THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

Appellate Case No.: 2015-002041

Mortesha Mouzon-Johnson, Claimant, Appellant,

v.

Mead Westvaco, Self-Insured Employer, Respondent.

AMENDED FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Mortesha Mouzon-Johnson ("the claimant") filed this workers' compensation claim on February 8, 2013, asserting an injury by accident arising out of and in the course and scope of employment on June 1, 2012, or, in the alternative, an occupational disease. The claimant contended she injured her lungs and respiratory system when she was exposed to chemicals at work. The self-insured employer Mead Westvaco ("the employer") denied the claim in its entirety. On August 27, 2014, a single commissioner heard the case and by order dated November 24, 2014, the single commissioner found the claimant sustained an injury by accident arising out of and in the course and scope of her employment and awarded medical benefits, temporary total disability benefits, and permanent disability benefits to her lungs. The employer appealed to the full commission. After a hearing, the Commission issued an order dated September 1, 2015 denying the claim. The claimant filed a notice of appeal to this court on September 29, 2015.

FACTS

The claimant worked for the employer as a chemist for approximately thirteen years. (R. pg. 88, line 3) At the time of the hearing, she was forty years old and had a degree in biology with a minor in chemistry. (R. pg. 86, line 8; pg. 87 lines 6-7) In the first part of 2012, the claimant missed a period of time from work due to Bell's Palsy. (R. pg. 91, lines 10-12) The claimant returned to work on May 30, 2012 (R. pg. 92, lines 4-5). Because of some work restrictions related to the Bell's Palsy, the claimant was assigned a new chemical analysis to perform on June 1, 2012. (R. pg. 24, lines 2-19) The new analysis required the claimant had to mix several chemicals together—without a protective mask—in order to ultimately find the concentration of soap in a product produced by the employer. (R. pg. 92, line 20 – pg. 93, line 15). Upon performing the analysis that morning, the claimant developed pain in the right side of her face and noticed swelling in her face. She discussed the issue with her supervisor and was sent home, the fear being that she was experiencing a recurrence of Bell's Palsy. (R. pg. 93, line 17 – pg. 95, line 9). The clamant testified she experienced extreme lethargy (R. pg. 125 lines 3-8) and other people noticed she was wheezing. (R. pg. 131-132 lines 23-25, 1)

The claimant's supervisor testified that on June 1, 2012, the claimant approached her and asked if the supervisor thought the claimant's face looked swollen. The supervisor testified she told the claimant "[w]ell, your whole face looks swollen," and she explained that a few minutes later the claimant told the supervisor that her face was burning. (R. pg. 207, line 12 – pg. 208, line 8). Immediately thereafter, however, the supervisor testified that the claimant's face was not swollen on June 1, 2012. (R. pg. 208, lines 9-11).

Concerned she had a recurrence of Bell's Palsy, the claimant sought treatment with Dr. Bahadori, her neurologist, on June 4, 2012. (R. p. 733) Dr. Bahadori explained that the issue

was not Bell's Palsy-related, and referred her to her allergist, Dr. Davidson. (R. pg. 95, line 10 – pg. 97, line 1)

The claimant, after her doctor's appointment on the Monday following the accident, told her supervisor that she had had a chemical reaction to toluene on June 1, 2012. (R. pg. 210, lines 4-11). Following that conversation, the supervisor indicated that the employer instructed the claimant not to come back to work due to her accident and resulting condition. (R. pg. 210, lines 11-20). Later, the claimant did return to work briefly after being cleared but on restrictions from handling chemicals. (R. 126, lines 17-19) She continued to have reactions while working in the lab even though she was not directly working with the chemicals. (R. pg. 127, lines 20-25)

The claimant had preexisting asthma and allergies. Dr. Spandorfer was her pulmonologist, and Dr. Davidson was her allergist. Dr. Davidson saw the claimant on June 7, 2012, less than a week after the date of exposure in this claim. (R. p. 756) The claimant reported to Dr. Davidson that she had a reaction—including swelling and sharp pain on the left side of her face—as a result of her exposure to chemicals including toluene, methanol, petroleum ether, and acetone, while at work on June 1, 2012. (R. p. 756) Dr. Davidson diagnosed the claimant with allergic rhinitis and asthma, and ordered a PCT scan of the sinuses, which came back normal. (R. p. 757)

At a follow-up appointment on July 3, 2012, the claimant explained that she had experienced two more reactions while working and that her employer ordered her to avoid all solvents and to stay out of work. (R. p. 760) Dr. Davidson noted "low spirometry off controller medication," and restarted Advair and continued Singulair (both asthma medications) for the claimant's symptoms. (R. p. 761) On July 24, 2012, Dr. Davidson again noted the claimant was out of work due to her condition, adding that he could not be sure which chemicals were causing

her recurrent symptoms. (R. p. 763) The claimant continued to follow up with Dr. Davidson periodically, and noted some improvement as she continued taking her medication and, because she was out of work on disability, avoided the worksite and chemicals that had initially caused her condition. (R. p. 763)

The claimant's first visit to Dr. Spandorfer after her work-related accident was on August 23, 2012. (R. p. 722) On that date, the doctor noted that "[t]he patient is now not able to return to work," because she had "developed progressive difficulties of shortness of breath with facial swelling, wheezing and chest tightness and cough after exposure to chemicals at her work site." Dr. Spandorfer explained in his notes that the claimant frequently deals with chemicals in her job as a chemist over the previous 15 years, and that chemical odors are "disseminated through her worksite." The claimant reported requiring rescue bronchodilator therapy due to her symptoms. Dr. Spandorfer diagnosed his patient with "occupationally induced or occupationally worsened asthma" and prescribed Singulair, ProAir HFA Aerosol Solution, and Advair for the Claimant's associated symptoms. (R. pp. 722-723)

