THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Circuit Court Case No. 2009-CP-23-2535

Archie Eddie Jones, Jr., Employee, ... Respondent,

vs.

3M Corp., Employer and Old Republic
Insurance Company, Carrier, ... Appellants.

AMENDED INITIAL BRIEF OF RESPONDENT

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VIII. Is the Commission's determination that Jones is entitled to a partial lump-sum payment of his award for the purposes of paying his attorney fees and costs related to this claim an abuse of discretion?

STATEMENT OF THE CASE

This appeal arises from the Workers' Compensation Commission. Eddie Jones sustained extensive injuries as a result of a chemical spill that occurred on June 3, 1997 while he was working for 3M Corporation. Before the Commission, Jones contended he sustained burns covering his entire body and causing injuries to many body parts, including but not limited to his eyes, arms, legs, feet, toes, urinary tract system, and lungs. He also contended he suffers from related psychological overlay and has suffered a brain injury and physical brain damage as a result of the accident. Jones sought lifetime compensation and medical benefits and requested a lump-sum payment of his compensation benefits in an amount sufficient to pay his attorney fees and costs in this claim.

3M and its workers' compensation insurance carrier, Old Republic Insurance Company (hereinafter referred to together as "3M") admitted Jones sustained injury by accident as alleged and sustained compensable injuries as alleged, except that it they deny that he has sustained brain damage or any injury to his penis/urinary tract. 3M further admits Jones is entitled to permanent total disability as a result of the accident and is entitled to lifetime related medical benefits, but they deny that he is entitled to lifetime compensation benefits. Concerning the alleged brain injury, 3M raises the defense of intervening cause based on strokes Jones sustained in 1999 and 2005.

By Order dated June 27, 2008, the single Commissioner found that in addition to the admitted injuries, Jones sustained brain injury and physical brain damage and also injuries to his penis and urological system as a result of the accident. The Commissioner awarded

lifetime medical and compensation benefits. (R. pp. x-x)

3M appealed that decision to the Full Commission Panel arguing primarily that the Commissioner erred in finding Jones sustained brain injury and physical brain damage as a result of the accident. However, by Order dated February 25, 2009, the Commission's Appellate Panel affirmed and adopted the Commissioner's Order without change. (R. pp. x-x)

3M next appealed to the Circuit Court for Greenville County. Following the submission of briefs and oral argument by the parties, the Honorable D. Garrison Hill issued an Order dated May 20, 2011 affirming the Commission's decisions. (R. pp. x-x)

3M now appeals to this Court.

STATEMENT OF FACTS

Jones' wife, Derrell Jones, testified on his behalf at the hearing before the single Commissioner on November 20, 2007. Ms. Jones stated her husband is 64 years old and that they had then been married for 45 years. She testified that prior to his injury at work, he was a vegetarian, a "body builder," and "the picture of health" and that in her opinion his good health is the reason that he was able to survive the accident and his burns. (tr. p. 16, lines 4-7; p. 20, line 20-p. 21, line 5)

Ms. Jones testified Jones suffered a burn injury at work in June 1997 and that he was taken to Greenville Memorial Hospital and then flown to MUSC in Charleston, where he stayed for several months. He now has extensive scarring all over his body as a result of the burns, and the scarring causes infections and other difficulties, especially on his feet where the skin breakdowns limit the time that he can be on his feet and limit his activities. (tr. p. 16, line 4-p. 18, line 1) Ms. Jones testified Jones was at that moment dealing with a related bone infection in his foot. He continues to go to a wound care facility for help with those problems. In addition, he has trouble with the parts of his body where the physicians harvested skin for grafting and has to keep lotion on those areas. He also does not have full movement of his hands and fingers. (tr. p. 18, line 2-p. 20, line 1)

Ms. Jones testified that Jones went into respiratory arrest while in the hospital following his injury, continues to have trouble with his lungs, and has only about 45% lung capacity. She explained that this greatly diminishes his stamina, and he has many days where he simply cannot breathe well and is obviously not feeling well because of it. (tr. p. 18, line

16-p. 19, line 8) Jones has difficulty with his urinary tract due to the fact that he had a catheter in for so long and due to the fact that during his recovery he accidentally stepped on the catheter tube, ripping it from his urethra. He also now has erectile dysfunction. (tr. p. 20, line 2-p. 20, line 19)

Ms. Jones testified her husband also has displayed cognitive problems since right after his injury by accident. She explained that before his injury he was very smart and quick and was able to understand and recall most things after reading over it just once. However, after the accident, she noticed right away that he had difficulty remembering things and had a hard time reading and understanding many things, and those problems continue to this day. She stated he now has to go over and over things in order to understand it. Ms. Jones testified Jones loses track of his subject and stammers and rambles when he is talking. He cannot make decisions or commitments anymore and leaves such things to her. She also has to handle their financial matters because he is not able to do so. (tr. p. 22, line 1-p. 23, line 7)

Ms. Jones admitted her husband suffered something similar to a stroke on two occasions after his injury at work, once in 2000 and again in 2005; however, she testified that these strokes did not worsen his condition in any way. (tr. p. 33, line 21-p. 34, line 10)

