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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1823614

APPELLATE CASE NO.: 2023-000185

James Freshley, ... Claimant/Appellant,

vs.

Conbraco Industries, Employer, and Great American
Insurance Company, Carrier..Defendants/Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. **Are the Full Commission's findings of fact and conclusions of law that Claimant did not contract an occupational disease supported by the substantial evidence in the record which includes an expert opinion that Claimant did not even contract a disease and his symptoms were not causally related to his employment?**

II. **Is the Full Commission Order controlled by any error of law when the Full Commission applied the proper legal standard for analyzing occupational disease claims?**

STATEMENT OF THE CASE

This is a workers' compensation case. Claimant/Appellant James Freshley (hereinafter "Claimant") commenced this case by filing a Form 50 – Employee's Notice of Claim and/or Request for Hearing on January 27, 2021. (ROA p. ___, Form 50). In this Form 50, Claimant alleged he sustained an injury to "lungs and skin" on November 28, 2018 "arising out of exposure to numerous chemicals and fumes in performing his duties as lead man in the zinc bath department of 2nd shift." (ROA p. ___, Form 50, par. 2).

By Form 51 dated February 26, 2021, Defendants/Respondents Conbraco Industries, Employer, and Great American Alliance Insurance Company, Carrier, (hereinafter collectively "Employer") denied that Claimant sustained any compensable injury or occupational disease arising out of and in the course and in the scope of employment. (ROA p. ____, Form 51, par. 1). Employer also contended that "any alleged need for medical care is not causally related to nor the proximate result of any compensable injury and/or occupational disease." (ROA p. ____, Form 51, par. 6).

Both parties submitted Form 58 – Pre-Hearing Briefs prior to the evidentiary hearing before the single commissioner. (ROA p. ____, Claimants' Form 58; Employer's Form 58).

The parties appeared before Commissioner Aisha Taylor on June 10, 2021.

As a result of the hearing held June 10, 2021, the single commissioner concluded as a matter of law and fact that Claimant did not sustain any compensable injury by accident or occupational disease arising out of and in the course of his employment with Employer. Accordingly, the single commissioner denied the Claimant's claim for workers' compensation benefits.

By Form 30 dated July 26, 2022, Claimant appealed from the single commissioner's denial of his claim for workers' compensation benefits. Specifically, Claimant alleged in his Form 30:

> The Single Commissioner erred, as a matter of fact and conclusion and law, in failing to find the Claimant sustained compensable occupational disease and/or injury the accident as a result of his exposure to certain chemicals on the job, and that, as a result the Claimant is entitled temporary total disability benefits." (ROA p. ___, Form 30).

Both parties submitted briefs to the Full Commission. (ROA p. ___, Appellants/Claimants Brief to the Appellate Panel; Brief of Respondents).

The South Carolina Workers' Compensation Commission held oral arguments in this case on October 17, 2022. By Appellate Panel Decision and Order filed January 31, 2023, the Full Commission "Affirmed and Amended" the findings and conclusions of the single commissioner. (ROA p. ___, South Carolina Workers' Compensation Commission Appellate Panel Decision and Order) (hereinafter "Full Commission Order").

In this Full Commission Order, the Full Commission concluded as a matter of law and fact the Claimant did not sustain any compensable injury by accident or occupational disease arising out of and in the course and scope of his employment with Employer. The Full Commission did not adopt the single commissioner's findings of fact verbatim. It modified some of the findings slightly.

On February 13, 2023, Claimant filed his Notice of Appeal with the South Carolina Court of Appeals.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard of review for decisions by the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). South Carolina Code Ann. §1-23-380(5) provides that:

> [t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(5) (*emphasis added*).

"The appellate court's review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law." Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999); see also Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997) ("On appeal from the Workers' Compensation Commission, this court may reverse where the decision is affected by an error of law."). The commission's decision must be affirmed unless it is clearly erroneous in view of the substantial evidence on the whole record. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 586, 535 S.E.2d 146, 149 (Ct. App. 2000).

An appellate court cannot substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Sanders v. MeadWestvaco Corp., 371 S.C. 284, 638 S.E.2d 66, 69 (Ct. App. 2006). A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

STATEMENT OF FACTS

Claimant began working for Employer on October 8, 2007. (ROA p. ____, Tr. p. 28, ll. 12-19). He testified that he had no medical issues prior to working for Employer. (ROA p. ____; Tr. p. 28, L. 25 - p. 29, L. 2). He did develop serious non-employment related health issues over the years subsequent to 2007.