On February 5, 2013, Dr. Spandorfer evaluated the claimant's lung function and noted "the patient has had significant improvement in her symptoms since she has been removed from her work environment." Following an examination, the doctor diagnosed the claimant with asthma, pulmonary fibrosis, and "other diseases of [the] lung." Based on these diagnoses, Dr. Spandorfer recommended a spirometry test in order to evaluate the effectiveness of the claimant's treatment. (R. pp. 708-710)

At her next appointment on August 22, 2013, the claimant visited the doctor for "evaluation of her reactive airway dysfunction syndrome/occupationally induced or worsened asthma." The spirometry results were "abnormal," revealing a "mixed disorder with moderate

limitation." In line with those results, the claimant reported an increasing need for "frequent rescue bronchodilator therapy," as much as five times per week. She also noted for the doctor that she had recently begun experiencing nighttime symptoms that also required the use of rescue therapy. The claimant explained that the triggers for her asthma included "exposure to chemicals, dusts, fumes including bleach and perfumes, smoke as well as increasing temperature/heat." She added that she did not believe she could return to work due to her regular exposure to chemicals at her worksite. Dr. Spandorfer agreed, diagnosing the claimant with occupationally-induced or –worsened asthma and noting that the claimant "is not felt to be able to return to her primary worksite due to the development of occupationally induced asthma and the risk of deterioration in her chemical exposure/worksite." For her asthma, the doctor prescribed the Claimant Singulair, Advair, and Ventolin. Finally, the doctor also noted his diagnosis of reactive airway disease, again stating "the patient has occupationally induced lung injury." (R. pp. 718-720)

The claimant saw Dr. Spandorfer on April 8, 2014. At that appointment, the claimant explained that she had been stable since being removed from her known triggers, including her worksite. Nevertheless, she added, symptoms still arise when she is exposed to chemicals, perfumes, dust, and volatile agents including softens, requiring rescue bronchodilator therapy upwards of three times per week. Pursuant to his evaluation, Dr. Spandorfer once again diagnosed the claimant with occupationally-induced or –worsened asthma as well as reactive airway disease, which was brought on by her exposure to "[t]oluene and methanol/organic solvents." Finally, the doctor also noted diagnoses of pulmonary fibrosis and other unclassified diseases of the lung. (R. pp. 727-729)

On May 10, 2013, the employer sent the claimant for an independent medical evaluation

by Dr. Herndon, a pulmonologist selected by the employer. The employer furnished a complete set of medical records to Dr. Herndon, including the records of Drs. Bahadori, Davidson, and Spandorfer. Following his evaluation of the claimant, Dr. Herndon diagnosed her with shortness of breath attributable to restrictive lung disease, as well as asthma, noting:

> I suspect that she did likely suffer from occupational asthma which has improved since being away from the exposures at work. She appears to have had significant allergic reactions to some exposure at her workplace. **I agree with her physicians, to a reasonable degree of medical certainty, she should no longer be exposed to these chemicals and should be restricted from working where the exposures occurred.**

Dr. Herndon went on to add: "[t]he chemicals that she was exposed to (sic) could have certainly exacerbated her asthma at the time of the exposure." (R. pp. 770-780)

On September 12, 2013, Dr. Spandorfer completed a questionnaire regarding his treatment of the claimant as well as her current condition. The doctor, being board certified in pulmonary and critical care medicine, affirmed his diagnosis of the claimant's occupationally induced or worsened asthma, further confirming that it is causally related to the claimant's work exposure on June 1, 2012. For her condition, Dr. Spandorfer noted that the claimant would need future medical treatment in the form of medications, office visits, breathing treatments, and inhalers. In a handwritten note, the doctor added:

> may require additional treatments/medications due to drug-induced side effects from [the] use of medications in the treatment of her occupationally induced or worsened asthma, including but not limited to steroid or beta agonist related side effects; glaucoma, cataracts . . . osteoporosis, GERD, hypertension, diabetes/hyperglycemia, [weight] gain with sleep apnea palpitations, [etc.].

Dr. Spandorfer noted that the claimant had reached maximum medical improvement and gave her an impairment rating of 35% to her lungs. (R. pp. 725-726)

On June 19, 2013, Dr. Davidson also completed a questionnaire regard the claimant's condition and the treatment he had provided her over the preceding year. Dr. Davidson admitted in the questionnaire that he had completed a disability form for the claimant, which he found "convoluted and confusing," but that it was "not [his] intention to state that [claimant's] condition was not related to her work." The doctor confirmed that his notes from his initial evaluation of the claimant indicated an allergic reaction to chemicals in the workplace. Dr. Davidson added, "[o]ther possible diagnoses needed to be ruled out and tests were ordered to do so; when these were normal, my diagnosis was angioedema related to solvent exposure in the workplace." Further, he stated his opinion that the claimant's reaction was causally related to her exposure to chemicals at work. The doctor also indicated that, after reviewing the reports of Dr. Spandorfer and Dr. Steve E. Herndon, he agreed with the diagnosis of the claimant's condition as occupationally-induced asthma. Moreover, Dr. Davidson noted his agreement with Dr. Herndon that the claimant "should no longer be exposed to these chemicals and should be restricted from working in [her] job." (R. pp. 772-773)

In a second questionnaire dated August 23, 2013, Dr. Davidson answered questions specifically regarding future medical treatment for the claimant's current condition. Dr. Davidson again confirmed his diagnosis of the claimant as having occupationally-induced or –worsened asthma, which is causally related to her work exposure on June 1, 2012. As a result of her occupationally-induced or –worsened asthma, the claimant will need, medications, office visits, breathing treatments, and inhalers. The doctor also noted the claimant had reached maximum medical improvement and gave her a 25% impairment rating to the lungs. (R. pp. 774-775)

Since the accident, the claimant has been forced to use her rescue inhaler more

frequently, and testified that she is sensitive to new things such as perfumes, aerosol cleaners, and even markers. (R. pg. 107, lines 7-18). She has a greatly reduced energy level due to her decreased lung function. (R. pg. 107, lines 19-25). Due to her work-related accident, she is now taking several medications, including Xyzal, Singulair, Advair, and an Albuterol inhaler. (R. pg. 108, lines 1-9). The claimant also described a respiratory episode she had in which a marker being used in the same room as her at her daughters' school left her unable to breathe. (R. pg. 108, line 10 – pg. 109, line 20). She also explained that she has not worked since the accident because the pulmonologist instructed that she can no longer work around chemicals due to her condition, despite her schooling and training as a chemist and a biologist. (R. pg. 110, line 12 – pg. 111, line 10). The claimant conceded that she did have asthma prior to this accident, but explained that she worked at the employer for nearly a decade after childbirth with no asthma-related problems until June 1, 2012. (R. pg. 112, lines 1-14).

