THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1823614

James Freshley, Claimant ..... Appellant,

vs.

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

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This is a Workers' Compensation claim tried before the Single Commissioner on the Appellant's claim that he suffered reactive airway disease as a result of exposure to airborne chemicals at his Employer, Conbraco Industries, Inc.

The Single Commissioner denied the claim. On appeal, the Commission Panel affirmed. This appeal followed.

STANDARD OF REVIEW

The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the Court may reverse or modify a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. §1-23-380(5). While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996)(citing Kearse v. State Health & Hum. Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Adams v. Texfi Indus., 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000)(quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)).

FACTS

A. WORK HISTORY/EXPOSURE

1. PRIOR TO EMPLOYER, CONBRACO:

After graduating high school in Conway, South Carolina, the Claimant worked as a meat cutter in a grocery store, as a maintenance man at Holiday Inn, for Horry Telephone, as a building inspector, (R. p. 1469), and for a building supply company. (R. pp. 1469-1470).

During these years, prior to working for Conbraco, the Claimant was in good health and had annual physicals with no difficulties, (R. p. 1470, line 15 – page 1471, line 2), and, specifically, suffered from no shortness of breath or problems with his heart or lungs. (R. p. 1448, lines 9-12). The Employer subpoenaed the Claimant's records going back several years before his work at Conbraco and offered no evidence to the contrary.

2. WORK HISTORY AT CONBRACO:

Conbraco is a manufacturer, primarily of valves. The Claimant began work of Conbraco in 2007 and spent the overwhelming majority of his career at Conbraco working in the shipping department, specifically in the zinc coating process: the "zinc line." (R. pp. 1470-1475).

The zinc coating process involves bathing the manufactured parts in a variety of chemicals. The process emits visible fumes. (R. p. 490, Exh. B13; R. p. 1472, lines 9-18):

The zinc coating process takes place in the shipping department; in close proximity to other associated processes, including titration, passivation, and the washer, which also involve airborne

chemicals, as indicated in the diagram below, prepared by the Respondents' expert. (See R. p. 668, App. Exh. D).:

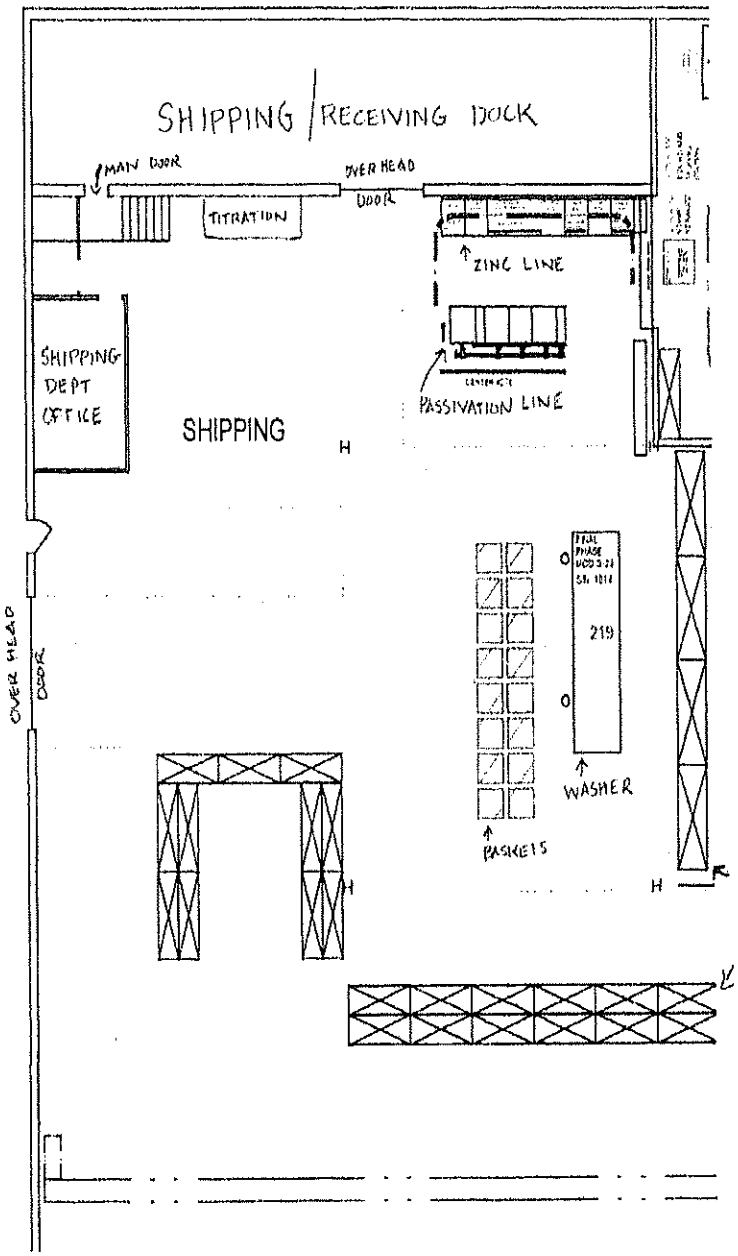

Exhibit D:

The employer, in response to subpoena, produced Material Safety Data Sheets (MSDS) describing a variety of chemicals used in the shipping department:

R. p. 541, Phosphoric Acid (Ex. C48);
R. p. 541, Calcium Nitrate (Ex. C48);
R. p. 541, Zinc Oxide (Ex. C48);
R. p. 541, Nitric Acid (Ex. C48);
R. p. 612, Hydrochloric Acid (Ex. C119):
R. p. 535, Caustic Soda (Ex. C42);
R. p. 535, Sodium Gluconate (Ex. C42);
R. p. 536; 599, Phosphoric Acid (Ex. C43, Ex. C106);
R. p. 536, Nickel Nitrate (Ex. C43);
R. p. 536, Zinc Nitrate (Ex. C43);
R. p. 536, Zinc Dihydrogen Phosphate (Ex. C43);
R. p. 599, Sulfuric Acid (Ex. C106);
R. p. 498, Triethanolamine (Ex. C5);
R. p. 498, Monoethanolamine (Ex. C5);
R. p. 498, Nonanoic Acid (Ex. C5):
R. p. 505, Methoxy (Ex. C12);
R. p. 505, Proparol (Ex. C12);
R. p. 554, Allphatic Petroleum Solvent (Ex. C58);
R. p. 554, Glycol Ether (Ex. C58).

The Claimant was employed from October 8, 2007, until he was terminated on May 8, 2020. During that time, the Claimant was exposed to these hazardous airborne chemicals in the Shipping Department.

The Material Safety Data Sheets (MSDS), (R. pp. 494-631, Exh.C1 – C138), describe each of those chemicals, (which include hydrochloric acid, phosphoric acid, zinc oxide, nitric acid, and sulfuric acid), and warn that inhalation could result in dizziness and shortness of breath, conditions from which the Claimant suffers. (R. pp 494-631, Exh. C).

The Single Commissioner found:

> 7. **Claimant relies heavily on the MSDS sheets, which list all of the chemicals listed in the entire facility – not just the Shipping Department** – as well as warnings of the potential side effects of exposure to those chemicals.
>
> (R. p. 11, ¶ 7)(emphasis added).