Ms. Jones stated that her husband used to be very active and worked out all the time, but now after his injuries, his lowered lung capacity will not allow him to work out and he cannot keep up with her when they walk together. He does go shopping with her on occasion, but again, is limited in the amount that he can walk. His feet get sore from walking on hard surfaces or he will get a sore on his feet from walking, and then he will be in bed for a while or will not be able to walk very well for a couple of weeks. (tr. p. 20, line 20-p. 21, line 6; p. 24, line 24-p. 25, line 3; p. 30, line 21-p. 31, line 7) Ms. Jones stated Jones can drive, and they

recently drove together to Minnesota; however, she explained that he drove only part of the way and that they had to stop overnight several times on the trip there and again on the trip back. (tr. p. 24, line 22-p. 26, line 19) She stated he is able to keep up with his medications by writing down everything he does and splitting his pills up into daily dispensers, but that is really the only thing that he is able to keep up with. (tr. p. 23, line 22-p. 24, line 18) Ms. Jones testified that Jones tried to help his niece with a school subject with which she was having difficulty, but she explained that he initially obsesses on such things and then quickly loses all interest. She stated that he is much less able to work on things around the house as he used to do, and he frequently injures himself when he tries to do such things and continually has bruises and band-aids on his hands. (tr. p. 26, line 20-p. 28, line 14)

Ms. Jones testified Jones attempted to return to work and worked for about eight months, but she stated that he did not work in his previous job. His employer attempted to train him to use a computer, which he had no prior experience with, and he was not able to absorb it and got very frustrated. In addition, the employer had him working in a high traffic area, and he was distracted and unable to focus on his work. (tr. p. 29, line 18-p. 30, line 20)

Ms. Jones stated Jones has emotional problems because of his injuries, and he has been seeing psychiatrist Dr. Robert Richards for treatment of those problems for some time. She testified that he had no such emotional problems before his injury by accident. (tr. p. 21, lines 13-25)

The medical records show that an EMS team reported to employer-defendant's facility on June 3, 1997 and found Jones lying on a backboard covered by a burn sheet. The Fire Chief on the scene reported Jones had been burned by a chemical, Therminol 66, which was described as a super-heated oil that is a skin and respiratory irritant. The EMS attendant noted

that Jones stated that his eyes and lungs were burning, and he observed second and third degree burns over approximately 54% of the front of Jones' body, including his face, arms, torso, legs, and feet. (APA pp. 1-2) Jones was transported to Greenville Memorial Hospital, but he was then quickly moved by air transport to the Burn Center at the Medical University of South Carolina in Charleston. (APA pp. 3-13)

While en route to MUSC, Jones experienced respiratory distress and was intubated. At the hospital, he was found to also have an inhalation injury with a collapsed lung, pulmonary edema, bilateral pleural effusion, and resulting reduced lung volumes. By June 7, 1997, this condition was noted to be worsening with developing pneumonia and infections, and the condition continued to wax and wane over the next many weeks. On June 11, 1997, Jones began undergoing multiple, extensive surgeries to debride and treat his burns, many of which were full-thickness burns. Skin grafting procedures were begun on July 2, 1997, beginning with the legs and feet, then face and abdomen. On August 2, 1997, an EEG was performed due to increasing confusion and abnormalities were found consistent with encephalopathy. Further skin grafting was accomplished on August 20, 1997, including the right arm, and Jones's left fifth toe was also amputated. (APA pp. 14-91, 112-116)

Jones was discharged and admitted to the rehabilitation unit on September 25, 1997. His final burn measurement was approximately 40% of his total body surface area. Beyond the multiple skin grafting procedures, the discharge summary was notable for reported critical respiratory status, including very low oxygen levels and development of E. coli, yeast, and staph infections, which were treated extensively with respirators and antibiotics. Jones' graft sites were noted to be improving, but there were still continued problems behind his left ear, on his right thigh, and on his abdominal wall. He was continuing to have difficulty with

ambulation, contracture of his hands, and with speech and swallowing. (APA pp. 112-117)

Jones was discharged from the rehabilitation unit on October 23, 1997, and the discharge summary noted that he was functional in activities of daily living, including ambulation though he could only walk about 1000 feet. His pulmonary situation and his skin was noted to be improving, and his wife was competent with dressing changes. Jones was provided a home health nurse and was instructed to follow up in the burn clinic. (APA pp. 117-120)

On October 28, 1997, Jones began treatment for urethral erosion, which was due to long-term catheter placement, and such treatment eventually included surgical repair. At that time, the physician noted that Jones was continuing to struggle with parenchymal disease of his lungs from inhalation. (APA pp. 123-124) On November 6, 1997, Jones also underwent surgery to correct and close a fistula that remained after removal of his tracheostomy tube. (APA pp. 125-128) On December 30, 1997, he underwent additional surgery and additional skin grafting on his right foot, with subsequent hydrotherapy. (APA pp. 130-146) And on August 13, 1998 and again on December 17, 1998, Jones underwent additional surgeries to revise the scarring on his left nose, left upper eyebrow, left ear, neck, trunk, and right arm. (APA pp. 147-155)

Jones' general physician, Dr. June Souviron, began following him for his burn and respiratory injuries in October 1997. At that time, she also diagnosed depression due to stress from his burns and prescribed medications. She followed him for chronic chemical pneumonitis, pulmonary fibrosis, acute bronchitis and sinusitis, migraine headaches, and continued psychological distress, including anxiety and depression. Dr. Souviron eventually referred Jones to Dr. William Walker for his respiratory issues. (APA pp. 156-197) On

February 8, 1999, she recorded Jones' complaints of difficulty with focus and concentration as he attempted to return to work and noted that he had a history of compromised oxygen supply to his brain as a result of his work injury and trauma. (APA p. 159) Dr. Souviron opined on October 4, 2007 that Jones is permanently and totally disabled because of his work injuries. (APA p. 198; see also pp. 201, 211)

Pulmonologist Dr. William Walker began following Jones on March 31, 1998 and noted his work injury including body and pulmonary burns. On examination, he found decreased pulmonary function and incomplete expansion of the lungs and opined that Jones was continuing to struggle with significant lung disease from his burn injury. Dr. Walker recommended continued medications and pulmonary rehabilitation. (APA pp. 215-217) On June 15, 1998, Dr. Walker stated again that Jones has severe lung disease from his accident, including damage to his pharynx which left him susceptible to aspiration and chronic low-grade bronchitis with obstructive component. He stated Jones is going to have intermittent acute flare-ups of varying degrees of severity and duration, and he opined that Jones is not able to do strenuous physical activity from a pulmonary standpoint because of his lung disease. (APA pp. 218-219)

