

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

71935

SCWCC No. 1023410

Michael W. Dority, Claimant,

Appellant,

v.

CTR of the Carolinas, Inc., et. al., Employer, and
Twin City Fire Insurance Company, Carrier,

Respondents.

**MOTION TO STRIKE MATTER INCLUDED IN APPELLANT'S DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

Jason A. Griggs, Esquire
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3288
Attorney for Respondents

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APR 21 2014

SC Court of Appeals

Pursuant to Rule 240, SCACR, Respondents CTR of the Carolinas, Inc., et. al. and Twin City Fire Insurance Company (collectively “CTR”), by and through their undersigned attorney, hereby move this Court for an Order striking portions of Appellant Michael W. Dority’s (“Dority”) Proposed Designation of Matter to be included in the Record on Appeal. CTR would respectfully show:

1. That Dority filed his Designation of Matter to be Included in the Record on Appeal with this Court on March 19, 2014. Dority’s Designation of Matter to be Included in the Record on Appeal is attached hereto as Exhibit #1.

2. That Designation Number 8 proposes to include “Claimant’s Notice of Witnesses and Written Medical Reports/Physician or Other Evidence to be Introduced on Behalf of Claimant Under the Provisions of the South Carolina Administrative Procedures Act (“APA Submission”) and all attached evidence including numbers 1 through 36, pp. 1-458.”

3. That as is evidenced in Footnote 1 of the Single Commissioner’s Order dated August 19, 2013, CTR objected to Dority’s APA Submission numbers 9, 10, 16, 25, 26, 32, 33, 34, and 35. A copy of the Single Commissioner’s Order is attached hereto as Exhibit #2.

4. That the Single Commissioner excluded the above-mentioned APA Submissions, pursuant to CTR’s objections, and they were not made a part of the record.

5. That on August 23, 2013, Dority filed a Form 30 requesting review of the Single Commissioner’s Order. A copy of Dority’s Form 30 is attached hereto as Exhibit #3.

6. That Dority did not raise the exclusion of the above-referenced APA Submissions as an issue for review, (*See* Exhibit #3).

7. That on October 31, 2013, Dority filed his Appellant’s Brief with the Appellate Panel of the Commission. A copy of his Appellant’s Brief is attached hereto as Exhibit #4.

8. That Dority did not raise or brief the issue of the Single Commissioner's Decision to exclude the above-mentioned APA Submissions to the Appellate Panel.

9. That on November 22, 2013, Dority filed a Reply Brief with the Appellate Panel of the Commission. Again Dority did not brief the issue to the Appellate Panel in his Reply Brief. A copy of his Reply Brief is attached hereto as Exhibit #5.

10. That because the ruling by the Single Commissioner excluding portions of Dority's APA Submissions was not appealed or briefed, the Appellate Panel did not rule this portion of the Single Commissioner's decision. Additionally, the Appellate Panel did not rely on this evidence in reaching its decision, since it was not a part of the record.

11. That it is well settled law in South Carolina that if a party does not raise an issue on appeal, it is abandoned and becomes the law of the case. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009) (citing C.J.S. Appeal & Error § 991 (2008)); *See also* Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003).

12. That the Single Commissioner specifically ruled on the above-referenced APA Submissions and excluded them from the record, and since Dority did not appeal this ruling to the Appellate Panel, it is hereby the law of the case.

13. That based on the foregoing, Dority's APA Submission numbers 9, 10, 16, 25, 26, 32, 33, 34, and 35 are not proper for inclusion in the Record on Appeal.

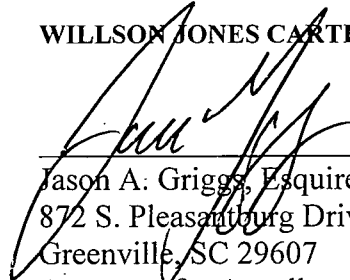
WHEREFORE, Respondents CTR of the Carolinas, Inc., et. al., and Twin City Fire Insurance Company respectfully move for an Order from this Court striking Dority's

Designation Number 8 in his Matter to be Included in the Record on Appeal insofar as it includes matter that has physically been excluded from the record in this case.

Respondents also move for an Order from this Court striking from Dority's Brief any reference to the aforementioned APA Submissions.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



Jason A. Griggs, Esquire
872 S. Pleasantburg Drive
Greenville, SC 29607
Attorneys for Appellants

April 17, 2014

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1023410

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APR 21 2014

SC Court of Appeals

Michael W. Dority, Claimant,

Appellant,

v.

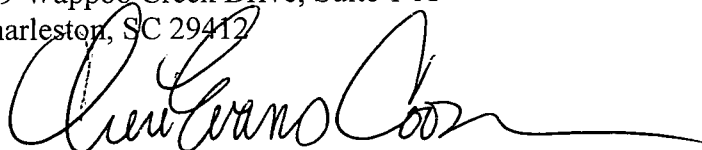
CTR of the Carolinas, Inc., et. al., Employer, and
Twin City Fire Insurance Company, Carrier,

Respondents.

CERTIFICATE OF SERVICE

I, Cheri Evans Coon, do hereby certify that I am the Legal Assistant for Jason A. Griggs, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Greenville, South Carolina, and that on the 17th day of April, 2014, I mailed the foregoing **MOTION TO STRIKE MATTER INCLUDED IN APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Jeffrey T. Eddy, Esquire
109 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412



Cheri Evans Coon
Legal Assistant to Jason A. Griggs, Esquire
WILLSON JONES CARTER & BAXLEY, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

EXHIBIT 1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Susan S. Barden, Aisha Taylor and T. Scott Beck, Commissioners

Case No. 2014-000225 (WCC FILE NO. 1023410)

Michael W. Dority, Claimant, Appellant,

v.

CTR of the Carolinas, Inc., et al., Employer, and Twin City Fire
Insurance Company, Carrier, Respondents.

DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON
APPEAL OF APPELLANT

RECEIVED
APR 21 2014
SC Court of Appeals

Jeffrey T. Eddy
109 Wappoo Creek Drive
Suite 1-A
Charleston, SC 29412
Telephone: (843) 795-6666
Facsimile: (843) 762-0449
Bar Number: 1834
Attorney for Appellant

Appellant proposes, in addition to the materials designated by the Respondents, the following to be included in the Record on Appeal:

- 1) Form 50 (Employee's Notice of Claim) dated May 10, 2012;
- 2) Transcript of Hearing before Commissioner Avery B. Wilkerson, Jr. dated March 26, 2013 and April 23, 2013;
- 3) Claimant's Pre-Hearing Briefs dated January 18, 2013 and March 11, 2013;
- 4) Decision and Order of Commissioner Avery B. Wilkerson, Jr. dated August 19, 2013;
- 5) Transcript of Hearing before the Appellate Panel of the Commission dated December 16, 2013;
- 6) Order of the Appellate Panel of the Commission dated January 30, 2014;
- 7) Transcript of deposition of Dr. John D. Doty, II dated October 3, 2012;
- 8) Claimant's Notice of Witnesses and Written Medical Reports/Physician or Other Evidence to be Introduced on Behalf of Claimant Under the Provisions of the South Carolina Administrative Procedures Act ("APA Submission") and all attached evidence including numbers 1 through 36, pp. 1-458;
- 9) Transcript of deposition of Michael Dority dated August 22, 2012;
- 10) Transcript of deposition of Dr. Gregory Feldman dated October 4, 2012;
- 11) Transcript of deposition of Charlie E. Glenn dated October 29, 2012;
- 12) April 23, 2013 Hearing Exhibit C-1 (CTR Safety Operations Manual dated 10/05/05);
- 13) Claimant's Form 30 Request for Commission Review dated August 23, 2013;
- 14) Claimant Brief to Full Commission dated October 31, 2013;
- 15) Defendants' Motion to Postpone Hearing dated January 25, 2013.



Jeffrey T. Eddy
109 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412
(843) 795-5666
Attorney for Appellant

March 19, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Susan S. Barden, Aisha Taylor and T. Scott Beck, Commissioners

Case No. 2014-000225 (WCC FILE NO. 1023410)

Michael W. Dority, Claimant, Appellant,

v.

CTR of the Carolinas, Inc., et al., Employer, and Twin City Fire
Insurance Company, Carrier, Respondents.

CERTIFICATION REGARDING
DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON
APPEAL OF APPELLANT

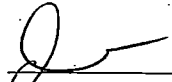
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APR 21 2014

SC Court of Appeals

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Facsimile: (843) 762-0449
Bar Number: 1834
Attorney for Appellant

The undersigned counsel for appellant hereby certifies that the Appellant's Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the appeal.



Jeffrey T. Eddy
109 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412
(843) 795-5666
Attorney for Appellant

March 19, 2014

EXHIBIT 2

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1023410

Michael W. Dority,	)
Employee,	)
Claimant,	)
	)
vs.	)
	)
CTR of the Carolinas,	)
	)
Employer,	)
and	)
	)
Twin City Fire Insurance Company,	)
	)
Carrier,	)
Defendants.	)

HEARING: Held in Rock Hill, South Carolina on March 26, 2013 and April 23, 2013.

APPEARANCES: Claimant represented by Jeffrey T. Eddy, Esquire of Charleston, South Carolina.

Defendants represented by Jason A. Griggs, Esquire of Willson Jones Carter & Baxley, P.A., Greenville, South Carolina.

PURPOSE OF HEARING: To determine the issues as set forth on the Forms 50 and 51.

DECISION AND ORDER: By Avery B. Wilkerson, Jr., Commissioner

FILED: August 19, 2013

APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

BY CLAIMANT:¹

- APA #1: Expert Report of Jerrold L. Abraham, M.D., dated 1/15/2013, consisting of pages 1-2.
- APA #2: Curriculum Vitae: Jerrold L. Abraham M.D., dated 12/20/2012, consisting of pages 3-21.
- APA #3: Particle Analysis/SUNY Upstate Medical, dated 1/14/2013, consisting of pages 22-25.
- APA #4: Report of Richard L. Kradin, M.D., dated 7/27/2012, consisting of pages 26-28.
- APA #5: Curriculum Vitae: Richard L. Kradin, M.D., dated 3/1/2012, consisting of pages 29-43.
- APA #6: Radiology Report of Lancaster Imaging, dated 6/29/2010, consisting of page 44.
- APA #7: Radiology Report of Lancaster Imaging, dated 7/6/2010, consisting of page 45.
- APA #8: Records of John D. Doty, M.D., dated 7/22/2010 – 8/1/2012, consisting of pages 46-67.
- APA #11: Report of Mark K. Reames, M.D., dated 9/14/2010, consisting of pages 68-72.
- APA #12: CMC Operative Report, dated 9/23/2010, consisting of pages 73-75.
- APA #13: CMC Surgical Pathology Report, dated 9/23/2010, consisting of pages 76-78.
- APA #14: CMS Discharge Summary, dated 10/4/2010, consisting of pages 79-81.
- APA #15: American Thoracic Society Official Statement: Idiopathic Pulmonary Fibrosis, consisting of pages 82-100.
- APA #17: Chemical Test Report of Applied Technical Services, Inc., dated 4/23/2012, consisting of pages 112-113.
- APA #18: Material Safety Data Sheet for BRAZEIT A-56T (Bellman-Melcor, LLC), dated 11/1/2007, consisting of pages 114-122.
- APA #19: Material Safety Data Sheet for SILVALOY A-56T (Wolverine), dated 7/5/2011, consisting of pages 123-132.
- APA #20: Material Safety Data Sheet for SAFETY-SILV 56 (Harris), dated 7/30/2010, consisting of pages 133-144.
- APA #21: Material Safety Data Sheet for SILVERBRAZ 56 (SRA), dated 12/2006, consisting of pages 145-149.
- APA #22: Material Safety Data Sheet for MONEL (Special Metals), dated 12/2/2002, consisting of pages 150-151.
- APA #23: Vocational Evaluation Report of Joel E. Leonard, dated 9/19/2010, consisting of pages 152-155.
- APA #24: Curriculum Vitae: Joel D. Leonard, consisting of pages 156-158.
- APA #27: E-mails admitting no Air Monitoring or Employee Hazard Communication Program at

¹ Based on Defendants' objections, Claimant's APAs #9, #10, #16, #25, #26, #32, #33, #34, and #35 were excluded from evidence and not made a part of the record.

- CTR, dated 9/11/2012, consisting of pages 320-321
- APA #28: ACGIH Statement of Position Re: TLVs, dated 2/12/2008, consisting of pages 322-323.
- APA #29: Report of Victor L. Roggli, M.D., dated 2/1/2013, consisting of pages 324-327.
- APA #30: *Electron Microprobe Analysis in Metal-Induced Lung Disease*, Victor L. Roggli, M.D., (1999), consisting of pages 328-335.
- APA #31: *Excerpt of Pneumoconiosis, Mineral and Vegetable*, Victor L. Roggli, M.D., (2008), consisting of pages 336-348.
- APA #36: Power Point Presentation by Jerrold Abraham, M.D., dated 3/11/2013, consisting of pages 416-458.
- APA #37: Addendum to Curriculum Vitae of Jerrold L. Abraham M.D., consisting of page 459.
- APA #38: "Lung Pathology and Mineralogy in a Pheumoconiosis Database," *Ann. Occup. Hyg.*, Vol. 41, Supplemental 1, pp. 522-530 (1997), consisting of pages 460-468.
- Exhibit #1: Site Operations Safety Manual from CTR of the Carolinas, Inc., dated 10/5/2005.
- Depositions: A) John D. Doty, II, MD, taken on 10/3/2012.
B) Gregory Feldman, MD, taken on 10/4/2012.
C) Charlie Edward Glenn, taken on 10/29/2012.

BY DEFENDANTS:

- APA #37: Reports of Dr. Victor Roggli, dated 2/1/2013 – 2/27/2013, consisting of pages 459-464.
- APA #38: Curriculum Vitae: Dr. Victor Roggli, consisting of pages 465-488.
- APA #39: Records of Dr. Gregory Feldman, dated 9/21/2012, consisting of pages 489-492.
- APA #40: Curriculum Vitae: Dr. Gregory Feldman, consisting of pages 493-499.
- APA #41: Industrial Hygiene Assessment of Betty S. Harris, MPH, CIH, CHMM, CMC, dated 10/2/2012 – 10/15/2012, consisting of pages 500-523.
- APA #42: Curriculum Vitae: Betty S. Harris, consisting of pages 524-547.
- APA #43: Correspondences between Claimant's counsel, Dr. Gregory Feldman's office, and Defendants' counsel, dated 2/19/2013 – 3/6/2013, consisting of pages 529-547.

STIPULATIONS

Counsel for the respective parties stipulated at the time of the hearing to the following issues:

1. That the purpose of the hearing is to determine the issues as set forth in the Forms 50 and 51 and any other issues which may timely come before the Commission;
2. That Claimant's average weekly wage was \$668.81 with a corresponding compensation rate of \$445.90;
3. That Notices were timely and properly served upon all parties of interest;
4. That Venue, set in York County, is proper; and
5. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declaration or unstipulated medical reports.

STATEMENT OF THE CASE

Michael W. Dority ("Claimant") filed a Form 50, Request for Hearing, on August 1, 2012, alleging an injury and illness to his lungs due to the inhalation of silver solder fumes, dust, and other airborne contaminants during the course of his employment with CTR of the Carolinas. ("CTR"). On August 29, 2012, CTR and its workers' compensation carrier, Twin City Fire Insurance Company, (collectively "Defendants") timely filed a Form 51 denying that Claimant sustained any injury by accident or occupational disease arising out of and in the course of his employment.

This claim was initially scheduled for hearing before Commissioner Gene McCaskill on October 19, 2012, but prior to the case being called, the parties entered into a Consent Order to remove the hearing from the docket due to the need for additional discovery. The claim was subsequently scheduled for hearing before Commissioner Melody L. James on February 5, 2012. However, prior to the scheduled hearing, the parties again agreed that additional discovery was needed before the claim could be adjudicated, and the scheduled hearing was removed from the docket pursuant to the parties' Consent Order, January 29, 2013. On February 1, 2013, Claimant's attorney sent a letter to the Commission requesting that the case be reset for hearing, and a hearing on the parties' Forms 50 and 51 was ultimately held before the undersigned on March 26, 2013 and on April 23, 2013 in Rock Hill.

At the hearing, Claimant took the position that he sustained a compensable occupational disease to his lungs (severe end stage lung disease) as the result of exposure to inorganic particles, including a variety of dusts and fumes, while working for CTR. Claimant sought a finding of compensability and argued that he was permanently and totally disabled as a result of his severe end stage lung disease. Claimant sought causally-related medical treatment, including reimbursement for all causally-related medical treatment to date and payment for any and all future causally-related medical treatment. In support of his position, Claimant relied on the opinions of his retained experts: Dr. Richard Kradin and Dr. Jerrold Abraham.

Additionally, Claimant contended that his claim was supported by Dr. John Doty, his treating physician.