The claimant was receiving long-term disability benefits for chemical sensitivity, which were set to be terminated on September 4, 2014. (R. pg. 112, lines 15-24). She testified further that she is receiving long-term disability benefits due to the issues which are a result of her present accident. (R. pg. 114, lines 4-10). She also testified that she took asthma medications seasonally, including Advair, prior to the June 1, 2012 accident, but that since the accident she has to take the medication daily. (R. pg. 112, lines 2-20).

The claimant testified regarding a letter she received from her long-term disability provider, ING. In pertinent part, the letter stated that the claimant was not receiving disability benefits due to Bell's palsy or left arm weakness, but rather due to "symptoms associated with sensitivity to chemicals/solvents in the work place." (R. pg. 180, line 16 – pg. 183, line 17). Finally, the claimant noted that, although she had not received any termination notice from the

employer, she had been informed that she could not return to working in the laboratory because of the chemicals and solvents therein. (R. pg. 191, line 11 – pg. 192, line 3). The claimant testified she appealed her denial of long-term disability benefits by noting, in part, that she suffers from an allergic reaction to chemicals, as well as facial swelling. (R. pg. 194, line 16 – pg. 197, line 17).

All three medical experts were deposed, two of them more than once. Dr. Spandorfer was first deposed on July 25, 2013. Dr. Spandorfer is board certified in internal medicine, pulmonary diseases, critical care, and sleep medicine. (R. pg. 280 lines 2-5). The claimant has been a patient of Dr. Spandorfer since August 17, 2005 when she first saw him for complaints of shortness of breath following childbirth and development of HELLP Syndrome. (R. pg. 280 lines 11-17). At that time, Dr. Spandorfer diagnosed her with mixed respiratory disorder characterized by dyspnea with restriction in airflow limitation, obstructive sleep apnea, asthma, and pulmonary hypertension. (R. pg. 283 lines 18-25). On June 19, 2008, the claimant's diagnosis changed to include asthma, restrictive lung disease, and allergic rhinitis. (R. pg. 8 lines 14-22).

In February 2011, the claimant told Dr. Spandorfer that she had an asthma attack, was having breathing problems at work, and she felt that general work related exposure was driving some of her respiratory problems. (R. pg. 288 lines 1-16). In February 2012, Dr. Spandorfer diagnosed the claimant with asthma, pulmonary fibrosis, hypersomnia with sleep apnea, a pulmonary nodule, and headache. (R. pg. 292 lines 13-17). By August 23, 2012, Dr. Spandorfer made a note that the claimant was not able to return to work due to progressive difficulties of shortness of breath with facial swelling, wheezing, chest tightness, and cough after exposure to chemicals such as toluene and methanol at work. (R. pg. 290 lines 21-25; R. pg. 289 lines 1-5).

Dr. Spandorfer noted her O2 saturation level at 98%, which is normal for an adult her age who was experiencing asthma symptoms. (R. pg. 295, lines 1-12). The claimant self-reported her exposure, and did not provide Dr. Spandorfer with any other information in regards to the amount of exposure she was subjected to. (R. pg. 290 lines 7-19). While the claimant is alleging an injury on the date of June 1, 2012, she did not report this specific date to Dr. Spandorfer, however she did report she's been a chemist for fifteen years and diagnosed with asthma for the past eight years. (R. pg. 293 lines 14-26; pg. 294 lines 1-6).

Dr. Spandorfer performed a spirometry test February 23, 2012. (R. pg. 296 lines 9-11). He reported the claimant blew out only 1.56 liters of air, which was 50 percent predicted. (R. pg. 397 lines 6-13). Dr. Spandorfer stated that 80 percent of air is expected to leave the lungs, no matter what size the lungs are, and the claimant's ratio was 87 percent, indicating a supernormal isovolemic flow. (R. pg. 297 lines 14-19). This means that more gas came out quicker, which is an indication that there is an increase of elastic recoil. (R. pg. 297 lines 18-21). On August 23, 2012, Dr. Spandorfer provided the opinion that the claimant had occupationally induced asthma based on her symptomology. (R. pg. 302 lines 20-25). Dr. Spandorfer testified the agents she was exposed to agents that are known to cause respiratory illnesses, and since her restriction appeared to precede her visits to Dr. Spandorfer in 2005, it is apparent she had a history of asthma that was worsened. (R. pg. 303 lines 10-15). Even though the claimant's lung function improved from February 2012- August 2012, her lung function was still very low. (R. pg. 304 lines 7-13). Dr. Spandorfer states that despite the fact her asthma improved during this time period, it was directly related to the fact she removed herself from her work environment after the alleged June 1, 2012 accident. (R. pg. 305 lines 9-12).

Dr. Spandorfer testified that if the claimant continued to have symptoms of asthma in her

daily life outside of work, which would not necessarily be an indication that the asthma was not work related. (R. pg. 305 lines 13-17). Oftentimes individuals with asthma continue to have sensitivity to other airborne related or environmental exposures. (pg. 305 lines 17-25). Dr. Spandorfer admits that while asthma is a condition that occurs during the general population regardless of where one works, the fact that the claimant not being at work improved her airflow indicates that her work is a finding expected for somebody who had an occupationally related asthma. (R. pg. 306 lines 20-25). Dr. Spandorfer testified his opinion is based on the subjective self-reporting of the claimant. (R. pg. 308 lines 13-16).