Thereafter, Jones' respiratory problems, including related chronic obstructive pulmonary disease, bronchiectasis, and obstructive sleep apnea, were treated by Dr. Gowdhami Mohan with multiple medications and a dental device for sleeping. (APA pp. 412-579) He opined that Jones' decreased lung function caused by his work injury contributed to his sleep apnea. Dr. Mohan concurred in the opinion that Jones is unable to work in any capacity due to continued medical and psychological problems. (APA pp. 505, 508, 544, 579-580)

Urologist Dr. William Hinnant evaluated Jones on June 23, 1998 and diagnosed traumatic hypospadias from the Foley catheter he wore for about three months during his early treatment. (APA pp. x-x) Dr. Hinnant recommended and performed corrective surgery on July 9, 1998, and continued to follow Jones thereafter for difficulties with urination, complete voiding, urinary tract infections, prostatitis syndrome, and erectile dysfunction. (APA pp. x-x) Dr. Hinnant performed a urethrotomy procedure in June 2000 to correct a stricture and improve his stream. (APA pp. x-x) He ultimately opined that Jones will require a couple of continued visits each year to address stricture and periodic urinalysis. (APA pp. 224- 248, esp. see p. 245)

Psychiatrist Dr. Robert Richards began following Jones on April 20, 1999 for distress related to his injuries. He initially diagnosed hypomania and posttraumatic stress disorder and prescribed medications. Dr. Richards recorded complaints of confusion on April 30, 1999 and, after further evaluation, amended his diagnosis to hypomania or bipolar disease and ADD due to traumatic brain injury. (APA pp. 254-260) On January 4, 2000, Dr. Richards noted Jones described onset of flashbacks and vivid dreams, in addition to increased arousal, sadness, and hopelessness, and he added the diagnoses of cognitive disorder due to traumatic brain injury and delayed onset PTSD from the work injury. (APA p. 274) On April 19, 2000, Dr. Richards found reports of continued difficulty with reading and short-term memory, in addition to disorganized thoughts and indecision, and he recommended neuropsychological testing to evaluate cognitive difficulties. (APA pp. 279-280)

In an evaluation on September 10, 2001, Dr. Richards reiterated his earlier diagnoses, including traumatic brain injury and stated that Jones' medication treatment course has been complicated by the need for steroids to treat his respiratory problems. He opined that Jones'

problems have never achieved remission, that attempts to expose him to environments with even mild stress usually result in disorganized thinking and racing thoughts, and that his medical condition was aggravating his emotional distress and his emotional distress was aggravating his medical condition. Dr. Richards concluded that Jones has treatment-resistant bipolar disorder due to his traumatic brain injury, that he is not able to complete even simple tasks, as stress causes disorganized thinking and intense anxiety, and that he is totally disabled from working. (APA pp. 311-314) He opined on February 20, 2003 that Jones had reached maximum medical improvement from his injury-related bipolar disorder and ADHD, though the steroid treatment necessary for his medical conditions had prevented him from reaching the higher level of functioning usually achieved by patients with those conditions. (APA pp. 330-331) Dr. Richards continued to follow Jones, adjust his medications, and provide therapy. He opined on October 20, 2007 that Jones is permanently and totally disabled due to his work injuries. (APA pp. 332-390, 391)

Jones was evaluated at the Anderson emergency room on June 9, 2001 for an episode in which he bent over and was suddenly unable to speak. Ms. Jones also reported some left-sided facial droop. The evaluating physician noted his work-related injuries, including chronic COPD, and his multiple related medications. The physician also noted that all reported problems had quickly returned to normal, and he diagnosed a transient ischemic attack, or TIA, and hospitalized Jones for observation. Following subsequent evaluations, the physicians expressed some doubt whether this episode was in fact a TIA or simply a result of his ongoing psychiatric difficulties and increased recent stress. Of note, an MRI scan of the brain showed some evidence of white matter changes in the right parietal lobe, but this was not felt to be acute. The MRI showed no vascular injury. (APA pp. 614-641) A similar episode occurred

on March 21, 2004 and testing again found no clear new problem. (APA pp. 658-661)

Dr. Robert Moss performed neuropsychological testing on June 29, 2007. He noted Jones' history of an extensive burn injury at work, including continuing chronic respiratory problems. He also noted Dr. Richards' subsequent diagnoses of bipolar disorder due to traumatic brain injury and cognitive disorder NOS due to traumatic brain injury. Dr. Moss recorded Jones' complaints of memory and concentration problems, changes in reading and receptive language comprehension, changes in spelling and calculation ability, changes in ability to plan and organize, and some word-finding difficulty. Concerning the administered testing, Dr. Moss stated Jones gave good effort and that results were felt to be valid and interpretable. He found deficits in verbal memory, problems in divided attention and processing speed, and problems in phonemic fluency consistent with reported word-finding difficulties. Psychological testing showed marked elevation on somatic scale, as expected given his continuing physical problems. Dr. Moss stated that behavioral testing results were consistent with a brain injury and would not be attributable to depression or anxiety. Based on these results, Dr. Moss diagnosed cognitive disorder due to brain injury and personality change due to brain injury, and he opined that the most likely cause was hypoxia related to his post-accident pulmonary problems. He did however posit that the cause could be exposure to the toxic substance in the work injury, though he was not familiar with that chemical. Dr. Moss stated that the normal imaging results found after the TIA events ruled out any possibility that such vascular events could account for the neuropsychological test results, and he opined that the work injury was in fact the cause of the brain injury. (APA pp. 734-739)

ARGUMENTS

In Brown v. Greenwood Mills, Inc., this Court explained at length the standard of review in workers' compensation cases.