Defendants denied that Claimant sustained an occupational disease arising out of and in the course of his employment with CTR. In support of their position, Defendants relied on the opinions of their retained experts: Dr. Victor Roggli and Dr. Gregory Feldman. Defendants contended that Claimant's allegations regarding the conditions of the work environment and his job duties at CTR were not accurate. With regards to Claimant's expert opinions, Defendants argued that Dr. Kradin's opinion and Dr. Abraham's opinion were not reliable and should be given limited weight because both opinions were based on inaccurate facts provided by Claimant. Defendants also argued that Dr. Doty's opinion that Claimant's job at CTR "could have" contributed to Claimant's lung disease was not sufficient to satisfy Claimant's burden of proof.

EVIDENCE OF THE CASE

CLAIMANT'S TESTIMONY²

Upon direct examination by his attorney, Claimant testified that he is fifty-six years old and that he lives in Fort Lawn, South Carolina. He testified that he completed the ninth grade and that he subsequently obtained a GED. With regards to his employment history, Claimant testified that from 1975 to 1996, he worked for Springs Industries at the Grace Bleachery in Lancaster, South Carolina. He testified that the Grace Bleachery was a plant that finished raw cotton materials. He testified that when he was hired by Springs Industries, he worked as an operator for a short period of time and that he subsequently moved into the Industrial Maintenance and Instrumentation Department, where his job duties required him to maintain and repair machinery throughout the plant. When asked about the conditions and his exposure at the Grace Bleachery, Claimant testified that he was exposed to "a little bit of dust," but not a whole lot of fumes. He further testified that he did not have any breathing problems and that he never failed any of his yearly breathing tests while working at Springs Industries. Claimant

² Claimant testified during the first day of the hearing, March 26, 2013, and his testimony is contained in "Part One" of the hearing transcript.

testified that from 1996 to 1999 he worked at the Georgia Pacific plant in Catawba, South Carolina, where they manufactured hardboard siding and plasterboard. When asked by his attorney if he was exposed to any airborne particles while working for Georgia Pacific, Claimant testified that his only exposure was to the resin that was used in the plasterboard. Claimant testified that when he left Georgia Pacific in 1999, he returned to Springs Industries, where he again worked in the maintenance department until June of 2007.

Claimant testified that he started working for CTR at its Rock Hill plant on July 9, 2007. He testified that CTR manufactured and restored tanks and equipment that were used by hospitals and other companies to hold oxygen and other types of gases. When asked about CTR's plant in Rock Hill, Claimant testified that the facility had several departments but that all of the departments were contained under one roof. He testified that the different departments inside the plant included Bulk Tank, Tanker Restoration, Final Line, the O2 cleaning room, the Electrical Department, the paint booth, and the sandblasting area. Claimant testified that when he was hired by CTR, he worked in Final Line and that he worked in Final Line for approximately a year and a half before being transferred to the electrical department.

When questioned about each department, Claimant testified that Final Line was located in the back right corner of the plant and was where CTR manufactured piping that was used to reduce gas pressure and to deliver gas from the tanks. He testified that Bulk Tank, which was located in the front right side of the plant, was where CTR restored and manufactured large tanks that held three hundred (300) to nine thousand (9000) gallons of gases. He testified that he believed the bulk tanks were made out of aluminum and stainless steel. Claimant further testified that while he did not work in Bulk Tank, it was located near Final Line and that there was only a partial wall that separated the Bulk Tank and Final Line. Claimant testified that Tank Restoration was located in the front left side of the plant and was where CTR restored and repaired large tanker trucks. He testified that an employee's duties in the Tanker Department included grinding and removing truck rear ends, changing tires, cutting and welding

metals to repair sections of the tanks, and installing new brake systems. Claimant testified that the air in the plant flowed throughout Tanker Restoration, Bulk Tank, and Final Line areas because they were not completely sealed off from each other. He further testified that the O2 cleaning room was where the silver soldered copper tubing and other parts were cleaned. He testified that the O2 cleaning room, the Electrical Department, and the paint booth were both completely sealed off from the other areas in the plant.

When questioned about his daily job duties in Final Line, Claimant testified that he cut and soldered pipes together. He testified that the pipes he worked with in Final Line were made of a variety of different metals, including copper, stainless steel, and brass. Claimant testified that the soldering process required him to put flux on the pipes, to heat the pipes with a rosebud torch, and to feed the solder wire around the pipe. He testified that he did not know what components or substances were contained in the solder wire. Claimant testified that when he heated the solder, it would create smoke that he could see rising up to the ceiling. He also testified that he had to cut pipes on a daily basis while working in Final Line and that cutting the pipes created dust.

Additionally, Claimant testified that after he soldered the pipes together, he would take the pipes to an employee in the sandblasting department so that the pipes could be sandblasted. Claimant testified that he would actually have to perform the sandblasting a couple of times per week when the department was backed up with work. He testified that even though the sandblasting was performed in an enclosed cabinet, he would be exposed to the dust when he opened the cabinet to remove the pipes. Claimant further testified that once the pipes had been sandblasted, he would perform an inspection and then deliver the pipes to an employee in the O2 room so that the pipes could be cleaned. He testified that the O2 room would return the pipes to him in a bag after they had been cleaned and that he would then assemble the final product on the tanks aluminum frame racks. Claimant testified that at least two times per week he had to grind and sand some of the aluminum parts in order to make them fit properly and that he inhaled the dust from the aluminum parts during that process.

Claimant testified that there were two work stations in Final Line directly across, and approximately eight to ten feet away, from his work station that used tubing called Monel to build high pressure gas panels. He testified that those employees cut the Monel with band saws, which created dust, and that they used an air hose to blow dust off of the tubing after it had been cut. Claimant testified that the Monel was not a product that was used every day.

While Claimant testified that most of the dust in Final Line was created from the cutting of pipes at each work station, he also testified that sand and dust would be blown into the plant from the outdoor sandblasting area, where the large tanks that would not fit inside the sandblasting cabinets were sandblasted, when the doors to the plant were open. He testified that the tanks that were sandblasted outside were made out of different metals, including aluminum, stainless steel, black steel, and carbon steel and that the outside sandblasters wore respiratory protection. Claimant testified that he believed he inhaled the sand and dust from the outside sandblasting area when it was blown into the plant.

Claimant testified that he never wore any type of respiratory protection while working in Final Line. He also testified that the atmosphere in Final Line was "horrible" during the winter months. When asked by his attorney what ventilation CTR had in the plant during the winter months, Claimant testified "They didn't have none." He alleged that during the winter months, CTR kept the plant doors closed and that there were no fans to ventilate the smoke and dust out of the plant. He testified that the atmosphere was better during the summer months because the doors were open which provided ventilation.

Claimant testified that he did not notice any respiratory problems while working in Final Line. He testified that around December of 2009, he was transferred to the Electrical Department, where he built electrical panels for Final Line. He testified that the Electrical Department was closed off from other areas of the plant but that he was exposed to the conditions in the main part of the plant when he delivered the panels to Final Line. Claimant testified that he worked in the Electrical Department for approximately a year and a half. He testified that his last day of employment with CTR was September

19, 2010.

When asked about his medical treatment, Claimant testified that he first treated with his family physician, that he had complaints of shortness of breath when he initially saw his family physician, and that his family physician ordered chest x-rays. He testified that his chest x-rays showed three spots on his lungs and that he was subsequently referred to Dr. John Doty. Claimant testified that Dr. Doty first examined him on July 22, 2010, and that he did not complain of any pulmonary symptoms to Dr. Doty during his initial visit because he did not know what was exactly wrong with him. He testified that Dr. Doty performed a saline flush, which caused his symptoms to worsen, that Dr. Doty subsequently ordered a biopsy, and that he had to be hospitalized for the biopsy. Claimant testified that he is still treating with Dr. Doty, that he has to wear oxygen all of the time, and that his current medications include Spriva and a hand held inhaler.

On cross-examination, Claimant was asked about the dimensions of CTR's Rock Hill plant, and he testified that while he did not know the exact square footage, it was a "pretty good size," and that he believed the ceiling inside the plant was approximately twenty to twenty-five feet high. When asked about the ventilation inside the plant, Claimant testified he believed the plant had five to six large, garage type roll-up doors and that the doors were wide and tall enough to drive a tractor-trailer through. He admitted that CTR opened these doors throughout the spring, summer, and fall months when it was not raining or extremely cold and that when these doors were open, there were some cross-breezes throughout the plant. Claimant testified that the air in the facility was clear when the doors were open and the wind was blowing. He alleged that the doors remained shut the majority of the time during the winter months, but he admitted that even during the winter months, the doors were opened and closed throughout the day. Claimant testified that he only spent one winter working in Final Line. Claimant specifically testified that there was a large roll-up door next to Final Line and that he could feel a breeze when that door was open.

Claimant testified that on the roof of the plant, there were ceiling and suction fans that ventilated

air and particles outside of the plant; however, he alleged that those fans were located over the Tanker Restoration and Bulk Tank areas and that there was not a suction fan over the work stations in Final Line. He further alleged that even though Tanker Restoration and Bulk Tank had ventilation fans that sucked the air out of the plant, the dust and shavings from those departments still flowed into Final Line. Claimant admitted that there was a fan on the wall of Final Line that was also used for ventilation.

When asked about his previous employment at Springs Industries, Claimant testified that he worked for Springs Industries for approximately thirty years and that during that time, he was exposed to different bleaches, dyes, and dust. Claimant testified that he did not work with aluminum during his employment with Springs Industries, and he testified that if medical reports indicated he worked with aluminum at Springs Industries, then the reports were not accurate. Further, Claimant specifically testified that he did not perform any welding while working at Springs Industries. When asked about Dr. Richard Kradin's report, dated July 27, 2012, which indicated that his job duties at Springs Industries included "extensive welding with rods containing nickel, stainless steel, aluminum, galvanized steel, lead, and cadmium," Claimant testified that Dr. Kradin's report was incorrect. Additionally, when asked about the portion of Dr. Kradin's report that indicated he "participated in firefighting at the [Springs Industries] plant which occurred on a regular basis releasing fumes from the burning chemicals," Claimant admitted that he did do some firefighting during his employment with Springs Industries, but that Dr. Kradin's report was incorrect because he did not participate in firefighting on a "regular basis." Claimant also testified that he was exposed to various resins while working as a mechanic at Georgia-Pacific.

With regards to his employment with CTR, Claimant testified that he worked in Final Line for approximately fifteen months and that he moved from Final Line to the Electrical Department in October of 2008. Claimant testified that a normal workday was eight hours and that he had three breaks during the day: two fifteen minute breaks and a thirty minute unpaid lunch break. Claimant testified that during his fifteen months on Final Line, he silver soldered everyday but that he did not do it all day

long because he spent part of the day cutting tubing and other materials that he needed to build the parts for the tanks. Claimant also admitted that he performed a number of other tasks throughout the day. Claimant testified that he believed the silver solder, the flux, and the other particles he inhaled while working at CTR were the cause of his current respiratory problems.

Claimant testified that on average, he would perform soldering for four hours a day. He testified that when he refers to soldering, he is referring to actually having the torch lit and using the silver solder wire. Even though he testified that he soldered an average of four hours per day, Claimant maintained that Dr. Kradin's report, which stated "he soldered 8 hours a day, 5 days a week," was correct.

When questioned about his specific job duties during a normal day in Final Line, Claimant testified that he would use the torch for a period of time and then he would perform other activities for a period of time. He testified that he was not soldering when he was performing these other activities. With regards to his job duties other than soldering, Claimant testified that he would occasionally have to go to different areas of the plant to get parts that he needed and that when he finished soldering a certain part together, he would have to turn off the torch, blow the parts off, and place the parts in a bucket of water so that the parts could cool. He also testified that he had to take parts to the sandblasting area, that he had to take parts to the O2 room for cleaning, and that he had to assemble parts with hand tools. Again, he specifically testified that he was not soldering while doing these activities. Additionally, Claimant testified that he would have to put labels and stickers on certain components he manufactured and that he was not soldering while applying the labels and stickers. Claimant further testified that when he finished manufacturing a component, he would have to secure the final components to a Unistrut on the tanks and that after he secured the final components to the Unistrut, a Quality Control employee would come to his station and perform a pressure test on the components. He testified that he would stand with the Quality Control employee while the testing was being performed. Claimant specifically testified that he was not perform any soldering while securing the final components to the Unistrut and while waiting on the Quality Control employee to perform the necessary tests.

After being questioned about his specific job duties in Final Line, Claimant testified that he would perform a number of tasks, other than soldering, throughout his workday during the fifteen months he worked in Final Line. He testified that there were times where all of the employees in Final Line were soldering, but that it did not happen all of the time because everyone had different tasks that needed to be performed.

When asked about the occasional sandblasting that he performed, Claimant testified that he would put the parts into a cabinet, which was completely closed while the sandblasting was being performed, and that he would use rubber gloves that were attached to the cabinet to manipulate the part while sandblasting. He testified that the door to the sandblasting cabinet was on the side of the cabinet, that the door was approximately two feet tall by two and a half feet wide, and that when he was standing, the door was slightly above his chest area. Claimant testified that when he opened the side door of the sandblasting cabinet, a lot of dust would just come out of the cabinet.

Claimant testified that he did not have any trouble remembering the events and details of his employment at CTR. Claimant was then asked about the vocational report from Joel Leonard, his vocational expert, which stated that "during the interview, he demonstrated difficulty recalling details and events. He experienced difficulty responding to the specific intent of questions and was prone to providing stories and extraneous information not relevant to my inquiry," and Claimant testified that he thought Mr. Leonard's report was inaccurate on this point.

Claimant testified that while working in Final Line, he never complained about the air quality issues to his supervisor. Claimant testified that after working in Final Line for fifteen months, he started working in the Electrical Department, which was enclosed with its own door, walls, and ceiling. He testified that he did not perform any work in the Electrical Department that produced fumes, dust, or particles. He further testified that the only time any smoke was produced in the Electrical Department was when he had to drill holes in panels and brackets, which he testified "produced a little bit of smoke." When shown his deposition testimony where he testified that there was no work in the

Electrical Department that produced smoke, Claimant admitted that his deposition testimony was incorrect.

Claimant testified that while working in the Electrical Department, the only time he was exposed to the general plant conditions was when he went into the plant to install panels in Final Line. Claimant testified that on average, he spent approximately three hours per day installing panels, but he also testified that there were some days where he did not install any panels.

MICHAEL HORNBACK'S TESTIMONY³

Defendants called Michael Wayne Hornback to testify as a witness in this matter. Mr. Hornback testified that he has worked for CTR for fifteen years and that his current job title is Production Manager. He testified that when he was initially hired by CTR, he worked in Final Line and that he worked in Final Line for approximately five years. He testified that his job in Final Line was the same job Claimant was performing when he started working at CTR. Mr. Hornback testified that when he worked in Final Line, one of his job duties was soldering. When asked about the soldering process, Mr. Hornback testified that soldering is the joining of two metals using silver solder wire. He testified that in order to perform this process, an employee would need to clean the two metals, apply flux, heat the metals with a torch, and then fill in the joint with solder. He testified that when an employee is engaged in the soldering of metals, there is only a "little puff of smoke," which he testified dissipates quickly. He specifically testified that the smoke does not hang in the air and that there is not a visible cloud of smoke. He further testified that solder that is used at CTR is cadmium free, which is an industry standard.

When questioned about Claimant's employment with CTR, Mr. Hornback testified that he hired Claimant and was his supervisor during the time Claimant worked in Final Line. He testified that Claimant did not perform soldering all day and that his job in Final Line required him to perform a

³ Michael Hornback testified during the second day of the hearing, April 23, 2013, and his testimony is contained in "Part Two" of the hearing transcript.

variety of tasks. In fact, Mr. Hornback testified that it was not possible for Claimant to solder eight hours a day, five days a week, because of the number of other tasks Claimant would have to perform during the day. Mr. Hornback specifically testified that Claimant would only spend approximately thirty minutes per day on average with the torch lit and actually soldering metals.

With regards to Claimant's other daily duties, Mr. Hornback testified that Claimant would have to occasionally leave his work station during the day to get parts and to interact with other departments. He also testified that before Claimant could solder the metal, he had to have it blasted with glass beads in order to remove the rough edge and to clean the metal. He testified that Claimant would have occasionally performed some of the bead blasting. When asked about the bead blasting process, Mr. Hornback testified that it is performed in an enclosed case, which has a vacuum system to catch all the dust and the fine particles. He testified that he has performed bead blasting in the past and that when the parts are removed from the enclosed case, there is no exposure to particles or dust because the vacuum system sucks out the majority of it.

Mr. Hornback testified that after Claimant soldered the metals together, he would have to take the part to the O2 cleaning room, where it would be dipped into an acid. He testified that once the O2 cleaning room returned the part to Claimant, he would have to reassemble the piping. Mr. Hornback testified that the piping was normally assembled by hand and that the reassembling process took the majority of Claimant's time. He testified that after the part was reassembled, Claimant would have to get it pressure tested, and once the pressure testing was complete, Claimant would have to label the parts.