Dr. Spandorfer agreed with the findings of Dr. Herndon, another local pulmonologist who diagnosed the claimant with occupationally-induced asthma. (R. pg. 311 lines 14-24). Because Dr. Spandorfer saw the claimant February 23, 2012 and she had no problems with her asthma until June 1, 2012, when she had the incident at work, he testified this could be indicative of occupationally induced asthma exposure if the chemicals caused her to go out of work. (R. pg. 314 lines 4-13). Dr. Spandorfer testified that just because the claimant did not visit him immediately after the incident, it did not necessarily mean that it was not a work related injury. (R. pg. 316 lines 5-9). Dr. Spandorfer believed the claimant has given her maximum effort on all spirometry testing, and has not magnified her symptoms. (pg. 318 lines 13-24). After all questioning, Dr. Spandorfer stated that to a reasonable degree of medical certainly that Mrs. Johnson has either occupationally-induced asthma or occupationally-worsened asthma. (R. pg. 325 lines 20-25).

Dr. Spandorfer was next deposed on April 30, 2014. Dr. Spandorfer confirmed that when he saw the claimant for her work exposure, she reported that as a chemist, she was exposed to chemicals and volatile agents such as toluene, methanol, petroleum ether, and acetone. (R. pg.

334 lines 3-25). When he saw her on August 23, 2012, the claimant reported difficulties of shortness of breath, facial swelling, chest tightness and cough after exposure to chemicals at work. (R. pg. 336 lines 3-6). Dr. Davison testified that prior to June 1, 2012, the claimant needed to take Advair for her asthma, however if she was not taking her Advair prior to the chemical exposure at work, that means her disease was not active. (R. pg. 341 lines 8-21).

Dr. Spandorfer again confirmed the claimant now has occupationally-induced or worsened asthma. (R. pg. 350 lines 18-22). She presented to him with symptoms of cough, shortness of breath, and wheezing that worsened at her work site. (R. pg. 350 lines 22-24). Since her work accident, the claimant has required frequent use of rescue therapy and has a marked shortness of breath. (R. pg. 352 lines 20-22). Due to her condition, he has now diagnosed her with Reactive Airway Dysfunction Syndrome (RADS). (R. pg. 354 lines 16-24; pg. 355 lines 2-3; pg. 356 lines 9-17).

Dr. Spandorfer agreed with both Drs. Herndon and Davidson that the claimant has occupationally worsened asthma. (R. pg. 378 lines 18-22). Nothing in the deposition and questioning by the defense attorney would change his answer that she has occupationally worsened asthma. (R. pg. 378 lines 24-25, pg. 379 lines 1-4). Dr. Spandorfer testified that it was common for any patient to not take one of their medications, or to use one seasonally. (R. pg. 379 lines 6-25). Dr. Spandorfer found the claimant to be a good historian, trustworthy, and forthcoming. (R. pg. 380 lines 6-20). Prior to this accident, the claimant was never diagnosed with RADS. (R. pg. 382, lines 2-13). She still maintains a 35% impairment to the lungs as a result of this accident. (R. pg. 384 lines 18-25; pg. 385 lines 1-3).

Dr. Davidson was first deposed on July 31, 2013. He is board certified in allergy and clinical immunology. (R. pg. 412, lines 7-8). Dr. Davidson testified the claimant has been his

patient since approximately June 1, 2010. (R. pg. 413, lines 17-20). In July 2010, Dr. Davidson diagnosed the claimant with asthma, allergic rhinitis, and recurrent urticaria. (R. pg. 422, lines 10-17).

Approximately two years later, on June 7, 2012, the claimant presented herself to Dr. Davidson after having some problems at work with pain in her face and facial swelling. (R. pg. 425, lines1-4). The claimant also reported she had been out of work for three months with Bell's palsy. (R. pg. 425, lines 5-8). During the claimant's first week returning to work after her Bell's palsy had subsided, "she developed sharp pains in the left side of her face and swelling with her eyes swelling almost shut, and this happened while she was at work." (R. pg. 426, lines 7-11). In order to rule out any underlying condition that might cause facial swelling, Dr. Davidson ordered blood tests. (R. pg. 427, lines 1-13). Dr. Davidson clarified that "[t]he presence of swelling when someone is exposed to a particular substance or environment suggests a reaction," (R. pg. 430, lines 8-10), and the Claimant, had "three separate episodes where she had facial swelling while she was in the workplace in the room where she could smell the chemicals." (R. pg. 21, lines 8-15). Dr. Davidson stated, "my impression based on the recurrent episodes in that particular environment is that more likely than not it was a reaction to something in the workplace." (R. pg. 22, lines 3-6). Dr. Davidson testified there was no way for him, or anyone in this region, to test the claimant for allergies to toluene, methanol, petroleum ether, or acetone. (R. pg. 432, lines 4-7, pg. 451, lines 16-25).

Dr. Davidson's primary diagnosis on August 15, 2012 was angioedema. (R. pg. 434, lines 12-25). He did not "indicate any allergy to any chemical or solvent or material which [the claimant] reported being exposed to in the workplace" because "there wasn't any place on [the form] to indicate any of that." (R. pg. 435, lines 15-20). Because there was no possible way for

Dr. Davidson to confirm that the claimant was having reactions to the chemicals in the workplace, Dr. Davidson did not indicate this on the form. (R. pg. 435, lines 21-25 pg. 436, lines 1-3). Dr. Davidson also explained that he did not answer the question, "[i]s this condition due to an accident," affirmatively because at that time he was not aware of any accident. (R. pg., 436, lines 4-17).

