noblin v. Randolph Corp.*, 180 Va. 345, 358-59, 23 S.E.2d 209, 214 (1942).

> If the employee pursues both remedies, at such time that the employee makes a claim for workers' compensation benefits, the "claim . . . shall operate as an assignment to the employer of any right to recover damages," and the employer "shall be subrogated to [the right to recover damages] in his own name or in the name of the injured employee."

Wood v. Caudle-Hyatt, Inc., 18 Va. App. 391, 395-96, 444 S.E.2d 3, 6 (1994) (quoting Code § 65.2-309(A)). "[T]he employee may not pursue his common law remedy in such a manner or settle his claim to the prejudice of the employer's subrogation right and thereafter continue to receive workers' compensation benefits." *Id.* at 397, 444 S.E.2d at 7 (citations omitted).

> The employee necessarily prejudices his employer's subrogation rights and, thus, is barred from obtaining or continuing to receive benefits under a workers' compensation award when an employee settles a third-party tort claim without notice, or without making a claim for workers' compensation benefits, or without obtaining the consent of the employer.

Id. (citation omitted).

In *Wood*, the employee promptly, by certified mail, notified the employer of the terms of the proposed third-party settlement, which was in excess of his potential workers' compensation benefits, and requested the employer's consent or objection within ten days. *Id.* at 398, 444 S.E.2d at 7. We held that the employer was thus afforded an opportunity to object and to protect its subrogation rights, and was not prejudiced by the settlement. *See id.* **[Page 699]**

Here, Hertz was neither told of, nor given the opportunity to object to, the settlement offer prior to its acceptance by the claimants. Unlike the situation in *Wood*, the claimants' unauthorized settlement of their third-party claim prejudiced Hertz by depriving it of the opportunity to protect and assert its subrogation rights against the third-party tort-feasor. *See Safety-Kleen Corp. v. Van Hoy*, 225 Va. 64, 69, 300 S.E.2d 750, 753 (1983); *Green v. Warwick Plumbing & Heating Corp.*, 5 Va. App. 409, 412, 364 S.E.2d 4, 6 (1988).

Relying on *Wood*, the dissent asserts that "Hertz consented through inaction to the settlement of the third-party wrongful death claim . . . ." That was the situation in *Wood.* In that case, the employer was informed in advance of the settlement to be made and was told that unless it objected, the settlement would be undertaken. The situation in this case is just the opposite. While Hertz was told that settlement negotiations were in progress, it was not informed of the settlement until the settlement agreement had been made. Thus, unlike the situation in *Wood*, Hertz was never given the opportunity to forestall the settlement. The settlement was presented to it initially as a *fait accompli* which, subject to court approval, was binding.

The dissent further contends that Hertz had a full opportunity to oppose the settlement at the approval hearing before the trial court. This contention overlooks the purpose and character of that hearing. Because a wrongful death action is brought by a personal representative on behalf of statutory beneficiaries, court approval is required to ensure that the rights and interests of those beneficiaries are protected. Hertz was not a party whose interests were subject to protection by the trial court. It was not represented by the personal representative. Indeed, the personal representative's counsel expressly refused to represent Hertz. Hertz was left to pursue its own rights as an independent party. Its exclusion from settlement negotiations forestalled its ability *pro tanto* to enforce its rights. The approval hearing before the trial court could in no way reverse that exclusion. **[Page 700]**

The claimants argue that *Safety-Kleen* and *Green* do not control decision in this case. They argue that because the third-party settlement exceeded Hertz's maximum potential liability, the settlement effectively insulated Hertz from any liability under the Act and, thus, effected no prejudice. The commission addressed this contention. The commission, citing *Stone v. George W. Helme Co.*, 184 Va. 1051, 1059-60, 37 S.E.2d 70, 73-74, (1946), held that the extinguishment of the third-party claim prejudiced *per se* Hertz's right of subrogation. It further held that variation in the amount of the third-party settlement would affect Hertz's potential fractional liability for fees and costs, and that Hertz, therefore, had an interest in the amount of the third-party settlement and the right to participate in its determination. The commission concluded:

> [Mr. Shea], by his decision, did not represent [Hertz's] interests in the third-party claim. The claimants did not advise [Hertz] of the settlement offer nor obtain its consent. These actions impaired [Hertz's] right of subrogation and foreclosed the possibility that [Hertz] could lessen its obligation by negotiating a higher settlement. The claimants' right to compensation, in this case the reimbursement of attorney's fees and costs, is barred.

We approve that rationale.

The claimants never pursued their rights under the Workers' Compensation Act. They proceeded directly with their third-party wrongful death suit, excluding Hertz from participation in that suit or in its settlement. They sought and received no intervening benefits under the Workers' Compensation Act. Thus, they rejected their rights under the Act and proceeded directly and independently to a full recovery at law.

The judgment of the commission is affirmed.

Affirmed.

ELDER, J., dissenting.

I would hold this case is controlled by rather than distinguishable from *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, **[Page 701]** 444 S.E.2d 3 (1994). Here, the claimants notified Hertz of the proposed settlement and the date on which they hoped to obtain court approval. Hertz had over four weeks in which to act but failed to voice any objections during that time. Therefore, I respectfully dissent.

Wood involved a claimant with asbestosis who filed a claim for workers' compensation benefits against his employer, Caudle-Hyatt, Inc. *Id.* at 393, 444 S.E.2d at 5. Wood simultaneously pursued common law tort actions against various asbestos manufacturers and negotiated settlement offers for the tort claims. *Id.* Wood notified Caudle-Hyatt in writing by certified mail of the terms of the settlement offers and said he intended to accept them unless Caudle-Hyatt objected within ten days. *Id.* Caudle-Hyatt responded that it was not liable for Wood's asbestosis claim; it did not agree or object to the proposed tort settlement or mention any subrogation rights. *Id.* at 393-94, 444 S.E.2d at 5. Wood then settled the tort claims for an amount that exceeded the sum he might have received for his ailment under the Workers' Compensation Act, exclusive of medical expenses. *Id.* at 394, 444 S.E.2d at 5.

On appeal, we held, *inter alia*, that Wood's claim for compensation and a *pro rata* share of attorney's fees from Caudle-Hyatt was not barred because Wood informed Caudle-Hyatt of the terms of the settlement and gave it an opportunity to object or to participate in order to protect its subrogation rights. *Id.* at 398-99, 444 S.E.2d at 7-8. In essence, we held that Caudle-Hyatt consented to the settlement through its inaction.

Similarly, here, Hertz consented through inaction to the settlement of the third-party wrongful death claim on behalf of the claimants. Virginia's wrongful death statutes provide that a decedent's personal representative may compromise a wrongful death claim only with court approval. *See* Code § 8.01-55. It is undisputed that the claimants' attorney kept Hertz's attorneys apprised of the settlement negotiations in the wrongful death suit as they progressed. Although the commission found that the claimants' counsel verbally accepted **[Page 702]** a settlement offer of $725,000 on April 22, 1997, without first obtaining Hertz's approval for that exact figure, claimants' counsel informed Hertz's attorneys of the verbal acceptance that same day. The hearing required under Code § 8.01-55 for formal approval of that settlement did not occur until at least May 21, 1997, more than four weeks later.

During that four-week period, claimants' counsel provided Hertz's counsel with a copy of the letter confirming settlement of the third-party claim. Claimants' counsel also wrote a separate letter, dated May 9, 1997, directly to Hertz's counsel. That letter notified Hertz of the May 21, 1997 hearing at which the claimants intended to seek approval of the third-party settlement. The letter also indicated the claimants' intent thereafter to "turn [their] attention to the subrogation interest of Hertz," indicating clearly that they did not intend to abandon their claim for workers' compensation benefits. Despite this notice, Hertz did not appear at the May 21, 1997 hearing and did not object to the settlement prior to the court's entry of an order approving the settlement on May 27, 1997. Although Hertz lacked standing to oppose the court's entry of an order approving the third-party settlement, the claimants' or personal representative's consent remained a prerequisite to judicial approval of the settlement. If Hertz had communicated its objections to the claimants prior to the hearing or entry of the court's order of approval, the claimants could have withdrawn their consent.

Thus, I would hold that here, as in *Wood*, Hertz consented to the settlement by its inaction, and I would reverse and remand to the commission for further proceedings consistent with this approach, including the mandate that the commission address the issue raised by Hertz regarding apportionment of attorneys' fees and costs incurred by Hertz in protecting its interests in the third-party action. Therefore, I dissent.

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

ROGER MOSCHLER
v.
KENCO GROUP INC
AMERICAN ZURICH INS CO, Insurance Carrier
RISK ENTERPRISE MANAGEMENT, Claim Administrator

Jurisdiction Claim No. VA02000006266
Claim Administrator File No. 5710867362
Date of Injury November 30, 2010
Decided: February 7, 2014

Roger Moschler
Claimant, pro se.

Matthew J. Griffin, Esquire
Emily O. Sealy, Esquire
For the Defendants.

Opinion by MARSHALL, Commissioner

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's January 15, 2014 Order quashing a subpoena duces tecum issued January 10, 2014. We AFFIRM.

I. Material Proceedings

After an evidentiary hearing, a Deputy Commissioner issued a February 13, 2012 Opinion finding the claimant suffered no more than bruising and a skinned elbow as the result of a work-related fall on November 30, 2010. His claim for medical benefits was denied. The Commission affirmed on January 7, 2013 [13 WC UNP VA02000006266]. The claimant appealed to the Court of Appeals of Virginia, which affirmed, *Moschler v. Kenco Group, Inc.*, 13 Vap UNP 0244132, No. 0244-13-2 (Va. Ct. App. July 2, 2013). The claimant's petition for appeal to the Supreme Court of Virginia was refused.1 As of October 4, 2013, the claimant's petition for rehearing was pending before the Supreme Court of Virginia, Record No. 131228.

By letter received January 7, 2014, the claimant requested a subpoena duces tecum. The Clerk of the Commission issued a January 10, 2014 subpoena duces tecum to the employer requiring production on or before January 30, 2014 at 10:00 a.m. of these documents and things:

> A complete copy, as it existed on November 29, 2010, of any employer memoranda, procedure, policy, instruction, directive, or by whatever characterization it may be titled or identified, concerning the reporting, acknowledging, recording, memorializing, investigating, or otherwise preserving, information concerning employee injuries, accidents, illnesses, by whatever cause or event, regardless of the degree, or extent of injury or illness, notwithstanding whether or not any medical care is obtained, offered by the employer or sought by the employee; these requirements shall include any medium in which the requested material existed, including, but not limited to, print, electronic data, poster or other signage, video recording or transmission, oral, visual, or audio transmission, or any other means of dissemination or publication, whether internal to the employer or to other persons or entities. Any change, including, but not limited to, the wording, application, interpretation, availability, accessibility, potential or actual target audience, publication or other use thereof of this information as it existed on or after November 30, 2010, [through] the present and continuing through September 30, 2011.
>
> On behalf of the **Claimant** in a matter now pending and undetermined Roger Moschler, **Claimant** and Kenco Group, Inc., **Defendants.**

On January 10, 2014, defense counsel moved to quash the subpoena duces tecum, arguing the request was overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and the documents were not relevant to any active claims. They argued there was no evidence the documents would constitute after-discovered evidence. The defendants further asserted the claimant sought the documents and things for purposes of lawsuits outside the Commission's jurisdiction.

The Deputy Commissioner quashed the subpoena duces tecum by Order dated January 15, 2014. He noted Rule 1.8 of the Rules of the Commission limits the scope of discovery "only to matters which are relevant to issues pending before the Commission." Finding no issues pending before the Commission,2 he granted the motion to quash the subpoena duces tecum.

The claimant requested reconsideration or review, attaching a December 30, 2013 amended motion for rehearing by the Supreme Court of Virginia to his request. He asserted the Supreme Court of Virginia was awaiting the requested documentation. The Deputy Commissioner denied the request for reconsideration and forwarded the request to the Clerk's office as a Request for Review on January 22, 2013.

II. Findings of Fact and Rulings of Law

Code § 65.2-703 allows "[a]ny party to a proceeding" under the Workers' Compensation Act to seek discovery in conformity with rules promulgated by the Commission. Rule 1.8 of the Rules of the Commission limits the scope of discovery to matters which are relevant to issues pending before the Commission.

There are no issues pending before the Commission at this time. This matter is pending on a petition for rehearing of a denied appeal to the Supreme Court of Virginia. The claimant's other claims have been resolved or are on appeal.3 The claimant is not under any award of indemnity or medical benefits. The Deputy Commissioner did not err in quashing the subpoena duces tecum. We AFFIRM.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

FOOTNOTES

1 The Supreme Court's case information system indicates the appeal was refused on September 20, 2013.

2 The Deputy Commissioner incorrectly stated the matter was pending before the Court of Appeals rather than the Supreme Court of Virginia.

3 A claim for a July 9, 2010 accident against Glaxo Smith Kline, JCN VA00000305449, was finally settled by agreement approved on December 20, 2010, with no ongoing medical or indemnity award. On July 30, 2012 and August 3, 2012, the claimant asked to vacate the Award Order. A Deputy Commissioner issued an August 10, 2012 letter holding the Commission no longer had jurisdiction. On August 29, 2013, the Commission affirmed. This matter is currently on appeal at the Court of Appeals of Virginia, Record No. 1841-13-2.

A claim for a May 18, 2011 accident against the current employer was assigned JCN VA02000009342. This claim was finally resolved by an approved petition and order on October 15, 2013, and there is no medical award to the claimant.

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

BILLY TROY JOHNSON, Claimant
v.
LAUREL TRUCKING INC., Employer
OLD REPUBLIC INSURANCE CO., Insurer

VWC File No. 200-18-25
Decided: August 29, 2001

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For Clinchfield Coal Company

Opinion by TARR, Commissioner

REVIEW on the record before Commissioner Tarr, Commissioner Diamond and Commissioner Dudley at Richmond, Virginia.

The employer and carrier request Review of the Chief Deputy Commissioner's letter opinion quashing its subpoena duces tecum. We REVERSE and REMAND.

On March 16, 2000, the claimant, a truck driver for Laurel Trucking Company, sustained an electrical shock injury while loading coal at Clinchfield Coal Company's preparation plant. The employer paid temporary total disability benefits from March 16, 2000, pursuant to a Commission Award Order dated May 10, 2000. This Award also provided for lifetime medical benefits. The wage loss portion of the Award was terminated by agreement on October 17, 2000, based on the claimant's return to work at a pay equal or greater than his pre-injury wage. From documents in the file, it appears that the claimant received an electrical shock from a metal box under the control of Clinchfield Coal Company.

By letter dated April 19, 2001, the employer requested that the Commission issue a subpoena duces tecum to Clinchfield Coal Company. The employer contended that it "has asserted its right of subrogation in this claim." The employer maintained that in "order to fully investigate the subrogation issue, the carrier requests that the enclosed Subpoena Duces Tecum be issued for the production of any and all documents and tangible items in Clinchfield's possession concerning this accident."

Clinchfield Coal Company, by counsel, objected to the subpoena and asked that it be quashed. The Chief Deputy Commissioner ruled that the Commission does not have the specific jurisdiction to issue the subpoena in question because the scope of discovery exceeds that contemplated in Rule 1.8, as there are no issues pending before the Commission.

Commission Rule 1.8(A) provides in pertinent part that:

> The scope of discovery shall extend only to matters which are relevant to issues pending before the Commission and which are not privileged. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

The scope of discovery in a Commission proceeding is also guided by Supreme Court Rule 4:1(b)(1), which states, in pertinent part that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any

other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

In construing Commission Rule 1.8, we have previously held that if a claimant is under an open award, the employer has the right to discover medical evidence relevant to the claimant's physical and medical condition. *Perry v. Olan Mills, Inc.*, 95 WC UNP 1687546, VWC File No. 168-75-46 (April 18, 1995). We have also suggested that discovery would be an appropriate method for obtaining wage information concerning a claimant who is under an open award. *McNabb v. AJD Installation Co.*, 96 WC UNP 1334054, VWC File No. 133-40-54 (May 9, 1996); *Olson v. MMR/Wallace Corp.*, 75 Va. WC 26 (1996).

