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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL COMMISSION

Appellate Case No.: 2022-001546

Monica Murphy, Claimant.....Appellant,

v.

Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o AIG Claims, Inc., Carrier.....Respondents.

INITIAL REPLY BRIEF OF APPELLANT

Frederick I. Hall, III
The Rick Hall Law Firm, LLC
301 Gibson Road
Lexington, SC 2972
(803) 957-5333
(803) 957-7717 facsimile
rick@sctrialattorneys.com
S.C. Bar No. 2591
Attorney for Appellant

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ARGUMENT

I. The trier of fact must weigh and measure each piece of evidence. The Commission ignored objective medical evidence (a prolonged QT interval) which is evidence that Claimant's exposure to 40% HF caused Claimant's heart block and injury to her lungs; the error being the substantial, reliable, evidence on the whole record proves that it is more probable than not that the Claimant's exposure to HF did cause the Claimant's heart and lung injuries.

The Claimant concedes that with respect to exposure to HF there are certain things one must look for to validate the diagnosis. This is particularly true with respect to HF induced cardiac dysrhythmia or heart block. The Commission ignored evidence in the record which proves what the Respondent claims Ms. Murphy must prove - a cohesive theory of causation. Such evidence is in the record in spades. The Commission is required as a matter of law to weigh and measure each piece of evidence. *Clark v. Philips Electronics/Shakespeare, et al*, 857 S.E.2d 378, 433 S.C. 186 (S.C. Ct. App. 2021). While the Commission is free to disregard medical evidence in favor of other competent evidence in the record, it is not free to ignore substantial competent evidence which is favorable to the Claimant in order to reach a conclusion desired by the Commission. *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E. 2d 200 (S.C. Ct. App. 2012). Other states have held similarly. ("We view the evidence in the light most favorable to the decision, 'but may not view favorable evidence with a total disregard to contravening evidence,'" *Dewitt v. Rent- A- Center, Inc.* 146 N.M. 453, 456, 212 P.2d 341, 344 (2009) *citing Herman v. Miners' Hosp.,* 111 N.M. 550, 552, 807 P.2d 734, 736 (1991)). This is what the Commission has done here. *See also Geck v. North Dakota Workers Comp. Bureau*, 198 N.D. 158, ¶ 13, 583 N.W.2d 621, 625 (1998) *citing Lang v. North Dakota Workers Comp. Bureau*, 1997 N.D. 133, ¶ 18, 566 N.W.2d 801 (1997). ("the Bureau may not simply ignore competent medical [evidence] without expressly setting forth findings of fact adequate reasons, which are supported by the record, for doing so.") In this case,

the Commission ignored substantial evidence from a treating doctor on a critical factor, a prolonged QT interval- evidence indicative of significant HF exposure. **Dr. Elgin Hobbes, a treating doctor at University Hospital provided a "Final Diagnosis of Toxic Inhalation injury sequela, Chemical exposure," and noted "Prolonged QT,"** which was eventually interpreted as 3rd degree heart block, requiring a pacemaker. (Cl. APA p. 46; R. p. __). The Commission's Order and Decision is entirely devoid of analysis of this evidence and violates its own standard to assign greater weight to the opinion of the treating physician. Indeed, the Commission's Appellate Panel and Order Affirming the Single Commissioner does not treat this critical evidence as even a "passing breeze," which Johnny Mercer wrote about in the song, The Days of Wine and Roses.

According to the case law of this State, it is the custom, practice and wisdom in worker's compensation cases to assign great weight to a treating doctor's findings and diagnoses. *Hope v. Michael's Stores, Inc.*, 2015 WL 2328618 (S.C. Work Comp. Comm. 2015). The Commission noted in *Hope*:

> We give more weight to the opinion of the treating physician, Dr. Mark Dean. He was chosen by the Claimant, and she stated that she was happy with his treatment. He also had an opportunity to treat Claimant for several months and actually performed her surgery. We give greater weight to the opinion of the treating doctor who is intimately familiar with Claimant's injury, treatment, and condition than we give to the one-time IME doctor.

Id. at *6.

Given the fact Halocarbon admits in its own documents that **even a minimal exposure to HF can "cause a wide range of effects that may not show for many hours and days after the initial exposure if not properly treated,"** the reliable and substantial evidence on the whole record supports only one conclusion: Murphy sustained a permanent injury to her heart and lungs from her exposure to HF. (APA No. 20, p. 204; R. p. __).