Although Dr. Davidson did not give the claimant any physical limitations, he indicated on the form that she needed to avoid contact with solvents including toluene, methanol, acetone, and petroleum ether (chemicals that the claimant was exposed to in the course of her employment). (R. pg. 436, lines 19-25-pg. 437, lines 1-11). Dr. Davidson "made a distinction that these reactions she was having in and around June of 2012 were different than the previous chronic urticarial condition that she had which was mostly hives with some intermittent facial swelling." (R. pg. 439, lines 24-25-pg.440, lines1-3). His finding that "[the claimant] was having a reaction to something in the workplace" is to a reasonable degree of medical certainty. (R. pg. 440, lines 18-21). The claimant "only had these episodes during this time period on three different occasions when she was in that environment." (R. pg. 441, lines 17-19).

Based on reviewing her records, Dr. Davidson notes that he would agree with Dr. Herndon and Spandorfer's diagnosis of occupational-induced or occupational-worsened asthma. (R. pg.34, lines 17-24). On May 10, 2011, the claimant's last visit before the date of injury, the Claimant's asthma control test score was 22, consistent with well-controlled asthma. (R. pg. 444, lines 1-11). Dr. Davidson confirmed, "[the claimant] was relatively asymptomatic." (R. pg. 444, lines 16-17). The claimant also had some spirometry testing which indicated that her forced expiratory volume was 87 percent, within normal range. (R. pg. 444, lines 21-25-pg. 445, lines 1-2). On May 29, 2013, however, the Claimant's forced expiratory volume "was 67 percent

predicted which is consistent with moderately severe asthma and 20 percent lower than what it had been." (R. pg. 445, lines 18-25-pg. 446, lines 1). In addition, "[h]er forced vital capacity was 71 percent predicted, and the ratio of her forced expiratory volume in one second to her forced vital capacity was 78 percent predicted. Anything below 80 is consistent with obstruction in the lungs and asthma . . . the numbers show moderately severe asthma." (R. pg. 446, lines 13-21).

Dr. Davidson testified it was important to note that in May of 2011 and May of 2013, when these tests were performed, the claimant was taking the same medications. (R. pg. 456, lines 2-4). The test results in May of 2011 were within normal range, and in May of 2013 (subsequent to the date of injury) the claimant's test results proved to be problematic. (R. pg. 455, lines 3-5). He further notes that the claimant's "efforts were good, and compliance with the test was good . . . the numbers that we obtained on several occasions were valid." (R. pg. 437, lines 13-16).

Dr. Davidson clarified in his second deposition taken on October 2, 2013, that he diagnosed the claimant with occupationally "worsened" asthma. (R. pg. 468, lines 19-13). In 2010, when the claimant first came to Dr. Davidson for allergy testing, she did not recognize that chemicals were a problem at that time. (R. pg. 470, lines 13-18). Although normal exposure to general irritant pollutants could explain the variability between May 2011 and July 2012, Dr. Davidson does not believe that this would explain the claimant's symptoms. (R. pg. 476, lines 22-25). Because the tests performed by Dr. Davidson revealed that the claimant's persistent decrease in lung function was significantly lower and had not changed since July of 2012, (R. pg. 477, lines 2-6), the findings of the lab results would be inconsistent with normal intermittent exposures. (R. pg. 476, lines 1-6, 22-25 - pg. 13, lines 1-6).

Dr. Davidson confirmed that when he saw the claimant on June 7, 2012, she did not

report any problems with asthma, breathing difficulty, shortness of breath, or other lung problems associated with exposure at work. (R. pg. 484, lines 1-6). He further noted that "lung function doesn't always correlate with symptoms, and there are studies that suggest that you can have a 20 or 30 percent decrease in your lung function and not be symptomatic. So . . . the change in her lung function over time may not mean necessarily that she was symptomatic." (R. pg. 484, lines 11-17). Dr. Davidson rejected the opposing counsel's assumption that an irritant effect always causes an immediate reaction. (R. pg. 489, lines 20-23). He clarified that chemical exposure could cause a worsening of asthma which may not necessarily cause immediate symptoms. (R. pg. 490, lines 2-3).

Although there is often a temporal relationship between symptoms and exposure to the irritant, over long periods of time with low level exposures "sometimes people don't complain of immediate symptoms when they're exposed." (R. pg. 507, lines 3-10). "[T]here may be permanent damage from what she was exposed to." (R. pg. 508, lines 1-2).

On July 3, 2012, after the claimant had the episode of facial swelling at work, Dr. Davidson performed a lung function test that indicated that the claimant's lung function was significantly reduced from previous studies. (R. pg. 495, lines 11-20). Based on these results, Dr. Davidson "asked her to start taking the Advair regularly again," although Dr. Spandorfer, the prescribing doctor, had advised the claimant that "she didn't generally need to take [Advair] in the summertime." (R. 494, lines 19-25, pg. 495, lines 17-20).

Further, Dr. Davidson testified that because the claimant was not taking Advair in May of 2011 when her lung function was normal, he does not believe that "not taking the Advair could account for her breathing test being lower in 2012 and 2013 than it was in the spring of 2011." (R. pg. 502, lines23- pg. 493, lines 2). Dr. Davidson noted that he was not overly concerned

about her asthma because the claimant had a pulmonologist that was caring her asthma. (R. pg. 491, lines 7-14). After he "looked over the whole picture, including two pulmonologists that said she had occupational asthma, and [his] records," Dr. Davidson believed that "[the claimant's] asthma had gotten worse as a result of occupational exposures." (R. pg. 491, lines 16-23). Dr. Davidson agreed with the diagnosis from Dr. Spandorfer and Dr. Herndon. (R. pg. 497, lines 17-24).