Based upon the APA Submissions from both parties, Claimant first started suffering from serious headaches in August of 2009. (ROA p. ____, APA #13, p. 397). Although these headaches were a "10 on a one-to-ten scale" and necessitated a trip to the emergency room, Plaintiff denied their existence, and the treatment for same, at the evidentiary hearing. (ROA p. ____, APA 13, pp. 397, 403; Tr. p. 59, L. 24 – p. 69, L. 4).

Claimant returned to the doctor a few days later in August of 2009 still complaining of headaches. (ROA p. ____, APA p. 13, p. 410). Claimant also denied this episode in his testimony before the single commissioner. (ROA p. ____, Tr. p. 60, ll. 5-10).

Claimant was diagnosed with hypertension as early as 2011 (ROA p. __, APA #13, p. 520). He denied this diagnosis at the evidentiary hearing. (ROA p. ____, Tr. p. 63, ll. 19-23).

In 2011, Claimant sought additional treatment for headaches and dizziness. (ROA p. ____, APA #13, p. 427). He was hospitalized overnight for these symptoms. (ROA p. ____, APA #13, p. 520). At the trial in this case, Claimant initially denied this medical history. (ROA p. ____, Tr.

p. 61, ll. 1-4).

Claimant also was diagnosed with Obstructive Sleep Apnea in August of 2010. (ROA p. ____, APA #14, pp. 616-619). While Claimant did not deny the sleep apnea diagnosis, he testified that he was not diagnosed until 2015. (ROA p. ____, Tr. p. 61, L. 25 – p. 62, l. 2).

In 2014, Claimant once again sought medical treatment for headaches and the doctor noted that Claimant suffered from "chronic headaches." (ROA p. ____, APA #13, p. 569). At trial, Claimant denied this medical history as well. (ROA p. ____, Tr. p. 60, ll. 14-22).

In 2015, Claimant's family doctor referred him to McCleod Physician Associates for evaluation of "new-onset atrial fibrillation." (ROA p. ____, APA #1, p. 1). Cardiologist Dr. Guha officially diagnosed Claimant with atrial fibrillation. (ROA p. ____, APA #1, pp. 14-16). Claimant informed Dr. Guha on August 24, 2015, that he had been "experiencing shortness of breath and palpitations **for nearly two years**." (ROA p. ____, APA #1, p. 14). (*emphasis added*). Claimant also "has had episodes of dizziness." (ROA p. ____, Id.).

At the hearing, Claimant denied telling Dr. Guha about his long history of shortness of breath and heart palpitations. (ROA p. ____, Tr. p. 64, ll. 9-15). Claimant testified that all he told the cardiologist was that he was "having skin problems." (ROA p. ____, Tr. p. 64, ll. 19-22).

Between June 2018 and August 2018, Claimant received treatment for heart palpitations and shortness of breath with Dr. Guha. Claimant was later referred to Dr. Jona, a pulmonologist. Claimant ultimately underwent three ablation procedures (in 2016, 2018, and 2019) for treatment of atrial fibrillation. (ROA p. ____, Tr. p. 65, ll. 3-16; APA #1).

Claimant acknowledges that the above symptoms, diagnoses, and treatments were not employment related. **[insert reference]**

At trial, Claimant testified that, in or around late 2018, he began experiencing skin irritation, burning eyes, and headaches which he attributed to "daily exposure to the fumes and mists of the zinc bath." (ROA p. ____, Claimant's Ex. A; Tr. p. 37, ll. 1-21).

Claimant reported these symptoms to his supervisor, Sarah Huffman, in August of 2018 according to the November 28, 2018 "Employee Injury Report." (ROA ___, Claimant's Ex. A). This Employee Injury Report did not contain any reference to any complaints of lung or breathing problems.

Claimant testified that he made additional complaints of symptoms to Sarah Huffman in May of 2019. (ROA p. ____, Tr. p. 39, ll. 1-4). At trial, Claimant testified that he told Huffman not only about his "skin and eyes burning," but also that his "breathing was getting bad." (ROA p. ____, Tr. p. 79, ll. 5-11).

However, on the "Supervisor Accident Investigation Report" dated May 17, 2019, Huffman detailed the nature of the alleged injury as "skin leesions [sic] on the face. Also known as sores, along w/headaches, skin irritation, burning eyes." (ROA p. ____, Claimant's Ex. A3). This report does not mention any issues related to Claimant's breathing.