Respectfully, this finding was in error. Karen Brooks, the Employer's Environmental

Health and Safety Manager, who compiled the MSDS Sheets in response to Appellant's subpoena, testified that each sheet described chemicals used in the Shipping Department, in close proximity to the zinc line, where the Claimant worked. (See R. p. 1556, line 19 – p. 1559, line 22).

The Material Safety Data Sheets (MSDS) provide the employer and the employee warnings of the risks of inhalation of the chemicals including: "Bronchitis, pulmonary edema, chemical pneumonitis", (R. p. 42, Exh. C52 - MICRO 24), "allergy or asthma symptoms", (R. p. 44, Exh. C126 - Hydrochloric Acid), "nausea, headache, dizziness, fatigue, drowsiness, unconsciousness…., irregular heartbeats…", (R. p. 45, Exh. C32 - Marton Martex); "headache, dizziness, irritation of the upper respiratory tract." (R. p. 45, Exh. C58 - Rust Veto); "…damage to the upper respiratory tract or even the lungs." (R. p. 46, Exh. C44 - Marton ZNX); "Fatal if inhaled." (R. p. 46, Exh. C113 - Sulfuric Acid/Phosphoric Acid).

Many of the MSDS recommend the use of ventilators or respirator protection. It is undisputed that the Employer, however, did not provide the Claimant or his co-employees with ventilators or any other personal protection equipment, other than simple dust masks. (R. pp. 1475-1476; R. p. 1551).

The Claimant complained repeatedly to his Employer about symptoms from his exposure to the fumes and mist of the zinc bath, and the other chemicals in the shipping area.

In response, on November 28, 2018, Sarah Huffman, the Claimant's supervisor, completed an Employee Injury Report which indicated:

> Date of Injury: 11/27/2018. …
> How Did this Injury Occour[sic]? Through the daily exposure to the fumes and mist of the zinc bath. …
>
> Is There Any Way You Could Have Avoided This Injury?
> Ventilation system would have prevented the exposure to the fumes.

(R. p. 47, Exh. A1).

> James Freshley Lead person in the Melonite/Phosphate department has advised me of a medical issue that he believes is directly related to the chemicals use din the Zinc Phosphate Process. ... Triggers for these symptom[sic] are by the zinc bath fumes and mist. ... James first brought this issue of skin irritation and headache to my attention back in August of 2018. Since then the symptoms have steadily increased and no relief has been found. Note: Symptoms are not as irritating when James is not around the coating process. But return aggressively upon return to work in the area. ... PPE is being looked at and ordered. This includes gloves, jacket, respirator googles and the properly installed ventilation system is required.

(R. p. 48, Exh. A2).

Ms. Huffman reported that the Claimant began experiencing symptoms as far back as June 2018, and that he first brought his symptoms to her attention in August 2018. Ms. Huffman notes that the Claimant's symptoms, which began with skin irritation and headaches, have steadily increased; and that his symptoms, "are not as irritating when James is not around the coating process but return aggressively upon his return to work in the area." (R. 48, Exh. A2).

To help reduce the problem, the Claimant's supervisor indicated that the Employer was looking into and ordering new personal protective equipment, to include gloves, jackets, respirators and goggles, along with a properly installed ventilation system. (R. p. 1551).

In spite of this statement in November 2018, no ventilators were provided to the employees, no ventilation system was installed, and the Claimant's symptoms worsened. (Id.).

On May 17, 2019, six months later, in response to the Claimant's continued complaints, Ms. Huffman completed a second report:

> ... Date Injury Reported 1st Aug 2018/2nd Nov 2018
> Skin lessons[sic] on the face. Also known as sores, Along w/headache, skin irritation, burning eyes.
> BH-PR, (Zinc Line Coating Line Bath)
> Fumes that rise from the bath.
> Employee feels that this is an ongoing injury. Brought about through the daily exposure to the fumes and mist of the chemical (BH-PR) used in the soap bath of the Zinc Line.

> Employee says Jason Purser, Jesse Robinson can confirm that they are experiencing similar symptoms.

(R. p. 50, Exh. A3).

Ms. Huffman's Accident Investigation Report of May 2019, again, recorded that the Claimant has complained in August 2018 and November 2018. Ms. Huffman noted, "Employee feels that this is an ongoing injury brought about through the daily exposure to the fumes and BH-PR used in the soak bath on the zinc line." (R. p. 50, Exh. A3).

The Claimant was then sent to by the Employer to Doctors Care where the doctor diagnosed, "possible chemical exposure, runny nose, itchy skin on face." (R. p. 221). The doctor noted, "The Claimant only has issues at work. No symptoms until he goes to work." Id. The Claimant was prescribed hydrocortisone cream, Hydroxyzine and Prednisone. The doctor noted, "If ventilation is an issue, recommend masks that are effective barrier protection for the patient to prevent runny nose and facial itching." (R. p. 221).

At this point, the Claimant was referred to the Human Resources Department and spoke with Rene Chaisson. Upon seeing Ms. Chaisson after his visit to Doctors Care, the Claimant complained to her of shortness of breath and related his breathing problems to the fumes at the job. (R. p. 1524, line 4 – p. 1530, line 1).

Ms. Chaisson did not provide the Claimant with an appointment with a pulmonologist. She did not provide him a ventilator as had been recommended by his supervisor six months previously. Instead, Ms. Chaisson referred the matter to the workers' compensation carrier and Ms. Brooks

ordered an air quality study by Phillip W. Shoopman, P.E., which was performed on June 19, 2019. (Tr. p. 1555, lines 8 – 23).

Ms. Brooks did not provide Mr. Shoopman all of the Material Safety Data Sheets from the shipping department. She provided Mr. Shoopman with only one MSDS for product MICRO 24. (R. pp. 539-549, Exh. C46-C56).

Ms. Brooks testified:

Q. And here is why I ask. **The Material Safety Data Sheets that you guys produced to us contain C-1 through C-138, 138 pages, right**?
A. **Correct**.
Q. **You compiled those**?
A. **Correct**.
Q. You compiled those when you gave it to us?
A Correct.
Q. But you didn't give them to Mr. Shoopman?
A. No, sir.
Q. Now, you made a list here, C-3, ---
A. Yes, sir.
Q. --- of what those chemicals were?
A. Yes, sir.
Q. And where they were used?
A. Yes, sir.
Q. **Some of those chemicals weren't used on the zinc line**?
A. **No, sir**.
Q. Some of those chemicals – **all of those chemicals, though, were used in the shipping department**?
A. **Yes, sir**.
Q. **And some of those chemicals, for example, were used on the passivation line**?
A. **Yes, sir**.

BY MR. WUKELA:

And the diagram there, Commissioner, is D-36.

DIRECT EXAMINATION RESUMED BY MR. WUKELA:

Q. **The passivation line is a few feet away from the zinc line, right**?
A. **Yes, sir**.
Q. And in the passivation line your list here indicated that some

of the things used in the passivation line are chemicals on this list?

A. Yes, sir.

Q. **Others, for example, are used in the titration**?

A. **Yes, sir**.

Q. **Titration is just next door to the zinc line, next to the door as well**.

A. **Yes, sir**.

Q. You didn't give him the chemicals from the titration line?

A. No, sir.

Q. And those chemicals include things like – and I'm looking at page six of my brief – hydrochloric acid?

A. Yes, sir.

Q. Hydrochloric acid is used in the titration line, ---

A. Yes, sir.

Q. --- just right next to the zinc line?

A. Yes, sir.

Q. And hydrochloric acid, according to the MSDS sheet, is harmful if inhaled and may cause asthma systems or breathing difficulties if inhaled, correct?