Dr. Davidson testified that the claimant was still having occasional hives with certain allergic exposures, i.e., touching her dog; however, hives is distinct from the respiratory symptoms that she experienced after exposure to chemicals at work. (R. pg. 500, lines 12-23). Since the claimant has been taking her medications regularly there has not been a significant change in her lung function. (R. pg. 503, lines 23-25). Dr. Davidson believes that the claimant has reached maximum medical improvement. (R. pg. 504, lines 1-2). He further testified, "with long-term exposures to things, it's common for people to have permanent worsening of their asthma." (R. pg. 505, lines 1-3). The claimant may have permanent worsening of her asthma in decreased pulmonary function of her lung capacity. (R. pg. 508, lines 3-8).

As a result of her occupationally worsened asthma, the claimant needs future additional medical care that would tend to lessen her period of disability. (R. pg. 511, lines 11-14). "Since the development of occupational asthma, she now appears to have lower lung function and the need to take Advair all year round." (R. pg. 512, II.13-15). Dr. Davidson testified that usually when patients have a gradual worsening of asthma, their lung function does not drop by that much and stay low when taking medications. (R. pg. 517, II. 23-25). But when that happens, Dr. Davidson tests his patients to try to figure out if there is some other factor that might be causing the decrease in lung function. (R. pg. 518, lines 1-8). "[I]n this case, [he] feel[s] like the other

factor is most likely the work place exposure." (R. pg. 518, lines 8-10).

Dr. Herndon was deposed on October 15, 2013. Dr. Herndon testified the claimant's pulmonary problems were first brought to light in 2005 when she was diagnosed with HELLP syndrome from a complicated pregnancy. (R. pg. 566, lines 9-25). She required non-invasive ventilation, and showed a mild restrictive lung disease. (R. pg. 567, lines 3-5). Dr. Herndon reviewed Dr. Spandorfer's tests of restrictive deficits on pulmonary function, and both physicians agreed it could possibly be due to body habitus which can cause restrictive lung deficits. (R. pg. 567 19-23).

The tests that were administered to the claimant over time indicated the pattern that fit her best was restrictive lung disease. (R. pg. 573, lines 6-10). Dr. Herndon notes he saw a range in the claimant's serial pulmonary function studies done between 2005-2013 indicating restrictive lung disease with the vital capacity between 50% and 70% predicted. (R. pg. 579, lines 19-24). The claimant reported the subjective symptoms of shortness of breath with exertion out of proportion to what would be expected for her age and health status in June 2012. (R. pg. 580, lines 13-16). She reported to using an Albuterol inhaler 2-3 times per week to keep her wheezing under control. (R. pg. 580, lines 18-22). Other triggers for her asthma were walking upstairs, and a little bit of weight gain since her first facial swelling. (R. pg. 580, lines 23-25).

Dr. Herndon admitted inconsistency between when the claimant visited her neurologist, Dr. Bahadori, where she did not report shortness of breath three days after her June 2012 incident. (R. pg. 595, lines 12-20). The claimant told Dr. Herndon she had shortness of breath at work upon being exposed to certain chemicals before July 2012, but when she visited Dr. Bahadori July 5, 2012, she was exposed to those same chemicals but didn't report shortness of

breath. (R. pgs. 595-596). Despite this, Dr. Herndon states is possible asthma can return to baseline after removal from the exposure for a few days. Dr. Herndon stated that he could not say with a reasonable degree of medical certainty whether or not the claimant has any permanent impairment of her lungs as a result of any alleged exposure at work. (R. pg. 602, lines 5-13). In his opinion, it is unlikely that it's permanent, rather temporary. (R. pg. 603, lines 17-22). There is no objective evidence the claimant has obstructive lung disease. Her objective tests and finding consistently show a restrictive pattern, and a restrictive pattern unrelated to her employment could theoretically cause subjective symptoms such as shortness of breath with exertion.

Dr. Herndon states that he was aware of the claimant's medical history from her records. (R. pg. 604, lines 9-18). Dr. Herndon states that he is aware of Dr. Spandorfer, and that Dr. Spandorfer has a good reputation. (R. pg. 605, lines 4-10). He would not question a diagnosis made by Dr. Spandorfer. In fact, Dr. Herndon does not think to question another physician's diagnosis at all. (R. pg. 607, lines 1-2). Dr. Herndon stated he relied on all past medical reports and what the claimant reported to him in making his diagnosis, and he thought based on this information the claimant suffered from occupationally worsened asthma. (R. pg. 613, lines 17-23). Dr. Herndon had no independent knowledge of the history of any other treatment that the claimant had gotten since May 2013. (R. pg. 614, lines 14-21). Dr. Herndon states that he has no reason to not believe the claimant, and does not feel she was trying to deceive him in any way.

On August 14, 2013, Claimant visited Vision Counseling & Vocational Consulting for a vocational evaluation performed by Vocational Expert Chaddrick Middleton, MA, CVE, CRC, LPC-I. Mr. Middleton noted that the claimant presented with complaints of, most notably,

decreased breathing capacity and "severe allergic reactions to chemicals and solvents at her job that affect her ability to return to work as a chemist." After a thorough review of the claimant's personal and educational background as well as her work history, Mr. Middleton described the claimant's job as an "analytical chemist." Based on the claimant's history, medical reports, and indicated restrictions—including avoidance of exposure to chemicals—Mr. Middleton created a work profile for the claimant. The overall results of the evaluation indicated that the claimant could expect to make "slightly above entry level pay" for a new job within her work profile—specifically, as a laboratory technician—due in very large part to her medical condition and the fact that she cannot be around chemicals. Mr. Middleton quantified this statement at a projected hourly rate of $18.78, or approximately $39,058.41 per year. (R. pp. 784-798)

On August 23, 2013, Mr. Middleton produced an addendum to his report in the form of a Future Diminished Earning Capacity Evaluation. In it, he stated, "[d]ue to [the claimant's] functional limitations and restrictions the client is not able to return to work as a chemist and has suffered a residual loss of earning capacity as a result of her work related (sic) injuries." The addendum compared the claimant's past work as a chemist, where she earned approximately $56,000 per year, to her new recommended job as a laboratory technician in order to "determine her future diminished earning capacity." The second report delved deeper into the requirements of each position and confirmed the previous report's finding that the claimant's new salary would fall at the 25th percentile, while her previous job as a chemist paid her in the 50th percentile for that position.