Employer sent Claimant to Doctor's Care Carolina Forest related to Claimant's complaints of symptoms. On the initial visit on May 9, 2019, Claimant presented with a "rash" on his face. (ROA p. _____, APA #2, p. 141). The medical records do not mention any symptoms related to Claimant's breathing. In fact, the review of symptoms noted "Respiratory: Negative." (ROA p. ____, APA #2, p. 141).

Claimant returned to Doctor's Care on May 17, 2019, once again complaining of a rash while not mentioning any symptoms related to diminished breathing. (ROA p. ____, APA #2, p.

162). At trial, Claimant insisted that he did, in fact, tell Doctor's Care about his breathing problems despite no reference to breathing problems in the medical notes.

In June of 2019, Employer obtained an Air Monitoring Survey, which determined that the "acid mist results and zinc oxide sample results were either significantly below their respected PEL (permissible exposure limits) or below laboratory detection limits." (ROA p._____, Employer's APA Ex. 5).

Claimant was examined by dermatologist Noah Kahn on August 22, 2019, who diagnosed Seborrheic Dermatitis and Xerosis. (ROA _____, APA #3, p. 176). After a "complete review of symptoms," Dr. Kahn also noted "no shortness of breath" and "no wheezing." (ROA p. ____, Id.)

On August 26, 2019, Claimant had an appointment with Dr. Jona, who asked him questions about his exposure to chemicals at work, which is the first time any doctor mentioned such a possible correlation. (ROA p. _____, Claimant's APA #4, p. 178). Dr. Jona then referred Claimant to pulmonologist Dr. Robert Miller at the Medical University of South Carolina.

Dr. Miller met with Claimant for the first time on November 21, 2019. Dr. Miller performed pulmonary function tests on Claimant, but Dr. Miller did not know what was causing any shortness of breath (ROA p. _____, APA #6, p. 210). Dr. Miller referred Claimant to a neurologist for the headaches and dizziness and to a cardiologist, Dr. John Sturdivant, for the shortness of breath. On December 5, 2019, Dr. Miller released Claimant to return to work. (ROA p. _____, APA #6, p. 217).

Dr. Miller ultimately testified that, while he believed Claimant suffered from reactive airway disease syndrome (RADS), he was basing this conclusion solely on Claimant's description of his exposure to chemicals. (ROA p. _____, Miller depo. p. 48, ll. 13-17). When asked by

Claimant's counsel whether the chemical exposure that Claimant claimed to have endured was consistent with the diagnosis of RADS caused by such chemicals, Dr. Miller testified only that, "I believe so," while confirming that he is "not a toxicologist." (ROA p. ___, Id. at p. 53, ll. 18-25).

Dr. Miller later testified that he had no independent source of information as to the amount or duration of Claimant's chemical exposure, other than what Claimant told him. (ROA p. ____, Id. at p. 57, l. 21 – p. 58, l. 10). Dr. Miller confirmed that he could "not say what [Claimant] was exposed to" that would cause RADS, because—again—"I'm not a toxicologist." (ROA p. ____, Id. at 76, ll. 9-13).

Dr. Sturdivant first saw Claimant on December 4, 2019. In June of 2020, Dr. Sturdivant noted underlying and longstanding arrythmia. (ROA p. _____, APA #7, p. 381). Dr. Sturdivant later testified at the deposition that the Claimant was able to work from a cardiac standpoint. (ROA p. ____, Sturdivant depo. p. 34, ll. 6-12).

Dr. Sturdivant testified that Claimant "continue[d] to have intermittent atrial fibrillation." (ROA p. ____, Id. at p. 32, l. 10). He also testified that the symptoms of intermittent atrial fibrillation "can be anything from palpitations, which is sensing your heartbeat, to exertional intolerance, fatigue, shortness of breath, dyspnea with exertion, or shortness of breath with exertion." (ROA p. ____, Id. at p. 38, l. 24-p. 39, l. 30). In essence, Dr. Sturdivant indicated that all of Claimant's symptoms were consistent with intermittent atrial fibrillation related to his underlying cardiac issues, which he had been experiencing since at least 2013. Further, Dr. Sturdivant confirmed that Claimant's chronic Obstructive Sleep Apnea can also result in the fatigue Claimant experienced. (ROA p. ____, Id. at p. 44, ll. 15-19).