A. Yes, sir.

Q. But you didn't give the expert who performed the air quality test the MSDS sheet for hydrochloric acid?

A. No, sir.

Q. **And the washer, the washer in that diagram is next to the passivation line**?

A. **Yes, sir**.

Q. **A few feet away from the zinc line**?

A. **Yes, sir**.

Q. And in the washer, you guys use chemicals, also.

BY MR. WUKELA:

I'm looking at page seven of my brief, your Honor.

DIRECT EXAMINATION RESUMED BY MR. WUKELA:

Q. And those chemicals, also, the MSDS sheets warn that high concentrations may be harmful, may affect breathing, suggest ventilation, correct?

A. Yes, sir.

Q. But you didn't give those to the expert?

A. No, sir.

Q. **In fact, all those chemicals are used in close proximity to the zinc line**. there's 138 pages of them, but the only ones you gave to the expert to test for was that one?

A. **Yes, sir**.

Q. And he didn't test for the other ones?
A. No, sir.

(R. p. 1556, line 19 – p. 1559, line 24)(emphasis added). (See also R. p. 1555, line 24 – p. 1557, line 3; R. p. 1473, line 23 - p. 1475, line 8).

Mr. Shoopman performed air quality testing in the shipping department for this one chemical alone, (MICRO24), by placing monitors on some employees. (R. pp. 632-668, Exh. D).

Mr. Shoopman's report concluded that the chemical was within the OSHA permissible exposure limit.

Based upon this test, the Employer chose to do nothing in response to the Claimant's symptoms. In fact, the Employer did not even provide the ventilators recommended by their own supervisor, Ms. Sarah Huffman.

Q. Okay. so in 2019 you were aware of that chemical; you were aware that it – the manufacturer said if might cause shortness of breath; you were aware that Mr. Freshley used the chemical, and you were aware that he was complaining of shortness of breath; you were aware that he related it to that chemical?
A. Yes, sir.
Q. Did you give him a ventilator?
A. No, sir.
Q. Did you do any of the things that his supervisor had recommended?
A. No, sir.

(R. p. 1555, lines 8 – 19).

The Employer failed to provide the ventilator recommended by the Appellant's supervisor in spite of the fact that the MSDS for MICRO 24, the one chemical the employer tested for, indicates that it contains phosphoric acid, calcium nitrate, zinc oxide, and nitric acid, and warns: "Do not breathe dust/fume/gas/mist/vapors/spray". (R. p. 53, Exh. C47 - MICRO 24).

Ultimately, in 2020, after the Claimant was no longer able to work due to reactive airway disease and this litigation was underway, the employer finally made the changes that had been recommended by Ms. Huffman, the Claimant's supervisor, in November 2018, and installed a new

zinc line that operates robotically and is ventilated to the outside air. (R. p. 1547, line 1 – p. 1548, line 2).

B. MEDICAL HISTORY

The Claimant is a 55 year-old non-smoker. (R. p. 1448, lines 6-8).

The Claimant never suffered from any medical issues with his heart or lungs prior to working at Conbraco. (R. p. 1448, lines 9-12).

In 2015, after working for the Employer for approximately eight years, the Claimant first began to suffer from heart palpitations. (R. p. 1488, lines 13-21). His family doctor, Dr. Richard Ellis, referred the Claimant to a cardiologist, Dr. Prabal Guha; whom the Claimant saw for the first time on August 7, 2015. (R. p. 77). Dr. Guha tested the Claimant's heart and concluded that the Claimant had an irregular heartbeat and diagnosed him with atrial fibrillation.

Of note, certain chemicals used in the Appellant's department, if inhaled, can cause irregular heartbeats:

> Breathing high concentrations may be harmful. Mist or vapor can irritate the throat and lungs. Breathing this material may cause central nervous system depression with symptoms including nausea, headache, dizziness, fatigue, drowsiness, or unconsciousness breathing high concentrations o this material, for example, in an enclosed space or by intentional abuse, **can cause irregular heartbeats which can cause death**.

(R. p. 525, Exh. C32 - Matron Martex)(emphasis added).

This was not known to the Claimant or Dr. Guha at the time.

Dr. Guha preformed an ablation on the Claimant's heart to restore normal heart rhythm on September 7, 2016. (R. p. 120). After that, the Claimant maintained normal heart rhythm until June 2018. (R. p. 152).

Also beginning in June 2018, the Claimant began complaining of additional symptoms, including headaches, skin lesions, burning and itching eyes; which he related to his exposure to

chemicals at the job. (R. p. 475, Exh. A2).

Claimant's symptoms of cardiac arrhythmia ultimately lead Dr. Guha to perform a second ablation on April 6, 2019. (R. p. 177). The Claimant continued to work during this time period, exposed to the chemicals without a respirator, with the exception of short periods of time when he was out for medical procedures.

By August 23, 2019, the Claimant saw Dr. Guha's office again complaining of heart palpitations and shortness of breath. (R. p. 195). Dr. Guha's PA noted he was still in normal sinus rhythm but diagnosed dilated cardiomyopathy, a condition in which the heart muscle has become weakened and enlarged. Dr. Guha's staff ordered cardiac therapy and placed the Claimant out of work from August 13, 2019 through August 23, 2019. Id.

Dr. Guha then referred the Claimant to Dr. Vinod Jona, a pulmonologist, to evaluate the Claimant's shortness of breath.

On October 8, 2019, from the cardiac standpoint, Dr. Guha indicated: "Patient has been evaluated today. From a cardiac standpoint Mr. Freshley can go back to work." (R. p. 200).

In the meantime, on August 26, 2019, pulmonologist Dr. Vinod Jona saw the Claimant on referral from Dr. Guha and noted:

> 1. **Shortness of breath**
> 2. **Exposed to chemicals** ...
>
> NEW PATIENT: **Patient states that Dr. Guha has referred him for shortness of breath. He works around chemicals at his job and has had multiple heart related issues and now shortness of breach has started.** He has OSA. Patient has productive cough with green sputum,...

(R. p. 251)(emphasis added).

Dr. Jona made note of the Claimant's chemical exposure at work:

> **...Is the exposure clinically significant yes**
> **Is the intensity clinically significant? yes**
> **Is there a temporal association between the exposure and symptom onset? yes**

Does the patient work in an occupation known to be at risk for the development of lung disease? yes
What do they do in their current job and previous jobs? line where he coats parts to clean rust off. Sodium hydroxide

(R. p. 251)(emphasis added).

Dr. Jona assessed:

1. SOB (shortness of breath) - R06.02 (Primary)
2. Reactive airway disease without complication, unspecified asthma
Severity, unspecified whether persistent - J45.909
3. Sleep apnea in adult - G47.30
4. Dilated cardiomyopathy - I42.0, stable
5. Atrial fibrillation, unspecified type - I48.91

(R. p. 252).

Dr. Jona further noted on August 26, 2019:

> Has shortness of breath with exertion. Significant cardiovascular issues including cardiomyopathy. Has had recurrent atrial fibrillation. Has morbid obesity and obstructive sleep apnea and is on CPAP. He says that he works around dust and chemicals and has some significant tightness and the question was whether he has occupational asthma. Due to spirometry showed more of a restrictive pattern.
>
> * * *
>
> **Probably may have reactive airway disease** ...

(R. p. 253).

On August 29, 2019, the Claimant filed the instant Workers' Compensation claim.