ARGUMENTS

I. BECAUSE ALL THE MEDICAL EXPERTS IN THE RECORD OPINED THE APPELLANT SUFFERED FROM OCCUPATIONALLY WORSENED ASTHMA AND BECAUSE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION SUBSTITUTED ITS OWN MEDICAL OPINION FOR THAT OF THE MEDICAL EXPERTS IN THE RECORD, THE FINDING OF THE COMMISSION THAT THE APPELLANT DID NOT SUSTAIN AN INJURY OR AGGRAVATION OF A PREEXISTING CONDITION TO HER LUNGS OR RESPIRATORY SYSTEM IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

An employee is entitled to benefits under the South Carolina Workers' Compensation Act if the employee sustains an injury by accident arising out of and in the course and scope of employment. S.C. Code Ann. § 42-1-160. Furthermore, an aggravation of a preexisting condition is compensable. S.C. Code Ann. § 42-9-35.

"The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This court can "reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Substantial evidence is neither a "mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Id. Furthermore, in reviewing decisions of the

Commission, the court must consider two principles. "First is the guiding principle undergirding our workers' compensation system that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award my not rest upon surmise, conjecture, or speculation." Id.

In workers' compensation claims, "medical evidence is entitled to great respect." Burnette, 401 S.C. at 206, 737 S.E.2d at 427. Although the Commission may disregard medical evidence in favor of other competent evidence in the record, the Commission may not rely on its own "medical" opinion. Id. at 206, S.E.2d at 428 (finding "particularly disturbing" a finding of the Commission that was the "medical opinion of the single commissioner, adopted by the Commission.")

There is no reliable, probative, and substantial evidence in either the testimony or medical evidence in the record to support the decision of the Commission. The only medical opinions in the record are that the claimant suffered from occupationally worsened asthma. Dr. Spandorfer, who treated the claimant both before and after the exposure at work, opined the claimant suffered from occupationally worsened asthma as a result of the exposure. On August 23, 2012, Dr. Spandorfer noted that "[t]he patient is now not able to return to work," because she had "developed progressive difficulties of shortness of breath with facial swelling, wheezing and chest tightness and cough after exposure to chemicals at her work site." At that visit, the claimant reported requiring rescue bronchodilator therapy due to her symptoms. Dr. Spandorfer diagnosed the

claimant with "occupationally induced or occupationally worsened asthma."

On February 5, 2013, Dr. Spandorfer evaluated the claimant's lung function and noted "the patient has had significant improvement in her symptoms since she has been removed from her work environment." On August 22, 2013, Dr. Spandorfer's records reveals the claimant was there for "evaluation of her reactive airway dysfunction syndrome/occupationally induced or worsened asthma." Dr. Spandorfer diagnosed the claimant with occupationally-induced or –worsened asthma and noted that the claimant "is not felt to be able to return to her primary worksite due to the development of occupationally induced asthma and the risk of deterioration in her chemical exposure/worksite." Finally, the doctor also noted his diagnosis of reactive airway disease, again stating "the patient has occupationally induced lung injury." On April 8, 2014, Dr. Spandorfer once again diagnosed the claimant with occupationally-induced or –worsened asthma as well as reactive airway disease, which was brought on by her exposure to "[t]oluene and methanol/organic solvents."

On September 12, 2013, Dr. Spandorfer completed a questionnaire wherein he affirmed his diagnosis of occupationally induced or worsened asthma and further confirmed that it is causally-related to the claimant's work exposure on June 1, 2012.

At both of his depositions, Dr. Spandorfer affirmed this opinion. At his first deposition, Dr. Spandorfer explained several issues regarding the claimant's condition: (a) even if the claimant continued to have symptoms of asthma in her daily life outside of work, that would not necessarily be an indication that the

asthma was not work related. (R. pg. 306 lines 13-17), (b) oftentimes individuals with asthma continue to have sensitivity to other airborne related or environmental exposures (R. pg. 306 lines 17-25), (c) the fact that the claimant not being at work improved her airflow is a finding expected for somebody who had an occupationally related asthma, (d) the inhalation of fumes that consisted of toluene, methanol, and other chemicals on June 1, 2012 could have aggravated or worsened her already diagnosed asthma (R. pg. 303 lines 10-15) and that the agents she was exposed to are agents that are known to cause respiratory illnesses (R. pg. 310 lines 19-25), (e) just because Mrs. Johnson did not visit him immediately after the incident, it does not necessarily mean that it was not a work related injury (R. pg. 316 lines 5-9), (f) even though Mrs. Johnson's lung function improved from February 2012- August 2012, her lung function was still very low (R. pg. 304 lines 7-13) and (g) Dr. Spandorfer believed the claimant had given her maximum effort on all spirometry testing, and had not magnified her symptoms. (R. pg. 318 lines 13-24). After all questioning at the deposition, Dr. Spandorfer reaffirmed his opinion that to a reasonable degree of medical certainly that the claimant has either occupationally-induced asthma or occupationally-worsened asthma. (R. pg. 325 lines 20-25).