As to chemical exposure, Dr. Sturdivant—like all of Claimant's doctors—admitted that he

did not know what chemicals, agents, compounds, solvents, or solutions that Claimant worked around, nor did he know what quantity or duration of exposure Claimant had to any chemicals. (ROA p. ____, Id. at p. 37, l. 8 – p. 38, l. 7). Dr. Sturdivant also did not even know when Claimant had last worked for Employer, (ROA p. ____, Id.)

The Full Commission also had the benefit of the opinions of Dr. Gregory Feldman. (ROA p. ___, APA #22, p. 912). Dr. Feldman is board certified in pulmonary medicine, internal medicine, and critical care medicine. Dr. Feldman reviewed all of the relevant medical evidence in this case, including Dr. Miller's deposition testimony. He concluded that, in his medical opinion, the diagnosis of RADS was not supported because Dr. Miller (and Dr. Jona) failed to properly exclude alternative explanations. (ROA p. ____, Id.). Dr. Feldman found that Claimant's symptoms were due to his many comorbidities, including obesity and known progressive cardiomyopathy. (ROA p. ____, Id.). Dr. Feldman also noted that Claimant had a markedly abnormal cardiopulmonary exercise test that indicated cardiovascular impairment, numerous pulmonary function tests (PFTs), anemia, and non-compliance with his CPAP machine (which Claimant was supposed to use due to chronic Obstructive Sleep Apnea). (ROA p. ___, Id.).

When he applied for short-term disability on October 12, 2020, Claimant stated that his condition was not work related (ROA p. ____, Employer's Ex. 4).

ARGUMENT

I. The Full Commissioner's decision that Claimant failed to establish a compensable occupational disease is supported by the reliable, probative, and substantial evidence in the record.

The Full Commission found that the Claimant "failed to meet his burden of proving a compensable injury by accident or occupational illness to lungs, skin, or resulting headaches within the course and scope of his employment." (ROA p. ____, Full Commission Order, p. 16 ¶22).

This conclusion is supported by reliable, probative, and substantial evidence in the record.

For occupation disease claims under S.C. Code Ann. §42-11-10, an employee must prove the following elements:

1. A disease;
2. The disease must arise out of and in the course of the claimant's employment;
3. The disease must be due to hazards in excess of those hazards that are ordinarily incident to employment;
4. The disease must be peculiar to the occupation in which the claimant was engaged;
5. The hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment; and
6. The disease must directly result from the claimant's continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment. Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 138, 345 S.E.2d 249, 250 (Ct. App. 1986).

On the first necessary element, Claimant presumes that if an employee alleges some exposure to chemicals at work, alleges symptoms, and then a doctor diagnoses a disease, then the Full Commission must accept that diagnosis and find a compensable occupational disease. Such is not the case.

While Dr. Miller did ultimately diagnose Claimant as suffering from reactive airway disease syndrome ("RADS")[1], the Full Commission is not required to accept any diagnosis or

[1] Although Dr. Miller did testify that Claimant suffered from RADS which was secondary to exposure to chemicals at work, a careful review of his entire testimony undermines the certainty of his opinion. He testified that he had "difficulty interpreting his [Claimant's] problem because its cardiac and pulmonary." (ROA p. ____, Miller depo. tr. p. 38 ll. 6-8). He simply did not know "how much was cardiac and how much is pulmonary." (ROA p. ___, Miller depo. tr. p. 75 ll 6-15). He admitted that he didn't "have a good handle on" what was actually causing Claimant's restricted breathing. (ROA p. _____, Miller depo. tr. p. 46 ll. 16-23).

Dr. Miller also confirmed that the nature of the chemical exposure is important in determining causation of RADS. (ROA p. ____, Miller depo. tr. p. 47 ll. 14-17). Then, he admitted that he had no information as to Claimant's actual exposure to chemicals. (ROA p. ____, Miller depo. tr. p. 57 l. 11 – p. 58 l. 22). When questioned about his opinion on cross-examination, Dr. Miller's answers reveal that his diagnosis of RADS was not certain. When asked whether his opinion was to a reasonable degree of medical certainty, the best Dr. Miller could muster was "I think so." (ROA p. ___, Miller depo tr. p. 55 ll. 18-21).

medical opinion if there is other competent evidence in the record. See Potter v. Spartanburg School Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011)(holding that the fact finder may disregard medical evidence in favor of other competent evidence.)