On September 26, 2019, Dr. Jona saw the Claimant again, diagnosed reactive airway disease and referred the Claimant to another pulmonologist, Robert Miller, MD at MUSC in Charleston. (R. p. 265).

Although the Claimant had been released to work on October 8, 2019, by Dr. Guha, from the cardiac standpoint; on October 14, 2019, the Claimant's family nurse practitioner, Johnlyn Nettles, restricted the Appellant from returning to work to allow him to see Dr. Miller. (R. pp. 275-177).

The Claimant was seen by Dr. Miller on November 21, 2019. Dr. Miller performed pulmonary function tests on the Claimant and initially indicated that he was not sure what was the cause of the Claimant's shortness of breath; although he was not comfortable returning the Claimant to work. (R. p. 285).

Dr. Miller referred the Claimant to a neurologist to see if he could find a neurological cause for the Claimant's headaches and dizziness, and to a cardiologist, Dr. John Sturdivant, to see if he could find a cardiac explanation for the Claimant's shortness of breath.

On December 5, 2019, in the meantime, Dr. Miller released the Claimant to a trial return to work. (R. p. 292).

The Human Resources Director, Rene Chaisson, testified that the Claimant was eager to return to work. (R. p. 1534, lines 23-24)).

By February 13, 2020, the Claimant again saw Dr. Miller who noted:

> Patient is back to work but continues to be weak and tired. **Patient saw neurology who felt he did not have a significant neurological issue. Continues to be very weak and tired and short of breath on any exertion. He is not considered to have a significant cardiac issue at this time.**

(R. p. 304)(emphasis added).

Given the opinions of the neurologist and the cardiologist excluding neurological or cardiac cause for his shortness of breath, Dr. Miller ordered a cardiopulmonary test which the Claimant underwent on February 28, 2020. (R. p. 320) The cardiopulmonary exercise test revealed that the Claimant had, "early exercise intolerance that is severe." (R. p. 320). The test was also significant in that the Claimant's breathing or ventilatory limit was achieved, consistent with his known impairment in pulmonary function, although his cardiovascular limit was not achieved:

> Ventilatory limit was achieved. This is consistent with his known impairment in pulmonary function demonstrating combined restrictive and obstructive physiology.

(R. p. 321).

On June 11, 2020, Dr. Miller ordered a pre- and post- bronchial dilator study; which he concluded was consistent with reactive airway disease. (R. p. 423) (See also R. p. 1348, line 25 - p. 1349, line 12).

Given all this, Dr. Miller testified:

> **A. Well, I -- I'm not a toxicologist. But, from what he tells me of his exposure, which I have in the first part of my note, I believe he has reactive airway dysfunction syndrome, secondary to his exposure at work.**
> **Q. Okay. And doctor, is that your opinion, to a reasonable degree of medical certainty?**
> **A. Yes.**

(R. p. 1354)(emphasis added).

Dr. Miller went on to testify:

> Q. But I just wanted to represent to you that, you know, those MSDS sheets weren't something that we made up. We were produced those, in response to subpoena, by the employer, when we asked about chemicals at the job.
>
> **Mr. Farry has asked you about a variety of conditions -- cardiac conditions, gastric reflux disease, sleep apnea, weight, medication. But is it fair to say that exposure to airborne hydrochloric acid, phosphoric acid, zinc oxide, nitric acid and sulfuric acid are consistent with your diagnosis that he suffered reactive airways disease as a result of exposure to chemicals at the job?**
> **A. Yep.**
> MR. FARRY: Object to the form.
> A. **I believe so.**
> Q. All right. Now, Doctor, we talked about that June of 2020 note, where you indicated that Mr. Freshley was significantly impaired. **Is he able to return to work?**
> A. **I do not believe so.**

(R. p. 1385, lines 4-24)(emphasis added).

The parties also deposed Dr. John Sturdivant, the cardiologist to whom Dr. Miller referred the Claimant to evaluate possible cardiac causes of the Claimant's shortness of breath. Dr. Sturdivant testified that he agreed with the cardiologist, Dr. Guha, that, from the cardiac standpoint, the Claimant could work:

A. What I would tell you, is that it -- it -- very simply, is that **Mr. Freshley's atrial fibrillation very well possible could be related to his underlying lung disease, but atrial fibrillation, in and of itself, is not -- is -- is not a limiting factor, from the standpoint of being able to go back to work.** For -- for -- so your question was -- was appropriately very pointed, because I am a super-specialized physician. **You know, your question was from the standpoint -- from a cardiac standpoint, can he work. The -- the -- the answer is that, from what I know of his cardiac condition, he can work.**

As you are aware, you know, the -- the -- the leg bone's connected to the hip bone and the hip bone's connected to the heart bone, and all that kind of stuff, and -- and -- and it all runs together. Dr. Miller, it sounds like, has already told you that his pulmonary condition would restrict him from working. I'm just telling you that **the condition that I found in my evaluation with respect to his heart, in and of itself, taken alone, is not -- is not an indication for -- for the inability to -- to hold sustainable employment.**

(R. p. 1420, line 15 - p. 1421, line 1; R. p. 1421, lines 6 - 12)(emphasis added).

The Employer then retained pulmonologist, Gregory Feldman, M.D., to prepare a report based on certain medical records; which the Employer provided Dr. Feldman. (APA p. 915). Those records did not include the MSDS sheets, the deposition of the Employer's Environmental Health and Safety Manager who compiled the MSDS sheets, nor the deposition of the Appellant's treating cardiologist, Dr. Sturdivant, who excluded the heart as the cause of the Claimant's disabling shortness of breath.

Dr. Feldman reviewed the reports he was given, and opined:

> I have been asked to review medical records, as well as deposition of pulmonologist Dr. Robert Miller, who has opined that Mr. Freshley numerous complains, despite presence of significant comorbidities are related in some fashion to reactive airway dysfunction syndrome due to unspecified chemical exposure at his job, Dr. Miller was either not provided records of the alleged exposure, or such records may not exist, but either way Dr Miller has testified that he can't say what exactly Mr. Freshley was exposed to.

* * *

> In summary I find diagnosis of RADS (reactive airway dysfunction syndrome) not supported by required criteria of exclusion of alternative explanation.

(R. pp. 1196-1197).

ARGUMENT

A. THE 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.

The Appellant alleges that he sustained a compensable occupational disease, i.e., reactive airways disease, as the result of his exposure to certain chemicals on the job.[1]

Our Courts have explained, "[c]overage of occupational diseases had always lagged far behind coverage for injury by accidents. Prior to the enactment of statutory provisions allowing compensation, occupational diseases were generally not compensable. 1B Arthur Larson, Workmen's Compensation Law §[52.02]; 99 C.J.S. Workmen's Compensation §169 (1958). Because a single time, place, or event constituting an 'accident' in the scope of employment could not be identified as the cause of a gradually developed disease, worker's compensation acts were thought to be incapable of supporting a disease claim." Fox v. Newberry County Mem. Hosp., 316 S.C. 537 (Ct. App. 1994), rev'd on other grounds, 319 S.C. 278 (1995).

"Occupational disease coverage, however, evolved to compensate persons for diseases which were clearly incident to a continuous exposure to some hazard in their industry greater or different than those involved in ordinary living or ordinary occupations." Id.