Relying on these precedents, we held in *Wampler v. McQuay International*, 96 WC UNP 1752006, VWC File No. 175-20-06 (July 16, 1996), that discovery is permissible while a claimant is under an open award even in the absence of a pending application for hearing. In *Craft v. Commercial Courier Express, Inc.*, 78 O.W.C. 270, 78 Va. WC 270 (1999), the claimant was under an open award for medical benefits. The employer propounded interrogatories on the claimant, asking him to provide supplemental answers to the interrogatories previously propounded with regard to his claim, and also asked to provide his physical addresses for various time periods. The claimant argued that since there were no claims pending before the Commission, the employer was barred from seeking further information through the discovery process. We disagreed holding that "the claimant's ongoing award for medical benefits constitutes an 'issue' or 'proceeding' pending before the Commission as those terms are used in Commission Rule 1.8 and in Virginia Code § 65.2-703."

In this case, the Chief Deputy Commissioner found that the claimant was not under an open award because the file was closed. The deputy found that "[a]lthough the claimant has received an award of lifetime medical benefits, there is no proceeding currently before the Commission in regard to his medical benefits, and the subpoena does not request medical documents." We disagree. As we held in *Craft*, "the claimant's ongoing award for medical benefits constitutes an 'issue' or 'proceeding' pending before the Commission as those terms are used in Commission Rule 1.8 and in Virginia Code § 65.2-703."

Clinchfield Coal Company also argues that the Commission cannot issue the subpoena because "the subpoena is designed to discover facts concerning the accident and a possible third-party claim against Clinchfield. The subpoena is therefore outside the scope of the enabling statute and the Rules of the Commission." Clinchfield argues the subpoena "is not being used to investigate any issue before this body, but to investigate a third-party action, which would have to be filed in circuit court." We disagree.

While it is true that the employer's action would be filed in circuit court, the right that it seeks to enforce, its employer's subrogation right against a potential third-party tort feasor, emanates from Code § 65.2-309 of the Workers' Compensation Act. Moreover, a recovery can affect our Award in accordance with Code § 65.2-312. Accordingly, we find that the Commission does have jurisdiction to issue the subpoena in question.

Clinchfield Coal Company's other objection to the subpoena is that it seeks information that is protected by the attorney-client privilege or is attorney work product. We therefore REMAND this case to Deputy Commissioner Burchett so that he may consider these other objections.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days from receipt of this Opinion.

cc:

Billy Troy Johnson
Route 1, Box 66
Cleveland, Virginia 24225

Old Republic Insurance Co.
P. O. Box 1590
Pikeville, Kentucky 41502

Laurel Trucking Inc.
P. O. Box 504
Bluefield, Virginia 24605

Fields v. Labor Ready, Inc., 01 WC UNP 2037099 (2001)

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

WILLIAM L. FIELDS, Claimant
v.
LABOR READY, INC., Employer
RELIANCE NATIONAL INDEMNITY CO., Insurer

VWC File No. 203-70-99
Decided: November 16, 2001

Richard E. Cassell, Esquire
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for the Claimant.

R. Ferrell Newman, Esquire
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Richmond, VA 23230
for the Defendants.

Opinion by the COMMISSION

REVIEW on the record before Commissioner Tarr, Commissioner Diamond, and Chief Deputy Commissioner Link in Richmond, Virginia.

This matter is before the Commission on the employer's August 29, 2001, petition for review of an August 24, 2001, Order from the Director of Claims/Deputy Commissioner. In that Order the Director of Claims/Deputy Commissioner directed the defendants to respond to discovery no later than August 31, 2001. Our file contains a copy of the 13 interrogatories propounded upon the defendants. In summary, the interrogatories ask for the following information:
1. The names, addresses, and job titles of all persons supervising or assisting the claimant unload a vehicle at the time of the accident.
2. All reports or records or investigations of the accident.
3. The name and address of the manufacturer of the device used as an unloading ramp.
4. The make, year, VIN #, and model of the truck as well as the name of the owner of the truck.
5. Instructions regarding the use of the unloading ramp.
6. Details regarding any claim that the unloading ramp was defective.
7. Information regarding the claimant's wage records.
8. Medical records and reports.
9. Wage records subsequent to the claimant's return to work, if applicable.
10. Information regarding any claim that the claimant was not entitled to compensation after December 13, 2000.
11. Connections between the respondent and the claimant and the person who attached the unloading ramp.
12. All connections between the respondent or the claimant and the person that manufactured the unloading ramp.
13. All connections between the respondent or the claimant and the person that supervised the unloading.

Counsel for the defendants argues that since the case has been accepted and payments made pursuant to the voluntary agreement of the parties and no other claim is pending, the carrier should not be burdened with the responsibility of responding to the interrogatories. Counsel asserts that Rule of the Commission 1.8(A) provides that "[T]he scope of discovery shall extend only to matters which are relevant to issues pending before the Commission. . . ." Counsel argues that the matters which are the subject of the discovery are not relevant to a pending claim.

The defendants' counsel also acknowledges that counsel for the claimant is investigating the possibility of a third party claim. The defendants state that they are happy to cooperate in that regard and to provide information relevant to that claim. However, counsel for the defendants states his reluctance to use the compensation case as a means to elicit information from the employer in regard to the evaluation of the viability of a third party claim. For that reason, counsel for the defendants requested review.

Subsequent to this request for review, on September 26, 2001, counsel for the defendants filed with the Commission and forwarded to the claimant's counsel a complete record of the days worked and wages paid to the claimant. Therefore, Interrogatory #7 appears not to be at issue.

In *Johnson v. Laurel Trucking Company, Inc.*, 01 WC UNP 2001825, VWC File No. 200-18-25 (decided September 20, 2001), the Commission held that the Commission can issue a subpoena designed to discover facts concerning an accident and a

possible third-party claim when the subpoena was being used to investigate a third party action to be filed in Circuit Court. The Commission found in *Johnson* that the right the parties sought to enforce, the employer's subrogation right against a potential third-party tort feasor, emanated from Va. Code Ann. § 65.2-309. Because a recovery in that action could affect an award of the Commission pursuant to Va. Code Ann. § 65.2-312, the Commission found that it had jurisdiction to issue the subpoena.

Although the present matter involves responses to interrogatories and not a subpoena, we find that the holding in *Johnson, supra*, is relevant to our present decision and determinative thereof. Accordingly, we find that the defendants must respond to the interrogatories propounded upon them by the claimant's counsel. Therefore, we AFFIRM the Director of Claims/Deputy Commissioner's August 24, 2001, Order directing the defendants to respond to discovery. We hereby ORDER the defendants to respond within 21 days of the date of this Opinion.

This matter is hereby removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

cc:

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Austin v. Consolidation Coal Company, 256 Va. 78, 501 S.E.2d 161 (1998)

IN THE SUPREME COURT OF VIRGINIA

KENNETH WAYNE AUSTIN
v.
CONSOLIDATION COAL COMPANY

Record No. 972627
Decided: June 5, 1998

Present: All the Justices

Pursuant to Rule 5:42, a certified question from a United States District Court is answered in the negative because Virginia law would not recognize intentional or negligent interference with a prospective civil action against a third party by spoliation of evidence as an independent tort under the facts of this particular case.

Torts — Spoliation of Evidence — Practice and Procedure — Court Orders — Interference with Actions Against Third Persons

Plaintiff was injured by a hose which burst during a welding operation. Having received workers' compensation benefits he could not sue his employer. Plaintiff pursued a products liability action against the manufacturer and distributor of the allegedly defective hose. The employer allegedly refused to disclose the identities of the manufacturer and distributor of the hose. In a court proceeding on a petition to perpetuate testimony, the trial court commented that an order on the motion should contain a statement that no parties were to do anything which would affect the integrity of the hose. However, no such order was entered. The employer allegedly destroyed the hose before plaintiff's experts ever had a chance to conduct independent testing. Discovery revealed that the distributor of the hose is an affiliate of plaintiff's employer. Plaintiff initiated an action against the employer, claiming that it tortiously interfered with his ability to pursue a products liability suit when it destroyed the allegedly defective hose. This certified question was presented by the federal district court.

1. It is the firmly established law of this Commonwealth that a trial court speaks only through its written orders. For purposes of this opinion the federal district court's statement of facts is amended to reflect that no order to preserve the hose was entered by the circuit court, and the answer to the certified question is, in part, predicated upon this factual modification.
2. The issue whether an employer has a duty to preserve evidence for the benefit of an employee's potential tort action against a third party is a matter of first impression in this Commonwealth. However, the principles that apply to the facts and circumstances are familiar and well settled.
3. The essential elements of a cause of action based on a tortious act are (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that duty or right, and (3) harm or damage to the plaintiff as a proximate consequence **[Page 79]** of the violation or breach. A cause of action does not evolve unless all of these factors are present.
4. Under the facts and circumstances of this case, plaintiff has no cause of action against his employer for intentional or negligent spoliation of evidence because the employer had no legal duty to preserve the hose. In the absence of a legal duty, plaintiff has no cause of action against the employer.
5. No state or federal statutes or authorities require an employer to preserve its personal property so that such property may be used to benefit an employee who has filed a tort action against a third party.
6. The employer/employee relationship that existed between plaintiff and his employer, based on the record in this case, does not give rise to such duty.
7. The Virginia Workers' Compensation Act is devoid of any language which imposes a duty upon an employer to preserve property which may be beneficial to an employee who seeks to prosecute a civil action against a third party.
8. The facts here, showing that the employer conducted an investigation of plaintiff's accident and forwarded the hose to an affiliate corporation for testing and analysis, are not sufficient to support plaintiff's assertion that the employer assumed a tort duty to preserve the hose.
9. Even assuming that entry of such an order would have created a duty, no order was entered imposing an obligation to preserve the evidence, and, thus, no duty was created.

Upon a Question of Law Certified by the United States District Court for the Southern District of West Virginia.

Certified question answered in the negative.

Thomas R. Scott, Jr. (Donald T. Caruth; Street, Street, Street, Scott & Bowman; Brewster, Morhous & Cameron, on briefs), for plaintiff.

Ancil G. Ramey (Monroe Jamison; Steven P. McGowan; Steptoe & Johnson, on brief), for defendant.

Amicus Curiae: The Virginia Trial Lawyers Association (Jonathan A. Smith-George; Patten, Wornom & Watkins, on brief), in support of plaintiff.

JUSTICE HASSELL delivered the opinion of the Court.

Pursuant to Rule 5:42, the United States District Court for the Southern District of West Virginia certified to this Court the following question of law: **[Page 80]**

> "Whether Virginia law would recognize intentional or negligent interference with a prospective civil action by spoliation of evidence as an independent tort under the facts described below."
>
> The order contained the following facts:
>
> "On May 20, 1995, the plaintiff Kenneth Austin was injured while working in a coal mine in Buchanan County, Virginia. The accident occurred when a hose that Mr. Austin was using to cool down a welding area burst in his hands, causing severe injuries to his face and neck. Because he received workers' compensation benefits, Mr. Austin was barred by statutory immunity under Virginia law from pursuing a cause of action against his employer, Consolidation Coal Company (Consolidation), the defendant in the above-styled case. Therefore, Mr. Austin chose to pursue a products liability action against the manufacturer and distributor of the allegedly defective hose which caused his injuries.
>
> "However, Consolidation allegedly refused to disclose the identities of the manufacturer and distributor to Mr. Austin. Consolidation also refused to provide Mr. Austin with samples of the hose, or to allow his expert to evaluate the hose on Consolidation's property. This is despite the fact that Consolidation freely granted access to the hose to both the manufacturer and the distributor for their defense experts to evaluate. When one year passed and Consolidation had still failed to provide voluntary cooperation, Mr. Austin filed an action against them in the Buchanan County Circuit Court. At a May 23, 1996 hearing, Judge Keary R. Williams ordered that Consolidation's purchasing agent sit for a deposition with plaintiff's counsel for the purpose of discovering the identities of the manufacturer and distributor of the hose. Judge Williams also ordered Consolidation to preserve the hose as evidence until the plaintiff's experts had an opportunity to test it.
>
> "In direct violation of this court order, Consolidation allegedly destroyed the hose before Mr. Austin's experts ever had a chance to conduct independent testing. Mr. Austin did eventually discover the identities of the manufacturer, National Fire Hose Corporation, and the distributor, Fairmont Supply Company, **[Page 81]** and subsequently filed suit against both companies in this Court. Discovery also revealed that the distributor, Fairmont Supply Company, is either a subsidiary or an affiliate corporation of Consolidation. Due to Consolidation's destruction of the allegedly defective hose, Mr. Austin claims that he confronts significant obstacles in proving his products liability claim. For this reason, Mr. Austin initiated the above-styled action against Consolidation, claiming that they tortiously interfered with his ability to pursue a products liability suit when they destroyed the allegedly defective hose. Other courts have labeled such tortious conduct as 'spoliation of evidence.'"

Even though the federal district court's certification order states that the Circuit Court of Buchanan County entered an order requiring that Consolidation preserve the hose, no such order was actually entered. The litigants conceded, at the bar of this Court, that the Circuit Court of Buchanan County did not enter a written order prohibiting the destruction of the hose. Rather, the circuit court stated during a hearing on Austin's petition to perpetuate testimony that an order granting the relief requested in the petition "should contain a statement that no parties are to do anything [which would affect] the integrity of the hose. . . ."

[1] We have stated that "[i]t is the firmly established law of this Commonwealth that a trial court speaks only through its written orders." *Davis v. Mullins*, 251 Va. 141, 148, 466 S.E.2d 90, 94 (1996). *Accord Walton v. Commonwealth*, 256 Va. 85, 94, 501 S.E.2d 134, 140 (1998) (this day decided); *Town of Front Royal v. Industrial Park*, 248 Va. 581, 586, 449 S.E.2d 794, 797 (1994); *Robertson v. Superintendent of the Wise Correctional Unit*, 248 Va. 232, 235 n.*, 445 S.E.2d 116, 117 n.* (1994). Therefore, for purposes of this opinion, we must amend the federal district court's statement of facts to reflect that no order to preserve the hose was entered by the Circuit Court of Buchanan County. Our answer to the certified question is, in part, predicated upon this factual modification.

Austin argues that Virginia should recognize a cause of action for intentional spoliation of evidence based on the facts and circumstances of his case. Relying upon cases from other jurisdictions, Austin says that those courts have recognized "a cause of action in tort for interference with the preservation of evidence, commonly known as spoliation of evidence. The elements are: (1) pending or probable **[Page 82]** litigation involving the plaintiff; (2) knowledge on part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by the defendant designed to disrupt plaintiff's case; (4) disruption of plaintiff's case; and (5) damages proximately caused by the defendant's acts." Austin cites the following authorities in support of his position: *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986); *Smith v. Superior Ct.*, 198 Cal. Rptr. 829, 837 (Ct. App. 1984); *Bondu v. Gurvich*, 473 So. 2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984); *Viviano v. CBS, Inc.*, 597 A.2d 543, 549-50 (N.J. Super. Ct. App. Div. 1991); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993). *But see Panich v. Iron Wood Prod. Corp.*, 445 N.W.2d 795, 797 (Mich. Ct. App. 1989) (employer has no duty to preserve evidence).

Continuing, Austin asserts that we should also recognize a cause of action for negligent spoliation of evidence. Austin says that this so-called tort differs from intentional spoliation of evidence in that the purported tortfeasor negligently damaged or destroyed evidence which may be necessary as proof in a civil action. *See Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Ct. App. 1985).

Responding, Consolidation argues that under the facts and circumstances described in the certification order, it has no duty to preserve evidence for the benefit of an injured person who has a potential cause of action against a third party. Therefore, Consolidation contends that Austin has no cause of action against it for any so-called tort of intentional or negligent spoliation of evidence.