In this case, Dr. Feldman opined "with medical certainty" that Claimant did **not** suffer from RADS. (ROA p.___, APA #22, p. 913). Dr. Feldman is board certified in pulmonary medicine, internal medicine, and critical care medicine. He reviewed all of the relevant medical evidence in this case, including Dr. Miller's deposition testimony. Dr. Feldman opined that the criteria for diagnosing RADS "require a physician to exclude an alternative diagnosis" which Dr. Miller failed to do. (ROA p. ___, APA #22, p. 912). Dr. Feldman found that Claimant's symptoms were due to his many comorbidities, including obesity and progressive cardiomyopathy, all of which could explain Claimant's symptoms. (ROA p. ____, APA #22, p. 913). Dr. Feldman also noted that Claimant had a negative CT scan of the chest. (ROA p. ____, APA #22, p. 912).

Essentially, Dr. Feldman opined that it is not proper to assume that some unknown exposure to chemicals at some point in time caused Claimant's symptoms when there are so many other objective explanations for Claimant's condition. Simply put, Dr. Feldman concluded that the "diagnosis of RADS in this case is not supported by any reliable medical evidence and it is not possible to make." (ROA p. ___, APA #22, p. 913). Logically, without a diagnosis of a "disease", it is not possible to have an occupational disease.

The Full Commission expressly considered all of the evidence, including the opinions of Dr. Miller and Dr. Feldman, and decided to "give great weight to the opinions and testimony of Dr. Feldman ..." (ROA ___, Full Commission Order p. 16, ¶25). The "final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel."

Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Dr. Feldman's opinion that Claimant did not contract RADS is, by itself, substantial evidence sufficient to affirm the Full Commission's denial of this claim. No further inquiry is necessary to resolve this appeal.

In addition to finding that Claimant did not contract a disease, the Full Commission also found that the "medical evidence does not support a causal connection between Claimant's medical conditions and any alleged exposure at work." (ROA p.__, Full Commission Order p. 16 ¶22). Despite Claimant's allegation to the contrary, "[a]s in all workers' compensation cases, the burden is on the *claimant* in an occupational disease case to prove such facts as will entitle the claimant to compensation."[2] Mohasco, 289 S.C. at 138, 345 S.E.2d at 254. (*emphasis added*). "The claimant must show a causal connection between his alleged occupational disease and the conditions of employment in which he was engaged. (ROA p. ____, Id.)

Claimant implies that Dr. Miller's deposition testimony alone proves causation. However, as noted above, Dr. Miller later testified that he had no independent source of information as to the amount or duration of chemical exposure, other than what Claimant told him. (Id. at p. 57, l. 21 – p. 58, l. 10). Dr. Miller confirmed that he could "not say what [Claimant] was exposed to" that would cause RADS, because—again—"I'm not a toxicologist." (Id. at 76, ll. 9-13). Thus,

[2] Claimant argues that Employer had "the burden of proving not only the interplay of a non-compensable cause, but also its proportion to the overall disability." (Brief of Appellant p. 24). This argument lacks merit.

First of all, this argument was not set forth in Claimant's Form 30 so it is not preserved for appellate review.

Even if preserved, this argument misconstrues Employer's position in this case. Employer contends that Claimant did not contract a disease and, if he did, it was not caused by his exposure at work. Employer is not asking for an apportionment between Claimant's disputed disease and other non-compensable causes as contemplated by S.C. Code Ann. §42-11-90 or Hanks v. Blair Mills, 286 S.C. 378, 384-85, 335 S.E.2d 91, 95 (Ct. App. 1985). Employer is simply asking for determination that Claimant did not contract an occupational disease arising out of and in the course and scope of his employment. Without a compensable occupational disease, the concept of apportionment is not even triggered.

Dr. Miller's testimony actually confirms the Full Commission finding that "none of the physicians had specific details regarding the specific department in which Claimant worked or any other specific chemicals to which Claimant was directly exposed and for what amounts of time, if any." (Full Commission Order, p. 16, ¶23). The doctors, after all, were not toxicologists.