When asked about dimensions and layout of CTR's Rock Hill plant, Mr. Hornback testified that the plant was approximately 50,000 square feet and that the ceilings in the plant were approximately forty feet tall at the highest point and twenty-five feet tall at the lowest point. He testified that the departments inside the plant are divided with floor to ceiling walls in some places. With regards to the plant's ventilation, Mr. Hornback testified that the plant has fourteen garage type roll-up doors in the

plant that are large enough for a tractor-trailer to driver through. Mr. Hornback testified that the large, roll-up doors are located on each wall of the plant, and he specifically testified that there are six large, roll-up doors in Final Line. He also testified that there are twenty to thirty fans in the plant. He testified that there are large industrial fans (approximately three foot in diameter) in the plant and that Final Line has two or three of these fans. He also testified that each work station in Final Line has its own smaller, individual fan. Additionally, he testified that the plant had four wall fans and two ceiling fans. He testified that the fans on the walls suck the air out of the building and are turned on year round. He testified that the two ceiling fans are in the central part of the building and that they pull air out of the building. He specifically testified that one of the wall fans was near Final Line of the plant and that it was operable when Claimant was working there. Mr. Hornback testified that the fans occasionally breakdown, but they are repaired within one week.

Mr. Hornback testified that if the temperature is above forty degrees outside, all fourteen of the roll-up doors are kept open for ventilation purposes, which produces a cross-breeze throughout the plant. He further testified that while there are times during the winter months where the fourteen large roll-up doors are shut, the doors are constantly opened and closed in order to bring materials in and take materials out of the plant. He testified that the fans are never turned off during the winter months. Mr. Hornback testified that there is no dust, fumes, or smoke hanging in the air inside of the plant.

Mr. Hornback testified that while there is some welding performed in the plant, it is done in an area that is separated from Final Line by a twenty to twenty-five foot wall, and he testified that there are doors and ventilation fans in the welding area of the plant.

With regards to the layout of Final Line, Mr. Hornback testified that are five work stations: three work stations that perform all of the copper work, one work station on the back wall that performs all of the high pressure brass work, and one work station in the middle of the department that performs more specialized work.

Mr. Hornback also testified that Claimant performed "very little" work with aluminum in Final

Line. He specifically testified that while each of the units that are fabricated in Final Line have some aluminum on them, such as the brackets to secure the unit down at the customer's location, there is very little drilling or sanding of aluminum, and he further testified that certainly the employees in Final Line did not sand, grind, cut, or drill aluminum on a daily basis.

Mr. Hornback testified that following the Claimant's initial fifteen months at CTR, he was transferred to the Electrical Department, where he manufactured electrical components. He testified that the Electrical Department was located in an enclosed room in the plant. He testified that there are not any fumes, dust, or smoke in the Electrical Department and there was no active cutting, soldering, sawing, grinding, or sanding performed in the Electrical Department. He further testified that the only drilling that is performed in the Electrical Department is drilling small holes in the electrical box that the employees assembled. Mr. Hornback testified that when Claimant worked in the Electrical Department, he would have spent approximately six hours out of an eight hour day inside the Electrical Department. He testified that Claimant would come to Final Line periodically to deliver, and to occasionally attach, the electrical components to the fabricated units.

Mr. Hornback testified that during the five years he worked in Final Line, he never experienced any coughing fits. He also testified that he has never had an employee complain to him about the air quality in Final Line or in the plant in general. He specifically testified that Claimant never complained to him about the air quality in the plant and that during the fifteen months that he supervised Claimant in Final Line, he never witnessed Claimant choking up.

During cross-examination by Claimant's attorney, Mr. Hornback testified that Final Line was separated from the area where the welding was being performed by a partial wall that was approximately fifty feet long by twenty five feet tall. He testified that the wall did not extend all the way to the ceiling. He also testified that the wall did not extend all the way to the front of the plant and that there was approximately forty feet from the end of the wall to the front of the building. When asked about the work performed in the welding area, Mr. Hornback testified that the welders fabricated skids and

mounts out of carbon steel and aluminum and that during the fabrication process, the metals would have to be sawed, drilled, cut, occasionally sanded, grounded at times, and welded.

With regards to Claimant's employment in Final Line, Mr. Hornback testified that he was estimating Claimant worked fifteen months in that department and that he may have worked a couple more months in that area of the plant. He testified that he was not aware of Claimant ever using any respiratory protection inside the plant. He also testified that he did not know the exact metals that were contained in the silver solder that CTR uses, but that it was his understanding the silver solder did not contain cadmium since the box it came in said it was cadmium free. When asked about the other materials Claimant used in Final Line, Mr. Hornback testified that Claimant would have used copper tubing, very little stainless steel tubing, and very little brass tubing. He testified that Jason Threatt was the only employee in Final Line that worked with Monel, a type of stainless steel that was used in pure oxygen applications. He further testified that while Mr. Threatt would cut the Monel, any particles created from the cutting would simply drop to the floor.

ROBERT THREATT'S TESTIMONY⁴

Defendants called Robert Jason Threatt to testify. Mr. Threatt, who is currently employed by CTR, testified that he has worked for CTR for fifteen years and that he has worked in Final Line since August of 2007, approximately six years. Mr. Threatt testified that his job in Final Line required him to solder on a regular basis, but he testified he had a number of other duties and tasks that he had to perform during a regular workday, including going to other parts of the plant to get parts, cutting pipes and panels, bending tubing, taking pipes to the O2 room for cleaning, assembling parts by hand, pressure testing parts, bolting components to tank stands, and affixing labels to parts. He testified that on average, he would spend approximately an hour per day actually soldering parts, but that there were times where he would go a day or more without performing any soldering.

⁴ Robert Threatt testified during the second day of the hearing, April 23, 2013, and his testimony is contained in "Part Two" of the hearing transcript.

Mr. Threatt testified that he was familiar with Claimant's job, that the two of them performed similar jobs, and that there was no way possible Claimant could have soldered eight hours a day, five days a week. He further testified that he worked side-by-side Claimant in Final Line, that he witnessed Claimant doing his job, and that he never saw Mr. Dority experience a coughing fit or spitting up things while in Final Line. Mr. Threatt also testified that he has never experienced a coughing fit, that he has never had any complaints about the air quality in the plant, and that he has never talked to anyone that had complaints about the plant's air quality.

Mr. Threatt testified that CTR's plant is a pretty large plant and that there is ventilation to move air in and out of the plant in the form of large, garage type roll-up doors and fans. Mr. Threatt testified that there are fourteen roll-up doors that are large enough to drive a tractor-trailer through. He testified that these doors are left open all the time during the spring and summer months. He further testified that during the fall and winter months, the doors are up and down depending on weather. However, he testified that the doors are never closed for more than an hour or two during the cooler months because they have to be opened constantly to bring equipment and materials in and out of the plant. He specifically testified that there is a large roll-up door in or close to Final Line. Mr. Threatt testified that CTR also has ventilation fans in the ceiling, as well as in the walls, that exhaust air out of the plant. He testified that the wall unit fans are 5 ft. x 5 ft. and that there is a wall unit fan in Final Line that is constantly running. He testified that there are times when the fans in the plant will break down or have motor problems but that the fans are fixed and are not left inoperable for an extended period of time. Finally, Mr. Threatt testified that he has never seen any type of fog or fume cloud hanging inside of the plant.

On cross-examination by Claimant's attorney, Mr. Threatt testified that the plant has floor fans that circulate air around a particular area of the plant. When asked about his job duties, he testified that he does not see any smoke when soldering metals together. He further testified that he would have to cut parts and that occasionally, he would have to drill holes in aluminum panels. He testified that when

he drilled holes in the aluminum panels, he would have to perform some light sanding with a DA, which is a sander for light finish on materials, and that the sanding would create "a little" dust that would drop to the floor. Mr. Threatt further testified that he occasionally worked with Monel, that he would have to bend, cut, and solder the Monel, and that when he worked with Monel, Claimant would be approximately fifteen to twenty feet away from him. He testified that he only worked with Monel about four times per year.

DEPOSITION TESTIMONY OF CHARLIE GLENN

Claimant submitted the deposition transcript of Charlie Glenn, dated October 29, 2012, into evidence. During direct examination by Claimant's attorney, Mr. Glenn testified that he was a high school graduate, that he took some college courses, but that he did not complete his college degree. He testified that he was hired by CTR in February of 2007 and that prior to working for CTR he spent 15 years working as a project manager in telecommunications.

With regards to his employment with CTR, Mr. Glenn testified that he was initially hired as Project Manager in CTR's I.T. Department. He testified that his job duties as Project Manager included maintaining and upgrading software on CTR's automatic fill systems and ensuring that the tanks and vessels were filled with the appropriate mixture of gases. He testified that he worked as Project Manager for approximately three years before being promoted to CTR's I.T. Director, and he testified that his job duties as I.T. Director were similar to his duties as Project Manager. He testified that in the Spring of 2011, he was promoted to Director of Quality Control and Safety ("Safety Director"), a position he held until he was laid off by CTR in November of 2011. He testified that his job duties as Safety Director required him to ensure the tanks in Final Line were inspected, pressure tested, and safe to ship to the customers. He further testified that CTR gave him a "crash course" in workplace safety and that he was responsible for employee safety, including hard hats, safety shoes, safety harnesses, and step ladders.

When asked about the details of CTR's plant in Rock Hill, Mr. Glenn testified that the facility

was approximately 30,000 square feet, that it was mainly one large open space, and that it had a number of doors that raised in order for tractor trailers to enter the plant. He further testified that the Final Line area of the plant contained five tables and that soldering was performed at each of the tables. He specifically testified that employees at three of the tables spent most of the day using silver solder and soldering copper tubing and stainless steel tubing. Mr. Glenn testified that he observed the soldering work performed in Final Line on a daily basis and that smoke was produced whenever soldering was being performed in Final Line. He further testified that the employees in Final Line would occasionally grind excess solder off of pipes and that the grinding process created a lot of dust. He testified that the dust and smoke was not limited to Final Line and that there was dust and smoke throughout the plant.

Mr. Glenn also testified that he believed the ventilation in the plant was inadequate and that the amount of dust and smoke in the plant depended on the time of year. He specifically testified that the plant had six large overhead doors, that there was one large door close to Final Line, but that the other doors were "a pretty good distance away" from Final Line. He testified that these doors that would be raised during the spring, summer, and fall months but that they would be closed the majority of the time during the winter months (which he defined as November – February). In addition to the large doors, Mr. Glenn testified that there were also three large fans on the walls of the plant, as well as two ceiling fans, that took air out of the plant. With regards to the ceiling fans, he testified that one of them did not work and the other one was very slow. He also testified that one of the three wall fans was inoperable. Mr. Glenn testified that during his time as CTR's Safety Director, he received three or four complaints about the smoke and fumes in the plant. He further testified that CTR never performed any air quality testing during his employment.

Mr. Glenn further testified that he was familiar with Claimant and that Claimant worked as a Brazer in Final Line when he started with CTR. While he testified that he was not familiar with Claimant's job description, Mr. Glenn testified that Claimant performed soldering, grinding, and assembling all day long in Final Line. Mr. Glenn testified that was sure he had seen Claimant having a

coughing spell while working in Final Line but that he did not remember him having "a bad spell." He further testified that he would have coughing spells himself and that there were times when he would have to go outside because the smoke in the plant would irritate his eyes. Mr. Glenn testified that Claimant worked in Final Line for a period of time before being transferred to CTR's Electrical Department, where he assembled control panels with relays, switches, and timers for Final Line. He testified that once Claimant assembled the control panel, he would have to go out into the main part of the plant to install and test the control panels.

During cross-examination by defense counsel, Mr. Glenn testified that he had never been employed as an environmental or safety director prior to working for CTR. He further testified that he does not have a college degree in any environmental science or safety related field and that the extent of his formal safety training was one course taken at a community college in 1981. Mr. Glenn testified that he was offering his testimony in this claim as lay testimony and that he is "definitely not an expert by no means."

With regards to Claimant's job as a Brazier, Mr. Glenn testified that Claimant soldered parts each day, but that he spent a significant portion of his day performing other activities, including chasing parts throughout the plant, taking parts to the cleaning room, assembling parts by hand, screwing fittings together, reviewing drawings, cooling soldered parts off in water, testing components, sandblasting parts, blowing parts down, securing parts to tanks, and labeling parts. He specifically testified that Claimant was not actively soldering for eight hours per day.

As to the ventilation conditions, Mr. Glenn testified that there were no ventilation problems during the majority of the year and that the air and the facility was essentially clear during the spring, summer, and fall months since the large doors were left open. He also testified that the doors were raised during the winter months when the temperature was warmer. Finally, Mr. Glenn testified that to his knowledge, CTR had not been cited for any OSHA violations.

MEDICAL RECORDS

On June 29, 2010, Dr. Frank Sharp, Claimant's primary care physician, referred Claimant to Lancaster Imaging Center for a CT scan of his abdomen due to complaints of abdominal pain. The CT of his abdomen showed "Extensive bibasilar interstitial thickening or infiltrates, minimal bilateral posterior lateral pleural thickening, and tiny right pleural effusion," and a chest CT was recommended for further evaluation. (Claimant's APA #6). A CT of Claimant's chest, dated July 6, 2010, revealed "pathologic intrathoracic lymphadenopathy and bilateral subcentimeter noncalcified pulmonary nodules," as well as "extensive coronary artery calcifications." (Claimant's APA #7).

Due to the abnormal findings in Claimant's chest CT, Dr. Sharp referred Claimant to Dr. John D. Doty, of Charlotte Medical Clinic for a pulmonary consultation. In his initial report, dated July 22, 2010, Dr. Doty noted that Claimant developed left upper abdominal pain approximately one month ago, that he was eventually diagnosed with diverticulitis, and that his pain subsequently subsided following a course of antibiotics. While Claimant's recent CT scan of the chest was abnormal, Dr. Doty noted that Claimant was essentially asymptomatic from a pulmonary standpoint. Claimant denied having any dyspnea with his usual activities of daily living or with his occupation, and he also denied any wheezing. Dr. Doty noted that while Claimant complained of an occasional cough, he indicated that his cough had been decreasing in both frequency and productivity since he stopped smoking a week earlier. Dr. Doty further noted that Claimant had a 60-pack-year smoking history, that he was currently working in maintenance on electronic instruments at a local company, and that he previously worked approximately 35 years in the maintenance department at Springs Manufacturing, where he was exposed to dye, cotton dust, and some asbestos. Dr. Doty performed pulmonary function tests, which showed mild airflow obstruction with a significant reduction in his defusing capacity. Dr. Doty diagnosed Claimant with evidence of COPD based on his spirometric findings and an abnormal CT scan of the chest. While Dr. Doty did not have actual image of the CT scan of the chest, he noted that the differential diagnosis could include idiopathic pulmonary fibrosis ("IPF"), asbestosis, or a hypersensitivity reaction to an occupational or environmental exposure. Dr. Doty referred Claimant for some lab work, including a

hypersensitivity panel, and he also opined that Claimant would likely need a bronchoscopy and possible biopsy of the lungs. (Claimant's APA #8).

On September 14, 2010, Dr. Mark K. Reames of Sanger Heart & Vascular Institute examined Claimant and noted that Claimant had findings of interstitial lung disease of unknown etiology on his chest CT scan and that he recently underwent a bronchoscopy, which was negative. Dr. Reames also noted that Claimant had a 60-pack-year history of tobacco abuse, as well as known diagnoses of dyslipidemia, questionable obstructive sleep apnea, obesity, and COPD. Following his examination, Dr. Reames recommended a thoracoscopic lung biopsy in an attempt to determine a definitive diagnosis. (Claimant's APA #11; *See also* Claimant's APA #8).

On September 23, 2010, Claimant was admitted to Carolinas Medical Center in Charlotte, North Carolina, where he underwent a right-sided video-assisted thoracoscopic surgery with wedge biopsies of the upper, middle, and lower lobes, as well as an intercostal nerve block. (Claimant's APA #12). On October 4, 2010, Dr. Kiran Adlakha of Carolinas Laboratory Network issued a surgical pathology report from Claimant's lung biopsy and noted that the biopsy revealed showed emphysema with diffuse septal thickening, patchy aggregates of pigmented anthracotic macrophages with rare silicate particles, bronchiolar metaplasia with some honeycomb features, patchy chronic inflammation with lymphoid aggregate, and pulmonary hypertension. Dr. Adlakha opined that "Overall features are those of chronic fibrosing interstitial pneumonia in the back ground of emphysema and is likely going to behave as UIP." (Claimant's APA #13). Following his lung biopsy, Claimant was discharged from Carolinas Medical Center on October 4, 2010, and the discharge note indicates that Claimant was diagnosed with interstitial lung disease of unknown etiology, dyslipidemia, questionable obstructive sleep apnea, obesity, COPD, and diverticular disease. Claimant was instructed to use oxygen at home and to follow-up with Dr. Reames. (Claimant's APA #14).