Respondent's own purported HF expert and its toxicologist affirm what is, in fact, in the Claimant's medical records. That is, if one is experiencing HF induced heart block or rhythm disturbance, you would expect to see a prolonged QT interval. Dr. Elgin Hobbs notes in the University Hospital records that Ms. Murphy had a "prolonged QT" interval reading from the initial Electrocardiogram. (Cl. APA p. 45; R. p. __). Dr. MacKinnon acknowledged on cross - examination in his deposition, which is quoted at length in Appellant's Brief, that a prolonged QT interval is a significant finding subsequent to an HF exposure and that it would take a significant exposure to precipitate a prolonged QT interval. (MacKinnon Dep. pp. 41: 22-25 to 43: 1-21; R. pp. __). Dr. Early, the Defendants' toxicologist, notes the effects of HF on the heart include "prolongation of the QT interval, arrhythmias (ventricular tachycardia, fibrillation, and electromechanical dissociation). (Defendant's APA p. 400; R. p. __).

Dr. Setaro, Claimant's expert cardiologist, and an Associate Professor of Medicine at Yale, notes that with HF exposures there "can be prolongation of the QT interval on ECG or other electrical disturbances. (Cl. APA p. 240; R. p. __).

The substantial, reliable evidence, therefore, shows that no fewer than four doctors note the significance of a prolonged QT interval following an exposure to HF, which Murphy had. The failure of the Commission to weigh this evidence, analyze it and come to the only reasonable conclusion that can be reached (which is that HF caused the claimant heart and lung injuries) should be reversed according to *Clark*.

Ms. Murphy has already shown that the absence of abnormal electrolyte findings is not uncommon following HF exposures, as noted by Dr. Early, the defense toxicologist. (Def. APA p. 400; R. p. __). Even so, the Claimant had an abnormal electrolyte finding noted in her medical record which was revealed as low phosphorus. (Cl. APA p. 51; R. p. __). Dr. Chetan A. Patel, a

treating physician, notes "**The patient has a low phosphorus**, I will supplement with potassium phosphorus." Id. Both Dr. Early and Dr. MacKinnon missed this fact. Dr. Early states:

> The issue of electrolyte abnormality developing 10 days after the exposure is one that I would like to discuss. I reviewed the electrolyte reports from MCG. They were all done in the first 2 weeks after the exposure... **I did not see a low phosphate or local (sic) calcium in the reports.**

Dr. Gordon Early Report, Def. APA p. 399; R. p. __.

These are glaring and substantial errors by Halocarbon's experts on critical factors relating to the effects of an HF exposure. The Commission ignored these errors and facts which cannot be excused, which renders the Commission's factual findings unreliable. It is legal error to ignore objective medical evidence. *Crane v. Raber's Discount Tire Rack,* 429 S.C. 636, 842 S.E. 2d 349 (2020). Indeed, the Commission's finding at p. 46, No. 65 (R. p. ___) that there were no abnormal electrolytes noted is without evidentiary support because Murphy had a documented low phosphorous level. This is an abuse of discretion. An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. *Fontaine v. Peitz,* 291 S.C. 536, 354 S.E.2d 565 (1987); *Fields v. Regional Med. Ctr. Orangeburg,* 354 S.C. 445, 451, 581 S.E.2d 489, 492 (S.C. Ct. App. 2003); *Hedgepath v. American Tel. & Tel. Co.,* 348 S.C. 340, 559 S.E.2d 327 (S.C. Ct. App. 2001); *Bayle v. South Carolina Dep't of Transp.,* 344 S.C. 115, 542 S.E.2d 736 (S.C. Ct. App. 2001); *see also Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 553 S.E.2d 110 (2001) (stating abuse of discretion occurs where trial court is controlled by error of law or the trial court's order is based on factual conclusions without evidentiary support). *Ellis v. Davidson,* 358 S.C. 509, 524–25, 595 S.E.2d 817, 825 (S.C. Ct. App. 2004). The combination of absolutely false factual findings indicates that the Commission's decision is not based on sufficient substance to withstand scrutiny. Instead, the Commission engages in surmise, conjecture and speculation about the degree of Murphy's