[1] Of note, the Appellant initially pled both occupational disease and injury by accident in the alternative. A claimant need not elect between injury by accident and occupational disease theories; rather, the Commission must evaluate the facts under whichever legal rubric is most favorable to the claimant. See Marquard v. Pacific Columbia Mills, 278 S.C.870(1982).

"The earliest coverage of diseases took the form of inclusion within the broad definition of 'injury.' Then, some states began listing particular diseases and the process in which they are acquired as compensable. Finally, the modern trend has been toward expansion into general coverage. [Larson, §52.02.] A few examples of these diseases include asbestosis, silicosis, bronchitis, bursitis, and the commonly named diseases black lung and brown lung." Id.

Our Courts have previously recognized occupational asthma as an occupational disease. See, e.g., McCraw v. Mary Black Hosp., 350 S.C. 229 (2002)(addressing trigger of statute of limitations where Claimant suffered occupational asthma caused by exposure to chemicals at work).

South Carolina has enacted a general coverage statute which broadly defines an occupational disease instead of limiting it to specific diseases or processes. S.C. Code §42-11-10 (1985). Under our law, a claimant must prove the following elements, by a preponderance of the evidence, to recover for contraction of an occupational disease:

> 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 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."

Id. (citing Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 135 (Ct. App. 1986), rev'd on other grounds, 292 S.C. 489 (1987)).

Our Supreme Court has held that, in deciding occupational disease claims, the Workers' Compensation Commission must make specific findings as to each of the six elements. See Fox v. Newberry County Mem. Hosp., 319 S.C. 278, 282 (1995)(remanding occupational disease claim

to Commission where "the Commissioner never acknowledged that there were six elements that a claimant must prove to recover benefits for contraction of an occupational disease").

Here, the Commission never acknowledged the occupational disease elements. Moreover, the Commission erred in, effectively, applying an injury by accident standard by requiring that the Claimant show that a particular quantity of a particular chemical to which the claimant was directly exposed for a particular period of time on particular dates was the cause of his disability. Finally, the Commission erred, as a matter of law, in requiring that the claimant exclude co-morbidities, including heart disease, as the cause of the Appellant's disability.

1. The Commission Failed to Make Findings as to the Elements of the Occupational Disease Standard Set Out In Mohasco Corp., Dixiana Mill Div. v. Rising, and S.C. Code §42-11-10.

The Supreme Court was explicit in Fox v. Newberry County Mem. Hosp., 319 S.C. 278, 282(1995) in requiring the Commission to make findings as to the elements of occupational disease when deciding a claim under that section.

The Commission, here, failed to do so.

In fact, the Commission here, like the Commission in Fox, failed to acknowledge that there were six elements to be considered in deciding an occupational disease claim. Id. at 283. This alone was error sufficient to require reversal.

Moreover, the Commission's failure to address the occupational disease elements was not merely a technical failure, or a failure in drafting; but, rather, indictive of the Commission's broader failure to apply the legal standard for compensability of occupational disease claims, as set out herein.

2. The Commission Erred as a Matter of Law by Requiring that the Claimant Show that a Particular Quantity of a Particular Chemical to Which the Claimant Was Directly Exposed for a Particular Period of Time on Particular Dates was the Cause of His Disability.

As described by this Court in Fox, "prior to the enactment of statutory provisions allowing compensation, occupational diseases were generally not compensable. 1B Arthur Larson, Workmen's Compensation Law §[52.02]; 99 C.J.S. Workmen's Compensation §169(1958). Because a single time, place, or event constituting an 'accident' in the scope of employment could not be identified as the cause of a gradually developed disease, worker's compensation acts were thought to be incapable of supporting a disease claim." Fox v. Newberry County Mem. Hosp., 316 S.C. 537 (Ct. App. 1994), rev'd on other grounds, 319 S.C. 278 (1995).

"Occupational disease coverage, however, evolved to compensate persons for diseases which were clearly incident to a continuous exposure to some hazard in their industry greater or different than those involved in ordinary living or ordinary occupations." Id.

As Professor Larson explains, many states have adopted statutes, like §42-11-10, that "contain detailed definitions of the term 'occupational disease,' and these statutory definitions give the clue to the distinction which is controlling for present purposes. The common element running through all is that of the distinctive relation of the particular disease to the nature of the employment, as contrasted with diseases which might just a readily be contracted in other occupations or in everyday life apart from employment." Arthur Larson, Workmen's Compensation Law §52.03[2] (2009).

Here, two treating pulmonologists, Dr. Jona and Dr. Miller, opined that the Appellant suffers from an occupational disease: reactive airway disease. (R. p. 253; R. p. 1354).

The uncontradicted evidence of the record is that in the course of his employment with the Respondent, the Claimant worked in close proximity to a variety of hazardous airborne chemicals

in the process of coating valves with zinc. (R. p. 1556, lines 19-24; R. p. 1557, lines 13-15; R. p. 1559, lines 18-22).

The Material Safety Data Sheets (MSDS)(R. pp. 496-668, Ex. C1-C138) for each of those chemicals used in, or in close proximity to, the "zinc line" where the Appellant worked (which include hydrochloric acid, phosphoric acid, zinc oxide, nitric acid, and sulfuric acid among others), warn that inhalation could result in dizziness and shortness of breath, conditions from which the Appellant suffers. (Id.)

Dr. Miller, the Appellant's treating pulmonologist, testified that a history of exposure to airborne hydrochloric acid, phosphoric acid, zinc oxide, nitric acid and sulfuric acid was consistent with his opinion that the Appellant "has reactive airway dysfunction syndrome, secondary to his exposure at work." (R. p. 1354 p. 48, lines 13-17; R. p. 1385, lines 11-19).

The Commission denied the claim based on its findings that Dr. Miller "was not a toxicologist and did not have any information as to **the amount or quantity of a particular chemical that the Claimant was exposed to**...", (R. p. 32)(emphasis added).; and because the Commission found that "none of the treating or evaluating physicians had specific details regarding the specific department in which Claimant worked or any **specific chemicals to which Claimant was directly exposed and for what amounts of time, if any**." (R. p. 33, ¶ 23)(emphasis added).

In addition to being factually incorrect, as argued herein, the Commission's findings effectively require that the Appellant prove that a particular quantity of a particular chemical to which the claimant was directly exposed for a particular period of time on particular dates was the cause of his disability.

However, our courts have recognized that such a "time, place, or event constituting an 'accident' in the scope employment," which cannot be identified in the case of a gradually

developed disease, is not required in the case of occupational disease. See Fox v. Newberry County Mem. Hosp., 316 S.C. 537, 541.

3. The Commission Erred as a Matter of Law in Requiring that the Appellant Exclude Co-Morbidities, Including Heart Disease, as the Cause of the Appellant's Disability.

The Commission denied the claim based upon its finding 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. As such the undersigned could not exclude those factors as well." (R. p. 33, ¶ 24).

Again, in addition to being factually erroneous, as argued herein, this finding erred in placing the burden of disproving non-compensable causes upon the Claimant in this occupational disease claim.

It is well established that, in occupational disease claims, the Employer has the burden of proving not only the interplay of a non-compensable cause, but also its proportion to the overall disability. See Hanks v. Blair Mills, Inc., 286 S.C. 378, 385 (Ct. App. 1985)(citing Mizell v. Raybestos-Manhattan, Inc. 281 S.C. 430 (1984); and finding, in byssinosis claim, that although evidence revealed that Claimant had smoked for years and that smoking can cause or contribute to chronic lung disease, employer presented no evidence of the percentage of Claimant's disability caused by smoking; and, therefore, employer was not entitled to an apportionment under §42-11-90). See also, Beard, Poteat, Lamar, Sumwalt, The Law of Workers' Compensation Insurance in South Carolina, Fifth Ed., 2008, p. 283 (noting that in occupational disease claims "the burden of showing a portion of an employee's disability represents non-occupational contribution falls upon the employer and its carrier, who benefit from any reduction in compensation due.").