[2-4] The issue whether an employer has a duty to preserve evidence for the benefit of an employee's potential tort action against a third party is a matter of first impression in this Commonwealth. However, the principles that we must apply to the facts and circumstances before this Court are familiar and well settled.

> "The essential elements of a cause of action . . . based on a tortious act . . . are (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that duty or right, and (3) harm or damage to the plaintiff as a proximate consequence of the violation or breach. . . . A cause of action does not evolve unless all of these factors are present." *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 368-69, 350 S.E.2d 629, 631 (1986) (quoting *Locke v. Johns-Manville Corp.*, 221 Va. 951, 957, 275 S.E.2d 900, 904 (1981)); *accord Van Deusen v. Snead*, 247 Va. 324, 330, **[Page 83]** 441 S.E.2d 207, 210 (1994); *Atlantic Co. v. Morrisette*, 198 Va. 332, 333, 94 S.E.2d 220, 221-22 (1956).

We hold that under the facts and circumstances of this case, Austin has no cause of action against Consolidation for intentional or negligent spoliation of evidence because Consolidation had no legal duty to preserve the hose.

Austin tries to identify several sources which may have imposed a duty or obligation upon Consolidation to preserve the hose. Austin argues that he was an employee of Consolidation at the time of the accident and, therefore, a master/servant relationship existed which somehow imposed a duty upon Consolidation. Austin also asserts that "federal and state law mandate numerous requirements and duties, particularly in the context of the coal mining industry, upon employers to their employees" and that some of these statutes, which require employers to provide employees with safe working environments and conditions, may have imposed a duty upon Consolidation to preserve the hose.

[5-6] We disagree with Austin. Austin cites no state or federal statutes or authorities which require an employer like Consolidation to preserve its personal property so that such property may be useful to an employee who has filed a tort action against a third party. Additionally, the employer/employee relationship that existed between Austin and Consolidation, based on the record before us, does not give rise to such duty.

Austin also argues that "a fiduciary relationship or one of trust existed between Austin and Consolidation which mandated the preservation of the hose." Austin says that Virginia's Workers' Compensation Act, Code § 65.2-309, *et seq.*, "establishes such a consensual or fiduciary relationship as a matter of law." Continuing, he contends that a "claim for [w]orkers' [c]ompensation benefits operates as an assignment to the employer of any right to recover damages which the injured employee may have against any other party for such injury. . . . Austin's assignment of rights created a fiduciary relationship or a relationship of trust between Consolidation and him. The Act also created a duty upon Consolidation and elevated it to a position of trust."

[7] We find no merit in Austin's contentions. We have reviewed the Virginia Workers' Compensation Act, and it is devoid of any language which imposes a duty upon an employer to preserve property **[Page 84]** which may be beneficial to an employee who seeks to prosecute a civil action against a third party.

[8-9] Austin contends that Consolidation assumed a duty to preserve this hose because Consolidation conducted an investigation of Austin's accident and forwarded the hose to an affiliate corporation for testing and analysis. We disagree. These facts are simply not sufficient to support Austin's assertion that Consolidation assumed a tort duty to preserve the hose. We also reject Austin's argument that the purported "order" of the Circuit Court of Buchanan County imposed such duty upon Consolidation. Even assuming that entry of such an order would have created a duty, Austin conceded at the bar of this Court that no order was ever entered and, thus, no duty was created.

Accordingly, we must answer the certified question in the negative.

Certified question answered in the negative.

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

THE ESTATE OF WILLIAM R. LINNIN, Claimant
v.
HARTMAN WALSH PAINTING COMPANY, Employer
ZURICH AMERICAN INSURANCE COMPANY, Insurer

VWC File No. 213-36-39
Decided: November 7, 2003

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Opinion by the COMMISSION

REVIEW on the record before Commissioner Tarr, Commissioner Dudley, and Chief Deputy Commissioner Link in Richmond, Virginia.

This matter is before the Commission on Busch Entertainment Corporation's request for review of an Order rendered by Deputy Commissioner Woolard on July 30, 2003. The deputy commissioner ordered:

> that to the extent the subpoena duces tecum calls for proprietary and confidential information concerning the amounts charged, or received, pursuant to the service contract between Hartman-Walsh Painting Company and Busch Entertainment Corporation, the motion to quash is **GRANTED**, and the subpoena duces tecum is **DENIED** relative to that specific information. In all other respects, the Partial Motion to Quash Subpoena Duces Tecum is **DENIED** and Busch Entertainment Corporation shall comply with the Subpoena Duces Tecum.

The subpoena *duces tecum* issued on or about May 30, 2003, by Rhett B. Franklin, Esquire, described the subject of the subpoena as follows:

> Copies of all incident and investigative reports, including photographs, diagrams, field notes, witness statements, prepared by Busch employees following the accident involving William Linnin, III on March 1, 2003 near the "Big Bad Wolf" roller coaster. Copies of any geographical surveys of the area which encompasses the accident site, as well as engineering diagrams, plats, building plans of the same area. Copies of any and all contracts and addendums in effect at the time of the accident controlling the work being performed by Hartmann-Walsh Painting Company on the "Big Bad Wolf" roller coaster.

The Commission notes the significance of the fact that the company subject to the subpoena, Busch Entertainment Corporation, was not provided a copy of the Commission's July 30, 2003, Order. The Order in response to the petition from Busch Entertainment Corporation was sent only to the claimant, the employer (Hartman-Walsh Painting Company), and the insurer, Zurich American Insurance Company.

Busch Entertainment Corporation (BEC) is a third party in this workers' compensation matter. However, because BEC filed a

motion to quash the subpoena served on it and because the Commission issued an Order in response to BEC's motion, the Commission erred in not providing a copy of its Order to BEC.

BEC seeks review of the deputy commissioner's ruling denying, in part, the Partial Motion to Quash *Subpoena Duces Tecum* and thus finding that certain documents sought by the claimant through a subpoena *duces tecum* are not protected by the attorney-client privilege or the work product doctrine. BEC produced to counsel for the claimant documents responsive to other requests in the subpoena but also filed the partial motion to quash.

BEC has requested oral argument before the Commission. However, upon consideration of the position statements filed by the parties in this matter and documentation submitted by BEC, the Commission believes it has sufficient information in order to rule upon this issue and finds that oral argument is not necessary. *Barnes v. Wise Fashions*, 16 Va. App. 108, 428 S.E.2d 301 (1993).

Counsel for BEC provides a factual summary of the accident in this case. Counsel states that on or about March 1, 2003, William R. Linnin, the deceased claimant, was fatally injured while painting a portion of a roller coaster called the Big Bad Wolf at Busch Gardens Williamsburg. At that time of his fatal injury, Linnin was an employee of Hartman-Walsh Painting Company, a subcontractor of BEC, hired to perform painting jobs and other work at Busch Gardens Williamsburg. Counsel for BEC believes that one or more of Linnin's co-workers witnessed the accident. The accident was reported to BEC personnel. BEC personnel then prepared certain witness statements at the request of in-house counsel for Anheuser Busch Corporation, the parent company of BEC, as well as at the request of local counsel. The BEC personnel took handwritten notes and prepared summaries of the event that had transpired on or about March 1, 2003. Counsel for BEC believes that these are the documents requested in the subpoena in question which have now been ordered produced by the deputy commissioner's July 30, 2003, Order. It is from the Order denying BEC's partial motion to quash concerning the request for "incident and investigative reports, field notes, and witness statements prepared by Busch employees following the accident," that counsel petitions for review. Counsel for BEC asserts that the documents are protected by the attorney-client privilege and/or the work product doctrine.

In response to BEC's partial motion to quash, counsel for the claimant filed a letter brief with the deputy commissioner, arguing that the attorney-client privilege did not attach to the request for documents because the documents were not in connection with pending or threatened litigation. Additionally, counsel argued that the work product protection did not apply because BEC was a non-party to the workers' compensation litigation at issue and because there was no pending or threatened litigation involving BEC. The Commission held in *Johnson v. Laural Trucking, Inc.*, 01 WC UNP 2001825, VWC File No. 200-18-25, that the Commission has jurisdiction to issue subpoena against a potential third party, not actually involved in the workers' compensation litigation so long as an issue was pending before the Commission. In *Johnson*, the Commission remanded the case for a determination on the attorney-client privilege issue. Therefore, we find that the Commission has jurisdiction to consider this issue. The claimant's counsel agreed with BEC's motion to quash concerning proprietary or confidential information, specifically the amounts charged or received pursuant to the service contract between Hartmann-Walsh and BEC.

The work product doctrine traces its origin to *Hickman v. Taylor*, 329 U.S. 495 (1947). The privilege established by the work product doctrine is incorporated in Virginia Rule 4:1(b)(3). This rule provides that a party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for the other party's representative, including an insurer or agent, only upon a showing that the party seeking discovery has a substantial need for the materials in the preparation of his case and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

In this matter, we find that the information requested in the subpoena *duces tecum*: incident and investigative reports, field notes, and witness statements prepared by Busch employees following the accident are otherwise discoverable under Rule 4 and further that these documents appear reasonably calculated to lead to the discovery of admissible evidence under Rule 4:1(b)(1). Rule 1.8 of the Rules of the Virginia Workers' Compensation Commission states that discovery in workers' compensation actions shall extend only to matters which are relevant to the issues pending before the Commission and which are not privileged. We find that the documents are relevant to the issues before the Commission.

In order to determine whether these documents were prepared in anticipation of litigation or for trial and are, therefore, work product, we must attempt to determine whether the primary purpose for generating the documents was the prospect of litigation. In the present matter, counsel for BEC asserts that both in-house and local counsel instructed BEC personnel to prepare certain witness statements, to take certain handwritten notes, and to prepare summaries of events that had transpired. Based upon this information, we find that it is likely that from the outset in-house counsel and local counsel recognized that litigation was a likely outcome of the accident.

"[A] party acting on its own in anticipation of litigation or trial is creating work product." *Spahn Virginia Attorney-Client Privilege and Work Product Doctrine* (1997). In *Rakes v. Fulcher*, 210 Va. 542, 547, 172 S.E.2d 751, 756 (1970), the Court explained the rule regarding work product as follows: "Where both parties have an equal opportunity to investigate, and where all the witnesses to the accident are known and available to both sides, discovery should not be granted." The Court added, "We interpret good cause as used in our Rule 4:9 to mean that before any party is entitled to the production of documents or to other tangible things . . . there must be a showing of some special circumstances in addition to relevancy. Discovery procedures were not intended to open an attorney's file to opposing counsel; nor were they intended to afford one attorney the luxury of having

opposing counsel investigate the case for him."

Counsel for the claimant relies on *Robertson v. Commonwealth of Virginia*, 181 Va. 520, 539-540 (1943), for the proposition that there must be pending or threatened litigation for the attorney-client privilege to attach. However, at page 539, the Court in *Robertson* also wrote:

> A statement concerning an accident which is obtained by the employer from his servant for the bona fide purpose of being later transmitted to the employer's attorney for advice, or to be used by the attorney in connection with pending or threatened litigation is privileged.

Counsel for BEC also cites *Virginia Elec. & Power Co. v. Westmoreland — L. G. & E. Partners*, 259 Va. 319, 325 (2000), for the proposition that privilege attaches to a document prepared for the purpose of being sent to counsel for legal advice. Additionally, counsel cites *Commonwealth v. Edwards*, 235 Va. 499, 508-09 (1988), for the principle that confidential communications between an attorney and the client made because of that relationship and concerning the subject matter of the attorney's employment are privileged from disclosure "even for the purpose of administering justice."

In reliance upon *Collins v. Mullins*, 170 FRD 132 (W.D. Va. 1996), counsel for the claimant asserts that a non-party cannot claim work product protection. In *Collins*, the claimant sought witness statements from a former party to the litigation that the court had dismissed from the litigation pursuant to a Rule 12(b)(6)1 motion and whom the claimant was moving to dismiss pursuant to Rule 54(b). Counsel for the defendants asserts that the holding in *Collins, supra*, is not relevant to the present case because BEC is not a dismissed party but instead is a party with a real interest in protecting the documents at issue because the documents were created in anticipation of litigation.

Counsel for BEC further states:

> In a significant portion of products liability and premises liability, the person injured files a Workers' Compensation action against his employer prior to filing suit against the premises owner or product manufacturer or supplier. The purpose and policy behind the Workers' Compensation statutory scheme is to provide immediate monetary relief to persons injured in the scope of their employment. The Workers' Compensation statutory scheme specifically contemplates later actions against third parties, and gives the employer and/or its insurer the right to subrogate against that third-party to collect any award it has paid the employee. *See*, Va. Code Ann. §§ 65.2-309, 310.

For the purposes of this review, counsel for BEC offered to disclose the referenced documents that it believes are responsive to the subpoena but protected from disclosure for *in camera* inspection. Having considered the issues and having been provided a description of the documents, the Commission does not find it essential to review the actual documents.

Generally, a right of review lies only to a final decision or award of the Commission, granting or denying, or changing or refusing to change, some benefit payable or allowable under the Workers' Compensation Act and leaving nothing to be done except to superintend ministerially to the execution of the award. *Holly Farms Foods, Inc. v. Carter*, 15 Va. App. 29, 34 (1992) (*quoting Jewell Ridge Coal Corp. v. Hendeson*, 229 Va. 266, 269 (1985)). However, the Commission possesses the discretionary authority upon a showing of good cause to allow interlocutory review of evidentiary or procedural matters not involving final decisions or awards, where substantial prejudice might result from a contestable decision. *Echols v. Rite-Aid Corporation*, 78 O.W.C. 16, 78 Va. WC 16 (1999); *Handlovitch v. Chesapeake General Hosp.*, 75 O.W.C. 293, 75 Va. WC 293 (1996); *Saunders v. Management Consulting, Inc.*, 75 O.W.C. 22, 75 Va. WC 22 (1996).

The Commission usually declines interlocutory reviews on evidentiary or procedural matters except for good cause shown. *Dancy v. Georgia Pacific Corporation*, 76 O.W.C. 446, 76 Va. WC 446 (1997).

In the present matter, we find that BEC could suffer substantial prejudice if it is required to produce incident and investigative reports, field notes, and witness statements prepared by Busch employees following the accident. We find that BEC has already suffered prejudice by not being sent a copy of the July 30, 2003, Order. Therefore, the Commission will consider on review counsel's reliance upon the work product doctrine and attorney-client privilege.

We find that counsel for BEC has borne the burden of establishing that the documents in question were prepared in anticipation of litigation and that the incident and investigative reports, field notes, and witness statements are protected by the work product doctrine.

Having found that the documents are work product, we must determine whether the claimant has shown a substantial need for the documents and whether he has established that he cannot obtain the information elsewhere. A finding of substantial need involves consideration of two factors: (1) the relevance and importance of the documents, and (2) the ability to obtain the facts from other sources. We agree that the information sought is potentially relevant and important to the workers' compensation claim. However, we also find that the counsel for the claimant may seek the identity of the witnesses to the accident and that the other information the claimant's counsel seeks is obtainable through the standard discovery procedure of depositions. We find that the claimant's counsel has not shown that he has a substantial need for information which cannot be procured by other means. Therefore, we find that good cause has not been shown for the production of the documents that are protected by the work

product doctrine. We also find that any documents which were prepared by employees and transmitted at the request of counsel either to in-house counsel for Anheuser Busch Corporation or to local counsel are also protected by attorney-client privilege. Accordingly, we AFFIRM that portion of the July 30, 2003, Order which grants the partial motion to quash the subpoena *duces tecum* in regard to proprietary and confidential information concerning the amounts charged or received, pursuant to the service contract between Hartman-Walsh Painting Company and Busch Entertainment Corporation. We REVERSE the deputy commissioner's denial in regard to all other aspects of the partial motion to quash subpoena *duces tecum* on the ground that the documents previously identified in this Opinion are protected by the work product doctrine and/or by attorney-client privilege.