Additionally, the Full Commission found that "none of the physicians could exclude Claimant's serious pre-existing co-morbidities as the basis or at the very least a contributing factor to Claimant's medical condition." (ROA p. ____, Id. at ¶24). As discussed above, Claimant has a long history of pre-existing medical issues, dating back to at least 2011, including chronic Obstructive Sleep Apnea, cardiac problems (such as atrial fibrillation and cardiomyopathy), and hypertension. In 2015, Claimant's cardiologist, Dr. Prabal Guha, noted that Claimant complained of shortness of breath and heart palpitations going back to two years prior (i.e. 2013). (ROA p. ____, APA #1, p. 14). Claimant had cardiac ablation procedures in August 2016, July 2018, and April 2019. (ROA p. ___, APA #1).

Dr. Feldman noted that Claimant had many comorbidities, including obesity and known progressive cardiomyopathy. (*See* ROA p. _____, APA #22, p. 912). Dr. Feldman also noted that Claimant had a markedly abnormal cardiopulmonary exercise test that indicated cardiovascular impairment, numerous pulmonary function tests (PFTs), anemia, and non-compliance with his CPAP machine. (ROA p. ____, Id.) These prior serious comorbidities that were noted by the Full Commission are well-supported by the evidence in the record.

In this case, the Full Commission findings and conclusions are based on the determination that Dr. Miller's opinion, lacking as it was in any specific knowledge Claimant's exposure to chemicals, was not sufficient to establish a diagnosis of RADS or a finding of causation to satisfy

Claimant's burden. The Full Commission's conclusion is supported by Dr. Miller's acknowledgement in his testimony that he is not a toxicologist and that he did not have specific information about the nature of Claimant's exposure to chemicals. Furthermore, when applying for disability in 2020, Claimant admitted that his condition was not work related. (ROA p. ____, Employer's Ex. 4).

"The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682–83 (1946); Tiller v. National Health Care Center, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The record in this case supports the Full Commission's finding that Claimant failed to establish causation between his employment and his breathing symptoms.

Finally, even if Claimant did contract RADS caused by his excessive exposure to chemicals while on the job, Claimant suffered no disability. Claimant only missed time from work because of his cardiac problems which were admittedly non-work related. (ROA p. ____, Single Commissioner hearing tr. p. 24 ll. 10-17; Tr. p. 66 l. 10 - p. 68 l. 19; Tr. p. 76 l. 15 – p. 77 l. 4, Employer's Ex. 1, 2, 3). Compensability, and therefore liability, is founded upon disability, not injury. S.C. Code Ann. § 42-11-20. Disability is "measured by loss of earning capacity." Koon v. Spartan Mills, 286 S.C. 190, 192 n.1, 332 S.E.2d 544, 545 n.1 (Ct. App. 1985). Claimant is not disabled related to his exposure to chemicals. He was still able to perform his job up until the time he was laid off in May of 2020. (ROA p. ____, Tr. p. 76 ll. 15-25).

The question is not whether the record contains evidence which could have supported a finding of compensability. The inquiry is limited to whether the Commission's decision to deny

the claim is controlled by an error of law or clearly erroneous in light of the substantial evidence in the record. The Commission applied the proper law. The substantial evidence including, but not limited to, Dr. Feldman's opinions, supports the denial of the occupational disease claim in this case. Considering the record as a whole, reasonable minds could reach the conclusion the Commission reached. See Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 338 (1999).

II. The Full Commission properly applied the legal standard for occupational disease claims as set forth in Mohasco and S.C. Code Ann. §42-11-10.

Claimant now argues that the Full Commission "failed as a matter of law to properly apply the legal standard for occupational disease set out in Mohasco Corp., Dixiana Mill Div. v. Rising, and S.C. Code §42-11-10." (Appellant's Brief p. 19). This argument is not preserved for appellate review. Even if preserved, the Full Commission properly applied the standard for analyzing occupational diseases as provided by the South Carolina Workers' Compensation Act as well as the case law interpreting same. Claimant simply failed to meet his burden of proof.

In his Form 30, Claimant argued only that the single commissioner erred in failing to find Claimant's sustained a compensable occupational disease and/or injury by accident as relative exposure to chemicals on the job. (ROA p. ____, Form 30). Claimant did not argue in his Form 30 that the Commission failed to properly apply the legal standard as set forth in Mohasco and S.C. Code Ann. §42-11-10. Accordingly, Claimant failed to preserve this entire argument for appeal. Clark v. Aiken Cty. Gov't, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. Ap. 2005) "[a]n issue not raised in the application for review is not preserved for the full commission's consideration. General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue."). "Only issues within the application for review under S.C. Code Ann. §42-17-50 (1976) are preserved for appeal to the commission." Brunson v. Am. Koyo

Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. Ap. 2005). See also Rummage v. BGF Indus., 434 S.C. 441, 455 n.8, 865 S.E.2d 380, 388 n.8 (Ct. App. 2021), petition for cert. dismissed as improvidently granted, Op. No. 28166 (S.C. Sup. Ct. filed July 26, 2023)(noting that claimant's very generalized exception to the hearing commissioner's order was "like a hoopskirt- cover[ing] everything and touch[ing] nothing").