Following his open lung biopsy, Claimant returned to Dr. Doty on November 2, 2010 with complaints of periodic, significant dyspnea, particularly with exertion. He also reported that he had

been on home oxygen since being released from the hospital and that he continues to use oxygen at two liters continuously. Dr. Doty noted that the pathology results from Claimant's lung biopsy were most likely consistent with Usual Interstitial Pneumonitis ("UIP"), and following his examination, Dr. Doty diagnosed Claimant with interstitial lung disease, chronic hypoxemia, and evidence of obstructive lung disease. Dr. Doty specifically noted that the likeliest etiology of Claimant's interstitial lung disease appeared to be UIP since his extensive workup for secondary causes was negative. Dr. Doty instructed Claimant to continue his home oxygen, and he opined that Claimant was unable to return to work. (Claimant's APA #8).

On December 10, 2010, Claimant returned to Dr. Doty and reported that his breathing was fairly stable, but that he becomes dyspneic with modest exertion. Claimant also reported that he had experienced very little cough and no wheezing. Dr. Doty performed repeat pulmonary function tests, which he noted was stable. Following his examination, Dr. Doty diagnosed Claimant with interstitial lung disease, and he again noted that the most likely diagnosis was UIP since the extensive workup for secondary causes of his lung disease that was negative. He instructed Claimant to continue using home oxygen, and he recommended another CT scan of the chest. Dr. Doty also noted that Claimant was complaining of a great deal of stress due to his financial situation, and he diagnosed Claimant with anxiety and prescribed Xanax. (Claimant's APA #8).

On February 2, 2011, Dr. Doty examined Claimant, again diagnosed him with interstitial lung disease, and instructed him to continue using his home oxygen. On May 23, 2011, Dr. Doty noted that Claimant was doing reasonably well, but that he continued to have some complaints of shortness of breath with exertion. Claimant denied having a chronic cough, any wheezing, or chest pain. Dr. Doty diagnosed Claimant with interstitial lung disease and chronic respiratory failure, and he recommended ongoing conservative management, including continued use of home oxygen. (Claimant's APA #8).

On August 31, 2011, Claimant returned to Dr. Doty for a follow-up appointment. Dr. Doty noted that Claimant was using 2 to 3 liters of oxygen continuously and that he complained of increased

shortness of breath with exertion during the summer when both the temperature and humidity were high. Claimant underwent repeat pulmonary function tests and another CT of the chest on August 31, 2011, and Dr. Doty noted that both appeared to be stable. Dr. Doty diagnosed Claimant with interstitial lung disease, chronic respiratory failure, and mild obstructive airways disease, and he instructed Claimant to continue using home oxygen. (Claimant's APA #8).

On March 1, 2012, Dr. Doty noted that Claimant had obtained a new primary care physician, who encouraged him to enroll in pulmonary rehabilitation, but that he discontinued pulmonary rehabilitation after his first session because he caught a cold and was afraid of getting sick again. Following his examination, Dr. Doty diagnosed Claimant with interstitial lung disease. While Dr. Doty opined that Claimant's pathology was most consistent with UIP, he further opined that his clinical course seemed to be a bit more benign than would be expected with UIP secondary to IPF and that it raised the question as to whether his lung disease may have been secondary to some sort of occupational exposure. (Claimant's APA #8).

In a letter to Claimant's attorney, dated July 27, 2012, Dr. Richard L. Kradin⁵ of Harvard Medical School issued an opinion regarding causation of Claimant's lung disease. Dr. Kradin performed a records review and noted Claimant's occupational history. Dr. Kradin noted that from 1978 to 1996, Claimant worked as a Maintenance Mechanic for Springs Industries. He noted that Claimant's job duties at Springs Industries included "extensive welding with rods containing nickel, stainless, steel, aluminum, galvanized steel, lead, and cadmium" and "firefighting at the plant which occurred on a regular basis releasing fumes from the burning chemicals." With regards to his employment at CTR, Dr. Kradin noted that Claimant spent 18 months "soldering copper, brass, and stainless steel pipe and tubing," and he specifically noted that "he soldered 8 hours a day, 5 days a week." Additionally, Dr. Kradin noted that "there was minimal venting" in CTR's plant and that "fumes and dust were moved

⁵ Dr. Kradin's Curriculum Vitae was also submitted into evidence. (See Claimant's APA #5).

around the plant by fans.” After reviewing the medical records, the MSD Sheet for Wolverine Silvaloy, and the stained slides from Claimant’s lung biopsy, Dr. Kradin opined that “Mr. Dority’s occupational exposures to heavy metals, including the components of silver brazing allow, must be considered to a reasonable degree of medical probability causes of his chronic lung disease.” (Claimant’s APA #4).

On August 1, 2012, Dr. Doty noted that although he continued to complain of shortness of breath with exertion, Claimant was doing reasonably well from a pulmonary standpoint. Claimant reported that he always used oxygen with exertion and at night and that he would sometimes use oxygen during the day if it was especially hot or humid. Dr. Doty also noted that Claimant was losing his health insurance in October and that he was not eligible for any additional coverage at the present time. Again, Dr. Doty diagnosed Claimant with interstitial lung disease and instructed him to continue using his previously prescribed medications and oxygen. Dr. Doty noted that while Claimant’s pathology was most consistent with UIP, it was entirely consistent with what would be expected with UIP secondary to IPF since Claimant seemed a bit young to have IPF and since he had shown very little, if any, progression of his disease during the two and a half years he had treated him. (Claimant’s APA #8).

On September 14, 2012, Joel D. Leonard⁶ of Leonard & Associates Vocational and Rehabilitation Consultants, performed a vocational evaluation on Claimant at the request of his attorney. In his report, dated September 19, 2012, Mr. Leonard noted that “During the interview, [Claimant] demonstrated difficulty recalling details and events. He experienced difficulty responding to the specific intent of questions and was prone to providing stories and extraneous information not relevant to my inquiry.” Mr. Leonard also noted that Claimant used a portable oxygen unit throughout the interview and that he “was observed to become emotional and irritable at different times during the interview.” Following his interview of Claimant, Mr. Leonard opined that “Regardless of any other factor that accents his overall vocational profile, it is abundantly clear that Mr. Dority’s ability to access the open labor market and

⁶ Mr. Leonard’s Curriculum Vitae was submitted into evidence. (See Claimant’s APA #24).

engage in competitive employment is completely eroded by the nature of his pulmonary health. As such, I maintain the previously stated opinion that Mr. Dority is totally disabled.” Mr. Leonard also opined that Claimant should pursue both a psychological and neuropsychological evaluation to assess the nature of his emotional and cognitive standing since he presented with symptoms that suggested possible problems in both areas. (Claimant’s APA #23).

In a letter to Claimant’s attorney, dated January 15, 2013, Dr. Jerrold L. Abraham⁷ of Upstate Medical University in Syracuse, New York issued an opinion regarding causation of Claimant’s lung disease. Dr. Abraham performed a records review. He noted that Claimant’s occupational exposure at CTR included soldering copper, stainless steel, and brass tubing with silver solder. He further noted that Claimant’s job duties at CTR required him to grind completed welds, to sandblast parts on a regular basis, and to drill holes in and sand sheets of aluminum. Dr. Abraham also analyzed tissue samples from Claimant’s September 23, 2010 lung biopsy, and he noted that he found particulates from various metals in Claimant’s tissue samples. Dr. Abraham opined that based on the particulates he found in Claimant’s lung and based on Claimant’s exposure history, “his exposures to a multitude of different toxic dust particulates over his working career and including his exposures at CTR contributed to the development of his lung disease (pulmonary fibrosis).” (Claimant’s APA #1). Dr. Abraham also prepared a Power Point presentation, dated March 11, 2013, regarding his studies of Claimant’s tissue samples. (Claimant’s APA #36).

On September 20, 2012, Claimant was examined by Dr. Gregory J. Feldman⁸ of Upstate Lung & Critical Care Specialists. In his report, dated September 21, 2012, Dr. Feldman noted that Claimant complained of significant breathlessness, that he reported his shortness of breath had dramatically worsened since his lung biopsy in 2010, and that during the past several months, Claimant had required supplemental oxygen. After examining Claimant and reviewing his prior medical records, Dr. Feldman

⁷ Dr. Abraham’s Curriculum Vitae was also submitted into evidence. (See Claimant’s APA #2).

⁸ Dr. Feldman’s Curriculum Vitae was also submitted into evidence. (See Defendants’ APA #40).

diagnosed Claimant with IPF and COPD, and he opined to a reasonable degree of medical certainty that “Mr. Dority’s clinical course is consistent with IPF and is, in fact, classic for IPF with pathological findings of UIP confirming diagnosis.” Dr. Feldman specifically noted that Claimant “exhibits all of the cardinal features of IPF,” including “progressive dyspnea, bilateral interstitial fibrosis, with honeycombing on CT scan of the chest, and UIP pattern on histology,” and he also noted that the findings of mediastinal and hilar adenopathy on Claimant’s CT scan of the chest were commonly associated with advanced IPF. Dr. Feldman further noted that IPF is much more common in current or former smokers and that Claimant was a very heavy smoker with a documented history of sixty pack/year cigarette smoking. Finally, Dr. Feldman stated that “It is impossible to opine whether any of the numerous environmental exposures that Mr. Dority experienced over more than 30 years played a role, if any, in addition to smoking cigarettes in a genetic predisposition.” (Defendants’ APA #39).

In a letter to Defendants’ attorney, dated February 1, 2013, Dr. Victor L. Roggli⁹ of Duke University Medical Center’s Department of Pathology indicated that he performed studies on the slides and paraffin blocks from Claimant’s lung biopsy. Dr. Roggli noted that the slides and paraffin blocks “show diffuse pulmonary fibrosis with spatial and temporal heterogeneity, fibroblast foci, and vascular remodeling,” that there were “areas of chronic inflammation,” and that “some areas have a ‘chicken wire’ pattern of fibrosis reminiscent of non-specific interstitial pneumonia.” He further noted that other findings included “centrilobular emphysema and small airways disease with mucous plugging.” Dr. Roggli specifically opined that the findings did not satisfy the histological criteria for asbestosis and did not demonstrate features of any recognized pneumoconiosis. Dr. Roggli opined that “the most appropriate diagnosis is usual interstitial pneumonia (idiopathic pulmonary fibrosis) with some discordant features.” Dr. Roggli noted that there were some findings of aluminum silica particles but that this was a well recognized occurrence in cigarette smokers and that silica particles may be found in the lungs of most

⁹ Dr. Roggli’s Curriculum Vitae was also submitted into evidence. (See Defendants’ APA #38).

individuals from the general population. (Defendants' APA #37).

On February 27, 2013, Dr. Roggli issued a second letter to Defendants' Counsel and indicated that he reviewed Dr. Jerrold L. Abraham's report, dated January 15, 2013. With regard to the findings of aluminum silicates in Dr. Abraham's laboratory, Dr. Roggli again opined that aluminum silicates are found in smokers, that silica is also commonly found in lung samples in the general population, and that it also occurs in cigarette smoke. While he noted that Dr. Abraham's laboratory also identified a variety of metal particles, Dr. Roggli opined that this case does not meet the criteria for any of the metal induced lung diseases that have been described and that "there is no convincing evidence that any of the metal particles described by Dr. Abraham cause a usual interstitial pneumonia pattern." For these reasons, Dr. Roggli opined that Dr. Abraham's opinion that Claimant's lung disease was due to "exposure of a multitude of different toxic dust particulates over his working career and including his exposures at CTR" was sheer speculation and not supported by scientific evidence. In conclusion, Dr. Roggli opined to a reasonable degree of medical certainty that Claimant's case does not fit the pattern of any recognized pneumoconiosis and that "it is unlikely that exposure to the types of particulates Dr. Abraham found, including any that may have derived from his time at CTR, would have caused or contributed to the observed pattern of interstitial lung disease [in Claimant]." (Defendants' APA #37).

DEPOSITION TESTIMONY OF JOHN D. DOTY, II, M.D.

Dr. John D. Doty, was deposed in this matter on October 3, 2012, and the transcript of his deposition testimony was submitted into evidence.¹⁰ Dr. Doty testified that he is board certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine and that he has been practicing Pulmonary Medicine for eight years.

Dr. Doty testified that Usual Interstitial Pneumonitis ("UIP") a pathological description seen on lung biopsies that is associated with areas of the lung with lots of fibrosis next to areas of the lung that are completely normal, and he testified that UIP is often used synonymously with Idiopathic Pulmonary

¹⁰ The deposition of Dr. Doty lasted 2 hours and 15 minutes.

Fibrosis ("IPF"). He testified that patients with IPF usually present with non-specific breathlessness, have some physical exam findings, and have an oxygen requirement most of the time. He specifically testified that the cause of IPF is unknown. Dr. Doty testified that hypersensitivity pneumonitis is a lung disease caused by the inhalation of organic particles and that pneumoconiosis is a lung disease caused by the inhalation of non-organic particles, such as fumes, asbestos, or dust from metals. Dr. Doty further testified that there are a lot of conditions, including pneumoconiosis, that will give a UIP appearance on lung biopsies. He testified that the clinical course of a patient that had UIP as a result of end-stage pneumoconiosis would be hard to predict but that he would expect the patient's clinical course to stabilize if removed from the environment that is resulting in the exposure.

With regards to his treatment of Claimant, Dr. Doty testified that he initially examined Claimant in July of 2010, and that Claimant was referred to him by Dr. Sharp, his primary physician, due to an abnormal CT of the chest. Dr. Doty testified that the abnormalities in Claimant's initial CT scan included some emphysematous changes with interstitial fibrosis and wide-spread honeycombing. He testified that during his initial evaluation, Claimant reported that he was working in maintenance on electronic instruments at a local plant and that he previously worked at Springs Industries, where he was exposed to several different dyes, cotton dust, and asbestos. He further testified Claimant reported that he had a 60 pack years smoking history (2 packs/day x 30 years) but that he had stopped smoking a week prior to his initial appointment. Dr. Doty testified that Claimant underwent a bronchoscopy in August of 2010 and that in September of 2010, he was admitted to the hospital, where Dr. Mark Reames performed a lung biopsy. Dr. Doty testified that based on the biopsy results, and based on the negative hypersensitivity panel that was previously performed, he was initially leaning towards a diagnosis of IPF.

Dr. Doty testified that he continued to treat Claimant and that he has examined him seven times since following his lung biopsy, with his most recent examination occurring on August 1, 2012. He testified that while Claimant has had an oxygen requirement since being released from the hospital

following his biopsy, his condition has not progressed that much in the past two years. Dr. Doty testified that Claimant's condition has not behaved as he would expect in a case of IPF and that due to the lack of progression in Claimant's condition, he suspects Claimant may suffer from something else. While he testified that "at the end of the day it's very hard to predict exactly what causes UIP," Dr. Doty testified that he believed Claimant's clinical course was more consistent with a benign pneumoconiosis as opposed to IPF. Furthermore, Dr. Doty testified that Claimant suffers from smoking-related lung disease based on his pulmonary function tests and the emphysematous change in his pathology report but that he believes the interstitial fibrosis is playing a bigger role in his current condition.

Dr. Doty testified that he believed Claimant was totally disabled based on his current lung condition and oxygen requirement. He further testified that he reviewed Dr. Richard Kradin's report, and when asked if there was anything in Dr. Kradin's report that he found to be of importance, Dr. Doty testified:

It was educational to me because, again, I do not have expertise in occupational lung disease, so hearing his description of some of the pathologic changes that he saw being consistent with inhalational injury was educational to me; I mean, that's the first time I heard that.

Upon examination by Defendants' attorney, Dr. Doty again testified that he does not have any particular expertise in occupational lung disorders, and he testified that he does not specialize in pneumoconiosis. When asked what his current diagnosis of Claimant's condition was, Dr. Doty testified that he would code him as having Interstitial Lung Disease. However, he testified that there are several different types of Interstitial Lung Disease (including IPF, non-specific interstitial pneumonitis, sarcoidosis, and hypersensitivity pneumonitis) and that he cannot determine what type Claimant has at this time.

Dr. Doty testified that IPF is due to unknown causes and that both Dr. Reames (the thoracic surgeon that performed Claimant lung biopsy) and the pathologist that interpreted the biopsy believed Claimant suffered from IPF. Dr. Doty testified that while Claimant's clinical course has not been the

usual for a patient with IPF since his condition has not progressed fairly quickly, he has seen and treated patients who suffer from IPF and who have remained stable and followed the same course as Claimant. When asked about his knowledge of Claimant's alleged occupational exposure at CTR, Dr. Doty testified that he was not aware of the ventilation or exposure levels inside of the plant. He further testified that he does not know exactly what Claimant has been exposed to over his work history. After reviewing the Industrial Hygiene report prepared by Betty Harris, Dr. Doty testified that according to the report, the exposure levels at CTR were below OSHA standards. He testified that it takes a number of years for fibrosis to develop in a person's lungs and that it usually takes a person more than two or three years to develop an occupational lung disease.

At the conclusion of his deposition, Dr. Doty testified that to a reasonable degree of medical certainty he cannot rule out IPF as Claimant's diagnosis and that Claimant's job with CTR "could have" contributed to his current lung disease:

Q: [Mr. Griggs] To a reasonable degree of medical certainty, we cannot rule out IPF, Idiopathic Pulmonary Fibrosis, correct?