> The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.
>
> The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. 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 the administrative agency reached in order to justify its action.
>
> The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

> The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005)(citations omitted).

I. **The Commission's determination that Jones has sustained brain injury and physical brain damage as a result of his admitted injury by accident is supported by substantial evidence on the record.**

A review of all the evidence on the record in this claim in light of relevant statutory and case law shows that the Commission's determination that Jones has sustained traumatic brain injury and physical brain damage as a result of his injuries by accident is well supported by substantial evidence on the record, is not affected by any error of law, and therefore must be affirmed.

Section 42-9-10 of the Act provides that

> [n]otwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

S.C. Code Ann. § 42-9-10 (1997)(emphasis added). 3M's arguments center around the definition of the term "physical" as used in this statute. Of note, there are no reported South Carolina cases concerning the definition of the term "physical brain damage" used by the General Assembly in this statute. While the term is mentioned in Pearson v. JPS Converter

& Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997) that case sheds no light on the issue raised by defendants and does not hold that physical brain damage can only be proved in one particular manner or by one particular method.

Our appellate courts have held that "[w]here the terms of a statute are clear and unambiguous, there is no need for construction; courts must apply them according to their literal and ordinary meaning. Lail v. Richland Wrecking Co., 280 S.C. 532, 313 S.E.2d 342 (Ct. App. 1984). The Merriam-Webster dictionary defines "physical" as:

1: of or relating to natural science;
2: of or relating to physics;
3: of or relating to the body.

http://www.merriam-webster.com/dictionary/physical See also Dorland's Illus. Medical Dictionary, 27th ed., p. 1291 (defining "physical" as "pertaining to the body, to material things, or to physics") The third definition in Merriam-Webster obviously applies and indicates merely that the General Assembly intended a differentiation between bodily injury and psychological injury. There is no support for 3M's contention that the word "physical" requires something that can be viewed or touched. Furthermore, contrary to 3M's assertion, there is evidence on the record of diagnostic testing which shows clear brain injury and physical brain damage, specifically the testing and reports of Dr. Robert Moss. That evidence, the other medical evidence on the record, and lay testimony on the record constitutes overwhelming evidence proving that Jones has sustained physical brain damage in that he suffers brain dysfunction as a result of a bodily injury rather than as a result of any psychological factor.

At the hearing, Jones's wife, Derrell Jones, testified on his behalf. Ms. Jones stated her husband is 64 years old and that they have been married for 45 years. She testified that prior to his injury at work, he was a vegetarian, a "body builder," and "the picture of health." She further stated that in her opinion, his good health is the reason that he was able to survive the accident and his burns. (tr. p. 16, lines 4-7; p. 20, line 20-p. 21, line 5)

Ms. Jones testified her husband suffered a burn injury at work in June 1997, was taken to Greenville Memorial Hospital, and was then flown to MUSC in Charleston, where he stayed for several months. She stated that he went into respiratory arrest while in the hospital following his injury, continues to have trouble with his lungs, and has only about 45% lung capacity. Ms. Jones testified that Jones also has displayed cognitive problems since right after his injury by accident. She explained that before his injury he was very smart and quick and was able to understand and recall most things after reading over it just once. However, after the accident, she noticed right away that he had difficulty remembering things and had a hard time reading and understanding many things, and those problems continue to this day. She stated he now has to go over and over things in order to understand it. Ms. Jones testified that Jones loses track of his subject and stammers and rambles when he is talking. He cannot make decisions or commitments anymore and leaves such things to her. She also has to handle their financial matters because he is not able to do so. (tr. p. 16, line 8-p. 20, line 1; p. 22, line 1-p. 23, line 7)

Ms. Jones admitted her husband suffered something similar to a stroke on two occasions after his injury at work, once in 2000 and again in 2005; however, she explained that these strokes did not worsen his condition at all. (tr. p. 33, line 21-p. 34, line 10)

Ms. Jones stated that her husband can drive and they recently drove together to Minnesota, but she explained that he drove only part of the way and that they had to stop overnight several times on the trip there and again on the trip back. He is able to keep up with his medications by writing down everything he does and splitting his pills up into daily dispensers, but that is really the only thing that he is able to keep up with. She stated that Jones tried to help his niece with a school subject with which she was having difficulty, but such was short-lived, as he obsesses on such things and then quickly loses all interest. He is much less able to work on things around the house as he used to do, and he frequently injures himself when he tries to do such things and continually has bruises and band-aids on his hands. (tr. p. 23, line 22-p. 29, line 5)

The medical records show that an EMS team reported to 3M's facility on June 3, 1997 and found Jones lying on a backboard covered by a burn sheet. The Fire Chief on the scene reported Jones had been burned by a chemical, Therminol 66, which was described as a super-heated oil that is a skin and respiratory irritant. The EMS attendant noted that Jones stated that his eyes and lungs were burning, and he observed second and third degree burns over approximately 54% of the front of Jones' body, including his face, arms, torso, legs, and feet. Jones was transported to Greenville Memorial Hospital, but he was then quickly moved by air transport to the Burn Center at the Medical University of South Carolina in Charleston. (APA pp. 1-13)