Here, again, the Commission overlooked the legal standard in occupational disease claims, and denied the claim based upon its finding that the Appellant failed to disprove non-compensable causes for his disability.

Such was error as a matter of law.

Further, as argued below, the Commission's findings in this regard contained clear errors of fact; as both of the Claimant's treating cardiologists did, without contradiction, exclude the Appellant's heart condition as a source of his disability. (See R. p. 200 (Dr. Guha); R. p. 1420, line 15 - R. p. 1421, line 12 (Dr. Sturdivant)).

B. CONTRARY TO THE SUBSTANTIAL EVIDENCE, THE COMMISSION FAILED TO FIND THAT THE CLAIMANT HAS SUFFERED DISABLING OCCUPATIONAL DISEASE.

1. The Commission Based its Denial Upon its Erroneous Finding that "No One Has Been Able to Identify with any Specificity the Chemicals to Which the Claimant was Supposedly Exposed."

During his employment with the Respondent, the Claimant was exposed to a variety of hazardous airborne chemicals in the Shipping Department.

The Material Safety Data Sheets (MSDS), (R. pp. 496-668, Exh. C1 – C138), for each of those chemicals, (which include hydrochloric acid, phosphoric acid, zinc oxide, nitric acid, and sulfuric acid), warn that inhalation could result in dizziness and shortness of breath, conditions from which the Claimant suffers.

The Single Commissioner found:

> 7. **Claimant relies heavily on the MSDS sheets, which list all of the chemicals listed in the entire facility – not just the Shipping Department** – as well as warnings of the potential side effects of exposure to those chemicals.
>
> (R p. 28, ¶ #7)(emphasis added).

Respectfully, this finding was clearly erroneous. As the Appellant argued to the Commission Appellate Panel, (R p. 1251), Karen Brooks, the Employer's Environmental Health

and Safety Manager, who compiled the MSDS Sheets in response to subpoena, testified that each sheet described chemicals used in the Shipping Department, "in close proximity to the zinc line," where the Claimant worked. (See R. p. 1556, line 19 – p. 1559, line 22).

As to those chemicals, Ms. Brooks testified:

Q. And here is why I ask. **the material safety data sheets that you guys produced to us contain C-1 through C-138, 138 pages, right**?
A. **Correct**.
Q. **You compiled those**?
A. **Correct**.

* * *

Q. Some of those chemicals weren't used on the zinc line?
A. No, sir.
Q. Some of those chemicals – all of those chemicals, though, were used in the shipping department?
A. Yes, sir.
Q. And some of those chemicals, for example, were used on the passivation line?
A. Yes, sir.

BY MR. WUKELA:

And the diagram there, Commissioner, is D-36.

DIRECT EXAMINATION RESUMED BY MR. WUKELA:

Q. The passivation line is a few feet away from the zinc line, right?
A. Yes, sir.
Q. And in the passivation line your list here indicated that some of the things used in the passivation line are chemicals on this list?
A. Yes, sir.
Q. Others, for example, are used in the titration?
A. Yes, sir.
Q. Titration is just next door to the zinc line, next to the door as well.
A. Yes, sir.
Q. You didn't give him the chemicals from the titration line?
A. No, sir.
Q. And those chemicals include things like – and I'm looking

at page six of my brief – hydrochloric acid?
A. Yes, sir.
Q. Hydrochloric acid is used in the titration line, ---
A. Yes, sir.
Q. --- just right next to the zinc line?
A. Yes, sir.
Q. And hydrochloric acid, according to the MSDS sheet, is harmful if inhaled and may cause asthma systems or breathing difficulties if inhaled, correct?
A. Yes, sir.
Q. But you didn't give the expert who performed the air quality test the MSDS sheet for hydrochloric acid?
A. No, sir.
Q. And the washer, the washer in that diagram is next to the passivation line?
A. yes, sir.
Q. a few feet away from the zinc line?
A. yes, sir.
Q. and in the washer, you guys use chemicals, also.

(R. p. 1556, line 19 - p. 1559, line 7).

After the Claimant appealed to the Commission Appellate Panel, arguing that the Single Commissioner's finding No. 7 was erroneous, the Appellate Panel affirmed the Single Commissioner's Order, and adopted the Single Commissioner's findings, verbatim, with selected text amendments.

Among those amendments, the Panel simply deleted the Single Commissioner's finding No. 7. (R. p. 1606, See Commission Panel Request for Proposed Order).

However, the Panel still affirmed the Single Commissioner's conclusions, based on that erroneous finding No. 7. This is evident, in particular, when one considers another amendment which the Panel added to the Single Commissioner's findings: Finding No. 26. (R. p. 34, ¶26).

There, again, the Commission erroneously found that "**No one has been able to identify with any specificity the chemicals to which the Claimant was supposedly exposed**..." (R p. 34, ¶26 (emphasis added)).

The MSDS sheets, and the testimony of the Employer's Environmental Health and Safety Manager who compiled them, establishing their use "in close proximity" to the Appellant, were in evidence before the Commission. (R. pp. 496-668, Exh. C1-C138; R. p. 1556, line 19 – R. p. 1559, line 24).

Ms. Karen Brooks, the Employer's Environmental Health and Safety Manager, who compiled the Material Safety Data Sheets in response to subpoena, testified that each sheet described chemicals used "in close proximity to the zinc line;" the Claimant's work station within the employer's Shipping Department. (See R. p. 1556, line 19 - p. 1559, line 24).

The Commission Panel's Finding No. 26, like the Single Commissioner's Finding No. 7, is erroneous in light of the existence of those documents and that uncontradicted testimony by the Respondents' Environmental Health and Safety Manager.

Based upon this clearly erroneous finding of fact, the Commission denied the Appellant's claim.

2. The Commission Based its Denial Upon Its Erroneous Finding that "None of the Treating or Evaluating Physicians Had Specific Details Regarding ... Any Specific Chemicals to Which Claimant Was Directly Exposed and for What Amounts of Time, if Any."

In Finding No. 23, the Appellate Panel erroneously found that "none of the treating or evaluating physicians had specific details regarding ... any specific chemicals to which claimant was directly exposed and for what amounts of time, if any." (R. p. 33, ¶ 23).

This finding, upon which the Commission based its ruling, is in error.

In particular, as the Claimant argued to the Appellate Panel, (R. pp. 1288-1290), during his testimony, Dr. Miller, the Appellant's treating pulmonologist, was presented with, and questioned about, Material Safety Data Sheets compiled by the employer; describing the chemicals to which

the Claimant was exposed, and warning of their health dangers. (see R. pp. 1357-1359). Depo. Miller p. 51-53).

In fact, the Commission's Order acknowledges Dr. Miller's testimony in a separate finding, No. 17. (See R. p. 32, ¶17 (noting "Dr. Miller was questioned regarding the Material Safety Data Sheets...")).

Nevertheless, based upon the erroneous finding of fact that "None of the treating or evaluating physicians had specific details regarding ... any specific chemicals to which claimant was directly exposed and for what amounts of time, if any.", the Commission denied the Appellant's claim.