Not only was Claimant required to raise this issue in his Form 30, he was also required to do so concisely and with "specificity, not through blanket general exceptions." Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 251 n.2, 791 S.E.2nd 719, 722 n.2 (2016). See also S.C. Code Ann. Regs. 67-613 (A) ("each question must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is error."). Claimant simply did not satisfy these requirements for preservation in his Form 30. Even if preserved for appellate review, Claimant's contention that the full commission failed to apply the proper standard lacks merit.

After providing a history of the treatment of occupational disease claims in the law, Claimant concludes that the appropriate standard for occupational disease claims is as set forth in S.C. Code Ann. § 42-11-10 as confirmed/clarified in Mohasco. Inexplicably, Claimant then argues that "the Commission never acknowledged the occupational disease elements." (Appellant's Brief, p. 21).

Quite to the contrary, both the single commissioner and the Full Commission specifically referenced S.C. Code Ann. § 42-11-10 in finding that Claimant did not sustain a compensable occupational disease arising out of and in the course and scope of his employment with Employer. (ROA. p. ____, Single Commissioner Order p. 16, Conclusion of Law #2; Full Commission Order p. 17, Conclusion of Law #2). The Full Commission adopted Dr. Feldman's opinion that Claimant

did not actually contract RADS. (ROA p. ____, Full Commission Order p. 17, ¶26). The Full Commission then also found that the "preponderance of the medical evidence does not support a causal connection between Claimant's medical conditions and any alleged exposure at work." (ROA p. ____, Full Commission Order p. 15, ¶ 18). There is no requirement in the law for the Full Commission to cite every case- or any case for that matter- when making its findings of fact or conclusions of law. The Full Commission applied the proper standard in analyzing whether Claimant contracted a compensable occupational disease.

A. The Full Commission is not required to make findings of fact as to all of the elements of occupational disease as set forth in Mohasco and S.C. Code Ann. § 42-11-10 when it *denies* an occupational disease claim.

Claimant argues that the Full Commission is required to make specific findings of fact on all six of the Mohasco elements when ruling on occupational disease claims. In so arguing, Claimant relies solely on the holding in Fox v. Newberry Co. Mem. Hosp., 319 S.C. 278, 461 S.E.2d 392 (1995). Claimant's argument is not preserved for appellate review. Even if preserved, Claimant's reliance on, and interpretation of, the holding in Fox is erroneous.

Once again, Claimant did not raise this issue in his Form 30 and the issue is not preserved for appellate review. Claimant does not reference the Fox case in his Form 30 or in his 49-page brief to the Full Commission. (ROA p. ___, Form 30; Appellant/Claimant's Brief to the Appellate Panel). This argument is not preserved. Clark v. Aiken Cty. Gov't, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. Ap. 2005) ("[a]n issue not raised in the application for review is not preserved for the full commission's consideration. General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue.").

Regardless, the holding in Fox does not address the Commission's requirements when

denying an occupational disease claim. The Fox holding only addresses the Commission's obligation to make findings of fact on all of the relevant elements when ***awarding*** a claim for occupational disease.

In Fox, the Commission found the employee's herpetic whitlow to be an occupational disease and awarded compensation. Fox, 319 S.C. at 278, 461 S.E.2nd at 393. The Commission did not, however, make findings of fact directly or indirectly addressing four of the Mohasco elements. Accordingly, the Supreme Court remanded the case back to the Commission to make findings of fact on all six Mohasco elements.

The holding in Fox does not apply to the present situation. When the Commission finds that any of the Mohasco elements are not satisfied, it need not make specific findings of fact on the other remaining elements. For example, if the Commission determines that an employee did not contract a disease, it is irrelevant whether there is a causal connection between an employee's symptoms and their working conditions. The Full Commission is simply not required to make findings on all Mohasco elements if any one element is not satisfied. Claimant's belated argument to the contrary lacks merit.