While en route to MUSC, Jones experienced respiratory distress and was intubated. At the hospital, he was found to also have an inhalation injury with a collapsed lung, pulmonary edema, bilateral pleural effusion, and resulting reduced lung volumes. By June 7, 1997, this condition was noted to be worsening with developing pneumonia and infections, and

the condition continued to wax and wane over the next many weeks. On June 11, 1997, Jones began undergoing multiple, extensive surgeries to debride and treat his burns, many of which were full-thickness burns. Skin grafting procedures were begun on July 2, 1997, beginning with the legs and feet, then face and abdomen. On August 2, 1997, an EEG was performed due to increasing confusion and abnormalities were found consistent with encephalopathy. (APA pp. 14-91, 112-116)

Jones was discharged and admitted to the rehabilitation unit on September 25, 1997. His final burn measurement was approximately 40% of his total body surface area. Beyond the multiple skin grafting procedures, the discharge summary was notable for reported critical respiratory status, *including very low oxygen levels* and development of E. coli, yeast, and staph infections, which was treated extensively with respirators and antibiotics. Jones was continuing to have difficulty with ambulation, contracture of his hands, and with speech and swallowing. (APA pp. 112-117)

Jones's general physician, Dr. June Souviron, began following him for his burn and respiratory injuries in October 1997. At that time, she also diagnosed depression due to stress from his burns and prescribed medications. She followed him for chronic chemical pneumonitis, pulmonary fibrosis, acute bronchitis and sinusitis, migraine headaches, and continued psychological distress, including anxiety and depression. Dr. Souviron eventually referred Jones to Dr. William Walker for his respiratory issues. On February 8, 1999, *she recorded Jones's complaints of difficulty with focus and concentration as he attempted to return to work and noted that he had a history of compromised oxygen supply to his brain as a result of his work injury and trauma.* Dr. Souviron opined on October 4, 2007 that Jones is permanently and totally disabled because of his work injuries. (APA pp. 156-197)

Pulmonologist Dr. William Walker began following Jones on March 31, 1998 and noted his work injury including body and pulmonary burns. On examination, he found decreased pulmonary function and incomplete expansion of the lungs and opined that Jones was continuing to struggle with significant lung disease from his burn injury. Dr. Walker recommended continued medications and pulmonary rehabilitation. (APA pp. 215-221)

Thereafter, Jones's respiratory problems, including related chronic obstructive pulmonary disease, bronchiectasis, and obstructive sleep apnea, were treated by Dr. Gowdhami Mohan with multiple medications and a dental device for sleeping. He opined that Jones's decreased lung function caused by his work injury contributed to his sleep apnea. Dr. Mohan concurred in the opinion that Jones is unable to work in any capacity due to continued medical and psychological problems. (APA pp. 412-579)

Psychiatrist Dr. Robert Richards began following Jones on April 20, 1999 for distress related to his injuries. He initially diagnosed hypomania and posttraumatic stress disorder and prescribed medications. Dr. Richards recorded complaints of confusion on April 30 and after further evaluation altered his diagnosis to hypomania or bipolar disease and ADD *due to traumatic brain injury.* On January 4, 2000, Dr. Richards noted Jones described onset of flashbacks and vivid dreams, in addition to increased arousal, sadness, and hopelessness, and he added the diagnoses of *cognitive disorder due to traumatic brain injury* and delayed onset PTSD from the work injury. On April 19, 2000, Dr. Richards found reports of continued difficulty with reading and short-term memory, in addition to disorganized thoughts and indecision, and he recommended neuropsychological testing to evaluate cognitive difficulties. In an evaluation on September 10, 2001, Dr. Richards reiterated his earlier diagnoses, including traumatic brain injury and stated that his medication treatment course has been

complicated by the need for steroids to treat his respiratory problems. He opined that Jones's problems have never achieved remission, that attempts to expose him to environments with even mild stress usually result in disorganized thinking and racing thoughts, and that his medical condition was aggravating his emotional distress and his emotional distress was aggravating his medical condition. Dr. Richards concluded that Jones has treatment-resistant bipolar disorder due to his traumatic brain injury, that he is not able to complete even simple tasks, as stress causes disorganized thinking and intense anxiety, and that he is totally disabled from working. (APA pp. 254-391)

Jones was evaluated at the Anderson emergency room on June 9, 2001 for an episode in which he bent over and was suddenly unable to speak. Ms. Jones also reported some left-sided facial droop. The evaluating physician noted his work-related injuries, including chronic COPD, and his multiple related medications. The physician also noted that all reported problems had quickly returned to normal, and he opined Jones suffered a transient ischemic attack, or TIA, and he was hospitalized for observation. Following subsequent evaluations, *the physicians expressed some doubt whether this episode was in fact a TIA or simply a result of his ongoing psychiatric difficulties and increased recent stress.* Of note, an MRI scan of the brain showed some evidence of white matter changes in the right parietal lobe, but this was not considered to be acute. The MRI showed no vascular injury. (APA pp. 617-641) A similar episode occurred on March 21, 2004 and testing again found no clear new problem. (APA pp. 658-661)

Dr. Robert Moss performed neuropsychological testing on June 29, 2007. He noted Jones's history of an extensive burn injury at work, including continuing chronic respiratory problems. He also noted Dr. Richards' subsequent diagnoses of bipolar disorder due to

traumatic brain injury and cognitive disorder NOS due to traumatic brain injury. Dr. Moss recorded Jones's complaints of memory and concentration problems, changes in reading and receptive language comprehension, changes in spelling and calculation ability, changes in ability to plan and organize, and some word-finding difficulty. Concerning the administered testing, Dr. Moss stated Jones gave good effort and that results were felt to be valid and interpretable. He found deficits in verbal memory, problems in divided attention and processing speed, and problems in phonemic fluency consistent with reported word-finding difficulties. Psychological testing showed marked elevation on somatic scale, as expected given his continuing physical problems. Dr. Moss stated that *behavioral testing results were consistent with a brain injury* and would not be attributable to depression or anxiety. Based on these results, *Dr. Moss diagnosed cognitive disorder due to brain injury and personality change due to brain injury*, and he opined that *the most likely cause was hypoxia related to his post-accident pulmonary problems*. He did however posit that the cause could be exposure to the toxic substance in the work injury, though he was not familiar with that chemical. Dr. Moss stated that the *normal imaging results found after the TIA events ruled out any possibility that such vascular events could account for the neuropsychological test results*, and he opined that *the work injury was in fact the cause of the brain injury*. (APA pp. 734-739)