exposure as not of sufficient quantity or duration to cause permanent injury, when in fact Halocarbon's own documents admit otherwise. In fact, there was no scientific measurement of the quantity of fumes taken but Halocarbon's own expert admits the existence of a prolonged QT interval on ECG is evidence of a significant exposure, not a minimal one. And Dr. Mackinnon admits that visible fumes, which Halocarbon concedes were present, is evidence of a high degree of HF concentration. (Appendix pp. 3-5; Tr. pp. 191-195; Mackinnon Dep. p. 27: 1-2; R. p. ___). And Halocarbon's own witness, George Campbell, states that he knew it was HF that he was overcome by and not Sevoflurane or any other chemical. (Appendix p. 2, lines 2-5; Tr. p. 181; R. p. __).

Finally, it is noteworthy that the absence of hypocalcemia findings on lab report are very likely due to the fact that Ms. Murphy had been administered calcium gluconate on August 21, 2015 at the plant, which was continued in route to the hospital. (Tr. p. 67; R. p. __). This very likely masked a low level of calcium.

Insofar as the injury to her lungs, Dr. Early, the defense toxicologist, admits that "**Ms. Murphy's lung condition is worse now that it was prior to the exposure.**" (Def. APA p. 402; R. p. __). And so, the Respondent's claim that Dr. Early said she was no worse is patently false.

Dr. Mitchell, the defense pulmonologist, admitted that in fact there was evidence in the record of airflow obstruction with Ms. Murphy's lungs after bronchodilator testing. (Dr. Mitchell Dep. p. 27; Appendix p. 8, lines 2-13; R. p. __). And so, although RADS can present as either obstructive or restrictive disease, there is nonetheless substantial evidence of airflow obstruction on bronchodilator testing of Ms. Murphy's lungs. (Dr. Alleyne Dep. p. 12: 4-8; R. p. __). Dr. Mitchell further admitted, confirming Dr. Alleyne's testimony, that the diagnosis of reactive

airways syndrome- RADS- is based on history and clinical findings, and that there is no objective test to confirm a diagnosis of RADS. (Mitchell Dep. p. 32:12-15; R. p. __).

The Commission's finding that the Claimant did not prove her exposure to HF caused her heart block or lung injury should be reversed because it is not supported by substantial, reliable evidence of sufficient substance. In the face of the evidence detailed above, which was ignored by the Commission, the only reasonable conclusion that can be drawn from the evidence is that Murphy suffered both heart and lung injuries due to her exposure to HF.

II. Respondent's parenthetical, misplaced arguments as to the lethality of HF afford no basis to affirm the Full Commission. HF is hazardous as a matter of law, and defense experts Feldman and Mitchell's opinions are unsupported conclusions.

Halocarbon argues that Murphy has violated Rule 208 (b)(1)(C), S.C.A.C.R. by including allegedly argumentative and "hyperbolic" language in her Statement of the case by stating that HF "is one of the most dangerous chemicals used in all industry." This argument is false. Halocarbon's own HF expert, Dr. Mackinnon, concedes that the chemical is lethal if you are exposed. (Mackinnon Dep. p. 11: 7-9; R. p. __). And HF is highly hazardous as a matter of law, as it is on the Occupational Safety and Health Administration's *List of Highly Hazardous Chemicals, Toxics and Reactives* listed in the Code of Federal Regulations. 29 C.F.R. § 1910.119, Appendix A (2022). Murphy's inclusion of this admitted fact in her Statement of the Case is hardly a violation of Rule 208.

HF is hazardous as a matter of law. The Safety Data Sheets are required by the Hazzard Communication Regulations set forth in the Code of Federal Regulations precisely because the substance is very dangerous. 29 C.F.R. § 1910.119 (2022). Dr. Feldman's statement that a causal relationship between Hydro-fluoride inhalation and high-grade heart block is "physiologically improbable" lacks foundation and thus amounts to no more than an unsupported conclusion. Dr.

Feldman has no demonstrable experience with HF and there is no foundation in the record to scientifically support this conclusion. A conclusory statement as to an ultimate issue in a case is not sufficient to put evidence in conflict. *Germann v. New York Life Ins. Co.,* 286 S.C. 34, 331 S.E.2d 385 (S.C. Ct. App. 1985); *see also Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (S.C. Ct. App. 1994). The recitation of subjective opinions by Dr. Feldman and Dr. Mitchell, who have no demonstrable experience in HF exposure, cases fall within this analysis.