Such was error.

3. The Commission Based its Denial Upon the Erroneous Finding that There Was a "Lack of the Direct Medical Causation in this Instance."

The Single Commissioner found:

> **24. None of the treating or evaluating specialists opined regarding a causal connection between Claimant's medical conditions and the chemicals or possible symptoms identified on the Material Safety Data Sheets** because none of the physicians had specific details regarding the specific department in which Claimant worked or any specific chemicals to which Claimant was directly exposed and for what amounts of time, if any.
>
> (R. p. 15, ¶24)(emphasis added).

Respectfully, this Finding was also in error.

Two treating pulmonologists, Dr. Jona and Dr. Miller, opined that the Claimant suffers from reactive airway disease. (R. p. 253; R. p. 1354).

Specifically, Dr. Miller, pulmonologist at MUSC - Charleston, extensively evaluated other possible causes, including other possible neurological causes and cardiac causes, and testified that the Claimant sustained reactive airway disease as a result of his exposure to chemicals on his job.

Dr. Miller testified:

> A. Well, I -- I'm not a toxicologist. But, from what he tells me of his exposure, which I have in the first part of my note, **I believe he has reactive airway dysfunction syndrome, secondary to his exposure at work.**
> Q. Okay. And Doctor, **is that your opinion, to a reasonable degree of medical certainty**?
> A. **Yes**.

(R. p. 1354, lines 13 - 20)(emphasis added).

Dr. Miller went on to testify:

> Q. But I just wanted to represent to you that, you know, **those MSDS sheets weren't something that we made up. We were produced those, in response to subpoena, by the employer, when we asked about chemicals at the job**.
>
> Mr. Farry has asked you about a variety of conditions -- cardiac conditions, gastric reflux disease, sleep apnea, weight, medication. But **is it fair to say that exposure to airborne hydrochloric acid, phosphoric acid, zinc oxide, nitric acid and sulfuric acid are consistent with your diagnosis that he suffered reactive airways disease as a result of exposure to chemicals at the job**?
> A. **Yep**.
> MR. FARRY: Object to the form.
> A. **I believe so**.

(R. p. 1385, lines 4-24)(emphasis added).

Given this testimony, the Claimant argued to the Commission Appellate Panel that the Single Commissioner's factual finding No. 24 was erroneous. (R. pp. 1288-1290).

The Appellate Panel affirmed the Single Commissioner, adopted the Single Commissioner's Findings, and simply deleted the portion of finding No. 24 which read "None of the treating or evaluating specialists opined regarding a causal connection between Claimant's medical conditions and the chemicals or possible symptoms identified on the Material Safety Data Sheets because." (R. p. 33, ¶ 23; compare R. pp. 15-16, ¶24; See also R. p. 1606, Commission Panel Request for Proposed Order).

However, the Panel still affirmed the Single Commissioner's conclusions based on that erroneous finding. This is evident, in particular, when one considers the Panel's next Finding No. 24; wherein, verbatim, the Panel adopted the Single Commissioner's Finding No. 25. (R p. 33, ¶ 24; compare R. p. 16, ¶25).

There, the Panel found that "Claimant's testimony that he was 'playing softball and basketball' prior to his employment with the Defendant is not enough to overcome the **lack of the [sic] direct medical causation in this instance**." (R. p. 33, ¶ 24)(emphasis added).

The Commission denied the claim based on its erroneous finding that there was a "lack of the[sic] direct medical causation in this instance."

The Appellant did not rely on his "playing softball and basketball" to prove causation. As argued above, the Appellant offered evidence establishing that his occupational disease directly resulted from his exposure to chemicals on the job through the testimony of his treating pulmonologist; which was given in light of Material Safety Data Sheets describing the chemicals to which the Appellant was exposed. (R. p. 1385, lines 4-24).

The Single Commissioner ruled, erroneously, that such testimony did not exist; finding "None of the treating or evaluating specialists opined regarding a causal connection between Claimant's medical conditions and the chemicals or possible symptoms identified on the Material Safety Data Sheets…" (R. pp. 15-16, ¶24).

The Commission Panel struck that clearly erroneous phrase from their findings, but still erroneously disregarded Dr. Miller's testimony and the Material Safety Data Sheets, without explanation. See Burnette v. City of Greenville, 401 S.C. 417, 427 (Ct. App. 2012)(citing Potter v. Spartanburg School Dist., 395 S.C. 12, 23 (Ct. App. 2011) (holding fact finder may disregard medical evidence only in favor of other competent evidence)).

4. The Commission Based its Denial Upon the Erroneous Finding 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."

Over the Appellant's objections as to its inaccuracy, the Commission Panel adopted, verbatim, the Single Commissioner's finding that "none of the physicians could exclude Claimant's serious pre-existing co-morbidities as the basis or a the very least a contributing factor to Claimant's medical condition. As such, the undersigned could not exclude those factors as well." (R. p. 33, ¶ 24; compare R. p. 16, ¶25).

As argued above, as a matter of law, it is well established that the employer bears the burden of proving both a non-compensable cause and the proportion by which such a cause contributes to the Claimant's disability. See Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1985); See also Beard, Poteat, Lamar, Sumwalt, The Law of Workers' Compensation Insurance in South Carolina, Fifth Ed., p. 283, 2008. (noting "the burden of showing a portion of an employee's disability represents non-occupational contribution falls upon the employer and its carrier, who benefit from any reduction in compensation due.").

In finding "**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," (R. p. 16, ¶ 24)(emphasis added), the Commission erred in shifting the burden of proving a non-compensable cause to the Claimant.

Similarly, the Commission relied on the Defense's expert, Dr. Gregory Feldmann, (R. pp. 1196-1198), in finding that the Claimant did not suffer disability from occupational disease. Dr. Feldman also, effectively, shifted the burden to the Claimant to exclude non-occupational causes; finding, "**I find diagnosis of RADS (reactive airway dysfunction syndrome) not supported by required criteria of exclusion of alternative explanation.**" (R. p. 1197)(emphasis added).

As a matter of law, it was not the Claimant's burden to exclude pre-existing co-morbidities as the cause of the Claimant's disability. Rather, it was the Employer's burden to prove that non-compensable co-morbidities were the cause of Claimant's disability.

Further, as a matter of fact, the Commission and Dr. Feldman, on which it relied, overlooked the fact that both of the Claimant's treating cardiologists, Dr. Guha and Dr. Sturdivant, did, in fact, exclude the Claimant's cardiac condition as the cause of the Appellant's disability. (See R. p. 200)(Dr. Guha); R. p. 1420, line 15 - R. p. 1421, line 12(Dr. Sturdivant)).

Specifically, the parties deposed Dr. John Sturdivant, the cardiologist to whom Dr. Miller referred the Claimant to evaluate possible cardiac causes of the Claimant's disabling shortness of breath. Dr. Sturdivant testified that he agreed with the other treating cardiologist, Dr. Guha, that, from the cardiac standpoint, the Claimant could work:

> A. What I would tell you, is that it -- it -- very simply, is that **Mr. Freshley's atrial fibrillation very well possible could be related to his underlying lung disease, but atrial fibrillation, in and of itself, is not -- is -- is not a limiting factor, from the standpoint of being able to go back to work**. For -- for -- so your question was -- was appropriately very pointed, because I am a super-specialized physician. **You know, your question was from the standpoint -- from a cardiac standpoint, can he work. The -- the -- the answer is that, from what I know of his cardiac condition, he can work.**
>
> As you are aware, you know, the -- the -- the leg bone's connected to the hip bone and the hip bone's connected to the heart bone, and all that kind of stuff, and -- and -- and it all runs together. Dr. Miller, it sounds like, has already told you that his pulmonary condition would restrict him from working. I'm just telling you that **the condition that I found in my evaluation with respect to his heart, in and of itself, taken alone, is not -- is not an indication for -- for the inability to -- to hold sustainable employment.**
>
> (R. p. 1420, line 15 - p. 1421, line 1; p. 1421, lines 6 - 12)(emphasis added).