A: It's still on the list, yes.

...

Q: [Mr. Eddy] I just need to make sure that I understand what you mean by that. Would you agree that the work at CTR contributed to his lung disease?

A: [Dr. Doty] Could have contributed, yes.

Q: Assuming that he worked with the silver sauder and was exposed to the dust and fumes for a year and a half directly using the silver sauder, and then for a year and a half just coming into that site, would you, to a reasonable degree of medical certainty, believe that that would have contributed to his lung disease?

A: Yes.

Q: Okay. Thank you.

Q: [Mr. Griggs] Could have contributed or did?

[Mr. Eddy] Object to form.

[Mr. Griggs] Answer the question.

A: [Dr. Doty] I'll go with could have contributed.

(Depo. at 87:10-13 & 87:21 – 88:16.)

DEPOSITION TESTIMONY OF GREGORY FELDMAN, M.D.

The deposition transcript of Dr. Gregory Feldman, dated October 4, 2012, was submitted into evidence. Upon examination by Claimant's attorney, Dr. Feldman testified that he examined Claimant on September 20, 2012, that he reviewed a number of records prior to his examination of Claimant, including the pathology report of Dr. Kradin, and that Claimant provided him with a history regarding his work at CTR and the conditions inside CTR's plant. Dr. Feldman testified fibrosis in the lungs takes decades to develop and that it does not develop over a five to six year period. He further testified that because of the length of time it takes for fibrosis to develop in the lungs, the most important factor in determining whether Claimant's condition was related to an occupational exposure would be what happened to him while working at Springs Industries twenty to thirty years ago.

Dr. Feldman testified that he disagreed with Dr. Kradin's opinion that Claimant's pathological changes were due in part to his occupational exposures. He further testified that Dr. Kradin's opinion was pure speculation and that Dr. Kradin did not identify any features of pneumoconiosis. Dr. Feldman testified that Dr. Kradin is a pathologist, and not a clinician, and that pneumoconiosis is not a pathological diagnosis unless it is seen on a pathology slide. Dr. Feldman testified that the concentration levels of metals Claimant was exposed to (silver, tin, zinc, cadmium, etc.) during his employment would be important if the pathologist would have noted particulate matter in his lungs; however, he testified the pathologist in the present case did not describe any of these materials.

Dr. Feldman testified that Claimant has Usual Interstitial Pneumonitis ("UIP"), which is a pathological description of the findings in his lungs. He testified that there are a number of causes of UIP. He further testified that he does not believe Claimant suffers from pneumoconiosis. He also testified that he cannot state to a reasonable degree of medical certainty that Claimant's UIP has been caused by his alleged occupational exposure.

Dr. Feldman specifically testified that he believes Claimant has IPF, that he has the classic features for IPF, and that, by definition, the causes of IPF are unknown. Dr. Feldman testified that patients with

IPF usually have a “falling off the cliff” event and their lungs never recover. He also testified that after a “falling off the cliff” event, patients can stabilize for a period of time before falling again. With regards to Claimant, Dr. Feldman testified that based on the history Claimant provided, his “falling off the cliff” event was his lung biopsy in 2010. He further testified that Claimant’s clinical course since his biopsy has been consistent with IPF, that he most likely not going to improve, and that he has hit flat-lined until he has his next “fall.”

Following Dr. Feldman’s deposition, Claimant’s attorney wrote a letter to Dr. Feldman, dated February 19, 2013, requesting that he review the findings in Dr. Abraham’s report dated, January 15, 2013, and that he issue an opinion regarding any role Claimant’s employment at CTR may have played in causing his lung disease. On March 5, 2013, Dr. Feldman forwarded the correspondence he received from Claimant’s attorney to Defendants’ attorney, and he asked Defendants’ attorney which party should be invoiced. In an email dated March 5, 2013, Defendants’ attorney informed Dr. Feldman that he could respond to the request of Claimant’s attorney if he so desired, but that any invoice or bill for such response should be forwarded to Claimant’s attorney. On March 6, 2013, Claimant’s attorney emailed Dr. Feldman and instructed him to disregard his prior request. (*See Defendants’ APA #43*).

OTHER EVIDENCE

Claimant submitted CTR’s Site Operation Safety Manual, dated October 5, 2005, into evidence. This manual outlines CTR’s policies and procedures, including CTR’s policies regarding personal protective equipment and safe work procedures. (*See Claimant’s Exhibit #1*).

The Material Safety Data Sheets for Brazeit-A-56T, Silvaloy A-56-T, Safety-Silv 56, Silverbraz56, and Monel were submitted into evidence by Claimant’s attorney. (*See Claimant’s APAs #18-22*).

On April 23, 2012, Applied Technical Services, Inc., performed a test on “Silver Solder” that was “similar to AWS Classification BAg-7” to determine its composition. The Silver Solder was “analyzed by ICP atomic emissions techniques.” The test results indicated that the silver solder was comprised of 54.6% silver, 22.4% copper, 19.0% zinc, 4.0% tin, and 27 parts per million of cadmium. (Claimant’s APA

#17).

Email correspondence between Claimant's attorney and Defendants' attorney, dated September 5, 2012 and September 11, 2012, regarding Claimant's subpoena to CTR were submitted into evidence by Claimant. On September 11, 2012, Defendants' attorney advised Claimant's attorney that he was unaware of any air sampling/monitoring done at CTR's plant, that CTR did not have any "Employee Exposure Records," and that the only "Written Hazard Communication Program" CTR had was the Material Safety Data Sheets that were previously provided. (Claimant's APA #27).

On September 13, 2012, Betty S. Harris, MPH, CIH, CHMM, CMC¹¹ of Bureau Veritas North America, performed an Industrial Hygiene Assessment at CTR's plant in Rock Hill, South Carolina. In her report dated October 2, 2012, Ms. Harris noted that the sampling was performed on a day that was reported be representative of normal working conditions. Ms. Harris further noted that the results of her testing revealed that the measured concentrations of the selected metals (i.e., cadmium, copper, silver, tin, and zinc) in CTR's plant were less than their respective Occupational Safety and Health Administration ("OSHA") Permissible Exposure Limits and less than their respective Threshold Limit Values guidelines recommended by the American Conference of Governmental Industrial Hygienists ("ACGIH"). Additionally, on October 15, 2012, Ms. Harris prepared an addendum to her initial report, and she specifically noted that the employee engaged in brazing on the day of the survey had exposure "well below both the OSHA PEL and 2012 ACGIH TLV for fluorides and total particulate." She further opined that "Results of this industrial hygiene assessment indicate current work practices and procedures are adequate to control employee exposures to the monitored air contaminants below regulatory limits and recommended guidelines" and that "No recommendations to modify existing work practices or procedures are deemed necessary at this time." (Defendants' APA #41).

A record such as was necessary for a decision was made of the proceeding and after careful

¹¹ Betty S. Harris's Curriculum Vitae was also submitted into evidence. (See Defendants' APA #38).

consideration and study of all the evidence, the following Findings of Fact are accordingly made.¹²

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Michael W. Dority as Employee-Claimant and CTR of the Carolinas as Employer and Twin City Fire Insurance Company as Carrier, Defendants.

2. That Claimant alleges he sustained a compensable occupational disease to his lungs (severe end stage lung disease) as the result of exposure to inorganic particles, including a variety of dusts and fumes, while working for CTR. This is a denied claim.

3. That Claimant's average weekly wage was \$668.81, and his compensation rate was \$445.90. This finding is based on the stipulation of the parties.

4. That Claimant is fifty-six years old years old (DOB: 10/10/1956). This finding is based on Claimant's testimony.

5. That Claimant completed the ninth grade, and he subsequently obtained a GED. This finding is based on Claimant's testimony.

6. That Claimant was a heavy smoker, and he smoked two packs of cigarettes per day for thirty years (equating to a sixty pack-year smoking history). It was not until Dr. Sharp, his primary care physician, referred him to Dr. Doty for a pulmonary consultation in July of 2010 that Claimant decided to quit smoking cigarettes. This finding is supported by the evidence in the record as a whole, including but not limited to, Claimant's testimony, the medical reports, and the deposition testimony of Dr. Doty.

7. That prior to his employment with CTR, Claimant worked for Springs Industries for approximately thirty years at the Grace Bleachery, a plant that finished raw cotton materials. Claimant

¹² The undersigned's Order Directives were sent to the parties via email on May 30, 2013.

was initially hired by Springs Industries to be an operator, but after a short period of time, he was moved into plant's maintenance department, where he worked as a maintenance mechanic. His job duties as a maintenance mechanic required him to maintain and repair machinery throughout the plant. He also performed some firefighting during his employment with Springs Industries. Claimant's last date of employment with Springs Industries was in June of 2007. This finding is based on Claimant's testimony.

8. That while working for Springs Industries at the Grace Bleachery, Claimant was exposed to a number of different bleaches, dyes, and dust. Additionally, he was also exposed to fumes from burning chemicals. This finding is supported by Claimant's testimony.

9. That Claimant's work history also includes working as a mechanic at the Georgia Pacific plant in Catawba, South Carolina for approximately four years. While working as a mechanic at Georgia-Pacific, Claimant was exposed to various resins that were used in the manufacturing of the plasterboard. This finding is based on Claimant's testimony.

10. That Claimant started working for CTR at its plant in Rock Hill, South Carolina on July 9, 2007. During the first fifteen to eighteen months of his employment with CTR, Claimant worked in Final Line, where he manufactured parts and components that were used to reduce gas pressure and to deliver gas from the tanks. In late 2009, Claimant was transferred to the Electrical Department, where he manufactured electrical components for tanks. Claimant worked in the Electrical Department until his employment with CTR ended on September 19, 2010. This finding is based on the testimony of Claimant, Mr. Hornback, and Mr. Threatt.

11. That CTR manufactures and restores tanks and equipment that are used by hospitals and other companies to hold oxygen and other types of gases.

12. That CTR's Rock Hill plant is a large, single building facility that is approximately 50,000 square feet in size, and the plant's ceiling is about forty feet high at the apex in the center of the plant and about twenty-five feet high on the sides of the plant, which is the lowest point. This finding is supported

by the testimony of Mr. Hornback and Mr. Threatt.

13. That there are a number of departments inside CTR's Rock Hill plant, including Bulk Tank, Tanker Restoration, Final Line, the Electrical Department, the O2 cleaning room, the paint booth, the welding area, and the sandblasting area. Bulk Tank, Tanker Restoration, Final Line, the welding area, and the sandblasting area were divided by floor-to-ceiling walls in some places and large partial walls in other places. The Electrical Department, the O2 cleaning room, and the paint booth were completely sealed off from the other areas of the plant. This finding is supported by the testimony of Claimant, Mr. Hornback, and Mr. Threatt.

14. That Claimant's normal workday at CTR was eight hours long, and he had three breaks during the day: two fifteen minute breaks and a thirty minute unpaid lunch break. This finding is based on Claimant's testimony.

15. That Claimant's job in Final Line required to him perform a number of different tasks throughout the day. These tasks included soldering parts together, cutting tubing and other materials that he needed to build the parts for the tanks, bending tubing, walking to other areas of the plant to get parts, taking parts to the sandblasting area to be blasted, taking parts to the O2 room for cleaning, assembling parts by hand, applying labels and stickers to parts he manufactured, securing the final components to the tanks, and waiting on Quality Control employees to pressure test the parts he manufactured. This finding is supported by the testimony of Claimant, Mr. Hornback and Mr. Threatt.

16. That the soldering process required Claimant to clean the two metals he wanted to solder together, apply flux, heat the metals with a torch, and then fill in the joint with solder wire. This finding is based on the testimony of Claimant, Mr. Hornback and Mr. Threatt.

17. That Claimant also had to perform some sandblasting when the employees in the sandblasting department were backed up with work. This finding is supported by the testimony of Claimant and Mr. Hornback.

18. That Defendants' witnesses, Michael Hornback and Jason Threatt, were credible. This

finding is based on the evidence in the record as a whole, including my observations of the witnesses' demeanor and delivery of their testimony at the hearing. This finding is further supported by the general consistency of their testimonies.

19. That Claimant's testimony regarding the atmosphere inside CTR's Rock Hill plant, his job duties, the plant's ventilation, and his alleged "exposure" was exaggerated and inconsistent, and therefore, was neither probative nor reliable. The following list of examples is not exhaustive, but merely illustrative:

- Claimant alleged that he performed soldering for four hours a day on average while working in Final Line, and he testified that when he referred to soldering, he was referring to actually having the torch lit and using the silver solder wire. However, Mr. Hornback (Claimant's supervisor in Final Line) testified that Claimant would only spend approximately thirty minutes per day on average with the torch lit and actually soldering metals. Additionally, Mr. Threatt testified that his position in Final Line was similar to Claimant's and that on average, he would spend approximately one hour per day actually soldering parts.
- Even though Claimant testified that he soldered an average of four hours per day and that he performed a variety of other tasks during the day, Claimant maintained that Dr. Kradin's report, which stated "he soldered 8 hours a day, 5 days a week," was correct.
- While Claimant testified that he never went an entire day without soldering during his time in Final Line, Mr. Threatt testified that there were times when he would go a day or more without performing any soldering.
- Claimant alleged that when he heated the solder wire, it created smoke that he could see rise up to the top of the ceiling. However, Mr. Hornback testified that when an employee is engaged in the soldering of metals, there is only a "little puff of smoke" that dissipated quickly. Mr. Hornback specifically testified that the smoke does not hang in the air and that there is not a visible cloud of smoke in the plant.
- Claimant was inconsistent when testifying about the ventilation in the plant, and his testimony that there was a visible cloud of smoke and dust throughout the plant is clearly exaggerated and purely self-serving. (See *infra* Finding of Fact #21).
- During direct examination, Claimant initially testified that while working in Final Line, he would get "choked up" and lose his breath once or twice per week as a result of inhaling the smoke from the solder; however, he later testified that he did not notice any respiratory problems while working in Final Line. Notably, Mr. Threatt, who worked next to Claimant in Final Line, never saw Claimant experience a coughing fit or spitting up things.

- Claimant alleged that when he performed sandblasting, which was done in an enclosed cabinet that had a vacuum system, he would be exposed to a lot of dust because it would just come out of the cabinet when he opened the door to remove the part. However, Mr. Hornback testified that he has performed the same type of sandblasting in the past and that there is no exposure to dust or particles.

This finding is based on the evidence in the record as a whole, including my observations of the witnesses' demeanor and delivery of their testimony at the hearing.

20. That I give little weight to Eddie Glenn's deposition testimony. Mr. Glenn's testimony, like Claimant's testimony, is exaggerated. Additionally, Mr. Glenn's testimony is inconsistent with the credible testimony of Mr. Hornback and Mr. Threatt. This finding is based on the evidence in the record as a whole.

21. That despite Claimant's self-serving testimony to the contrary, CTR's plant had more than adequate ventilation consisting of fourteen large, garage type roll-up doors that were wide and tall enough to drive a tractor-trailor through, four wall fans, two ceiling suction fans, and several industrial sized floor fans. Specifically, with regards to the Final Line area of the plant where Claimant worked, there was at least one large roll-up door, one wall fan that ventilated the air out of the plant, and multiple large industrial floor fans. I give great weight to the credible and consistent testimony of Mr. Hornback and Mr. Threatt regarding the ventilation in the plant. While Claimant alleged that there were only five to six large roll-up doors in the plant, both Mr. Hornback and Mr. Threatt testified that there were actually fourteen large roll-up doors in the plant. Claimant admitted that the doors were opened throughout the spring, summer, and fall months and that the air in the facility was clear when the doors were open and the wind was blowing. Additionally, during direct examination, Claimant alleged that the atmosphere in Final Line during the winter months was "horrible" and that there was no ventilation in the plant during the winter months because CTR kept the plant doors closed and because there were no fans to ventilate the smoke and dust out of the plant. However, on cross-examination, Claimant admitted that even during the winter months, the large roll-up doors in the plant were opened and closed

throughout the day. Notably, both Mr. Hornback and Mr. Threatt testified that during the winter months the large roll-up doors are constantly opened and closed in order to bring materials in and take materials out of the plant. In fact, Mr. Threatt specifically testified that the doors are never closed for more than an hour or two during the winter months. Finally, even though Claimant testified that CTR did not have any fans to ventilate the air out of the plant during the winter months, the testimony of Mr. Hornback and Mr. Threatt clearly establishes that the wall fan in the Final Line area ran constantly throughout the year and was operable when Claimant was working there. This finding is based on the evidence in the record as a whole, including but not limited to the testimony of Claimant, Mr. Hornback, and Mr. Threatt.

22. That Mr. Hornback previously worked in Final Line for five years performing the same job Claimant had in Final Line, he never experienced any coughing fits during that time. Mr. Hornback also testified that neither Claimant nor any other employee has ever complained to him about the air quality in Final Line or in the plant in general. This finding is based on Mr. Hornback's testimony.

23. That Mr. Threatt has worked in Final Line since August of 2007, approximately six years, and has never experienced a coughing fit or had any complaints about the air quality in the plant. He also testified that he has never talked to anyone that had complaints about the air quality in the plant. This finding is based on Mr. Threatt's testimony.