Therefore, placing any credibility or weight on conclusory, unsupported statements is clear legal error.

III. The Single Commissioner and Full Commission erred in their factual findings regarding the Claimant's credibility and believability; the error being that there is absolutely no evidence in the Claimant's employment history with prior employers or the Employer in this case that would support a finding that the Claimant had a tendency to misrepresent the truth.

The Single Commissioner and Full Commission buttress their credibility findings on several discrepancies in the Claimant's medical records which are of the type that are found day in and day out in the electronic medical record world. For example, the Commissioner writes in her findings that Ms. Murphy complained about six bouts of diarrhea after the exposure, but this is not noted or is "denied" in the Urgent MD records on August 11, 2015. (See Order, Finding No. 46). This finding is patently unsupported by the record. On "Review of Systems," with regard to gastrointestinal it simply states that "Constipation, Diarrhea, Nausea and Vomiting are "Not Present, "which simply means Ms. Murphy was not complaining of those symptoms at the time. The Commissioner's finding on this point is a gross distortion of the record and not a careful reading of it. Ms. Murphy was complaining, in her words, of "sore throat, dry nose, and headache" at the time. (Cl. APA No. 1 p. 5; R. p. __). In addition, the Commission's findings that Ms.

Murphy's heart rhythm was found to be normal on exam at the Urgent MD nearly fourteen hours after her exposure which occurred around 5:30 a.m. in no way disproves her immediate symptoms which were proximate to the exposure and when delay in symptoms is a significant feature related to HF exposure. (Cl. APA p. 5; R. p. __).

Ms. Murphy was employed as a lab technician at the Savanah River Plant for approximately 28 years. Ken McDowell, the Defendant's Safety Director, testified that Ms. Murphy was a competent employee who certainly had some legitimate complaints, some of which did lead to some actions insofar as safety concerns. (Hearing Tr. pp. 151-152; R. p. __). This lengthy and successful employment record does not bespeak of someone who is a liar or who has a tendency to misrepresent the truth. No witness from the defense suggested that Monica Murphy was not honest. Not one.

As in *Clark*, where the claimant's alleged lack of candor played no role in the credibility of his MRI results, Murphy's alleged lack of truthfulness, not really proven, played no part in the ECG testing which demonstrated a prolonged QT interval- which is evidence of a significant HF exposure.

IV. Dr. Edelman's use of the term "biologically plausible" regarding the mechanism of injury to Ms. Murphy's heart does not make his opinion inadmissible to establish Murphy's exposure to HF was a proximate cause of her heart block within a reasonable degree of medical certainty. It is not the form of the words which establish medical certainty, but whether the opinion is "more probable than not." The words "most probable" need not be used.

Biologically plausible with regard to Ms. Murphy's severe respiratory response and subsequent QT interval or dysrhythmia here means "worth of belief." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/plausible (last visited November 28,

2022). This is sufficient to meet the "most probable test," which in turn is equivalent to a reasonable degree of medical certainty. The statute does not require the use of words "reasonable degree of medical certainty."

Our cases generally hold that, before expert testimony is admissible upon the question of the causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule. *Armstrong v. Weiland,* 267 S.C. 12, 225 S.E.2d 851 (1976); *Martin v. Mobley,* 253 S.C. 103, 169 S.E.2d 278 (1969); *Gambrell v. Burleson,* 252 S.C. 98, 165 S.E.2d 622 (1969). The rule has been succinctly stated as follows:

> It is not sufficient for the expert ... to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.

Eubanks v. Piedmont Natural Gas Co., 198 F. Supp. 522, 526–27 (W.D.S.C. 1961).

In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." *Gamble v. Price,* 289 S.C. 538, 347 S.E.2d 131 (S.C. Ct. App. 1986). It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes...." *Norland v. Washington General Hospital,* 461 F.2d 694, 697 (8th Cir. 1972); *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991).