Thus, two treating cardiologists, Dr. Guha and Dr. Sturdivant, independently evaluated the Claimant's cardiac condition and concluded that, from a cardiac standpoint, the Claimant had no work restriction. (See R. p. 200; R. p. 1420, line 15 - R. p. 1421, line 12).

The Commission's finding to the contrary was in error.

5. The Commission Based its Denial Upon the Opinion of Dr. Feldman; Which, Itself, Was Based on Factual Errors.

The Commission relied on the opinion of the Respondent's expert pulmonologist, Dr. Gregory Feldman, in denying the Claim. No doubt, the Respondents will point to Dr. Feldman's opinion as substantial evidence to support the denial.

Dr. Feldman never treated, nor saw, the Appellant. Dr. Feldman did not testify; rather, he prepared a report for the Respondents after reviewing certain records provided him by the Respondents. (R. pp. 1196-1198). Dr. Feldman's conclusions, like those of the Commission, were based on erroneous factual findings.

Dr. Feldman challenged Dr. Miller's diagnosis; which Feldman described as "reactive airway dysfunction syndrome due to **unspecified chemical exposure** at his job." (R. p. 1196)(emphasis added).

Dr. Feldman, like the Commission, based his conclusions on the erroneous finding that "Dr. Miller was either not provided records of the alleged exposure, or **such records may not exist**..." Id. (emphasis added).

In turn, the Commission found:

> 23. ... **none of the treating or evaluating physicians had specific details** regarding the specific department in which Claimant worked or **any specific chemicals to which Claimant was directly exposed** and for what amounts of time...
>
> * * *

> 26. ... **No one has been able to identify with any specificity the chemicals to which the Claimant was supposedly exposed** ...

(R. pp. 33-34, ¶¶23, 26).

Indeed, Dr. Feldman did not have the Material Safety Data Sheets compiled by the employer that describe the chemicals to which the Claimant was exposed; his note does not list those MSDS sheets among the materials he was provided by the Defense when preparing his report for the employer. (R. p. 1199).

However, those MSDS sheets, and the testimony of the Employer's Environmental Health and Safety Manager who compiled them, establishing their use "in close proximity" to the Appellant, were in evidence before the Commission. (R. pp. 494-631, Exh. C1-C138; R. p. 1556, line 19 – R. p. 1559, line 24).

As the Appellant argued to the Panel, and repeatedly here, Ms. Karen Brooks, the Employer's Environmental Health and Safety Manager, who compiled the Material Safety Data Sheets in response to subpoena, testified that each sheet described chemicals used "in close proximity to the zinc line;" the Claimant's workstation within the employer's Shipping Department. (R. p. 1556, line 19 - p. 1559, line 24).

Dr. Feldman's finding, like the Single Commissioner's Finding No. 7, and like the Commission Appellate Panel's Findings Nos. 23 and 26, are clearly erroneous in light of the existence of those documents and that testimony.

Further, Dr. Feldman also challenges Dr. Miller's diagnosis as "not supported by required criteria of exclusion of alternative explanation"; in particular, the exclusion of Appellant's heart condition as the cause of his shortness of breath. (R. p. 1196).

In turn, the Commission found:

> 24. ... **none of the physicians could exclude Claimant's serious pre-existing comorbidities as the basis or at the very least a**

> **contributing factor to Claimant's medical condition**. As such, the undersigned could not exclude those factors as well. ...

(R. p. 33;.¶24)(emphasis added).

However, Dr. Miller testified, at length, about his exclusion of the Appellant's heart condition as a cause of his shortness of breath. In particular, Dr. Miller testified that he performed a cardiopulmonary stress test, (R. pp. 320-321), and a pre and post bronchial dilated study which were both consistent with reactive airway disease, as opposed to cardiac condition as a cause of the Appellant's symptoms. (R. pp. 1348-1349).

More directly, Dr. Miller testified that he referred the Appellant to a Cardiologist at MUSC, Dr. John Sturdivant, to evaluate whether the Appellant's heart was the cause of his disabling shortness of breath. Dr. Sturdivant testified that he evaluated the Appellant and excluded the Appellant's heart as the cause of his disability. (See R. p. 1420, line 15- R. p. 1421, line 12; R. 1439, line 22 – R. p. 1440, line 3).

Dr. Feldman based his conclusion, as did the Commission, on the erroneous finding that no physician had excluded the Appellant's heart as a cause of his symptoms.

Dr. Feldman's report does not reference Dr. Sturdivant's deposition, and his deposition is not listed in Dr. Feldman's report as being among the documents he was given by the Respondents to review prior to issuing his report.

The Commission, however, did have Dr. Sturdivant's deposition in evidence. The Appellant argued, on appeal to the Commission Panel, that Dr. Sturdivant's deposition rendered erroneous the Single Commissioner's finding 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." (R. p. 16, ¶25).

Over the Appellant's objections, the Panel affirmed the Single Commissioner's erroneous finding, verbatim. (R p. 33, ¶ 24; compare R. p. 16, ¶25).

The Panel did not explain why it disregarded Dr. Sturdivant's testimony; excluding the Appellant's heart as the cause of his disabling shortness of breath. See Burnette v. City of Greenville, 401 S.C. 417, 427 (Ct. App. 2012)(citing Potter v. Spartanburg School Dist., 395 S.C. 12, 23 (Ct. App. 2011)(holding fact finder may disregard medical evidence only in favor of other competent evidence)).

Nor did the Panel explain why it chose, instead, to rely upon the report of Dr. Feldman; whose opinion was, itself, erroneously based on the absence of any evidence excluding the heart as the source of the Appellant's disability. See, Poston v. Southeastern Const. Co., 208 S.C. 35, 38(1946)(holding "a medical opinion which conflicts with the physical facts will not be permitted to control the determination of a factual controversy.").

Such was contrary to the substantial evidence of the record.

6. The Commission Failed to Find that the Appellant was Disabled, Contrary to the Substantial Evidence of the Record.

As to work restrictions, Dr. Miller, the treating pulmonologist, testified:

> Q. All right. Now, Doctor, we talked about that June of 2020 note, where you indicated that Mr. Freshley was significantly impaired. **Is he able to return to work**?
> A. **I do not believe so**.

(R. p. 1385, lines 4-24)(emphasis added).

Dr. Miller's testimony, as to Appellant's disability, was uncontradicted in the record. See Burnette v. City of Greenville, 401 S.C. 417, 427 (Ct. App. 2012)(citing Potter v. Spartanburg School Dist., 395 S.C. 12, 23 (Ct. App. 2011)(holding fact finder may disregard medical evidence only in favor of other competent evidence)).

For the foregoing reasons, the Single Commission's Decision and Order should be reversed.

RESPECTFULLY SUBMITTED,

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