The foregoing evidence overwhelmingly proves and is substantial evidence that Jones has suffered traumatic brain injury and physical brain damage as a result of his injury by accident within the clear and plain meaning of the Act. Evidence from Ms. Jones, MUSC, Dr. Souviron, and especially that from Dr. Richards and Dr. Moss show that Jones suffered brain injury as a result of compromised oxygen supply to his brain following his injury by accident and that he is continuing to display cognitive difficulties which indicate physical brain damage.

Dr. Moss definitively ruled out a psychological factor in the testing results and stated that the supposed TIAs did not cause the deficits. The Commission's findings of traumatic brain injury and physical brain damage as a result of his injury by accident are supported by substantial evidence on the records and must be affirmed under the standard of review. Therefore, in light of 3M's admission that Jones is permanently and totally disabled, he is entitled to lifetime compensation benefits under the provisions of § 42-9-10 as a matter of law.

II. The single Commissioner did not abuse his discretion in deciding not to hold the record open to allow 3M to obtain additional evaluations of Jones.

3M's argument that the Commissioner erred and abused his discretion in refusing to compel Jones to submit to further testing concerning his brain injury with a doctor of its choosing must be rejected.

The Supreme Court has recently dealt with a case that involved allegations of abuse of discretion in failing to leave the record open for further discovery, specifically the taking of depositions. In Trotter v. Trane Coil Facility, the Supreme Court noted as follows:

> A commissioner has the authority to postpone a scheduled hearing in a workers' compensation matter for "good cause," which includes such reasons as illness and the need for additional discovery. S.C. Code Ann. Regs. 67-613(B) (Supp.2010); see also id. 67-215(A)(5) (motions).
>
> The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown. Gurley v. Mills Mill, 225 S.C. 46, 80 S.E.2d 745 (1954); see also Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)("It has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion

to the prejudice of appellant.").

> For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Bartlett v. Rachels, 375 S.C. 348, 652 S.E.2d 432 (Ct. App. 2007); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002).
>
> "Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued." Gurley, 225 S.C. at 51-52, 80 S.E.2d at 747.

Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011). Further,

> A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are "rarely" overturned. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006)(citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)); M & M Group, Inc. v. Holmes, 379 S.C. 468, 475, 666 S.E.2d 262, 265 (Ct. App. 2008). "Every reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." 17 C.J.S. Continuances 5 (2011).

Trotter, 714 S.E.2d at 295.

Here, 3M failed to timely schedule the examinations in question and made no mention of such evaluations until just prior to the hearing. At that point, any report generated from the evaluation would not have been available at the time of the hearing due to the Commission's rules concerning the exchange of such information between the parties, and Jones would not have been able to respond to the report in any way. See S.C. Code Reg. 67-612 (1997). 3M's delay was in spite of the fact that it had every reason to know of the allegation of brain injury since at least 1999, when the condition was first discussed by Jones's physicians. (APA pp.

260-261) Jones also filed a claim for traumatic brain injury in 1999 (Form 50, dated 5/12/1999), and Jones's physicians first tried to gain authorization for neuropsychological testing in 2000. (APA p. 279) The notes from the various physicians, including the authorized, treating psychiatrist who first diagnosed brain injury, have been available to 3M since the date of accident. See S.C. Code Ann. § 42-15-95 (1997)(medical records pertaining directly to a workers' compensation claim must be provided to a party upon request). Jones's attorney reiterated the claim for brain injury with a Form 50 filed in July 2007. (Form 50, dated 7/2/2007) Having chosen to sit on their hands for so many years, 3M's arguments that the Commissioner somehow abused his discretion in denying its Motion to Compel neuropsychological testing must be rejected.

3M's contention that Jones in some way failed to give it timely notice of the evaluation with Dr. Moss such that it should be allowed additional time to respond to that report is incorrect. The Commission's regulations concerning the submission of information as a part of an initial claim and for the purpose of requesting a hearing before the Commission do not provide that the injured worker must disclose evaluations that have been obtained. See S.C. Code Reg. 67-206, -207 (1997). Furthermore, the regulation requiring the parties to continue to update information makes no mention of disclosing any such evaluations. See S.C. Code Reg. 67-610 (1997). The only such disclosure required to be made is that concerning the exchange of documentary information prior to the hearing, and Jones made that disclosure and provided the report to 3M according to the rule. See S.C. Code Reg. 67-612 (1997). Jones made 3M aware of his claim as required in the rules and provided his expert's report as required in the rules, and the Commission did not err in admitting that expert's report or in determining that 3M sat on its hands and failed to properly investigate the Jones's claim of

brain injury.

The Circuit Court's and the Commission's decision to affirm that decision should likewise be affirmed by this Court.

III. 3M's argument that the single Commissioner abused his discretion in failing to exclude the report of Dr. Robert Moss was abandoned and is not properly before this Court for determination.

3M mentions an argument in its brief to this Court to the effect that the single Commissioner erred and abused his discretion in failing to exclude the report of Dr. Robert Moss from the record. However, this issue is not properly before the Court for determination since 3M has never more than summarily argued the issue before the Commission or the Circuit Court. As such, the issue should be deemed abandoned.