This matter is ORDERED removed from the review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days of receipt.

cc:

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FOOTNOTES

1 *Federal Judicial Procedure and Rules* 12(b)(6) and 54(b).

Rule 1.8 Discovery

A. Scope and Method. The scope of discovery shall extend only to matters which are relevant to issues pending before the Commission and which are not privileged. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained by oral or written deposition, interrogatories to parties, production of documents or things, requests for admission, inspection of premises or other means of inquiry approved by the Commission.

B. Limiting Discovery. The Commission may limit the frequency or extent of discovery if it is unreasonably cumulative, duplicative, expensive or if the request was not timely

made. The Commission will consider the nature and importance of the contested issues, limitations on the parties' resources and whether the information may be obtained more conveniently and economically from another source.

C. Stipulation to Discovery. Except as specifically provided by these rules, the parties may by written stipulation agree to other methods of discovery or provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like other depositions.

D. Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement a response to include information thereafter acquired unless such information materially affects a prior response.

E. Protective Order. Upon good cause shown, the Commission may enter an order limiting discovery to protect a party, a witness, or other person from embarrassment, oppression, or undue burden or expense.

F. Subpoenas. A party requesting a subpoena for witness or subpoena duces tecum shall prepare the subpoena and submit it to the Commission for insertion of return date and Clerk certification; a check or money order for service fee, payable to the appropriate sheriff's office, shall accompany the request. The Commission shall forward the subpoena and service fee to the designated sheriff's office, unless requested to do otherwise.

Subpoenaed records may be made returnable to the requesting party or, at the direction of the Commission, to the Clerk of the Commission or to a regional office. If subpoenaed records contain medical reports they must be filed with the Commission pursuant to Rule 4.2.

Requests for subpoenas may be filed with the Commission at Richmond or in the regional office assigned to hear the case.

1. Subpoenas for Witnesses. Requests should be filed at least 10 days prior to hearing.

2. Subpoenas Duces Tecum. Requests should be filed at least 15 days before hearing and the subpoena shall describe with particularity the materiality of the documents or articles to be produced.

All requests for subpoenas duces tecum shall be served on each counsel of record, or the unrepresented party, by delivering or mailing a copy to each on or before the day of filing. Each request shall have appended either acceptance of service or a certificate that copies were served in accordance with the law, showing the date of delivery or mailing.

G. Depositions. After a claim or application has been filed, any party may take the testimony of any person, including a party, by deposition upon oral examination or upon written questions.

The attendance of witnesses may be compelled by subpoena. The deposition of a party or physician may be taken without permission of the Commission. Leave of the Commission shall be obtained to take the deposition of any other persons. Depositions shall be taken in accordance

with the requirements and limitations of the Rules of the Supreme Court of Virginia governing actions at law unless the parties stipulate to discovery as set forth in Rule 1.8(C), *supra.*

For good cause shown the deposition of an attending panel physician may be ordered to be taken at the expense of the employer if the physician has not prepared and completed an Attending Physician's Report (Form 6) or has not otherwise prepared written reports which are sufficient to answer questions concerning injury, diagnosis, causation, disability and other matters not stipulated and deemed by the Commission to be material to a claim or to a defense. The expenses of such depositions are subject to the approval of the Commission.

Depositions shall be filed with the Commission and be made a part of the record.

H. Interrogatories to Parties. After a claim or application has been filed, interrogatories limited to contested issues may be served by one party on another party, more than 21 days before hearing without prior Commission approval.

Answers under oath to each interrogatory are to be filed within 21 days after service. Objections must be included with answers. If there is objection to an interrogatory and the party serving the interrogatory moves the Commission for relief, the hearing officer shall enter an order resolving the issue, after giving the parties an opportunity to state their positions in writing.

No party shall serve upon any other party, at one time or cumulatively, more than 15 interrogatories, including all parts and subparts, without leave of the Commission for good cause shown. Leave shall be timely requested in writing. Relevant interrogatories should be served promptly upon commencement of a contested claim.

It is not necessary to file interrogatories or answers with the Commission unless they are the subject of a motion.

I. Request for Admission. After a claim or application has been filed, a party may serve upon any other party a written request for the admission of the truth of any material matter.

Each request must be numbered and set forth separately. Copies of documents shall be served with the request unless they have been furnished or made available for inspection and copying.

An admission under this rule may be used only for providing evidence in the proceeding for which the request was made and shall not have force or effect with respect to any other claim or proceeding. An admission or denial must be offered in evidence to be made part of the record. A party is required to respond within 30 days or be subject to compliance under Rule 1.8(K) or sanctions under Rule 1.12.

J. Production of Wage Information. If the average weekly wage is contested, the employer shall timely file a wage chart showing all wages earned by an employee in its employment for the term of employment, not to exceed one year before the date of injury.

If an employee has earned wages in more than one employment, the employee shall have responsibility for filing information concerning wages earned in an employment other than the one in which claim for injury is made.

K. Failure to Make Discovery; to Produce Documentary Evidence; to Comply With Request for Admission. A party, upon reasonable notice to other parties and all persons affected thereby, may request an order compelling discovery as follows:

A timely request in writing in the form of a motion to compel discovery may be made to the Commission or to such regional office of the Commission where an application is assigned to be heard.

Failure of a deponent to appear or to testify; failure of a party on whom interrogatories have been served to answer; failure of a party or other person to respond to a subpoena for production of documents or other materials; or failure to respond to a request for admission shall be the basis for an order addressing a request to compel compliance or for sanctions, or both.

L. Disposition of Discovery Material. Any discovery material not admitted in evidence and filed in the Commission may be destroyed by the Clerk of the Commission after one year from entry of a final decision of the Commission or appellate court.

Rule 1.9 Informal Dispute Resolution

At the request of either party, or at the Commission's direction, contested claims and applications for hearing will be evaluated and may be referred for informal dispute resolution. When it appears that a claim may be resolved by informal dispute resolution, the Commission will refer the case to a Commission representative who may schedule the parties for personal appearance or telephone conference. The Commission will attempt to identify disputed issues and to bring about resolution through agreement. Parties need not be represented by counsel. If agreement is reached it shall be reduced to writing and shall be binding.

Examples of limited issues often subject to prompt resolution are:

A. Average weekly wage;
B. Closed periods of disability;
C. Change in treating physician;
D. Contested medical issues including bills;
E. Permanent disability ratings;
F. Return to work;
G. Failure to report incarceration, change in address or return to work;
H. Attorney fee disputes.

If there is no agreement between the parties and there is no material fact in dispute, issues may be referred for decision on the record. If it is determined that material issues of fact are in dispute or that oral testimony will be required, the case will be referred to the docket for evidentiary hearing.

Rule 1.10 Willful Misconduct

If the employer intends to rely upon a defense under § 65.2-306 of the Act, it shall give to the employee and file with the Commission no less than 15 days prior to the hearing, a notice of its intent to make such defense together with a statement of the particular act relied upon as showing

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9

VWC File No.: VA000-00678284

Commonwealth of Virginia .....

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

James D. Denny, III v. MOR PPM

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Ms. Jane L. Daffron
Virginia Department of Labor & Industry
Powers-Taylor Building
13 South 13th Street
Richmond, Virginia 23219

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

ALL RECORDS, INCLUDING BUT NOT LIMITED TO ALL INVESTIGATION MATERIALS, WITNESS STATEMENTS, ACCIDENT REPORTS, PHOTOGRAPHS, AND/OR ANY OTHER RECORDS RELATED TO AN INCIDENT ON OCTOBER 5, 2012 IN WHICH JAMES D. DENNY, III, , SSN: 241-57-8413, DOB: 02/13/74 WAS FATALLY INJURED WHILE WORKING FOR HIS EMPLOYER, EMCOR/MOR AT THE FORMER INTERNATIONAL PAPER PLANT NOW OPERATED BY ST TISSUE, LLC AND/OR TAK INVESTMENTS, INC., AT 34040 UNION CAMP DRIVE, FRANKLIN, VA 23851.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before February 4, 2013 to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, The Estate of James D. Denny, III
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

DATE ISSUED

SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid

to Joseph C. Vith, III, Bancroft McGavin Horvath & Judkins, 3920 University Drive, Fairfax, VA 22030on the __day of January 2013.

_____
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – VWC File No.: VA00000713216
ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

LORENZA DERRICOTT, JR. v. AEROTEC

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Ms. Jane L. Daffron
Virginia Department of Labor & Industry
Powers-Taylor Building
13 South 13th Street
Richmond, Virginia 23219

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

ALL RECORDS, INCLUDING BUT NOT LIMITED TO ALL INVESTIGATION MATERIALS, WITNESS STATEMENTS, ACCIDENT REPORTS, PHOTOGRAPHS, AND/OR ANY OTHER RECORDS RELATED TO AN INCIDENT ON DECEMBER 4, 2012 IN WHICH LORENZA DERRICOTT, JR., SSN: 228-96-7255, DOB: 11/28/72 WAS INJURED WHILE WORKING FOR HIS EMPLOYER, AEROTEK, WHEN HE WHENT DOWN TO CHANGE THE SIZE OF THE FORM WHICH RESULTED IN THE AMPUTATION OF HIS LEFT LEG AT CP&P, 12063 WASHINGTON HIGHWAY, ASHLAND, VIRGINIA 23005.

At Reinhardt | Harper |Davis, PLC, 1809 Staples Mill Road, Suite 300, Richmond, Virginia 23230 on or before **August 26, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, Lorenza Derricott, Jr.
Craig B. Davis, Esquire/Va. Bar #38471
1809 Staples Mill Road, Suite 300
Richmond VA 23230
804-359-5500/telephone
804-355-9297/facsimile

_____ _____
DATE ISSUED SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Wendy E. Warren, Esquire, PennStuart, 1700 Bayberry Court, Suite 100, Richmond, Virginia 23226 on the _____ day of August 2013.

_____
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

VWC File No.: VA000-00678284

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

James D. Denny, III v. MOR PPM

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Isle of Wright County Sheriff's Office
17110 Monument Circle
Isle of Wright, VA 23397

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

1. Copies of all materials including but not limited to documents, photographs, video, investigation reports, witness statements, and measurements related to any investigation of an incident that occurred on October 5, 2012 at the International Paper Facility located at 34040 Union Camp Drive, Franklin, VA 23851, that was leased and/or operated by either ST Tissue or Tak Investments, which resulted in the death of James D. Denny, III after he was struck by an overhead crane.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **February 4, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, James D. Denny, III
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

_____ _____
DATE ISSUED SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Joseph C. Vith, III, Bancroft McGavin Horvath & Judkins, 3920 University Drive, Fairfax, VA 22030on the ___day of January 2013

_____
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – VWC File No.: VA 00000713216
ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

LORENZA DERRICOTT, JR. v. AEROTEK

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Hanover County Sherriff's Department
7522 Complex Road
Hanover, VA 23069

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

1. Copies of all materials including but not limited to documents, photographs, video, investigation reports, witness statements, and measurements related to any investigation of an incident that occurred on December 4, 2012 at CP&P, 12063 Washington Highway, Ashland, Virginia 23005, which involved an injury to Lorenza Derricott, Jr. after his leg was injured after utilizing a machine that fabricates concrete pipes.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **January 14, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, Robert Bohannon
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

_____ _____
DATE ISSUED SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Amy McNeely, Broadspire, P.O. Box 3646, Fairfax, Virginia 22038 on the _____ day of December 2012on the _____ day of December 2012.

_____
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – VWC File No.: VA 00000568891
ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

ROBERT BOHANNON V. SELECT STAFFING

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

MidAtlantic Foam
57 Joseph Mills Road
Fredericksburg, Virginia 22408

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

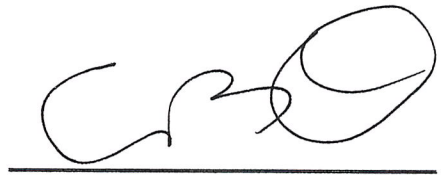
1. All documents related to the purchase, maintenance and upkeep of the Styrofoam grinder being used by Robert Bohannon, III, an employee of Select Staffing, at the time of his injury on January 30, 2012 specifically but not limited to, purchase contracts, maintenance contracts, bills of lading, purchase and delivery records, product manual, all records related to the purchase including billing and payment records, and all records related to the service, maintenance, modification and alternations.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **January 16, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, Robert Bohannon
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

12/27/12
DATE ISSUED



SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Cecelia S. Hilliard, ESIS, P.O. Box 6560, Scranton, PA 18505on the 27th day of December 2012.

SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – VWC File No.: VA00000713216
ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

LORENZA DERRICOTT, JR. v. AEROTEC

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Concrete Pipe and Precast, LLC
12063 Washington Highway
Ashland, Virginia 23005.

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

1. All documents related to the purchase, maintenance, modification and upkeep of the machine that fabricates concrete pipes being used by Lorenza Derricott, Jr., an employee of Aerotec, at the time of his injury on December 4, 2012 specifically but not limited to, purchase contracts, maintenance contracts, bills of lading, shipping and delivery records, product manuals, all records related to the purchase including billing and payment records, and all records related to any and all service, maintenance, modification and alternations to the machine.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **January 4, 2012** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, Lorenza Derricott, Jr.
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

DATE ISSUED

SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Amy McNeely, Amy McNeely, Broadspire, P.O. Box 3646, Fairfax, Virginia 22038on the day of December 2012.

_____
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

VWC File No.: VA000-00678284

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

James D. Denny, III v. MOR PPM

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

CT CORPORATION SYSTEM
Registered Agent for International Paper
4701 Cox Road, Suite 30
Glen Allen, VA 23060-6802

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

1. Copies of all materials including but not limited to documents, photographs, video, investigation reports, witness statements, and measurements related to any investigation of an incident that occurred on October 5, 2012 at the International Paper Facility, which resulted in the death of James D. Denny, III after he was struck by an overhead crane.
2. All documents related to the purchase, maintenance and upkeep of the crane that made contact with and caused fatal injuries to James D. Denny, III, an employee of MOR/EMCOR, at the time of his injury on October 5, 2012 specifically but not limited to, purchase contracts, maintenance contracts, lease agreements, bills of lading, purchase and delivery records, product manual, all records related to the purchase including billing and payment records, and all records related to the service, maintenance, modification and alternations.
3. Copies of all documents related to any contracts, leases, or other agreements between ST Tissue, LLC, TAK Investments, Inc., International Paper, MOR/EMCOR, and/or CR Meyer for any work to be performed, or any equipment to be leased or used, including the crane that caused or resulted in Denny's fatal injuries, at the former International Paper facility at 34050 Union Camp Drive, Franklin, VA 23851.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **June 6, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, James D. Denny, III
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

5-20-13
DATE ISSUED

Craig B. Davis
SIGNATURE OF ATTORNEY

Notice to Recipient: See page three for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Joseph C. Veith, III, Bancroft McGavin Horvath & Judkins, 3920 University Drive, Fairfax, VA 22030on the 20 day of May 2013.

Conn B Davis
SIGNATURE OF ATTORNEY

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

VWC File No.: VA000-00678284

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

James D. Denny, III v. MOR PPM

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Corporation Service Company
Registered Agent for ST Tissue, LLC
1111 E Main Street, 16th Floor
Richmond, VA 23219-0000

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

1. Copies of all materials including but not limited to documents, photographs, video, investigation reports, witness statements, and measurements related to any investigation of an incident that occurred on October 5, 2012 at the International Paper Facility, which resulted in the death of James D. Denny, III after he was struck by an overhead crane.
2. All documents related to the purchase, maintenance and upkeep of the crane that made contact with and caused fatal injuries to James D. Denny, III, an employee of MOR/EMCOR, at the time of his injury on October 5, 2012 specifically but not limited to, purchase contracts, maintenance contracts, lease agreements, bills of lading, purchase and delivery records, product manual, all records related to the purchase including billing and payment records, and all records related to the service, maintenance, modification and alternations.
3. Copies of all documents related to any contracts, leases, or other agreements between ST Tissue, LLC, TAK Investments, Inc., International Paper, MOR/EMCOR, and/or CR Meyer for any work to be performed, or any equipment to be leased or used, including the crane that caused or resulted in Denny's fatal injuries, at the former International Paper facility at 34050 Union Camp Drive, Franklin, VA 23851.