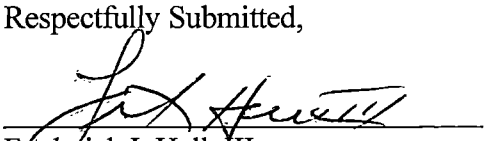
To require the use of the phrase, "to a reasonable degree of medical certainty" places form over substance. This cannot be what the statue envisions, rather the intent of the statute is to remove expert testimony from the realm of mere speculation.

CONCLUSION

In this admittedly complex case, whereby law the objective medical and scientific evidence control over the subjective opinions and credibility findings of the Commission, the Full Commission and Single Commissioner's findings miss the mark and completely ignore the most critical evidence in the entire case- a prolonged QT interval- which the qualified experts, both defense and claimant experts, agree is evidence of a significant exposure to HF. This is reversible error.

Because the Commission committed legal error in ignoring substantial evidence which proved an injury to the Claimant's heart and lungs and its factual and legal findings pertaining thereto are on the whole without evidentiary support or are clearly erroneous, the Appellate Panel's Decision and Order should be reversed.

Respectfully Submitted,

BY: 

Frederick I. Hall, III
The Rick Hall Law Firm, LLC
301 Gibson Road
Post Office Box 1898
Columbia, South Carolina 29072
(803) 957-5333
(803) 957-7717 facsimile
rick@sctrialattorneys.com
South Carolina Bar No. 2591
Attorney for Appellant

November 29, 2022

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Monica Murphy, Claimant, Appellant, v. Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o AIG Claims, Inc., Carrier, Respondents.	Appellate Case No: 2022-011546 **CERTIFICATE OF SERVICE**

The undersigned paralegal to The Rick Hall Law Firm, LLC does hereby certify that she has served a copy of Appellant's Initial Reply Brief in the above matter upon the individuals(s) at the address(s) listed below by delivering a copy of the same via the U.S. mail, postage prepaid, and email as indicated to:

Via US Mail & Email
Helen Hiser, Esquire
McAngus, Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Ste 200
P.O. Box 650007
Mt. Pleasant, SC 29465
helen.hiser@mgclaw.com

James Lichty, Esquire
McAngus, Goudelock & Courie, LLC
1320 Main Street
Meridian, 10th Floor
Columbia, SC 29201
jlichty@mgclaw.com

[Signature Block on Page 2]

Christine Mason Spurgeon
Paralegal to Frederick I. Hall, III, Esq.

Dated this 29th day of November, 2022
Lexington, South Carolina

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STATE OF SOUTH CAROLINA

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APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Monica Murphy, Employee.....Appellant,

v.

Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o AIG Claims, Inc., Carrier.....Respondents.

PROOF OF SERVICE

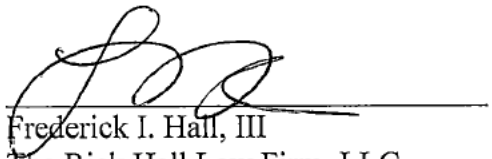
I certify that I have served the Initial Reply Brief of Appellant by emailing a copy and depositing a copy in the U. S. Mail, postage prepaid, on November 29, 2022, addressed to the attorney of record at the addresses listed below:

Helen Hiser, Esquire
McAngus, Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Ste 200
P.O. Box 650007
Mt. Pleasant, SC 29465

James H. Lichty, Esquire
McAngus, Goudelock & Courie, LLC
Meridian, 1320 Main Street, 10th Floor
P.O. Box 12519
Columbia, SC 29211

Attorneys for Respondent

[Appellant Attorney Signature Block on Page 2]



Frederick I. Hall, III
The Rick Hall Law Firm, LLC
301 Gibson Road
Lexington, SC 2972
rick@sctrialattorneys.com
(803) 957-5333
(803) 957-7717 facsimile
S.C. Bar. No. 2591
Attorney for Appellant

THE RICK HALL LAW FIRM, LLC
301 Gibson Road • P.O. Box 1898 • Lexington, South Carolina 29071
PHONE 803.957.5333 • FAX 803.957.7717

Rick Hall
rick@sctrialattorneys.com

Vic Harrelson
vic@fihall-ltc.com

November 29, 2022

Via U. S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Monica Murphy, Claimant, Appellant, v. Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o AIG Claims, Inc., Carrier, Respondents, Case No. 2022-001546

Dear Ms. Kitchings:

Enclosed please find the original and a copy of the Initial Reply Brief of Appellant, Proof of Service and Certificate of Service in the above captioned matter. Please file all the enclosed originals and return the filed, stamped copies to this office in the enclosed self-addressed, stamped envelope for your convenience.