24. That Claimant worked in Final Line for fifteen to eighteen months before being transferred to the Electrical Department, where he manufactured electrical components. Once transferred to the Electrical Department, Claimant spent five to six hours of each working day inside the enclosed Electrical Department, and he spent two to three hours in the main area of the plant attaching the electrical components to the tanks. This finding is based on the testimony of Claimant, Mr. Hornback.

25. That Claimant testified that he believed the silver solder, the flux, and the other particles he inhaled while working at CTR were the cause of his current respiratory problems. This finding is

based on Claimant's testimony.

26. That the CT of his abdomen, dated June 29, 2010, showed "Extensive bibasilar interstitial thickening or infiltrates, minimal bilateral posterior lateral pleural thickening, and tiny right pleural effusion." (*See* Claimant's APA #6).

27. That the CT of Claimant's chest, dated July 6, 2010, revealed "pathologic intrathoracic lymphadenopathy and bilateral subcentimeter noncalcified pulmonary nodules," as well as "extensive coronary artery calcifications." (*See* Claimant's APA #7).

28. That Dr. Doty initially examined Claimant on July 22, 2010, and in his report, Dr. Doty noted that Claimant was essentially asymptomatic from a pulmonary standpoint, that Claimant denied having any dyspnea with his usual activities of daily living or with his occupation, and that Claimant also denied any wheezing. (*See* Claimant's APA #8)

29. That on September 14, 2010, Dr. Mark K. Reames of Sanger Heart & Vascular Institute noted that Claimant had recently undergone a bronchoscopy, which was negative, and he recommended a thoroscopic lung biopsy in an attempt to determine a definitive diagnosis. (*See* Claimant's APAs #8 & #11).

30. That Claimant was admitted to Carolinas Medical Center and underwent a right-sided video-assisted thoroscopic surgery with wedge biopsies of the upper, middle, and lower lobes, as well as an intercostal nerve block on September 23, 2010. His discharge note from the hospital, dated October 4, 2010, states that Claimant was diagnosed with interstitial lung disease of unknown etiology, dyslipidemia, questionable obstructive sleep apnea, obesity, COPD, and diverticular disease. (*See* Claimant's APA #12).

31. That on October 4, 2010, Dr. Kiran Adlakha of Carolinas Laboratory Network issued a surgical pathology report from Claimant's lung biopsy and noted that the biopsy revealed showed emphysema with diffuse septal thickening, patchy aggregates of pigmented anthracotic macrophages with rare silicate particles, bronchiolar metaplasia with some honeycomb features, patchy chronic

inflammation with lymphoid aggregate, and pulmonary hypertension. Dr. Adlaka opined that "Overall features are those of chronic fibrosing interstitial pneumonia in the back ground of emphysema and is likely going to behave as UIP." (See Claimant's APA #13).

32. That Claimant's breathing problems worsened following his lung biopsy, and he has been on home oxygen ever since his lung biopsy. This finding is based on the evidence in the record as a whole.

33. That following his lung biopsy on September 23, 2010, Dr. Doty has provided the majority of Claimant's treatment. This finding is based on the evidence in the record as a whole.

34. That five physicians have issued causation opinions in this matter. Claimant relied on the opinions of his retained experts, Dr. Richard Kradin and Dr. Jerrold Abraham, and he also contended that his claim was supported by Dr. John Doty, his treating physician. Defendants relied on the opinions of their retained experts, Dr. Victor Roggli and Dr. Gregory Feldman. Defendants also asserted that Dr. Doty's opinion was not sufficient to satisfy Claimant's burden of proof.

35. That the Dr. Doty's medical opinion is not sufficient to support causation in this matter. First, at his deposition, Dr. Doty admitted that he did not have expertise in occupational lung disease. Additionally, when asked what his current diagnosis of Claimant's condition was, Dr. Doty testified that he would code him as having Interstitial Lung Disease. However, he testified that there are several different types of Interstitial Lung Disease (including IPF, non-specific intersitital pneumonitis, sarcoidosis, and hypersensitivity pneumonitis) and that he cannot determine what type Claimant has at this time. Dr. Doty specifically testified that to a reasonable degree of medical certainty he cannot rule out IPF as Claimant's diagnosis, and Dr. Doty would only go so far as to testify that the claimant's job with CTR, Inc. could have contributed to the lung disease. When viewed in its entirety, Dr. Doty's testimony is not sufficient to satisfy Claimant's burden in this matter. This finding is based on the evidence in the record as a whole, including the deposition testimony of Dr. Doty.

36. That Dr. Richard Kradin (Claimant's expert) performed a records review, and on July 27,

2012, he opined that “Mr. Dority’s occupational exposures to heavy metals, including the components of silver brazing allow, must be considered to a reasonable degree of medical probability causes of his chronic lung disease.” (See Claimant’s APA #4).

37. That I give little weight to the causation opinion of Dr. Kradin since his opinion is clearly based on inaccurate information. First, Dr. Kradin noted that Claimant worked as a Maintenance Mechanic for Springs Industries from 1978 to 1996 and that Claimant’s job duties at Springs Industries included “extensive welding with rods containing nickel, stainless, steel, aluminum, galvanized steel, lead, and cadmium,” Claimant specifically testified at the hearing that Dr. Kradin’s report was inaccurate because he did not perform any welding while working at Springs Industries. Additionally, while Dr. Kradin also noted in his report that Claimant “participated in firefighting at the [Springs Industries] plant which occurred on a regular basis releasing fumes from the burning chemicals,” Claimant testified that Dr. Kradin’s report was incorrect because he did not participate in firefighting on a “regular basis.” Most importantly, with regards to Claimant’s employment at CTR, Dr. Kradin’s report states, “He soldered 8 hours a day 5 days a week” and that “There was minimal venting in the shop; instead fumes and dust were moved around the plant by fans.” However, these statements on which Dr. Kradin’s opinion is based are clearly inaccurate. Claimant admitted at the hearing that he did not solder “8 hours a day 5 days a week,” and the testimony of Mr. Hornback and Mr. Threatt establishes that Claimant only soldered thirty minutes to an hour per day. Additionally, as outlined above in Finding of Fact #21, the ventilation in CTR’s plant was substantially more than “minimal.” This finding is based on the evidence in the record as a whole.

38. That Dr. Jerrold L. Abraham (Claimant’s expert) performed a records review and analyzed tissue samples from Claimant’s September 23, 2010 lung biopsy, and he opined that “Mr. Dority’s lung disease is not idiopathic and that his exposures to a multitude of different toxic dust particulates over his working career and including his exposures at CTR contributed to the development of his lung disease (pulmonary fibrosis).” (See Claimant’s APA #1).

39. That Dr. Gregory J. Feldman (Defendants' expert) examined Claimant on September 20, 2012, and noted that Claimant complained of significant breathlessness, that he reported his shortness of breath had dramatically worsened since his lung biopsy in 2010, and that during the past several months, Claimant had required supplemental oxygen. Dr. Feldman noted that Claimant was a very heavy smoker with a documented sixty pack-year history of cigarette smoking. After examining Claimant and reviewing his prior medical records, Dr. Feldman diagnosed Claimant with Idiopathic Pulmonary Fibrosis ("IPF") and COPD, and he opined to a reasonable degree of medical certainty that "Mr. Dority's clinical course is consistent with IPF and is, in fact, classic for IPF with pathological findings of UIP confirming diagnosis." He also opined that Claimant "exhibits all of the cardinal features of IPF." In conclusion, Dr. Feldman stated that "It is impossible to opine whether any of the numerous environmental exposures that Mr. Dority experienced over more than 30 years played a role, if any, in addition to smoking cigarettes in a genetic predisposition." (Defendants' APA #39).

40. That Claimant's attorney deposed Dr. Feldman on October 4, 2012. At his deposition, Dr. Feldman maintained his opinion that Claimant suffered from IPF. Dr. Feldman testified that patients with IPF usually have a "falling off the cliff" event and their lungs never recover. He also testified that after a "falling off the cliff" event, patients can stabilize for a period of time before falling again. With regards to Claimant, Dr. Feldman testified that based on the history Claimant provided, his "falling off the cliff" event was his lung biopsy in 2010. He further testified that Claimant's clinical course since his biopsy has been consistent with IPF, that he most likely not going to improve, and that he has hit flat-lined until he has his next "fall." This finding is based on Dr. Feldman's deposition testimony.

41. That Dr. Victor L. Roggli (Defendants' expert) performed a records review and analyzed tissue samples from Claimant's lung biopsy. On February 1, 2013, Dr. Roggli opined that based on his review of the records and his testing of Claimant's tissue samples, "the most appropriate diagnosis is usual interstitial pneumonia (idiopathic pulmonary fibrosis) with some discordant features." On February 27, 2013, Dr. Roggli noted that he reviewed Dr. Abraham's report, dated January 15, 2013, and he opined that

“there is no convincing evidence that any of the metal particles described by Dr. Abraham cause a usual interstitial pneumonia pattern.” He further opined that “it is unlikely that exposure to the types of particulates Dr. Abraham found, including any that may have derived from his time at CTR, would have caused or contributed to the observed pattern of interstitial lung disease [in Claimant],” and that Dr. Abraham’s opinion that Claimant’s lung disease was due to “exposure of a multitude of different toxic dust particulates over his working career and including his exposures at CTR” was sheer speculation and not supported by scientific evidence. (Defendants’ APA #37).

42. That I give greater weight to the causation opinions of Defendants’ experts (Dr. Feldman and Dr. Roggli) than to the causation opinions of Claimant’s experts (Dr. Kradin and Dr. Abraham). This finding is based on the preponderance of the evidence in the record as a whole.

43. That there is insufficient evidence to establish that Claimant’s lung disease was caused or aggravated by the work environment at CTR. This finding is based on the evidence in the record as a whole.

44. That there is insufficient evidence to establish that Claimant was exposed to any hazard in excess of those ordinarily incident to employment. This finding is based on the evidence in the record as a whole.

45. That Claimant’s assertion that his lung disease is causally related to the silver solder, the flux, and the other particles he worked with at CTR is purely speculative. This finding is based on the evidence in the record as a whole.

46. That Claimant failed to prove by a preponderance of the credible, reliable, and probative evidence that his alleged lung disease was directly caused by, aggravated by, or arose out of his employment with CTR. This finding is based on the evidence in the record as a whole.

47. That based upon the preponderance of the credible, reliable, and probative evidence, Claimant failed to carry his burden of proving a compensable occupational disease as contemplated in S.C. Code Ann. § 42-11-10; therefore, Claimant’s request for benefits is denied.

CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-11-10, Claimant failed to prove by a preponderance of the credible, reliable, and probative evidence that he sustained a compensable occupational disease resulting directly and naturally from exposure to hazards peculiar to her particular employment with CTR.

3. Under § 42-11-10, Claimant failed to prove a compensable occupational disease resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein.

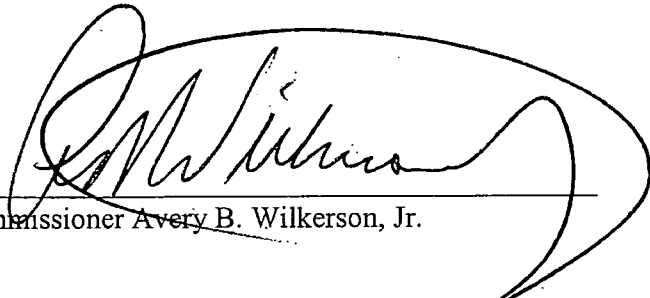
ORDER

IT IS HEREBY ORDERED that Claimant's claim for benefits under the South Carolina Workers' Compensation Act be, and hereby is, denied.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

August 19, 2013

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

EXHIBIT 3

Jeffrey T. Eddy
Attorney at Law, LLC

109 Wappoo Creek Drive, Ste. 1-A; Charleston, SC 29412
Tel. No. (843) 795-5666 and Fax No. (843) 762-0449; E-mail: jeddylaw@bellsouth.net.

August 23, 2013

Virginia Crocker, Director
Judicial Department
South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. Box 1715
Columbia, SC 29202-1715

Re: Michael W. Dority v. CTR OF THE CAROLINAS, INC.:
WCC File No.: 1023410

Dear Ginger:

In accordance with the SCWCC Regulations, enclosed for filing with the Commission please find the original and three copies for Claimant/Appellant's Request for Commission Review (WCC Form # 30) along with a Certificate of Service reflecting service on the Defendants. Please note that, pursuant to the regulation, a copy of the Decision and Order of Commissioner Avery B. Wilkerson, Jr. dated August 19, 2013 is attached to the Form 30.

Also enclosed, please find check number 1281 in the amount of \$150.00 (One-Hundred Fifty Dollars) in payment of the filing fee.

Thank you for your kind assistance in this matter.

Sincerely,



Jeffrey T. Eddy

cc Jason Griggs, Esquire (w enclosure)

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1023410
Carrier File #: YZEC 95077
Carrier Code #:
Employer FEIN #:

Claimant's Name: Michael W. Dority, Appellant SSN: 249-11-7660 Employer's Name: CTR OF THE CAROLINAS, INC., Respondent
Address: 1108 Dority Farm Road Address: 298 Porter Road; PO Box 11369
City: Fort Lawn State: SC Zip: 29714 City: Rock Hill State: SC Zip: 29730
Home Phone: (803) 872-4583 Work Phone: Insurance Carrier: Twin City Fire Insurance Company
Preparer's Name: Jeffrey T. Eddy Law Firm: Preparer's Phone #: (843) 795-5666

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 09/17/2010 (m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

Please see the attached "Grounds of Appeal."

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Jason A. Griggs, Esquire
address 872 S. Pleasantburg Drive, Greenville, SC 29607 on the 23rd day of August 2013
by ☒ first class postage ☐ certified mail ☐ personal service.

Preparer's Signature

Attorney for Claimant
Title

jeddylaw@bellsouth.net
Email

8/23/2014
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov. If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

GROUND OFS OF APPEAL IN RE: DORITY V. CTR (WCC FILE NO. 1023410)

1. Is finding of fact number 35 (treating pulmonologist's medical opinion is not sufficient to support causation) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: (a) the hearing commissioner excluded Dr. Doty's opinion supporting the claim (APA No. 9, p. 67.1) and (b) Dr. Doty testified claimant's lung disease was caused by his occupational exposures including those at CTR (dep. Dr. John Doty dated 10/03/12, pp. 9-10, 18-19, 21-32, 45, 50, 55-56, 60-61, 79, 81-82 & 88)?
2. Is finding of fact number 38 (regarding Dr. Jerrold L. Abraham) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: it completely ignores the fact that Dr. Abraham (APA No. 1, pp. 1-2) analyzed claimant's actual lung tissue using electron microscopy (SEM) and x-ray spectroscopy (EDS) and found particulate matter comprised of metals to which claimant was exposed at CTR and Springs?
3. Are findings of fact numbers 39 & 40 (regarding the opinions of Dr. Gregory J. Feldman) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: they completely omit Dr. Feldman's opinion that many metals cause lung disease and a pathological finding of particulate matter in the tissue would definitively prove claimant's lung disease was due to his occupational inhalation of dust and fumes (Dr. Feldman dep. dated 10/04/12, pp. 6, 17-18, 20-21, 27-28, 38-39 & 61-62)?
4. Is finding of fact number 34 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: claimant also relies on the opinions of the defendants' retained expert, Dr. Gregory Feldman.
5. Are finding of facts numbers 41 & 42 (regarding Dr. Victor L. Roggli) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: (a) Dr. Roggli did not "analyze" tissue samples from claimant's lung biopsy but merely reviewed existing slides under a light microscope; (b) Dr. Roggli first opined claimant does not have asbestosis when he thought this was an asbestos case; (APA No. 37, pp. 459-464) and (c) Dr. Roggli has authored medical articles stating SEM and EDS are important tools in detecting the types of disease-producing metals found in claimant's lung tissue, and he cites Dr. Jerrold Abraham in support of these statements (APA Nos. 29, 30 & 31, pp. 324-348)?

6. Is finding of fact number 37 (regarding the opinion of Dr. Richard Kradin) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: Dr. Kradin's opinion (APA No. 4, pp. 26-28) is based on his review of the pathology materials (lung tissue biopsy) and any confusion regarding the respective exposures at Springs or CTR does not detract from his opinion that claimant's lung disease was due to his occupational exposures generally?

7. Is finding of fact number 6 (regarding smoking) affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: the medical evidence (dep. Dr. John Doty dated 10/03/12 at pp. 32-34, 50, 75, 77 & 83) established claimant's occupationally-related pulmonary fibrosis, not smoking, is the cause of his disability?

8. Is finding of fact number 2 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: claimant alleged an accidental injury and/or occupational lung disease as a result of over 30 years exposure/employment and not just exposure "while working for CTR." (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?

9. Is finding of fact number 46 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: the question is not whether claimant's lung disease was caused by his employment with CTR but whether it was caused by claimant's occupational inhalations over 30 plus years and, if so, whether CTR is liable for the payments of benefits. (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?