At Emroch & Kilduff, P.O. Box 6856, Richmond, Virginia 23230 on or before **February 4, 2013** to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This subpoena is issued by the attorney for and on behalf of

Claimant, James D. Denny, III
Craig B. Davis, Esquire/Va. Bar #38471
P.O. Box 6856
Richmond VA 23230
804-358-1568/telephone
804-353-5817/facsimile

DATE ISSUED

SIGNATURE OF ATTORNEY

Notice to Recipient: See page three for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to Joseph C. Vith, III, Bancroft McGavin Horvath & Judkins, 3920 University Drive, Fairfax, VA 22030on the ___day of January 2013.

_____
SIGNATURE OF ATTORNEY

VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

JAMES D. DENNY, III,

Claimant,

v.

MOR PPM,

Employer.

VWC No.: VA000-00678284

OBJECTION TO CLAIMANT'S SUBPOENAS DUCES TECUM AND MOTION TO QUASH

COMES NOW ST Tissue, LLC, a non-party summoned by subpoena *duces tecum* in the above-styled matter, by counsel, and objects to the subpoenas *duces tecum* issued by the attorney representing the claimant in the above-styled matter requesting documents from ST Tissue, LLC, moving the Commission to Quash said subpoena, which said objection is based on the following grounds.

1. Paragraph 2 of the subpoena *duces tecum* commands ST Tissue, LLC to produce, "All documents related to the purchase, maintenance and upkeep of the crane that made contact with and caused fatal injuries to James D. Denny, III, an employee of MOR/EMCOR, at the time of his injury on October 5, 2012 specifically but not limited to, purchase contracts, maintenance contracts, lease agreements, bills of lading, purchase and delivery records, product manual, all records related to the purchase including billing and payment records, and all records related to the services, maintenance, modification and alterations."

DANIEL, MEDLEY & KIRBY, P.C.
LAW OFFICES
POST OFFICE BOX 720
DANVILLE, VIRGINIA 24543

14

MAR 06 2013

2. ST Tissue, LLC objects to paragraph 2 of the subpoena *duces tecum* as to any documents relating to the purchase or lease of the equipment at issue. The ownership of the equipment, as well as the proprietary negotiated terms of that ownership or lease, is not relevant to any of the issues raised in the pending suit and cannot be calculated to lead to admissible evidence in this suit. The plain language of the subpoenas *duces tecum* would require the production of documents, otherwise privileged, proprietary and confidential, which are neither relevant nor probative and the production of such documents would constitute an undue burden on ST Tissue, LLC.

3. Paragraph 3 of the subpoena *duces tecum* commands ST Tissue, LLC to produce, "Copies of all documents related to any contract leases, or other agreements between ST Tissue, LLC, TAK Investments, Inc., International Paper, MOR/EMCOR, and/or CR Meyer for any work to be performed, or any equipment to be leased or used, including the crane that cause or resulted in Denny's fatal injuries, at the former International Paper facility at 34050 Union Camp Drive, Franklin, VA 23851."

4. ST Tissue, LLC objects to paragraph 3 of the subpoena *duces tecum* as to any documents relating to contracts, leases, or other agreements between ST Tissue, LLC and International Paper. Such requests are not limited in time, nor are they sufficiently limited in scope and are therefore overly broad and unduly burdensome. Additionally, the plain language of the subpoenas *duces tecum* would require the production of documents relating to contractual agreements, otherwise privileged and confidential, which are neither relevant nor probative. The production of proprietary and sensitive

documents relating to the business of ST Tissue, LLC and their agreements with International Paper would likewise be unduly burdensome.

WHEREFORE, ST Tissue, LLC, by counsel, respectfully moves the Court to Quash said subpoena thereby limiting the scope of the Subpoena *Duces Tecum* issued by the claimant to exclude contracts, leases, or other agreements relating to the purchase of the crane at issue and all contracts, leases, or other agreements between ST Tissue, LLC and International Paper, so that only relevant information or information reasonably calculated to lead to admissible evidence will be disclosed.

ST Tissue, LLC

By Counsel

Counsel:

Matthew W. Evans (VSB # 82081)
Daniel, Medley & Kirby, P.C.
110 North Union Street
P. O. Box 720
Danville, Virginia 24543
(434) 792-3911 Phone
(434) 793-5724 Fax
Counsel for ST Tissue, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Objection to Subpoena *Duces Tecum* and Motion to Quash was served by facsimile and regular U.S. mailing to Craig B. Davis, Esq., P.O. Box 6856, Richmond, Virginia 23230 on this 5 day of March, 2013.

Matthew W. Evans

COMMONWEALTH of VIRGINIA
Workers' Compensation Commission
Virginia Beach Regional Office
Pembroke One, Suite 600
281 Independence Boulevard
Virginia Beach, VA 23462
www.vwc.state.va.us

March 28, 2013

Craig B. Davis, Esquire
Emroch & Kilduff
P. O. Box 6856
Richmond, VA 23230-0856

Joseph C. Veith, III, Esquire
Bancroft McGavin Horvath & Judkins PC
3920 University Drive
Fairfax, VA 22030-2507

Matthew W. Evans, Esquire
Daniel Medley & Kirby
P. O. Box 720
Danville, VA 24543

Re: James D. Denny v. MOR PPM
JCN VA00000678284

Dear Mr. Davis, Mr. Veith, and Mr. Evans:

After reviewing the parties' submissions in this claim, I overrule the motion to quash. ST Tissue should provide the requested information by April 2, 2013.

Kindest regards.

Sincerely yours,

Lee E. Wilder

Lee E. Wilder
Deputy Commissioner

LEW/akp

8. Identify by make, model, serial number, manufacturer and date of purchase the piece of equipment and/or lift being used by claimant's decedent at or before the time of the accident that lead to his death.

ANSWER:

9. Identify by name, address, and telephone number anyone who has examined, tested, viewed, visited, studied or otherwise performed any investigation or testing on the piece of equipment and/or lift operated by the claimant at or before the time of the accident.

ANSWER:

10. Describe in narrative form your contention as to how the deceased claimant's accident occurred and/or how the deceased claimant suffered the injuries and resulting death that are claimed to have resulted from the accident which is the subject of the claimant's Estate's Application.

ANSWER:

11. Identify by names, addresses, phone numbers, and job title all individuals, including but not limited to all current and former employees and/or or agents of the employer who (1) were eyewitnesses, came to the scene of, or have knowledge regarding the accident and the resulting death of claimant's decedent; and (2) provide a description of any and all statements provided by and/or taken from those individuals including the date of such statement(s); a summary of the substance of such statement(s); and the identity of the person who took or to whom the statement(s) were given.

ANSWER:

12. State all facts which you contend overcomes the "death presumption" or any other presumption that the claimant's accident arose out of and in the course of his employment with the employer and/or any evidence or facts which you content justify a position or argument that the "death presumption" does not apply to the facts of this case.

ANSWER:

13. For any Request for Admission below that is denied or that is not admitted in full, state all facts on which you rely or base your denial and/or lack of under qualified admission and identify by name, address, telephone number all individuals with knowledge of said facts.

ANSWER:

REQUESTS FOR PRODUCTION

1. Each document describing or mentioning a fact which supports any defense listed in response to Interrogatory No.1.

RESPONSE:

2. Each document describing, mentioning a fact, relating to, or which could otherwise be used to compute the claimant's decedent's Average Weekly Wage.

RESPONSE:

3. Copies of all recorded statements referred to in the preceding interrogatories.

RESPONSE:

4. A complete copy of the claimant's decedent's personnel file.

RESPONSE:

5. The claimant's decedent's payroll records for the 52 weeks preceding the accident.

RESPONSE:

6. All photographs, videographs or other graphic representations of claimant's decedent.

RESPONSE:

7. Each document or tangible item which you plan to introduce as evidence at the hearing.

RESPONSE:

8. A copy of any and all accident reports related to claimant's decedent's accident, including but not limited to the Employer's First Report of Accident, in the possession of the employer or carrier.

RESPONSE:

9. Copies of all medical records and/or records related to the death of the claimant's decedent you have received from any source.

RESPONSE:

10. Copies of all documents received pursuant to any subpoena *duces tecum*.

RESPONSE:

11. Copies of any photographs or video taken of the scene of the claimant's decedent's alleged accident, the area on or around where the accident occurred, and/or any of the equipment, machinery, or devices involved in the alleged accident.

RESPONSE:

12. A copy of any statements or reports from, by or regarding any individuals identified in response to Interrogatory No. 9.

RESPONSE:

13. Copies of all photographs taken of the scene of the accident by the employer, by any investigators as hired by the defendants and/or any of their agents, by any police or public safety officers or obtained from any source.

RESPONSE:

14. Copies of all police reports, accident reconstruction reports, safety analysis, OSHA and/or Virginia OSHA or records of any type related to the motor vehicle accident that is the subject matter of this claim.

RESPONSE:

15. A copy of all documents that were created by or on behalf of or at the direction of the Prince George Department or any other public safety agency that investigated the accident, including a document summarizing the testimony or observation of any witnesses.

RESPONSE:

16. Copies of any photographs of the equipment and/or lift operated by claimant's decedent or any other party involved in the accident including photographs taken at the scene of the accident or at any time afterwards.

RESPONSE:

17. Copies of all test results, reports or other records related to any testing or examination performed on any bodily fluids of claimant's decedent.

RESPONSE:

18. Copies of all accident reports, inspections, investigations, or other records related to the accident and resulting death of claimant's decedent.

RESPONSE:

19. Copies of any accident reports, test results, or other records related to the equipment and/or lift and/or bucket lift being used by the claimant's decedent at the time of his death.

RESPONSE:

20. Copies of all owners' manuals, bill(s) of sale, bill(s) of lading, maintenance records, rental records, leave documents, repair records, operator's manuals or documents of any type related to the equipment and/or lift being used by claimant's decedent at or before the incident that resulted in his death.

RESPONSE:

7. Please state your calculation of what you contend to be the Average Weekly Wage of claimant's decedent and provide an explanation and/or the basis for how you arrived at the figure.

ANSWER:

8. Identify by names, addresses, phone numbers, and job title all individuals, including but not limited to all current and former employees and/or or agents of the employer who were eyewitnesses to or have knowledge regarding the accident and provide a description of any and all statements provided by and/or taken from those individuals including the date of such statement(s); a summary of the substance of such statement(s); and the identity of the person who took or to whom the statement(s) were given.

ANSWER:

9. Please identify by name, address and telephone number all persons working for the employer, any independent or subcontractor, and/or temporary agency, or otherwise known to you who witnessed claimant's decedent's alleged injury, who were working with the claimant's decedent on the date of the alleged accident, or have otherwise discussed the facts of the alleged accident and resulting injuries with the claimant, any claimed beneficiaries or statutory dependents, or any parents, guardians or representatives of any claimed beneficiaries and/or statutory dependents.

ANSWER:

ho

10. Identify by name of manufacturer, model name, model number, year of purchase, identity and address of vendor from whom purchased, and date of purchase for any machine or other product being used by claimant's decedent or that came into contact with and/or inflicted injury to and/or applied any force or trauma to claimant's decedent at the time of his alleged accident.

ANSWER:

11. Identify by name, address, employer, job title and dates of employment any individuals operating or who had operated the crane that is alleged to have caused injuries to claimant's decedent within 2 hours prior to his death specifying in your answer the identity of the person operating the crane at the time of the original alleged injury to claimant's decedent.

ANSWER:

12. Describe in narrative form your contention as to how the deceased claimant's accident occurred and/or how the deceased claimant suffered the injuries and resulting death that are claimed to have resulted from the accident which is the subject of the claimant's Application.

ANSWER:

RESPONSE:

7. Each document or tangible item which you plan to introduce as evidence at the hearing.

RESPONSE:

8. A copy of any and all accident reports related to claimant's accident, including but not limited to the Employer's First Report of Accident and/or any other interval or employer accident and/or investigation report, in the possession of the employer or carrier.

RESPONSE:

9. Copies of all medical records for claimant you have received from any source.

RESPONSE:

10. Copies of all documents received pursuant to any subpoena *duces tecum.*

RESPONSE:

11. Copies of any photographs or video taken of the scene of the claimant's decedent's alleged accident, the area on or around where the injury that allegedly resulted in the death of claimant's decedent, or any of the equipment, machinery, or devices involved in the alleged accident.

RESPONSE:

12. A copy of any statements or reports from, by or regarding any individuals identified in response to Interrogatory No. 9.

RESPONSE:

Craig B. Davis, Esquire
Emroch & Kilduff, LLP
P.O. Box 6856
Richmond, Virginia 23230
(804) 358-1568
(804) 353-5817 (*facsimile*)

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Interrogatories, Requests for Admission and Requests for Production was mailed via first class mail, postage prepaid on this _____ January, 2013 to Joseph C. Vith, III, Bancroft McGavin Horvath & Judkins, 3920 University Drive, Fairfax, VA 22030.

whether and/or how those injuries occurred, including but not limited to the mechanism of such injury.

ANSWER:

11. Please identify by name, address and telephone number all persons working for the employer or otherwise known to you who witnessed the claimant's alleged injury, were working with the claimant on the date of his alleged injury or have otherwise discussed the facts of the alleged accident and resulting injuries with the claimant.

ANSWER:

12. Identify by name of manufacturer, model name, model number, year of purchase, vendor from whom purchased, and date of purchase for the machine being used by the claimant at the time of his injury.

ANSWER:

7. All photographs, videographs or other graphic representations of the claimant.

RESPONSE:

8. Each document or tangible item which you plan to introduce as evidence at the hearing.

RESPONSE:

9. A copy of any and all accident reports related to claimant's accident, including but not limited to the Employer's First Report of Accident, in the possession of the employer or carrier.

RESPONSE:

10. Copies of all medical records for claimant you have received from any source.

RESPONSE:

11. Copies of all documents received pursuant to any subpoena *duces tecum*.

RESPONSE:

12. Copies of any photographs or video taken of the scene of the claimant's alleged accident, the area on or around where the claimant claims the injury occurred, or any of the equipment, machinery, or devices involved in the alleged accident.

RESPONSE:

REINHARDT | HARPER | DAVIS, PLC

ATTORNEYS AT LAW

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Toll Free: (888) 501-1499
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Email: maritza@vainjurylaw.com

November 14, 2013

NOTIFICATION TO PRESERVE EVIDENCE

Mr. Ken Olsen
Safety Director
Slurry Pavers, Inc.
3617 Nine Mile Road
Richmond, Virginia 23223

Re: My client: James Walter Smith, III
DOA: October 17, 2013
JCN File No.: VA00000859368

Dear Mr. Olsen:

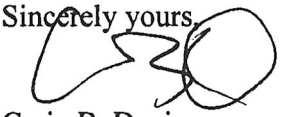
Please be advised that I represent James Walter Smith, III in both a personal injury and a workers' compensation claim for injuries he sustained in a motor vehicle accident while working for Slurry Pavers on October 17, 2013. I have been advised that Slurry Pavers has possession and control of the vehicle that was being operated by Mr. Smith at the time of the accident. Accordingly, I am writing you this letter to request that you preserve and do not in any way release, alter, or otherwise dispose of this vehicle until such time as I have the opportunity to inspect, photograph and otherwise view that vehicle. Any failure to maintain or preserve this evidence could lead to a claim of spoliation of evidence. Thus, I am providing you with our notice of an intention to investigate a potential third party personal injury case so that the evidence can preserved in its current state.