B. The Full Commission did not err in finding it "noteworthy that none of the treating or evaluating physicians has specific details regarding the specific department which Claimant worked or any specific chemicals to which Claimant was directly exposed and for what amounts of time, if any."

Claimant argues that the Commission "erred as a matter of law by *requiring* that the Claimant show a particular quantity of a particular chemical to which the Claimant was directly exposed for a particular period of time on particular dates with the cause of his disability." (Appellant's Brief p. 22) (*emphasis added*). Once again, this issue is not preserved for appellate review. Even if preserved, Claimant misinterprets, and misquotes, the Commission's findings.

The Full Commission properly considered the evidence regarding Claimant's exposure in determining the Claimant failed to satisfy his burden of proof.

Once again, Claimant did not raise this issue in his Form 30 and the issue is not preserved for appellate review. (ROA p. ___, Form 30; Appellant/Claimant's Brief to the Appellate Panel).

Even if preserved for appellate review, Claimant's interpretation of the Full Commission's findings of fact and conclusions of law is misguided. The Full Commission's actual finding of fact on this issue was:

> 23. It is noteworthy that none of the treating or evaluating physicians had specific details regarding a specific department in which Claimant worked or any specific chemicals to which Claimant was directly exposed and for what amounts of time, if any. (ROA p. ____, Full Commission Order p. 16, ¶23.)

The Full Commission did not find, as argued by Claimant, that the Claimant is ***required*** to "show a particular quantity of a particular chemical to which the Claimant was directly exposed for a particular period of time or particular date was the cause of his disability." Instead, the Full Commission simply found it "noteworthy" on the issue of causation that the physicians did not have specific details regarding Claimant's actual exposure to chemicals. As acknowledged by the Full Commission, Dr. Feldman opined that you cannot even make an RADS diagnosis "without a clear understanding of the chemical involved and the extent of exposure." (ROA p. ___, Full Commission Order p. 17, ¶26). The Full Commission's references to the issues relating to Claimant's actual exposure were solely for the purpose of determining that Claimant did not actually contract a disease and his symptoms were not related to his employment.

Furthermore, the details (or lack thereof) of Claimant's exposure are relevant to the determination of compensability. For a disease to be a compensable occupational disease, it must

be caused by "hazards in process of those hazards that are ordinarily incident to employment." S.C. Code Ann. §42, 11-10. The medical experts in this case were unable to confirm that Claimant was exposed to any extraordinary hazards which caused his symptoms.

The Full Commission did not commit any error of law in noting that the doctors did not know Claimant's actual exposure to chemicals. Claimants' exposure cannot be assumed, it must be proven. An award of workers' compensation benefits cannot be based upon surmise, conjecture, or speculation. Clade v. Champion Lab, 330 S.C. 8.11, 496 S.E.2nd 856, 857 (1998).

When determining whether Claimant contracted a disease caused by chemical exposure at work, the Full Commission did not err in noting that the doctors did not know what Claimant's chemical exposure was. Dr. Miller and Dr. Feldman agreed that the details of the exposure are important in diagnosing RADS and determining causation. Dr. Feldman further opined that the diagnosis of RADS is not even possible without knowledge of the details of the exposure when there are other explanations for the symptoms. The Commission placed great weight on Dr. Feldman's opinion and properly noted the inherent problems with any opinions based upon assumed chemical exposure.

CONCLUSION

The Full Commission found that Claimant/Appellant James Freshley did not sustain any compensable injury by accident or occupational disease arising out of and in the course and scope of his employment with Combraco Industries. This finding is supported by the substantial evidence in the record including, but not limited to, the opinions of Dr. Feldman. The record supports the conclusion that Claimant did not actually contract a disease and that his symptoms were not causally related to his employment. Furthermore, the record supports the conclusion that Claimant is not disabled.

Based upon the foregoing, the Appellate Panel Decision and Order filed January 31, 2023 should be affirmed in its entirety.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AISHA TAYLOR, COMMISSIONER

APPELLATE CASE NO.: 2023-000185

James Freshley, Claimant...Appellant,

v.

Conbraco Industries, Employer, and Great American
Insurance Company, Carrier...Respondents.

CERTIFICATE OF SERVICE

I, David A. Wilson, hereby certify that on September 11, 2023, I served a copy of the Initial Brief of Respondents *by email only*, addressed as follows:

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