10. Is finding of fact number 43 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986) in that: the question is not whether claimant's lung disease was caused by the work environment at CTR but whether it was caused by claimant's occupational inhalations over 30 plus years and, if so, whether CTR is liable for the payments of benefits. (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?

11. Is finding of fact number 18 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or

characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

12. Is finding of fact number 19 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

13. Is finding of fact number 20 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

14. Is finding of fact number 21 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

15. Is finding of fact number 44 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

16. Is finding of fact number 45 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

17. Is finding of fact number 47 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

18. Is conclusion of law number 2 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

19. Is conclusion of law number 3 affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g) (1986)?

EXHIBIT 4

Jeffrey T. Eddy
Attorney at Law, LLC

109 Wappoo Creek Drive; Suite 1-A; Charleston, South Carolina 29412
Tel. No. (843) 795-5666 and Fax No. (843) 762-0449; E-mail: jeddylaw@bellsouth.net.

October 31, 2013

Virginia Crocker, Judicial Director
South Carolina Workers' Compensation Commission
1333 Main Street
P.O. Box 1715
Columbia, SC 29202-1715

Re: Michael W. Dority v. CTR OF THE CAROLINAS, INC.;
WCC File No.: 1023410

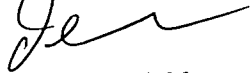
Dear Ms. Crocker:

In accordance with SCWCC Regulations R. 67-205 and R. 67-705, enclosed for filing with the Commission please find (1) the original and three copies of the Appellant's Brief to the Full Commission and (2) one copy of the transcript of the entire proceeding below pursuant to your Notice of Brief Request dated September 17, 2013.

Also enclosed you will please find a Certificate of Service reflecting service on the Defendants.

Thank you for your kind assistance in this matter.

Sincerely,



Jeffrey T. Eddy

cc Jason A. Griggs, Esquire

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C FILE NO.: 1023410

Michael W. Dority,

Claimant,

v.

CTR OF THE CAROLINAS, INC.,

Employer,

and

Twin City Fire Insurance Company,

Carrier,

Defendants.

CERTIFICATE
OF
SERVICE

The undersigned certifies that he served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: Jason Griggs, Esquire
Wilson, Jones, Carter & Baxley, PA
872 S. Pleasantburg Drive
Greenville, SC 29607

DOCUMENTS: Appellant's Brief to Full Commission

DATE OF MAILING: October 31, 2013.


Jeffrey T. Eddy, Esquire
109 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412
(843) 795-5666
Counsel for Claimant

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C FILE NO.: 1023410

MICHAEL W. DORITY,)
)
CLAIMANT,)
)
V.)
)
CTR OF THE CAROLINAS, INC.)
)
EMPLOYER,)
AND)
)
TWIN CITY FIRE AND INSURANCE COMPANY,)
)
CARRIER,)
)
DEFENDANTS.)

APPELLANT'S BRIEF TO THE FULL COMMISSION

Statement of the Case

Claimant filed a Form 50 on May 10, 2012 alleging he sustained an accidental injury and/or an occupational disease in the form of severe lung disease due to the inhalation of fumes, dust and other airborne contaminants in the work place. Claimant asserted he was permanently and totally disabled as a result of his lung disease and that he was first informed by his treating physician on May 8, 2012 it was due to his occupation. The defendants timely filed a Form 51 denying the claim.

A hearing was conducted by Commissioner Avery B. Wilkerson, Jr. on March 26, 2013 in Rock Hill, South Carolina and concluded on April 23, 2013.¹

Claimant asserted that his lung disease was caused by his exposures to airborne contaminants over a 35 year period beginning in 1975 with Springs Industries, Inc. ("Springs") and ending with the defendant, CTR OF THE CAROLINAS, INC. ("CTR") in 2010. (See claimant's Pre-Hearing Brief and tr. 3/26/13 hearing, pp. 13-14) Citing the cases of *Glenn v. Columbia Silica Sand* and *Hanks v. Blair Mills*, *infra*, claimant contended the defendants are liable for the payment of compensation because the employment with CTR at the time of disability involved exposures of a kind contributing to the disease. (tr. 3/26/13 hearing, p. 14)

The defendants conceded the claimant had presented the issues correctly and that Springs did not need to be enjoined but contended the employment with CTR was not injurious. (Id at pp. 24-25) Counsel for the defendant stated:

The issue here is that there's -- there's particulate matter that has been found, apparently by Dr. Abraham, within the lungs but where did all that particular matter come from; where did it come from? We've got a bunch of stuff -- a bunch of work at Springs where the actual things that he found in the lungs were there, okay? And did it all -- did it come from CTR?

¹ The case had previously been set for hearing on 2/5/13 but was postponed due to defense counsel's 1/21/13 request for a postponement in order to get additional expert review by Dr. Victor Roggli.

Commissioner Wilkerson issued a Decision and Order on August 19, 2013 denying benefits, and claimant filed a Form 30, Request for Commission Review, on August 23, 2013.

QUESTIONS PRESENTED

1. Is finding of fact number 35 (treating pulmonologist's medical opinion is not sufficient to support causation) erroneous in that: Dr. Doty testified claimant's lung disease was caused by his occupational exposures including those at CTR (dep. Dr. John Doty dated 10/03/12, pp. 9-10, 18-19, 21-32, 45, 50, 55-56, 60-61, 79, 81-82 & 88)?
2. Is finding of fact number 38 (regarding Dr. Jerrold L. Abraham) erroneous in that: it completely ignores the fact that Dr. Abraham (APA No. 1, pp. 1-2) analyzed claimant's actual lung tissue using electron microscopy (SEM) and x-ray spectroscopy (EDS) and found particulate matter comprised of metals to which claimant was exposed at CTR and Springs?
3. Are findings of fact numbers 39 & 40 (regarding the opinions of Dr. Gregory J. Feldman) erroneous in that: they completely omit Dr. Feldman's opinion that many metals cause lung disease and a pathological finding of particulate matter in the tissue would definitively prove claimant's lung disease was due to his occupational inhalation of dust and fumes (Dr. Feldman dep. dated 10/04/12, pp. 6, 17-18, 20-21, 27-28, 38-39 & 61-62)?
4. Is finding of fact number 34 erroneous in that: claimant also relies on the opinions of the defendants' retained expert, Dr. Gregory Feldman.
5. Are finding of facts numbers 41 & 42 (regarding Dr. Victor L. Roggli) erroneous in that: (a) Dr. Roggli did not "analyze" tissue samples from claimant's lung biopsy but merely reviewed existing slides under a light microscope; (b) Dr. Roggli first opined claimant does not have asbestosis when he thought this was an asbestos case (APA No. 37, pp. 459-464); and (c) Dr. Roggli has authored medical articles stating SEM and EDS are important tools in detecting the types of disease-producing metals found in claimant's lung tissue, and he cites Dr. Jerrold L. Abraham in support of these statements (APA Nos. 29, 30 & 31, pp. 324-348)?
6. Is finding of fact number 37 (regarding the opinion of Dr. Richard Kradin) erroneous in that: Dr. Kradin's opinion (APA No. 4, pp. 26-28) is based on his review of the pathology materials (lung tissue biopsy) and any confusion regarding the respective exposures at Springs or CTR does not detract from his opinion that claimant's lung disease was due to his occupational exposures generally?

7. Is finding of fact number 6 (regarding smoking) erroneous in that: the medical evidence (dep. Dr. John Doty dated 10/03/12 at pp. 32-34, 50, 75, 77 & 83) established claimant's occupationally-related pulmonary fibrosis, not smoking, is the cause of his disability?
8. Is finding of fact number 2 erroneous in that: claimant alleged an accidental injury and/or occupational lung disease as a result of 35 years exposure/employment and not just exposure "while working for CTR." (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?
9. Is finding of fact number 46 erroneous in that: the question is not whether claimant's lung disease was caused by his employment with CTR but whether it was caused by claimant's occupational inhalations over 35 years and, if so, whether CTR is liable for the payments of benefits. (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?
10. Is finding of fact number 43 erroneous in that: the question is not whether claimant's lung disease was caused by the work environment at CTR but whether it was caused by claimant's occupational inhalations over 35 years and, if so, whether CTR is liable for the payments of benefits. (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?
11. Are findings of fact numbers 18; 19, 20, 21, 44, 45 and 47 erroneous?
12. Is conclusion of law number 2 (under § 42-11-10, Claimant failed to prove by a preponderance of the credible, reliable, and probative evidence that he sustained a compensable occupational disease resulting directly and naturally from exposure to hazards peculiar to her (sic) particular employment with CTR) erroneous in that: the question is not whether claimant's lung disease was caused by the work environment at CTR but whether it was caused by claimant's occupational inhalations over 35 years and, if so, whether CTR is liable for the payments of benefits. (See Forms 50, 58, Claimant's Pre-Hearing Brief and transcript of hearing dated 03/26/13, p. 14)?
13. Is conclusion of law number 3 (under § 42-11-10, Claimant failed to prove a compensable occupational disease resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein) erroneous in that: the medical evidence overwhelmingly establishes claimant's lung disease is due to his occupation?

ARGUMENT

I. The Facts

The claimant, Michael Dority, was born on October 10, 1965 and lives in Ft. Lawn, South Carolina. (tr. 03/26/13 hearing, p. 54) He attended school through the ninth grade and subsequently obtained a GED. (Id at pp. 55-56)

Claimant brought this claim after his treating pulmonologist, John D. Doty, II, MD, determined he had occupationally-related, end-stage pulmonary fibrosis. (Dr. Doty dep., pp. 30-31).

Claimant worked for Springs at the Grace Bleachery in Lancaster, South Carolina from 1975 to 1996 and again from 2000 to 2007. (tr. 3/26/13 hearing, p. 56) At Springs, the claimant worked in maintenance and instrumentation and was exposed to dust and fumes. (Id at pp. 57-58, 113) While at Springs, he never experienced shortness of breath or other breathing problems and passed all annual breathing tests. (Id at p. 59)

Claimant worked for CTR from July 9, 2007 through September 17, 2010. (Id at p. 57) CTR manufactures cryogenics equipment and refurbishes vessels, bulk tanks and tanker trucks used in the delivery of industrial gases in a large facility involving extensive fabrication of various metals including stainless steel, aluminum, copper, nickel, tin, zinc, titanium and iron. (Glenn dep., pp. 12-14, 15, 21-22 & 33-35) One open space comprises various departments including final line side, fabrication shop, bulk tank area and the tanker section. (Id at pp. 15-17, 30 & 33-34) The Electrical Department and Oxygen Cleaning Section are separated from the open areas. (Id. at pp. 17-18)

Charlie E. Glenn worked for CTR from February, 2007 to November, 2011 as IT Director and Safety Director. (Glenn dep., pp. 7-9) He testified the work done in the CTR facility involved welding, brazing, grinding and sand-blasting of the various metals with torches and pneumatic grinders and sanders. (Id at pp. 16, 19-25, 27-28, 30-31, 33, 35, 42-34 & 85) This work created metal dust, shavings, fumes and smoke which traveled throughout the facility. (Id at pp. 24-25, 28, 31-36) In the winter, there a constant, visible cloud most of the day. (Id at pp. 45-46) In the summer, it was not as bad, but the wind would blow the dust from the grinding. (Id at pp. 32 & 46) Metal shavings and grindings were not cleaned up until the evening. (Id at p. 46) The dust affected the electronic equipment he used. (Id at pp. 25 & 28) In his opinion, claimant worked in deplorable conditions without respiratory protection and was exposed to the metal dust, shavings, fumes and smoke. (Id at pp. 42-47, 50-52 & 55, 76-77)

On the final line, claimant cut and brazed tubing made of copper, brass and stainless steel. (tr. 3/26/13 hearing, p. 70) He used a solder containing silver, zinc, copper, tin and cadmium to braze together tubing. (Id at p. 27) The brazing work created smoke and fumes that he inhaled daily. (Id at p. 75-76, 81-82 & 86) He also was required to grind and sand sheets of aluminum in constructing panels which created shavings and dust he inhaled on a regular basis. (tr. 3/26/13 hearing, pp. 80-82 & 130-131)

Co-workers within close proximity of claimant used power band saws to cut Monel tubing used to build high pressure gas panels. (Id at p. 82) Claimant inhaled the airborne dust created when the Monel tubing was cut. (Id at p. 83) Monel was comprised of various metals including aluminum, copper, iron, manganese, nickel, silicon, titanium (Claimant's APA No. 22, pp. 150-151).

Claimant then worked in the Electrical Department building panels. (tr. 03/26/13 hearing, p. 89) He mounted and tested the panels in the main plant and continued to be exposed to the dust, fumes and smoke including welding from the fabrication shop. (tr. 03/26/13 hearing, pp. 89-92) He was also exposed to silica from the sandblasting work he was regularly required to do and also from major sandblasting work done on tanker trucks behind the plant. (Id at pp. 71, 78-80, 84-86 & 124-126)

Claimant and the other employees wore no respiratory protection and experienced frequent choking and coughing due to the dust and smoke. (Id at pp. 75, 77, 88 & 89)

Since 09/17/10, he has been unable to work because of his breathing, his oxygen requirement and his doctors' orders. (Id at pp. 94-98) Joel Leonard, a vocational expert, has evaluated claimant and agrees he is permanently and totally disabled. (APA, pp. 152-155)

Dr. John D. Doty, II is a board certified pulmonary specialist at the Charlotte Medical Clinic who obtained a fellowship in Pulmonary Medicine at the Medical University of South Carolina (Charleston) from 2001 to 2004. (Doty dep., pp. 4-5) He has been practicing pulmonary medicine for several years and has treated patients with occupational lung disease (Id at pp. 5 & 73).

He has treated Michael Dority for severe, end-stage lung disease since July 22, 2010. (Id at pp. 12, 45 & 52). The possible diagnoses at that time included occupational/environmental reaction, idiopathic pulmonary fibrosis ("IPF"), and sarcoidosis. (Id at p. 15) Based on a September 23, 2010 biopsy, Dr. Doty initially leaned toward IPF. (Id at p. 18) The biopsy revealed a pattern of Usual Interstitial Pneumonitis ("UIP") that can be seen in a number of conditions including IPF. (9) However, IPF is usually seen in patients older than Mr. Dority and is almost always rapidly progressive. (Id at pp. 8, 12, 21, 24-25 & 72)

Because Mr. Dority did not experience progression of his disease, Dr. Doty began to favor the occupational history as the underlying cause of the disease. (Id at pp. 21-25) As noted by the pathologist who reviewed the biopsy, UIP pattern can also be seen in cases of end-stage pneumoconiosis, occupationally-related lung disease due to the inhalation of inorganic particulate matter like a metal or fume. (Id at pp. 9-10, 18-19 & 50) With pneumoconiosis, you remove the worker from the offending environment and, in a lot of cases, they should stabilize. (Id at p. 11) Since discontinuing employment at CTR, Mr. Dority has stabilized including his CT scans, pulmonary function tests, oxygen requirement and subjective complaints. (Id at pp. 21-24)

In Dr. Doty's opinion, to a reasonable degree of medical certainty, Mr. Dority's lung disease is due to occupational exposures. (Id at pp. 29-30) While he suspected occupational exposure from the beginning, given Mr. Dority's clinical course, he believes there is a 65% likelihood the disease is due

to the occupational exposures. (Id at pp. 24-26 & 30-32) Mr. Dority has a pneumoconiosis that has developed into interstitial lung disease ("ILD"). (Id at pp. 45 & 50) The occupational exposure to metal dust or fumes has led to the problem. (Id at p. 55)

The occupational history indicates Mr. Dority was exposed to dyes, cotton dust and asbestos at Springs and various metal dusts and fumes at CTR. (Id at pp. 16, 27, 30, 55 & 60-61) In Dr. Doty's opinion, prolonged inhalation of the fumes and dust from the silver solder Mr. Dority worked with at CTR can cause a benign pneumoconiosis, and Mr. Dority's clinical course is more consistent with a benign pneumoconiosis as opposed to IPF. (Id at p. 27) More likely than not, Mr. Dority's exposures at CTR contributed to his lung condition, and the combined exposures at both Springs and CTR caused the lung condition. (Id at pp. 30, 56, 79, 81 & 88) The three and a half years exposure at CTR contributed to his total particulate burden in his lungs. (Id at p. 82)

Mr. Dority's breathing problems and oxygen requirement are due to his pneumoconiosis and ILD. (Id at pp. 34 & 83) The fibrosis has caused a severe reduction in his diffusing capacity. (Id at p. 34) Cigarette smoking does not cause pneumoconiosis, pulmonary fibrosis or ILD. (Id at pp. 32, 50 & 75), it causes COPD or emphysema which is diagnosed by airflow (reduced FEV1 on spirometry). (Id at pp. 75-77) Mr. Dority's airflow/spirometry was normal in 2011 and 2012. (Id at p. 33) His oxygen requirement is not related to emphysema/COPD. (Id at p. 77) COPD does not result in an oxygen requirement until the FEV1 is reduced to 1 liter. His FEV1 is 2.8 liters. (Id at p. 77)