Please give me a call if you have any questions. My investigator advised me that he was instructed to direct any requests for viewing or inspecting the vehicle would be directed through the attorney for Slurry Pavers. As of yet, no attorney has noted an appearance in the workers' compensation claim. In excise of caution, however, I am sending this letter to you; the attorney I believe will ultimately be representing your company, Scott Ford; and the workers'

compensation adjuster.

Please give me a call if you have any questions.

Sincerely yours,



Craig B. Davis

CBD/ma

cc: Scott C. Ford, Esquire (***via email***)
Terry Myers
James Walter Smith, III

March 13, 2013

NOTICE TO PRESERVE EVIDENCE

Roy Lee
Store Manager
Southern States
7817 W Broad Street
Richmond, Virginia

Ernest Walmsey
Warehouse Supervisor
Southern States
7817 W Broad Street
Richmond, Virginia

Re: My Client: Steve Johnson
DOA: 2/20/13

Dear Mr. Lee and Mr. Walmsey:

I have been retained to represent Steve Johnson in a workers' compensation claim for the burn injuries he sustained on February 20, 2013. In discussing the facts of his accident with Mr. Johnson, it appears to me that there might also be a potential claim against the maker of the heater or propane tank that emitted the spark that led to his burn injuries.

Accordingly, I am writing you this letter to request that you preserve and do not in any way alter the heater and propane tank that emitted the spark that caused his injuries. Specifically, we intend at a later date to have the heater and tank inspected by an expert for purposes of determining whether there was a design and/or a manufacturing defect. The failure to preserve this evidence could lead to a claim of spoliation that could cause Southern States to be held accountable for the failure to preserve valuable evidence.

I am writing you this letter to place you on notice of our intention to investigate a potential claim so that you may preserve this evidence in its current state. Please give me a call if you have any questions. I am also copying the adjuster assigned to the workers' compensation claim in this case so that she is likewise aware of our request that this evidence be preserved.

Sincerely yours,

Craig B. Davis

CBD/ma
Enclosures

cc: Yolanda Wright
Steve E. Johnson

REINHARDT | HARPER | DAVIS, PLC

ATTORNEYS AT LAW

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Email: craig@vainjurylaw.com

Direct Dial (804) 612-3219 (MA)
Email: maritza@vainjurylaw.com

November 14, 2013

Via WebFile

The Honorable Robert H. Herring, Jr.
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: James Walter Smith, III v. Slurry Pavers, Inc.
JCN: VA00000859368
DOA: October 17, 2013

Dear Deputy Commissioner Herring:

Please allow this letter to serve as claimant's **Motion to Inspect**. The claimant was involved in a motor vehicle accident while working for the employer on October 17, 2013. I am representing the claimant both in the workers' compensation claim referenced above and an underlying third party personal injury against the negligent driver. It is my understanding that the employer has possession off the vehicle operated by the claimant at the time of the accident. When my investigator attempted to photograph the vehicle involved in the accident, he was instructed to go through the employer's workers' compensation attorney. Accordingly, I am asking the Commission for leave to inspect, photograph, and measure the employer's vehicle operated by the claimant at the time of the accident.

I have also requested in a letter under separate cover that defense counsel authorize this inspection. In the meantime, I thought it prudent to file this Motion at this time. As you are likely aware, the Commission has previously held that a party can use the Commission's discovery tools under the Acts and Rules solely for purposes of investigating a third party case. *See Johnson v. Laurel Trucking Inc.*, 01 WC UNP 2001825 (2001), *Fields v. Labor Ready, Inc.*, 01 WC UNP 2037099 (2001). Thus, even if the carrier concedes or agrees to the compensability to the workers' compensation claim, I ask that the Commission enter a specific order granting

this Motion to allow me to investigate the third party case.

Additionally, it is my understanding that Scott Ford will be representing the employer. Because he has not yet noted his appearance on webfile, I am copying this letter to Mr. Ford, the adjuster assigned to the case, and Ken Olsen, who I believe is the employer's safety director. I will also be sending all three of these individuals a Notification to Preserve Evidence for purposes of preserving the vehicle in question.

Thank you in advance for your consideration.

Sincerely yours,

Craig B. Davis

CBD/ma

cc: James W. Smith, III
Scott C. Ford, Esquire (***via email***)
Ken Olsen
Terry Myers

COMMONWEALTH of VIRGINIA

Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220
Website: www.workcomp.virginia.gov
Call Center: 1-877-664-2566

ROGER L. WILLIAMS, Chairman
WESLEY G. MARSHALL, Commissioner
R. FERRELL NEWMAN, Commissioner
JAMES J. SZABLEWICZ, Chief Deputy Commissioner

Marjorie P. Platt, Clerk

ROBERT H. HERRING, JR.
Deputy Commissioner
(804) 205-3124
FAX: 1-877-334-3237

November 15, 2013

Craig B. Davis, Esquire
1809 Staples Mill Rd, Suite 300
Richmond, VA 23230-3515

Re: James Walter Smith, III v. Slurry Pavers, Inc.
JCN VA00000859368

Dear Mr. Davis:

For good cause shown, your motion to inspect the vehicle driven by Mr. Smith at the time of his October 17, 2013, accident is hereby GRANTED. This order extends to your intent to inspect, photograph, and measure the vehicle.

This inspection shall occur at a time mutually convenient to the parties and at a time and location that, to the extent reasonably possible, will not interfere with the employer's business operations.

It is further ORDERED that, to the extent reasonably possible, the employer, carrier, or other person or business entity having physical custody of the vehicle shall preserve it in its immediate post-accident condition until such time as the claimant's inspection is complete.

Sincerely,

Robert H. Herring, Jr.

Robert H. Herring, Jr.
Deputy Commissioner

RHHjr/

cc: Scott C. Ford, Esquire

Ken Olsen, Slurry Pavers, Inc.

REINHARDT | HARPER | DAVIS, PLC

ATTORNEYS AT LAW

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*Also admitted in Maryland and the District of Columbia
**Also admitted in West Virginia

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Email: craig@vacomplaw.com

Direct Dial (804) 612-3219 (MA)
Email: maritza@vainjurylaw.com

January 7, 2014

Via WebFile

The Honorable Robert H. Herring, Jr.
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: The Estate of Dennis Eugene Dunavant v. ANCOS
JCN File No.: V00000867880

Dear Deputy Commissioner Herring:

Please accept this letter as claimant's **Motion to Preserve Evidence and Motion to Inspect** in the above referenced claim. The claimant's decedent was killed while using some form of scissors lift, telescope lift and/or bucket lift at the time of the accident. The claimant's Estate intends to investigate and potentially pursue a third party product liability claim related to his death. Thus, the claimant asks that the Commission specifically Order the employer (1) to preserve and/or maintain any evidence related to the claimant's accident, including the lift in question and any surveillance and/or security video that may exist of the claimant's accident; and (2) permit an inspection for purposes of photographing, measuring and inspecting the lift to conduct a failure analysis and/or determine a potential cause for the accident in support of a potential third party case.

Even if defense counsel agrees to permit the inspection, I ask that you please enter the Order. The Supreme Court has held that the absence of an Order compelling the preservation of the evidence can invalidate any legal duty to do so. Specifically, I draw your attention to *Austin v. Consolidation Cole Co.*, 256 VA 78 501 S.E.2d 161 (1998), in which the Supreme Court ruled on a certified question from the Fourth Circuit that no independent right of action for negligent spoliation existed under similar circumstances because no order had been entered imposing an obligation or duty on the employer to preserve the evidence in question. I thus respectfully ask that you enter a specific order granting the inspection and ordering the defendants to preserve the

evidence in question for investigation of a third party case as discussed above.

The Commission has the jurisdiction and authority to order and permit discovery solely for purposes of investigating a third party case. *See Johnson v. Laurel Trucking, Inc.*, 01 WC UNP 2001825 (2001); *Fields v. Labor Ready, Inc.*, 01 WC UNP 2037099 (2001). In these decisions, the Commission ruled that a party could issue subpoena *duces tecum* and conduct other discovery permitted under the Commission's Rules to investigate a potential third party case even where there were no pending issues in the workers' compensation claim based on the carrier's rights of subrogation.

On the basis of foregoing, I respectfully ask that you enter the requested order.

Sincerely yours,

Craig B. Davis

CBD/ma

cc: Scott C. Ford, Esquire
Judy Dunavant

REINHARDT | HARPER | DAVIS, PLC

ATTORNEYS AT LAW

1809 Staples Mill Road, Suite 300
Richmond, VA 23230
Main: (804) 359-5500
Toll Free: (888) 501-1499
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Alt Fax: (804) 612-3236

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Stephen T. Harper
Craig B. Davis**
Joel W. Young

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Main: (540) 371-4444
Toll Free: (800) 884-9507
Fax: (540) 368-1025

*Also admitted in Maryland and the District of Columbia
**Also admitted in West Virginia

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July 22, 2013

Via WebFile

The Honorable Robert H. Herring, Jr.
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: Steve E. Johnson v. Southern States
JCN File No.: VA00000759431

Dear Deputy Commissioner Herring:

Please accept this letter as my **Motion to Inspect**. Specifically, I seek leave of the Commission to photograph, measure and otherwise inspect a space heater owned and operated by the employer. The claimant's accident and resulting injuries occurred when a spark was emitted from that heater and landed on his clothes, resulting in multiple to burns the claimant's lower body.

The purpose of this request is to investigate and potentially prosecute a third party personal injury case against the manufacturer of the heater. Although I anticipate that the parties will be able to resolve all currently pending issues in the workers' compensation claim per the submission of an award Agreement, I rely upon the Commission's authority permitting a party to use the discovery tools available under the Act and the Commission's Rules to perform discovery solely limited to the investigation of a third party case. Specifically, in the case of *Fields v. Labor Ready, Inc.*, 01 WC UNP 2037099 (2001), the commission permitted a party to issue written discovery solely designed to investigate a third party case. In the corresponding case of *Johnson v. Laurel Trucking, Inc.*, 01 WC UNP 2001825 (2001) the Commission ruled that a party can also issue subpoenas *duces tecum* to third parties also solely related to obtaining records related to investigating and potentially pursuing a third party case.

Based on the foregoing authority, I ask that the Commission grant me leave to inspect, photograph and measure the space heater in question for purposes for discovering and/or determining any manufacturing and/or design defects in that product.

Thank you in advance for the opportunity to submit this motion.

Sincerely yours,

Craig B. Davis

CBD/ma

cc: C. Ervin Reid, Esquire

REINHARDT | HARPER | DAVIS, PLC

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February 21, 2014

Via WebFile

Marjorie P. Platt, Clerk
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, VA 23220

Re: Lorenza Derricott, Jr. v. Allegis Group/Aerotek, Inc.
VWC File No.: VA00000713216

Dear Ms. Platt:

Please accept this letter as claimant's **Motion to View, Inspect, and Photograph Premises and Machinery** and **Motion to Preserve Evidence** for such purposes. The claimant was injured on December 4, 2012, while assigned by his employer, Aerotec, a temporary agency, to perform work at Concrete Pipe and Precast, LLC, 12063 Washington Highway, Ashland, VA 23005. On the date of the accident, the claimant had been assigned to use a machine that fabricates concrete pipes. The claimant alleges that his injuries, including a traumatic amputation of his left lower extremity, occurred due to a malfunction and/or defect in the fabrication machine.

The claimant is attempting to investigate a potential third party case against the manufacturer of the concrete fabrication machine he was using at the time of his injury. The claimant thus seeks an Order from the Commission allowing him to enter onto the premises of Concrete Pipe and Precast, LLC ("CP&P") for purposes of viewing, inspecting, photographing and otherwise investigating any potential defects in that machine as part of a third party case. The claimant also asks that the machine be preserved until the inspection.

Prior to filing this motion, the claimant's counsel investigating the third party case and claimant's counsel herein attempted without success to obtain permission from the carrier and/or employer to conduct this inspection. It is my understanding that the employer and carrier prefer an Order prior to scheduling the inspector. Thus, I seek entry of an Order permitting the

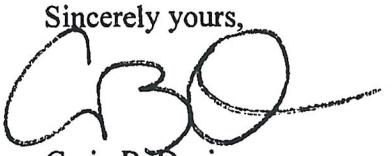
claimant to conduct the inspection which is solely designed to investigate the potential third party case.

There is ample authority authorizing a party in a workers' compensation case to use discovery procedures under the Workers' Compensation Act to conduct discovery under the Act solely for purposes of investigating a third party case. In *Johnson v. Laurel Trucking, Inc.*, 01 WC UNP 2001825 (2001) and *Fields v. Labor Ready, Inc.*, 01WC UNP 2037099 (2001), the Commission held that an employer and/or carrier's subrogation lien against the proceeds of a third party claim pursuant to Va. Code § 65.2-309 and the effects such a lien has on an award under Va. Code § 65.2-313 create a sufficient legal basis to permit a party to conduct discovery to investigate a third party claim. The Commission thereby determined that the existence of the lien and the potential effect on an award place the issue within the jurisdiction of the Commission. In *Johnson*, it was held that the Commission's jurisdiction extended to the issuance of a subpoena *duces tecum* to a third party to investigate the third party case, and a subpoena *duces tecum* permits inspection of tangible things, Rule 1.8 thereby authorizes the specific relief requested here. Attached as Exhibit 1 please see the attached letter Order entered by Deputy Commissioner Mayo on November 18, 2013 granting similar relief in another case, *Bohannon v. Select Staffing*, VWC File No: VA 00000568891 (November 18, 2013).

Finally, I ask that the Commission enter a specific Order in this case even if the employer and/or carrier subsequently consent to the inspection. As I have raised with the Commission in several recent instances, there is Supreme Court authority standing for the proposition that absent an order compelling the inspection and/or preservation of the materials in question, no enforceable legal duty is imposed upon parties, thereby destroying any potential claim of spoliation. *See Austin v. Consolidation Coal Co.*, 256 Va. 78 (1998).

Thank you for the opportunity to submit this motion on behalf of the claimant. I look forward to your response.

Sincerely yours,



Craig B. Davis

CBD/ma

cc: Wendy E. Warren, Esquire (via email)
William C. Carr, Esquire (via email)
Lorenza Derricott, Jr.

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

DENNIS E. DUNAVANT, Claimant

v. JCN: VA00000867880

AGRI-NUTRIENTS CO., INC., 8, Employer
MERCHANTS OF VIRGINIA GROUP SELF-INS.,
SEDGWICK CLAIMS MGMT. SERVICES, INC., Insurer

ORDER

Pursuant to the Motion of claimant's counsel and for good cause shown, it is hereby ORDERED:

1. That the defendants shall preserve and/or maintain any evidence related to the accident of Dennis Eugene Dunavant (Dunavant), including but not limited to the lift on which Dunavant was working at the time of the accident and any surveillance and/or security video of Dunavant's accident; and
2. That the defendants shall permit an inspection of the lift for purposes of photographing, measuring, and inspecting said lift at a mutually agreeable date and time to be determined.

Entered this 14th day of January, 2014.

VIRGINIA WORKERS' COMPENSATION COMMISSION

Susan R. Stevick
Deputy Commissioner

c: See attached list

GOODMAN ALLEN & FILETTI PLLC

C. Ervin Reid, Esquire
Direct Dial: 804.565.5970
ereid@goodmanallen.com

Mailing Address
P.O. Box 29910
Richmond, VA 23242

4501 Highwoods Parkway, Suite 210
Glen Allen, VA 23060
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Fax: (804) 346-5954

WEBFILE ONLY

July 22, 2013

Deputy Commissioner Robert H. Herring, Jr.
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

RE: Steve Johnson v. Southern States Cooperative
JCN: VA000 0075 9431

Dear Deputy Commissioner Herring:

Please accept this letter as the employer's response to the claimant's July 22, 2013, motion to inspect. The employer has no objection to the claimant's request and therefore considers claimant's motion moot.