Issues that are summarily addressed in a brief are deemed abandoned. Bryson v. Bryson, 378 S.C. 502, 662 S.E.2d 611 (Ct. App. 2008); Glasscock v. U.S. Fidelity & Guaranty Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); Williams v. Leventis, 290 S.C. 386, 350 S.E.2d 520 (Ct. App. 1986). See also Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974)(a bald conclusion which leaves unargued the error assigned by the exception is deemed abandoned). In Solomon, the Supreme Court noted that one of four exceptions was only addressed in one short passage in the appellant's brief which was essentially a bald statement without any real argument. The Court held that the exception was abandoned.

Here, 3M mentioned the issue in its brief to the Commission's Appellate Panel but offered only bald conclusions without any real support or analysis. (def's brief to Comm'n) Before the Circuit Court, 3M again mentioned the issue in its brief but again offered only

bald conclusions without any real support or analysis. (def's brief to Circ. Ct.) At oral argument before the Circuit Court, 3M again only summarily mentioned the issue and offered no support for their contention. (CCt tr. pp. 9-10) In his Order, Judge Hill recognized that such summary arguments are normally deemed abandoned. On appeal to this Court, 3M failed to heed Judge Hill's warning and again only mentioned the issue in its Brief of Appellant offering only bald conclusions without any real support or analysis. As such, Jones urges this Court to find 3M has abandoned the issue such that it is not before this Court for determination, as in Solomon above.

IV. The single Commissioner did not abuse his discretion in deciding not to exclude the report of Dr. Robert Moss from the record.

For the same reason set forth above concerning the Commissioner's decision not to hold the record open for further evaluations, 3M's challenge to the report of Dr. Moss must also be rejected. 3M argues that Dr. Moss's report is so remote from the time of the injury that it should not be afforded any weight. Despite the fact that remoteness of time from the injury by accident in no way detracts from Dr. Moss's testing or conclusions, this argument must be rejected since 3M failed for many years to do anything to evaluate the condition despite clear indication of the injury in the medical reports (see APA pp. 260-261) and in Jones's early allegations (see Form 50, dated 5/12/1999) and also the treating physician's explicit request for such neuropsychological evaluation (see APA p. 279). The Commission correctly refused to penalize Jones for obtaining the evaluation on his own when 3M failed to do so.

3M offers no support for its allegation that only a medical doctor can diagnose physical brain damage. It is common knowledge that such injuries are usually diagnosed and assessed through neuropsychological testing, and as a clinical psychologist certified by the American Board of Clinical Neuropsychology (see APA p. 739), Dr. Moss is certainly qualified to render his opinion on the issue. And, of note, the condition was also diagnosed by Dr. Richards, a medical physician and psychiatrist. (APA pp. 260-261, 279)

Contrary to 3M's contention, the statutes governing the practice of psychology in South Carolina clearly provide a psychologist with the authority to diagnose physical brain injury. Section 40-55-50 of the Code of Laws clearly states that a psychologist can assess and diagnose mental disorders and "identify neuropsychological aspects of other dysfunction" and defined "assessment" to include evaluation, administering and interpreting testing, and diagnosing mental disorders. S.C. Code Ann. § 40-55-50 (1997). 3M's contention that Dr. Moss cannot diagnose physical brain damage is wholly without support, was correctly rejected below, and should be rejected by this Court.

V. 3M's argument that the Commission erred in finding Jones is entitled to medical treatment for prostatitis and erectile dysfunction was abandoned and is not properly before this Court for determination.

3M mentions an argument in its brief to this Court to the effect that the Commission in some way erred in finding and concluding that Jones is entitled to medical treatment for prostatitis and erectile dysfunction. However, this issue is not properly before the Court for determination since 3M has never more than summarily argued the issue before the Commission or the Circuit Court. Further, 3M's argument to this Court is nothing more than a bald conclusion without support. As such, the issue should be deemed abandoned.

As set forth above, issues that are summarily addressed in a brief are deemed abandoned. Bryson; Glasscock; Williams v. Leventis. See also Solomon, 203 S.E.2d at 435 (a bald conclusion which leaves unargued the error assigned by the exception is deemed abandoned). In Solomon, the Supreme Court noted that an exception was only addressed in one short passage in the appellant's brief, was essentially a bald statement without any real argument, and held that the exception was abandoned.

Here, 3M mentioned the issue in its brief to the Commission's Appellate Panel but offered only bald conclusions without any real support or analysis. (def's brief to Comm'n) Before the Circuit Court, 3M again mentioned the issue in its brief but again offered only bald conclusions without any real support or analysis. (def's brief to Circ. Ct.) At oral argument before the Circuit Court, 3M again only summarily mentioned the issue and offered no support for their contention. (CCt tr. p. 9) In his Order, Judge Hill recognized that such summary arguments are normally deemed abandoned. On appeal to this Court, 3M failed to heed Judge Hill's warning and again only mentioned the issue in its Brief of Appellant offering only bald conclusions without any real support or analysis. As such, Jones urges this Court to find 3M has abandoned the issue such that it is not before this Court for determination, as in Solomon above.

VI. The Commission correctly determined Jones is entitled to treatment of prostatitis and erectile dysfunction as a result of his admitted injury by accident.

A review of all the evidence on the record shows that there is substantial evidence supporting the Commission's determination that Jones is entitled to treatment of prostatitis and erectile dysfunction as a result of his admitted injury by accident, and therefore, that

decision must also be affirmed.