Mr. Dority's end-stage fibrosis is irreversible. (Id at p. 12) He is totally and permanently disabled. (Id at pp. 36 & 52)

Claimant had the biopsy reviewed by Dr. Richard Kradin, a board certified pulmonologist and pathologist from Harvard University. Dr. Kradin reported that the biopsies exhibit several unusual pathological features seen in relation to the inhalation of smoke and fume inhalation. It is his opinion, to a reasonable degree of medical probability, that claimant's occupational exposures to metals, including the components of silver brazing alloy, caused his chronic lung disease. (APA, p. 26-28)

Dr. Gregory Feldman reviewed this case for the defendants. He agrees claimant had considerable exposure to many things over a 30 year period and that the work conditions at CTR were "pathetic." (Feldman dep., pp. 6, 20 & 38-39). However, in his opinion, claimant's lung disease cannot be definitively attributed to his occupational exposures without a pathological finding of particulate matter in the lung tissue. (Id at pp. 17-18, 20-21 & 27-28) There are many metals that can cause pneumoconiosis. (Id) If a pathologist found particulate matter in the lung tissue, it would be extremely important. Then he could say claimant's lung condition is due to his inhalation of dust and fumes, and "we would not be sitting here and arguing what he has." (Id at pp. 17 & 61-62)

In light of Dr. Feldman's opinions, Claimant had the tissue blocks from the lung biopsy sent to the leading expert in particulate analysis and the pathological diagnosis of pneumoconiosis, Dr. Jerrold L. Abraham. (Claimant's APA Nos. 1 & 2, pp. 1-25) Dr. Abraham analyzed the tissue using

scanning electron microscopy (SEM) and Energy Dispersive X-ray Spectroscopy (EDS) and found large numbers of particulates including aluminum, iron, tin, nickel, manganese, zinc and titanium. (Id) Claimant was exposed to all of these metals while working at CTR, *supra*. Based on these findings and the occupational exposure history, Dr. Abraham concluded that claimant's lung disease resulted from his exposures to a multitude of different toxic dust particulates over his career including those at CTR. (Claimant's APA Nos. 1 & 2, pp. 1-21)

After receiving Dr. Abraham's report, defendants hired yet another defense expert, Dr. Victor Roggli. His primary expertise is in the area of asbestos-related disease. (Defendants' APA, No. 38, pp. 465-488) Thinking this case involved allegations of asbestos-related disease, Dr. Roggli first authored a report dated February 1, 2013 and concluded claimant does not have asbestosis. In this report, he admits not having the occupational exposure history. (Defendant's APA, No. 37, p. 459)² Once informed of the allegations in this case, Dr. Roggli authored a second report which simply concluded Dr. Abraham's opinion is "sheer speculation not supported by scientific evidence." (Id at p. 463)

However, prior to his involvement in this case, Dr. Roggli prepared a report of a presentation entitled, *Electron Microprobe Analysis in Metal-Induced Lung Disease*, which sets forth on Table 1 a list of metals which can cause pneumoconiosis including iron, aluminum, silicon, tin, chromium, copper, nickel, titanium and zinc (all types of particulates found by Dr. Abraham in claimant's lung tissue). This report discusses the importance of SEM and EDS (methods used by Dr. Abraham) in the diagnosis of metal-induced lung disease. It states that these metals can cause mixed-dust pneumoconiosis and cites the article by Dr. Abraham setting forth the criteria for the diagnosis of mixed-dust pneumoconiosis. (Claimant's APA, pp. 328-335)

Also prior to his involvement in this case, Dr. Roggli authored a pathology textbook in which he states that the diagnosis of mixed-dust pneumoconiosis requires a careful and detailed occupational exposure history. If lung tissue is available, it should be analyzed for inorganic particulate content using SEM and EDS and the results correlated with the exposure history for a correct diagnosis. He states the analysis of the lung tissue for injurious agents provides important evidence in medicolegal cases. He cites various articles written by Dr. Jerrold L. Abraham in support of these statements.³ (Claimant's APA, pp. 336-348)

Dr. Roggli did not "analyze" tissue samples from claimant's lung biopsy but merely reviewed existing slides under a light microscope. (Defendants APA No. 37, p. 459)

II. The Law

² Nonetheless, Dr. Roggli makes a diagnosis of IPF and cites, in support, the American Thoracic Society's Official Statement regarding guidelines for the diagnosis of IPF. This statement lists exclusion of other known causes based on an occupational exposure history as the most important requirement in the diagnosis of IPF. (See Claimant's APA, No. 15, pp 85-86 &90)

³ Six different articles written by Dr. Abraham were cited by Dr. Roggli including "*Recent advances in pneumoconiosis: The pathologists' role in etiologic diagnosis*" and "*Proposed Criteria for Mixed Dust Pneumoconiosis: . . . diagnosis and clinical correlation.*"

The panel of the full Commission reviewing the Hearing Commissioner's decision is a fact-finding body, and its scope of review is not limited. *Lowe v. Am-Can Transport Services*, 283 S.C. 534, 324 S.E.2d 87 (Ct.App. 1984); *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E. 2d 318 (1967). The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. The Commission does not have to uphold the findings of the Hearing Commissioner if, in its opinion, the preponderance of evidence leads to a different finding, whether or not the Hearing Commissioner's findings were based on the preponderance of the evidence. *Id.*

The overwhelming medical evidence supports claimant's contention his lung disease is occupationally-related:

- in the opinion of the treating pulmonologist, Dr. Doty, to a reasonable degree of medical certainty, there is a 65% likelihood claimant's lung disease is due to the occupational exposures;
- in the opinion of the board certified pulmonologist and pathologist from Harvard University, Dr. Richard Kradin, the biopsies exhibit several unusual pathological features seen in relation to the inhalation of smoke and fumes, and to a reasonable degree of medical probability, claimant's occupational exposures to metals caused his chronic lung disease;
- the electron microscopy and energy dispersive x-ray analysis conducted on the claimant's actual lung tissue revealed an unusually high number of metal particles including aluminum, iron tin, nickel, manganese, zinc and titanium (all types which claimant inhaled at CTR), and therefore to a reasonable degree of medical certainty, it is the opinion of Dr. Jerrold L. Abraham that claimant's lung disease resulted from his exposures to different dust particulates over his career including those at CTR;
- in the opinion of the defendants' own expert, Dr. Gregory Feldman, many metals can cause the type of lung disease from which claimant suffers and a pathological finding of particulate matter in the lung tissue would allow him to say the disease is occupationally-related.

The only medical opinion which does not support the claim was rendered by an expert who appears to have been predisposed to furnish an opinion helpful to defendants. First, he concluded claimant does not have an asbestos disease. Then, he claims Dr. Abraham's opinion is not supported by scientific evidence even though he had previously gone on record as saying SEM and EDS are important tools in detecting the types of disease-producing metals causing pneumoconiosis as found in claimant's lung tissue.

Claimant's evidence establishes the elements of an occupational disease under SC Code Ann. § 42-11-10 et seq: (1) a disease; (2) the disease arises out of and in the course of the claimant's employment; (3) the disease is due to hazards in excess of those hazards that are ordinarily incident to employment; (4) the disease is peculiar to the occupation in which the claimant was engaged; (5) the hazard causing the disease is recognized as peculiar to a particular trade, process, occupation, or employment; and (6) the disease directly resulted from the claimant's continuous exposure to the

normal working conditions of the particular trade, process, occupation or employment. *Mohasco Corp., Dixiana Mill Div. v. Rising*, 289 S.C. 130, 135, 345 S.E.2d 249, 252 (Ct. App. 1986) (*Mohasco I*), *rev'd on other grounds*, 292 S.C. 489, 357 S.E.2d 456 (1987) (*Mohasco II*); see also *Fox v. Newberry County Mem. Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995).

The requirement the disease be peculiar to the occupation does not mean that the disease must either originate exclusively from or be unique to the particular kind of employment in which the employee is engaged before it can be considered an "occupational disease." *Mohasco I. Peculiar to the employment means only that the employment increased the risk of the disease. Ordinary diseases may be occupational diseases if produced or aggravated by distinctive conditions of employment. Mohasco II.*

This claim was brought under both the occupational disease and accidental injury provisions of the South Carolina Workers' Compensation Act ("Act") as claimant is entitled to compensation under either theory of recovery and is not required to elect between the two. *Marquard v. Pacific Columbia Mills*, 278 S.C. 323, 295 S.E.2d 870 (1982). The Hearing Commissioner's Decision and Order ("Order") failed to address the claim brought pursuant to the accidental injury provisions of the Act.

Claimant's evidence establishes a compensable accidental injury similar to the cases of *Hiers v. Brunson Construction Co.*, 221 S.C. 212, 70 S.E.2d 211 (1952), and *Sturkie v. Ballenger Corp.*, 268 S.C. 536, 235 S.E.2d 120 (1977). In *Hiers*, an employee with a preexisting cold was required to repair a roof on a cold, wet day in February. He experienced a "chill" while working on the roof which subsequently developed into influenza, pleurisy, and pneumonia. In affirming a death benefit award, the court defined "injury by accident" as follows:

The adjective "accidental" qualifies and describes the injuries contemplated by the statute as having the quality or condition of happening or coming by chance or without design, taking place unexpectedly or unintentionally. If one becomes ill while at work from natural causes, the state or condition is not accidental since it is a natural result of consequence and might be termed normal and to be expected. If, however, there is a subsisting condition of illness or incapacity or physical disability which is caused, increased, or accelerated by some act or event coming by chance or happening fortuitously, then the requisite quality or condition of the injury will exist so as to make it accidental. Neither is it necessary that the accidental quality or condition be created by wound or external violence . . . In the majority of jurisdictions, no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident.

Hiers at 230-231.

In *Sturkie v. Ballenger*, the court addressed the question of whether injuries resulting from a routine, continuous exposure to the elements were compensable. The claimant, a cement truck

driver working on a job site in Puerto Rico, was routinely exposed to high humidity and temperatures, fog, cement dust, and short rain showers. He worked without incident from August 1, 1972, to October 25, 1972, when he blacked out on the job. He was later diagnosed as having emphysema, which he contended resulted from his environmental and work conditions. In upholding the award of benefits, the SC Supreme Court stated that "a composite of these cases clearly establishes a recognition in South Carolina case law of disease resulting from exposure constituting an injury by accident where the result is unexpected." 268 S.C. at 541, 235 S.E.2d at 122.

Claimant's accidental injury and/or occupational disease resulted in disability during his employment with the defendants. In *Glenn v. Columbia Silica Sand*, 112 S.E.2d 711 (1960), the S.C. Supreme, in addressing the question of liability as between successive employers, held liability is assigned "to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease . . . We note, in passing, that where the employment at the time of disability was not of a kind contributing to the disease, the general rule is that liability for the entire compensation is that of the employer, and consequently of the carrier, at the time of the employee's last exposure causally related to the disease."

In *Hanks v. Blair Mills*, 335 S.E.2d 91, the employee worked in cotton mills from 1946 to 1979. Blair Mills/Commerce Insurance was ordered to pay benefits for total disability even though it was only on the risk for 24 days. Commerce argued any exposure during this period would have caused no measurable damage. The Court was not persuaded and cited Glenn: "in the case of occupational diseases, liability is . . . assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. . ." The Court noted the employment with Blair Mills was of a kind contributing to the disease of byssinosis.

In *Reese v. CCI Construction Co., et al.*, (Op. No. 2948) the claimant alleged an injury by accident/occupational disease while working for CCI. He had worked with "powered vibratory tools" as a carpenter and construction worker for over twenty years prior to his employment with CCI. On his third day of work for CCI, claimant twisted his right wrist while working with a power drill. The medical evidence indicated he suffered from necrosis of the carpal lunate and that this condition sometimes occurs among people who work with "very high powered vibratory tools." The Commission found claimant's disease qualified as an occupational disease but that the evidence did not establish that it was caused, aggravated or contributed to by his work at CCI and that, therefore he did not suffer a compensable injury by accident arising out of or in the course of employment. The S.C. Court of Appeals reversed and held the claim compensable because the employment with CCI was of a kind contributing to the disease. The Court cited *Glenn* and *Hanks* in reaching its decision.

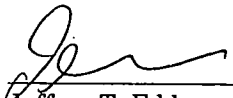
Claimant's last exposure causally related to the disease occurred from 2007 through 2010 while employed by the defendant. The defendants were on the risk when claimant's disease resulted in disability, and his employment with CTR was of a kind contributing to the disease. *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007).

CONCLUSION

The reliable and substantial evidence establishes that claimant has sustained an accidental injury and occupational disease and that the defendants are liable for the payment of benefits.

The Decision and Order of the Hearing Commission should be reversed. The claimant is entitled to compensation for permanent and total disability (500 weeks) at the compensation rate of \$445.90 and the payment of all past and future related medical bills.

Respectfully submitted,



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Counsel for Claimant

October 31, 2013

EXHIBIT 5

Jeffrey T. Eddy
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November 22, 2013

Virginia Crocker, Judicial Director
South Carolina Workers' Compensation Commission
1333 Main Street
P.O. Box 1715
Columbia, SC 29202-1715

Re: Michael W. Dority v. CTR OF THE CAROLINAS, INC.;
WCC File No.: 1023410

Dear Ms. Crocker:

In accordance with SCWCC Regulations R. 67-205 and R. 67-705, enclosed for filing with the Commission please find (1) the original and three copies of the Appellant's Reply Brief to the Full Commission. Also enclosed you will please find a Certificate of Service reflecting service on the Defendants.

Thank you for your kind assistance in this matter.

Sincerely,


Jeffrey T. Eddy

cc Jason A. Griggs, Esquire

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C FILE NO.: 1023410

MICHAEL W. DORITY,	)
	)
CLAIMANT,	)
	)
V.	)
	)
CTR OF THE CAROLINAS, INC.	)
	)
EMPLOYER,	)
AND	)
	)
TWIN CITY FIRE AND INSURANCE COMPANY,	)
	)
CARRIER,	)
	)
DEFENDANTS.	)

APPELLANT'S REPLY BRIEF TO THE FULL COMMISSION

The threshold issue in this case is whether the claimant's lung disease was caused by the inhalation of airborne contaminants over a 35 year period of employment beginning in 1975.

From day one, before any lawyers got involved, the treating pulmonologist, Dr. John Doty, suspected occupational lung disease (pneumoconiosis). An open lung biopsy was taken, and the hospital pathologist indicated the pattern she observed can be seen in cases of pneumoconiosis.

A claim was filed, and Dr. Doty gave a deposition in which he made clear his opinion that the lung disease was due to the occupation. Depending on how one views his testimony, it is Dr. Doty's opinion that the employment with CTR either contributed or could have contributed to the disease.

The defendant had an independent medical examination conducted by Dr. Gregory Feldman. Dr. Feldman testified in his deposition that exposure to metals can cause pneumoconiosis but that a finding of particulate matter in the lung tissue would be necessary to establish causation.

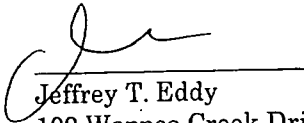
Therefore, the claimant had the lung tissue tested for particulate matter. Electron microscopy and energy dispersive x-ray analysis detected particulate matter including many metals known to cause pneumoconiosis. Defendant does not dispute the fact that many of the metals found in claimant's lung tissue were used at CTR during claimant's employment there.

Faced with this overwhelming medical evidence, the defendant goes off on a tangent regarding witness credibility and mischaracterizes the issue by arguing the evidence does not establish the CTR employment, alone, caused the disease. However, as conceded by the defendant at the hearing in this case, the first issue is whether claimant has an occupational disease, and if so, whether CTR is liable for the payment of benefits. The preponderance of the evidence is that claimant has developed an occupational lung disease.

The defendant does not address the issue of whether the CTR employment was of a kind contributing to the disease. However, the preponderance of the evidence (Drs. Abraham, Feldman, Doty and Kradin) establishes that the CTR employment did contribute to the disease as the very metals to which claimant was exposed at CTR were found in his lung tissue. At a minimum, the CTR employment was of a kind contributing to the disease.

Claimant respectfully appeals to the Full Commission to reverse the Decision and Order of the hearing Commissioner and award the applicable benefits afforded under the Act.

Respectfully submitted,



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Counsel for Claimant

November 22, 2013

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C FILE NO.: 1023410

Michael W. Dority,)
)
 Claimant,)
)
 v.)
)
 CTR OF THE CAROLINAS, INC.,)
)
 Employer,)
 and)
)
 Twin City Fire Insurance Company,)
)
 Carrier,)
)
 Defendants.)

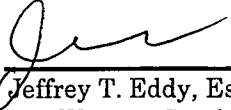
**CERTIFICATE
OF
SERVICE**

The undersigned certifies that he served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: Jason Griggs, Esquire
Wilson, Jones, Carter & Baxley, PA
872 S. Pleasantburg Drive
Greenville, SC 29607

DOCUMENTS: Appellant's Reply Brief to Full Commission

DATE OF MAILING: November 22, 2013.



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