Very truly yours,

C. Ervin Reid

CER/jt

cc: Craig B. Davis, Esquire (via fax only)
Yolanda Wright (via regular mail) (Claim No. 18321)

COMMONWEALTH of VIRGINIA

Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220
Website: www.workcomp.virginia.gov
Call Center: 1-877-664-2566

ROBERT H. HERRING, JR.
Deputy Commissioner
(804) 205-3124
FAX: 1-877-334-3237

July 23, 2013

Craig B. Davis, Esquire
1809 Staples Mill Rd Suite 300
Richmond, VA 23230-3515

C Ervin Reid, Esquire
PO Box 29910
Richmond, VA 23242-0910

RE: Steve Johnson v. Southern States Cooperative-West Broad S
Jurisdiction Claim No. VA00000759431

Dear Counsel:

I am in receipt of Mr. Davis' July 22, 2013, motion to inspect and Mr. Reid's correspondence dated July 22, 2013. It appearing that the defendants' have no objection to the claimant's motion to inspect and therefore the Motion to Inspect is dismissed as being moot.

Sincerely,

Robert H. Herring, Jr.

Robert H. Herring, Jr.
Deputy Commissioner

RHHjr/mec

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February 4, 2014

Via WebFile

The Honorable Robert M. Himmel
Deputy Commissioner
Virginia Workers' Compensation Commission
Roanoke Office
Tanglewood West, Ste. 425
3959 Electric Rd. SW,
Roanoke, VA 24018

Re: Trampus A. Burton v. Slurry Pavers, Inc.
JCN File No.: VA 00000848216

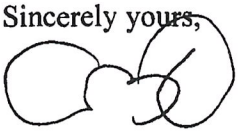
Dear Deputy Commissioner Himmel:

In accordance with Rule 1.8 (G) I am writing to request leave of the Commission to take the discovery depositions of the following individuals: Jermaine Thorton, Kevin Olsen, Kevin Adkins, Sherman Eagle, Herbert Wynn, Jr., and Chris Combs. These individuals were identified by the defendants through discovery as having knowledge of the facts of the claimant's accident and/or being present at the time of the accident. In addition to seeking their testimony for purposes of this claim, I also request the opportunity to depose these individuals for purposes of the claimant's pending workers' compensation claim investigating a corresponding third party case against the driver of the vehicle that struck the claimant.

In support of this request, I rely upon the cases of *Johnson v. Laurel Trucking Inc.*, 01WCUNP 2001825 (2001) and *Fields v. Labor Ready, Inc.*, 01WCUNP 2037099 (2001). In these cases, the Commission ruled that a party had the right to conduct discovery recognized under the Act even if solely limited to investigating a third party case and when there is no pending or contested issues that would otherwise justify the discovery. In this case, I seek leave to take the depositions both for purposes of the pending claim and to investigate the third party case.

Thank you in advance for your consideration.

Sincerely yours,



Craig B. Davis

cc: Scott C. Ford, Esquire
Trampus Burton

Scott C. Ford
Direct Dial: 804.775.7202
Facsimile: 804.775.3800
E-Mail: sford@lawmh.com

McCandlish Holton

February 18, 2014

Via Webfile:
The Honorable Frederick M. Bruner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re:	**Claimant:**	**Trampus Burton**
	Employer:	**Slurry Pavers, Inc.**
	Claim No.:	**301311318610001**
	DOA:	**September 26, 2013**
	VWCC No.:	**VA00000848216**

Dear Deputy Commissioner Bruner:

I represent the employer and carrier in the above-referenced matter. I am writing to provide you with my response to opposing counsel's February 4, 2014 correspondence in which he requests leave to take the discovery depositions of several individuals (see attached).

The defendants object to Mr. Davis' request for leave on the basis that Va. Workers' Comp. R. 1.8 limits the scope of discovery to matters which are relevant to issues pending before the Commission. The defendants contend that Mr. Davis should not be allowed the opportunity to take the depositions for purposes of *both* the above-referenced, pending claim *and* to investigate the third party case. See Roger Moschler v. Kenco Group Inc., JCN VA02000006266 (February 7, 2014).

For the above-mentioned reasons, the defendants respectfully request that Your Honor enter an Order that limits the scope of discovery to matters pending before the Commission and bars Mr. Davis from raising questions and topics related to or for the purposes of investigating the third party case during the depositions.

Contrary to Mr. Davis' assertions, it is not the case that he has the right to conduct discovery for dual purposes simply because he may have the right to conduct discovery for the purpose of investigating a third party case. To allow Mr. Davis the opportunity to take the depositions for both purposes places an undue burden and expense on the defendants. Furthermore, it could result in the deponent being deposed twice on the same topic.

Should you have any questions or concerns, please do not hesitate to contact me. Thanking you in advance, I am

Sincerely,

Scott C. Ford

SCF/ib
Enclosure
cc: Terry Myers *(via facsimile only, w/o enclosures @ 804.673.5400)*
Craig B. Davis, Esq. *(via regular mail only w/enclosures)*

REINHARDT | HARPER | DAVIS, PLC

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February 20, 2014

Via WebFile

The Honorable Frederick M. Bruner,
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: Trampus A. Burton v. Slurry Pavers, Inc.
JCN File No.: VA 00000848216

Dear Deputy Commissioner Bruner:

I am writing to reply to defense counsel's objection to my Motion to take the depositions of various witnesses in the above case. In his letter, defense counsel mischaracterizes the holding of *Moschler v. Kenco Group, Inc.* 14 WC UNP VA02000006266 (2014) for the proposition that I am not permitted to take the depositions of witnesses both to obtain information related to the above referenced pending workers compensation claim and to investigate a potential third-party case. Quite simply, the *Moschler* case states no such thing nor does it offer an inference even remotely close to the rule cited by defense counsel. Rather, in *Moschler*, a *pro se* claimant who had lost his claim for ongoing TTD and medical benefits before the Court of Appeals and the Supreme Court of Virginia, later served a subpoena *duces tecum* on the employer more than three years after his accident. The responsive subpoena sought numerous internal documents from the employer. After a deputy commissioner quashed the subpoena upon motion by the employer, the claimant, still *pro se,* sought review from the Full Commission. In affirming the deputy commissioner's decision to quash the subpoena, the Full Commission noted that Rule 1.8 "limits the scope of discovery to matters which are relevant to issues pending before the Commission." *Id.* (emphasis added). Because, the Commission found there were no issues or matters that were in fact "relevant to issues pending before the Commission," the subpoena was quashed. *Id.*

By contrast, the two cases cited in my original Motion, permit discovery solely related to the purpose of pursuing a third-party case on the grounds that the existence of a subrogation lien by an employer and/or carrier and the effect of a third-party recovery can have on an award make those matters "relevant to issues pending before the Commission." In *Johnson v. Laurel Trucking Inc.* 01WC UNP 2001825 (2001) (attached as Exhibit 1), the deputy commissioner initially ruled - as Mr. Ford suggests you do in this case - that the claimant was not entitled to issue a subpoena *duces tecum* because there was "no proceeding currently before the Commission in regards to his medical benefits and the subpoena does not request medical documents." *Id.* The defendant also argued that the Commission could not permit the subpoena because it was "designed to discover facts concerning the accident in a possible third-party case against [the employer], the subpoena is therefore outside the scope of the enabling statute and the Rules of the Commission." In overruling this decision, the Full Commission specifically rejected the contention that the claimant could not conduct discovery limited to the investigation of a third-party case that would have to be filed in Circuit Court *Id.* Rather, the Commission found that "the employer's subrogation right against the potential third-party tort feasor, emanates from Code § 65.2-309 of the Workers' Compensation Act. Moreover, a recovery can affect our Award in accordance with Code §65.2-312. **Accordingly we find the Commission does have jurisdiction to issue the subpoena in question.**" *Id.*(emphasis added).

In *Fields v. Labor Ready, Inc.* 01WC UNP 2037099 (2001) (attached as Exhibit 2), the defendant objected to written discovery propounded by the Claimant that was solely based on an investigation into a potential third party case. After the deputy commissioner ruled against the employer, the Full Commission relied on *Johnson v. Laurel Trucking, supra*, which the Full Commission found stood for the proposition that a subpoena *duces tecum* was proper where it was **"designed to discover facts concerning an accident and a possible third-party claim, when the subpoena was being used to investigate a third-party action to be filed in Circuit Court."** *Id.* (emphasis added). The Commission then extended the holding from *Johnson* from use of a subpoena to include written discovery and held that **"the defendants must respond to the Interrogatories propounded upon them by the claimant's counsel"** *Id. (*emphasis added).

Consequently, the Commission has, in two prior instances, specifically upheld the right of a claimant to use forms of discovery permitted under Rule 1.8 solely designed to investigate a third-party case. If the Full Commission has ruled that a claimant can use interrogatories, request for production, and subpoenas *duces tecum* for such purposes, then there is no valid basis – and certainly defense counsel has cited none – why those holdings do not also extend the taking of the depositions of factual witnesses. On this basis, I ask that you grant the leave to take the depositions as sought by Claimant's February 4, 2014 Motion. Please note this Motion was originally directed to Deputy Commissioner Himmel, who at the time, was assigned to this claim prior to it being placed on your docket.

Thank you in advance for your consideration.

Sincerely yours,

Craig B. Davis

CBD/aa
Enclosures

cc: Scott C. Ford, Esquire (via facsimile)
Trampus Burton

COMMONWEALTH of VIRGINIA

Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220
Website: www.workcomp.virginia.gov
Call Center: 1-877-664-2566

ROGER L. WILLIAMS, Chairman
WESLEY G. MARSHALL., Commissioner
R. FERRELL NEWMAN, Commissioner
JAMES J. SZABLEWICZ, Chief Deputy Commissioner

Marjorie P. Platt, Clerk

FREDERICK M. BRUNER
Deputy Commissioner
(804) 205-3138
FAX: 1-877-706-7686

February 21, 2014

Craig B. Davis, Esquire
1809 Staples Mill Rd Suite 300
Richmond, VA 23230-3515

Scott C. Ford, Esquire
PO Box 796
Richmond, VA 23218-0796

RE: TRAMPUS BURTON v. SLURRY PAVERS, INC. 5
Jurisdiction Claim No. VA00000848216

Dear Mr. Davis and Mr. Ford:

I am in receipt of Mr. Davis' letter dated February 4, 2014, requesting leave from the Commission in order to take the discovery depositions of Jermaine Thorton, Kevin Olsen, Kevin Adkins, Sherman Eagle, Herbert Wynn, Jr. and Christ Combs. That request is GRANTED.

In addition I have reviewed your respective position statements regarding the scope of those depositions. I find the claimant is entitled to depose these witnesses not only with regard to the pending claim but also for purposes of investigating a pending third party claim. The defendants' motion to limit discovery is therefore DENIED.

If you have any questions, please feel free to contact my office.

Very truly yours,

Frederick M. Bruner
Deputy Commissioner

FMB/mec

Craig B. Davis
1809 Staples Mill Rd Suite 300
Richmond, VA 23230-3515

Interested Parties

Claim Administrator Attorney:

Scott C. Ford
PO Box 796
Richmond , VA 23218-0796

Claimant Attorney:

Craig B. Davis
1809 Staples Mill Rd Suite 300
Richmond , VA 23230-3515

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Email: maritza@vainjurylaw.com

October 30, 2013

Via WebFile

The Honorable R. Temple Mayo
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, VA 23220

Re: **Robert Bohannon v. Select Staffing**
JCN File No.: VA00000568891

Dear Deputy Commissioner Mayo:

Please accept this letter as claimant's **Motion to View and Motion to Inspect.** The claimant was injured on January 30, 2012 while assigned by the employer to work as a machine operator at Mid Atlantic Foam in Fredericksburg, Virginia. On that date, the claimant was cleaning the inside of a grinding machine when it became energized. The movement of the blades trapped the claimant's legs and caused severe and permanent injuries to both of his legs and feet.

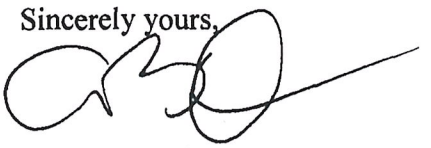
The claimant is attempting to investigate a potential third party case against the manufacturer of the machine he was using at the time of his injury that caused his injuries. The claimant thus seeks an order from the Commission allowing him to enter onto the premises of Mid Atlantic Foam and inspect the machine in question for purposes of further investigating any potential defects as part of a third party case. Prior to filing this motion, counsel for claimant in this case and counsel for the claimant in the third party case have attempted without success on several occasions to obtain permission from the carrier to conduct this inspection. Thus, I am now turning to the Commission for an Order to permit the claimant to conduct discovery solely designed to investigate and further the third party case.

There is ample authority authorizing a party in a workers' compensation case to use discovery procedures under the Workers' Compensation Act to conduct discovery under these

circumstances. In *Johnson v. Laurel Trucking, Inc.*, 01 WC UNP 2001825 (2001) and *Fields v. Labor Ready, Inc.*, 01WC UNP 2037099 (2001), the Commission held that an employer and/or carrier's subrogation lien against the proceeds of a third party claim pursuant to Va. Code §§ 65.2-309-312 permits a party to conduct discovery solely designed to investigate and obtain evidence related to a third party claim and places the issue under the jurisdiction of the Commission. Of note, in *Johnson*, the Commission held that the Commission's jurisdiction extended to the issuance of a subpoena *duces tecum* to a third party to investigate the third party case which would likewise authorize the relief requested here.

Accordingly, based on the foregoing I ask that the Commission grant the claimant the right to enter onto the premises and inspect the machine in question.

Sincerely yours,



Craig B. Davis

CBD/ma

cc: William W. Nexsen, Esquire (*via email*)
William B. Kilduff, Esquire (*via email*)

REINHARDT | HARPER | DAVIS, PLC

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November 5, 2013

Via WebFile

The Honorable R. Temple Mayo
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, VA 23220

Re: **Robert Bohannon v. Select Staffing**
JCN File No.: VA00000568891

Dear Deputy Commissioner Mayo:

I am in receipt of defense counsel's response to my Motion to Inspect which you granted by Order dated October 31, 2013. You subsequently vacated that order by letter dated November 1, 2013 to give defense counsel an opportunity to respond and the parties to confer about the identity of the entity to be made subject to your Order.

I believe the responsibility is on defense counsel to offer some evidence or proof that his clients have no authority to permit an inspection on the premises where the accident occurred. Based on my knowledge, his clients had a contract with Mid Atlantic Foam at the time of the accident and still have a contractual relationship with that entity at this time. Thus, it stands to reason that the contract permits the employer, its representative, agents, and employees to enter onto the premises for any number of reasons, including to inspect and/or to check on the safety and welfare of their employees who are there working under the watch of Mid Atlantic Foam and its agents. Absent something more than a bare assertion to the contrary by defense counsel, I believe your original ruling should stand.

Moreover, as cited in my original Motion, there is authority for permitting a litigant in a workers' compensation claim and the relevant Commission to compel a third party to act as part of the discovery process. For instance, as cited in the prior Motion, both Rule 1.8 and Commission case law permit a party to require a third party to respond to a subpoena *duces*

tecum. This is the key to this issue because Rule 4.9A of the Rules of the Supreme Court of Virginia permits use of a subpoena *duces tecum* to require a non-party to permit entry onto land "to inspect...test, or sample any designated tangible things...which are in the possession, custody or control of such person to whom the subpoena id directed." *See* Rule 4:9A(b). Given his client's subrogation interest at stake here, it seemed more reasonable to allow defense counsel, his clients and Mid Atlantic Foam some input on scheduling the inspection for an agreeable date and time. Because defense counsel continued to oppose our motion – to the detriment of his own client's subrogation interests – I filed the pending motion. I am also in the process of serving a subpoena *duces tecum* on Mid Atlantic Foam that tracks the language of Rule 4:9A and in which I set the date and time of the inspection. Given the impending statute of limitations for the third party case, I feel compelled to pursue and inspection from both angels.