Ms. Jones testified that Jones has had considerable difficulty with his urinary tract due to the fact that he had a catheter in for so long following his accident and during his medical treatment. He also accidentally stepped on the catheter tube once, ripping it from his urethra. She stated that he also now has erectile dysfunction because of all these problems. (tr. p. 20, lines 2-19)

The medical records show that following his discharged from the burn rehabilitation unit on October 3, 1997, Jones began treatment for urethral erosion caused by long-term catheter placement, and such treatment eventually included surgical repair. (APA pp. 123-128)

Urologist Dr. William Hinnant evaluated Jones on June 23, 1998 and diagnosed traumatic hypospadias from the Foley catheter he wore for about three months during his early treatment. Dr. Hinnant recommended and performed corrective surgery on July 9, 1998, and continued to follow Jones thereafter for difficulties with urination, complete voiding, urinary tract infections, prostatitis syndrome, and erectile dysfunction. Dr. Hinnant performed a urethrotomy procedure in June 2000 to correct a stricture and improve his stream. He ultimately opined that Jones will require a couple of continued visits each year to address stricture and periodic urinalysis. (APA pp. 224-248)

It is clear from Jones's history following his injury by accident and from the foregoing medical reports from Dr. Hinnant, and those from Dr. Rice (APA pp. 741-744), that all of Jones's penile and urological difficulties arose following and as a result of his injury by accident. As such, the Commission committed no error in finding Jones is entitled to treatment of all those conditions, including prostatitis syndrome and erectile dysfunction.

Because there is substantial evidence supporting this finding, the Commission's Order should be affirmed in its entirety.

VII. 3M's argument that the Commission erred in finding Jones is entitled to a partial lump-sum payment of his award for the purposes of paying his attorney fees and costs related to this claim was abandoned and is not properly before this Court for determination.

3M mentions an argument in its brief to this Court to the effect that the Commission in some way erred in finding and concluding that Jones is entitled to a partial lump-sum payment of his award for the purposes of paying his attorney fees and costs related to this claim. However, this issue is not properly before the Court for determination since 3M has never more than summarily argued the issue before the Commission or the Circuit Court. Further, 3M's argument to this Court is nothing more than a bald conclusion without support. As such, the issue should be deemed abandoned.

As set forth above, issues that are summarily addressed in a brief are deemed abandoned. Bryson; Glasscock; Williams v. Leventis. See also Solomon, 203 S.E.2d at 435 (a bald conclusion which leaves unargued the error assigned by the exception is deemed abandoned). In Solomon, the Supreme Court noted that an exception was only addressed in one short passage in the appellant's brief, was essentially a bald statement without any real argument, and held that the exception was abandoned.

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Order, Judge Hill recognized that such summary arguments are normally deemed abandoned. On appeal to this Court, 3M failed to heed Judge Hill's warning and again only mentioned the issue in its Brief of Appellant offering only bald conclusions without any real support or analysis. As such, Jones urges this Court to find 3M has abandoned the issue such that it is not before this Court for determination, as in Solomon above.

VIII. The Commission correctly determined Jones is entitled to a partial lump-sum payment of his award for the purposes of paying his attorney fees and costs related to this claim.

3M's argument on this issue must also be rejected. The Supreme Court's holding in Glover v. Suitt Constr. Co., 318. S.C. 465, 458 S.E.2d 535 (1995) clearly states that a partial lump-sum payment may be made to satisfy attorney fees in a lifetime compensation case, and it is only the lump-sum payment that is being awarded here. Under the Commission's rules, the commuted value of the award must still be determined by the Commission, and the specific amount of the fee and costs must still be agreed on by Jones and approved by the Commission through the Form 61. See S.C. Code Regs. 67-1205, 67-1605 (1997). The Order does not state that those separate steps can be or are being bypassed. The fact that those additional steps must still be taken before the payment is actually made does not make the Commission's determination that such a partial lump-sum payment for attorney fees and costs is in his best interest and consistent with applicable law.

3M's argument on this issue should be rejected, and the Commission's Order should be affirmed in its entirety.

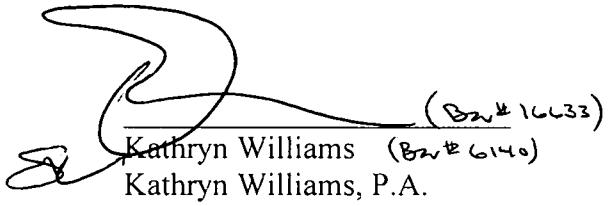
CONCLUSION

It is, therefore, respectfully submitted that 3M's arguments should be rejected in light of the substantial evidence on the record supporting all of the Commission's findings and rulings challenged on appeal, including the Commission's findings concerning the existence of physical brain damage as a result of the injury by accident.

The Court should not reach 3M's arguments concerning Jones's entitlement to treatment for his urological problems and a partial lump-sum payment of his award at all considering its abandonment of those issues due to summary and unsupported arguments. But if the Court decides those issues are properly before it, 3M's arguments should be rejected since the Commission's findings on those issues are also well supported by substantial evidence on the record.

Under the standard of review applicable to this case, 3M's appeal to this Court should be rejected in its entirety, and the Commission's Order should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Circuit Court Case No. 2009-CP-23-2535

Archie Eddie Jones, Jr., Employee, ... Respondent,

vs.

3M Corp., Employer and Old Republic
Insurance Company, Carrier, ... Appellants.

PROOF OF SERVICE

I certify that I have served the **MOTION TO AMEND INITIAL BRIEF OF RESPONDENT** and **AMENDED INITIAL BRIEF OF RESPONDENT** on Appellants by mailing a copy of same to their attorney of record at the address shown below by U.S. Mail, proper postage prepaid, on the 29th day of June, 2012.

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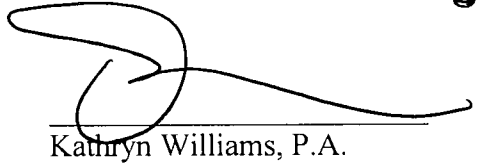

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