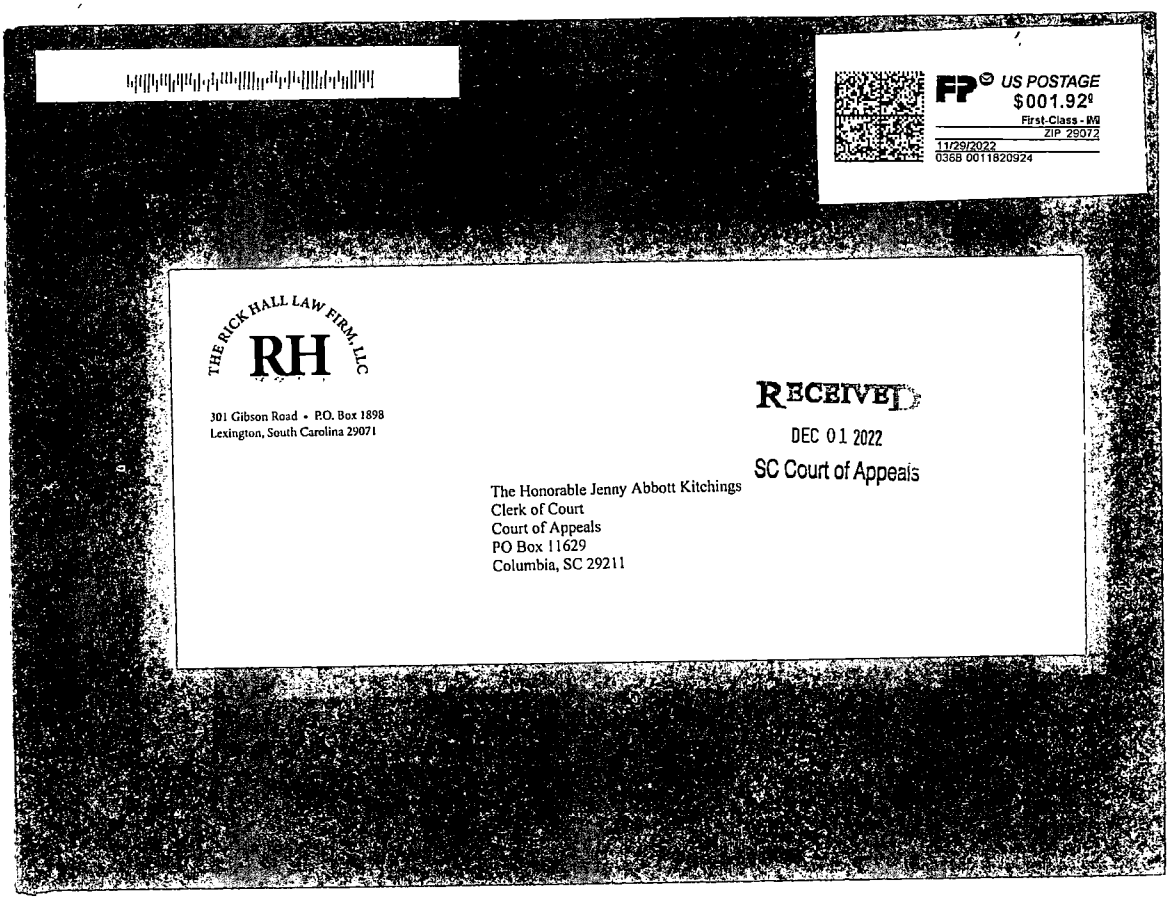
By copy of this letter, I am also serving a copy of the same upon Helen Hiser and James H. Lichty, Attorneys for Respondents and the South Carolina Workers' Compensation Commission.

Should you have any questions regarding this matter, please feel free to contact me at my Lexington office.

Yours truly,

Frederick I. Hall, III

FIH,III/cms
Enclosures
Cc: Helen F. Hiser, Esquire
James H. Lichty, Esquire
Judicial Department of S.C. Workers' Compensation Commission
Monica Murphy



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301 Gibson Road • P.O. Box 1898
Lexington, South Carolina 29071

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The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211