Finally, in response to your November 1, 2013 letter, the Order should be directed to **Mid Atlantic Foam, 57 Joseph Mills Drive, Fredericksburg, Virginia 22404.**

Based on the foregoing and in light of your prior ruling, I ask that you deny relief requested by defense ccunsel which appears, whatever that may actually be.

Thank you in advance for your consideration.

Sincerely yours,

Craig B. Davis

CBD/ma

cc: William W. Nexsen, Esquire (*via email and mail*)
William B. Kilduff, Esquire (*via email*)

REINHARDT | HARPER | DAVIS, PLC

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November 15, 2013

Via WebFile

The Honorable R. Temple Mayo
Deputy Commissioner
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, VA 23220

Re: **Robert Bohannon v. Select Staffing**
JCN File No.: VA00000568891

Dear Deputy Commissioner Mayo:

I have reviewed Mr. Nexsen's November 14, 2013 letter. As you will recall, Mr. Nexsen's initially objected to your ruling of October 31, 2013 granting claimant's motion to conduct an inspection of the machine he was using at the time of his injury. You vacated your original order following Mr. Nexsen's complaint that he had not been afforded sufficient time to respond to my motion. In response to your letter vacating the orders, I subsequently wrote to the Commission on November 5, 2013 to provide information identifying Mid Atlantic Foam as the proper party to whom the order allowing the inspection should be addressed. In the meantime, I also filed a subpoena *duces tecum* that was served on Mid Altantic Foam seeking to inspect that machine as well. Mr. Nexsen's letter thus constitutes his response in support of his objection to your Order compelling the inspection.

While Mr. Nexsen is correct that I have been in communication with John A. Merrick, Esquire, an attorney at Harmon Claytor representing Mid Atlantic Foam, my impression based on my communication with Mr. Merrick was that he contacted me only in response to my subpoena *duces tecum* rather than based on any joint effort to resolve this issue through some form of negotiated agreement in lieu of you re-issuing an Order compelling the inspection. I continue to strongly urge you to enter such an Order.

Furthermore, my communications with Mr. Merrick do not reflect the representations made by Mr. Nexsen suggesting that an agreement allowing the inspection is all but a "*fait accompli*" or that Mid Atlantic Foam has agreed to permit the inspection. Rather, I will represent to the Commission that Mr. Merrick made the following representations to me in our conversation: (1) that Mid Atlantic Foam was "considering" permitting the inspection but, as of yet, was not agreeing to it; (2) that Mid Atlantic Foam was seeking some reassurance that I was not pursuing or contemplating a third party claim against Mid Atlantic Foam for negligence; (3) that even if Mid Atlantic Foam agreed to inspection, it could not be accomplished on the date set forth in the subpoena *duces tecum* of December 5, 2013 and thus solicited additional possible dates for the inspection; (4) that Mr. Merrick was unaware of any case law or legal basis granting the Commission authority to order an inspection when the underlying workers' compensation claim was not being contested and compensability had been established; and (5) that I should, as a result, forward to Mr. Merrick case law supporting my position which would then be considered by Mid Atlantic Foam when deciding whether to permit the inspection.

Following that conversation, I forward Mr. Merrick a copy of the two leading cases granting the Commission the authority and jurisdiction to permit discovery, including discovery directed to a third party, solely designed to investigate a third party case; an Order I had received from Deputy Commission Wilder on another case granting the relief over the objection of a third party to whom a subpoena *duces tecum* had been issued; and alternate dates for the inspection. Since that time, however, Mr. Merrick has not followed up with me, contacted me, or otherwise agreed to permit inspection.

Thus, Mr. Nexsen's letter could reasonably be viewed as simply another attempt to "run out the clock" on my efforts to inspect the product prior to the running of the statute of limitations in the third party claim. While Mr. Nexsen may certainly be under the belief that these issues have been or are close to being resolved, my representations to the Commission are that Mr. Merrick has at no time agreed to the inspection and went no further than to agree to consider it after receiving assurances from me I was not contemplating a case against Mid Atlantic Foam and providing the applicable case law. No further agreements, assurances or discussion of dates has occurred.

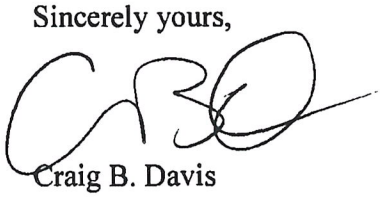
Thus, I specifically request that you enter an Order compelling Mid Atlantic Foam and the defendants to permit the requested inspection. Entry of an actual Order is crucial based on a sobering lesson I recently learned in another case where I am also representing the claimant in a workers' compensation claim and investigating a third party case. In that case, following a motion to inspect similar to the one I filed in this case, the defense attorney responded that because the employer agreed to permit the inspection the issue was moot and no Order was necessary. The deputy commissioner considering the issue agreed and responded with a letter stating that he did not need to rule on my motion because the issue had been rendered moot once the employer agreed to the inspection. Afterwards in that case, however, I learned that the employer had disposed of the product in question that I was seeking to inspect. In response to my resulting suggestion of a possible claim against the employer based on spoliation of evidence, the employer's attorney has implied that there was no actionable spoliation because no

Order was entered to compel them to make the product available. There may be some merit to that argument. *See Austin v. Consolidation Coal Co.*, 256 Va. 78 (1995)

To avoid any potential argument that there was not an Order in effect compelling the inspection in this case, I ask that you clearly and unequivocally enter the requested Order.

Thank you in advance for your consideration.

Sincerely yours,



Craig B. Davis

CBD/ma

cc: William W. Nexsen, Esquire
John A. Merrick, Esquire
William B. Kilduff, Esquire

COMMONWEALTH of VIRGINIA

R. TEMPLE MAYO
DEPUTY COMMISSIONER

(804) 205-3198

JAMES J. SZABLEWICZ
CHIEF DEPUTY COMMISSIONER

Workers' Compensation Commission
1000 DMV DRIVE
RICHMOND, VIRGINIA 23220

October 31, 2013

Craig B. Davis
1809 Staples Mill Rd Suite 300
Richmond, VA 23230-3515

William W Nexsen
4505 Colley Ave
Norfolk, VA 23508-2030

RE: ROBERT BOHANNON v. SELECT STAFFING
Accident date: 1/30/2012
VWC File No.: VA00000568891

Dear Counsel:

I received Mr. Davis' October 30, 2013 motions. He seeks to review and inspect a grinding machine from which the claimant allegedly sustained injuries.

Please accept this letter as an **ORDER** directing the employer to permit viewing and inspection of the machine within 14 days of the date of this letter. Failure to comply will result in contempt proceedings.

Should you have any questions, do not hesitate to contact this office.

Very truly yours,

R. Temple Mayo
Deputy Commissioner

RTM/lmg

cc: (See attached list)

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413; 16.1-89; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia .....

VWC File No.: VA00000568891

Virginia Workers' Compensation Commission
1000 DMV Drive, Richmond, Virginia 23220
ADDRESS OF COURT

ROBERT BOHANNON V. SELECT STAFFING

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Joe Green, President
MidAtlantic Foam
57 Joseph Mills Road
Fredericksburg, Virginia 22408

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

Produce and make available for inspection, testing, measuring by Charles Crimm, Forehling and Robertson, on December 5, 2013 at 11:00 a.m. the machine Model GP-0301Single Stage EPS Prebreaker, Serial No.: 8614, being used by Robert Bohannon, DOB 12/17/85 when he was injured while working on assignment by his employer, Select Staffing, on January 30, 2012 at Mid Atlantic Foam, 57 Joseph Mills Road, Fredericksburg, Virginia 22408.

This subpoena is issued by the attorney for and on behalf of

Claimant, Robert Bohannon
Craig B. Davis, Esquire/Va. Bar #38471
1809 Staples Mill Road
Richmond VA 23230
804-359-5500/telephone
804-355-9297/facsimile

11/6/13
DATE ISSUED

SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

TO the person Summoned

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:

ADDRESS:

☐ PERSONAL SERVICE Telephone Number:

Being unable to make personal service, a copy was delivered in the following manner:
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode or party named above after giving information of its purport. List name, age of recipient, and relation of

recipient to party named above:

☐ Posted on front door of such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Not found _____, Sheriff

_____ By _____, Deputy Sheriff
Date

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing subpoena *duces tecum* was mailed first class postage prepaid to William W. Nexsen, Esquire, Stackhouse Nexsen & Turrietta, 4505 Colley Avenue, Norfolk, Virginia 23508 on the 6 day of November 2013.

SIGNATURE OF ATTORNEY

COMMONWEALTH of VIRGINIA

(804) 205-3198

Workers' Compensation Commission
1000 DMV DRIVE
RICHMOND, VIRGINIA 23220

November 18, 2013

Craig B. Davis, Esquire
1809 Staples Mill Rd Suite 300
Richmond, VA 23230-3515

William W Nexsen, Esquire
4505 Colley Ave
Norfolk, VA 23508-2030

John A. Merrick, Esquire
4951 Lake Brook Drive #100
Glen Allen, VA 23060-9272

RE: ROBERT BOHANNON v. SELECT STAFFING
Accident date: 1/30/2012
VWC File No.: VA00000568891

Dear Counsel:

As you know, I received Mr. Nexsen's November 14, 2013 letter. I also received Mr. Davis' November 15, 2013 letter on the inspection issue.

Since it appears that there may not be an agreement on this issue, I feel that I must enter an Order. By copy of this letter to Mr. Merrick, I direct that MidAtlantic Foam allow claimant, his attorney, and experts to inspect its premises as requested in the subpoena *duces tecum* filed by claimant's counsel. This inspection will occur no later than December 5, 2013, unless the parties agree otherwise. Please accept this letter as an Order consistent with its contents. Failure to comply will result in sanctions.

Should you have any questions, do not hesitate to contact this office.

Very truly yours,

R. Temple Mayo
Deputy Commissioner

RTM/lmg
cc: (See attached list)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

_____, Plaintiff,

v.

_____,
Serve at: Registered Agent:

, Defendant.

COMPLAINT

The plaintiff _____, moves the Court for judgment against the defendant, _____, in the sum of SEVEN MILLION FIVE HUNDRED THOUSAND DOLLARS ($7,500,000.00) as hereinafter set forth:

1. At all times hereinafter mentioned, the defendant employed the plaintiff as a truck driver and warehouseman.

2. On the very cold morning of February 20, 2013, the plaintiff, who was acting within the scope of his employment with _____, was the first to arrive at his employer's jobsite warehouse. Consistent with and as part of his duties of employment, he turned on and ignited a double burner propane heater, which was connected to a propane tank ("heater and tank"). The heater and tank were of a type and model normally sold by the defendant in its retail operations, but the defendant regularly used this particular heater and tank to heat the warehouse.

3. While the plaintiff warmed his hands at a distance from the lit heater and its tank, the heater improperly and defectively emitted a spark that extended out to the plaintiff's legs, in breach of warranty, and caught his clothing on fire, causing him third-degree burns, multiple

intense surgeries, debridement, and extensive hospitalization over a period of months, as well as permanent injuries, distress, pain, suffering, and lost income.

4. On or about March 13, 2013, counsel for the plaintiff in the plaintiff's subsequent worker's compensation action issued a Notice to Preserve Evidence to the defendant concerning the heater and tank. Specifically, such notice was provided by first-class mail to, inter alia, the defendant, and _____, the insurance adjuster assigned to the workers' compensation claim.

5. On or about July 22, 2013, plaintiff's counsel filed with the Worker's Compensation Commission a motion to inspect the heater and tank, consistent with Fields v. Labor Ready, Inc., WC UNP 2037099 (2001) and Johnson v. Laurel Trucking, Inc., 01 WC UNP 2001825 (2001). These cases permit a party to a workers' compensation claim to conduct discovery solely for purposes of investigating a third-party case, and grant the Commission jurisdiction to enforce orders compelling that discovery even when there are no pending issues being contested or litigated in the underlying workers' compensation claim.

6. The defendant immediately (July 22, 2013) filed a written response to the motion indicating that the defendant was in agreement with the terms outlined in the motion, including leave for the plaintiff to inspect, photograph, and measure the heater in anticipation of a third-party claim against the manufacturer of the heater. The Defendant thereby assumed the duty to properly safeguard and preserve the heater and tank at least until such time that an expert could review and inspect the heater and tank.

7. Accordingly, and consistent with the parties' filings, on July 23, 2013, Virginia Workers' Compensation Deputy Commissioner Robert H. Herring, Jr., considered the **motion to inspect moot.** (A de facto order and/or imperative and/or duty was thereby created based on the

representations of defense counsel and the detrimental reliance upon those representations by the plaintiff and the Commission.)

8. Whereupon, on July 25, 2013, the plaintiff's workers' compensation counsel solicited dates from the defendant to enable the inspection to move forward as agreed.

9. Notwithstanding the prior agreement which mooted the need for an order, during the process associated with scheduling experts' review of the heater, on or about November 5, 2013, the defendant indicated that such inspection could not go forward. The defendant had destroyed the heater sometime after the mooting of the motion to inspect, upon information and belief in late October 2013.

10. A duty to preserve the evidence was imposed on the defendant by the defendant's formal acquiescence to the motion to inspect. See, e.g., Kellermann v. McDonough, 278 Va. 478, 684 S.E.2d 786 (2009). Due to the defendant's negligent destruction of the heater, however, the plaintiff now cannot prove his products liability case.

11. For these reasons, the plaintiff does hereby initiate this action against the defendant, inasmuch as the defendant negligently interfered with the plaintiff's ability to pursue a products liability suit.

12. Litigation involving the plaintiff in a products liability claim was probable before the destruction of the heater; the defendant was aware that such litigation was in fact probable; nonetheless, the defendant destroyed the evidence after having created and assumed duties that mooted the necessity for a court order; the destruction did destroy and obliterate the plaintiff's product liability case; and damages resulted as a consequence of the destruction of the ability to prove the products liability case. See Austin v. Consolidated Coal Co., 256 Va. 78, 501 S.E.2d 161 (1998).

I. Negligence

13. Paragraphs 1-12 are incorporated herein.

14. By its affirmative action (its written acquiescence) to the assumption of a duty to preserve the heater and tank, the defendant was thereafter obliged to protect and keep the heater and tank whole and available for the plaintiff's inspection. See Kellermann v. McDonough, 278 Va. 478, 684 S.E.2d 786 (2009). See Restatement (Second) of Torts § 323. Nonetheless, the defendant violated and breached that duty by negligently destroying the heater. The defendant failed to keep the heater in a safe place, failed to take appropriate action to ensure that its employees and managers would not destroy the evidence, and such other negligence as will become apparent through discovery. As a proximate consequence of the defendant's negligence aforesaid, the plaintiff has been harmed by the defendant by denying recovery in the product liability case, and the plaintiff has lost a right of action to recover for injuries.

15. That as a direct and proximate result of the act of destruction and negligence of the defendant, the plaintiff lost a right of action to recover for injuries caused by the negligent design and manufacture of the heater and breach of warranties associated therewith. The plaintiff's injuries are severe and permanent, and the plaintiff has suffered and will continue to suffer in the future great pain of body and mind, and the plaintiff has incurred and will be compelled to incur in the future large expenses for medical, hospital and doctors' bills in an effort to be cured of his injuries and be relieved of his pain and suffering, and the plaintiff has been prevented from engaging in his regular and gainful occupation and business and has suffered loss of income and earnings and will suffer loss of income and earnings in the future, and the plaintiff has suffered other damages.

WHEREFORE, the plaintiff demands judgment against the defendants in the sum of SEVEN MILLION FIVE HUNDREND THOUSAND DOLLARS ($7,500,000.00), prejudgment interest from the date of the accident, and costs for damages resulting as aforesaid.

TRIAL BY JURY IS DEMANDED.

_____

By Counsel

_____

_____Esquire