At his second deposition, Dr. Spandorfer continued to opine the claimant suffered from occupationally worsened asthma. He explained several issues regarding the claimant's condition: (a) when he saw the claimant on August 23, 2012, she reported difficulties of shortness of breath, facial swelling, chest tightness and cough after exposure to chemicals at work, (R. pg. 336 lines 3-6) (b)

prior to June 1, 2012, the claimant has been prescribed Advair for her asthma, however if she was not taking her Advair prior to the chemical exposure at work, that means her disease was not active, (R. pg. 341 lines 8-21) (c) since her work accident, the claimant has required frequent use of rescue therapy and has a marked shortness of breath, (R. pg. 352 lines 20-22) (d) due to her condition, he has now diagnosed her with Reactive Airway Dysfunction Syndrome (RADS), (R. pg. 354 lines 16-24; pg. 355 lines 2-3; pg. 356 lines 9-17) (e) that it was common for any patient to not take one of their medications, or to use one seasonally. (R. pg. 379 lines 6-25), (f) he finds the claimant to be a good historian, trustworthy, and forthcoming (R. pg. 380 lines 6-20) (g) prior to this accident, Mrs. Johnson was never diagnosed with RADS, (R. pg. 382, lines 2-13) and (h) nothing in the deposition and questioning by the defense attorney changed his opinion that she has occupationally worsened asthma. (R. pg. 378 lines 24-25, pg. 379 lines 1-4).

Dr. Davidson, who also treated the claimant both before and after the exposure at work, opined the claimant suffered from occupationally worsened asthma as a result of the exposure. The claimant first sought treatment with Dr. Davidson less than a week after the date of exposure at work. The claimant reported to Dr. Davidson that she had a reaction as a result of her exposure to chemicals including toluene, methanol, petroleum ether, and acetone, while at work on June 1, 2012. At a follow-up appointment on July 3, 2012, the claimant explained that she had experienced two more reactions while working and that her employer ordered her to avoid all solvents and to stay out of work. At that visit

Dr. Davidson noted "low spirometry off controller medication" and restarted her asthma medication Advair as well as continuing the Singulair.

On June 19, 2013, Dr. Davidson completed a questionnaire regard the claimant's condition and the treatment he had provided her over the preceding year. Dr. Davidson confirmed that his notes from his initial evaluation of the claimant indicated an allergic reaction to chemicals in the workplace. Dr. Davidson added, "[o]ther possible diagnoses needed to be ruled out and tests were ordered to do so; when these were normal, my diagnosis was angioedema related to solvent exposure in the workplace." Further, he stated his opinion that the claimant's reaction was causally-related to her exposure to chemicals at work. The doctor also indicated that, after reviewing the reports of Dr. Spandorfer and Dr. Herndon, he agreed with the diagnosis of the claimant's condition as occupationally-induced asthma. In a second questionnaire dated August 23, 2013, Dr. Davidson again confirmed his diagnosis of occupationally-induced or – worsened asthma causally-related to the claimant's work exposure on June 1, 2012.

In both of his depositions, Dr. Davidson affirmed these opinions. At his first deposition, he explained several issues related to the claimant's condition: (a) "[t]he presence of swelling when someone is exposed to a particular substance or environment suggests a reaction," and the claimant, had "three separate episodes where she had facial swelling while she was in the workplace in the room where she could smell the chemicals," (R. pg. 430, lines 8-15) (b) there was no way for him, or anyone in this region, to test the claimant for allergies to toluene,

methanol, petroleum ether, or acetone, (R. pg. 432, lines 4-7, pg. 451, lines 16-25) (c) "these reactions she was having in and around June of 2012 were different than the previous chronic urticarial condition that she had which was mostly hives with some intermittent facial swelling," (R. pg. 439, lines 24-25-pg.440, lines1-3) (d) after a review of the claimant's medical records, he agreed with Dr. Herndon's and Spandorfer's diagnosis of occupational-induced or occupational-worsened asthma, (R. pg. 443, lines 17-24) (e) on the claimant's last visit before the date of injury, the claimant's asthma control test score was 22, consistent with well-controlled asthma, (R. pg. 444, lines 1-11) (f) the claimant's spirometry testing before and after exposure revealed a worsening of her condition, (R. pg. 444, lines 21-25-pg. 445, lines 1-2, 18-25, pg. 446, lines 1, 13-21, pg. 455, lines 3-5) (g) in May of 2011 and May of 2013, when these tests were performed, the claimant was taking the same medications, (R. pg. 456, lines 2-4) and (h) the claimant's "efforts were good, and compliance with the test was good . . . the numbers that we obtained on several occasions were valid." (R. pg. 437, lines 13-16).

At his second deposition, Dr. Davidson continued to opine that the claimant suffered from occupationally worsened asthma. (R. pg. 468, lines 19-13). Dr. Davidson confirmed that when he saw the claimant on June 7, 2012, she did not report any problems with asthma, breathing difficulty, shortness of breath, or other lung problems associated with exposure at work. (R. pg. 484, lines 1-6). He further noted that "lung function doesn't always correlate with symptoms, and there are studies that suggest that you can have a 20 or 30 percent decrease in your lung function and not be symptomatic. So . . . the change in her lung

function over time may not mean necessarily that she was symptomatic." (R. pg. 484, lines 11-17). Dr. Davidson rejected the opposing counsel's assumption that an irritant effect always causes an immediate reaction. (R. pg. 489, lines 20-23). He clarified that chemical exposure could cause a worsening of asthma which may not necessarily cause immediate symptoms. (R. pg. 490, lines 2-3)

As with his first deposition, Dr. Davidson explained several issues related to the claimant's condition: (a) "these chemicals are respiratory irritants and they can cause worsening of asthma, and that's what I would believe would be the most likely explanation for it," (R. pg. 504, lines 16-19) (b) based on the tests he performed, normal exposure to general irritant pollutants would not explain the claimant's symptoms, (R. pg. 476, lines 1-6, 22-25, pg. 477, lines 1-6) (c) after the claimant had the episode of facial swelling at work, Dr. Davidson performed a lung function test that indicated that the claimant's lung function was significantly reduced from previous studies, and based on these results, Dr. Davidson "asked her to start taking the Advair regularly again," although Dr. Spandorfer, the prescribing doctor, had advised the claimant that "she didn't generally need to take [Advair] in the summertime." (R. pg. 494, lines 19-25, pg. 495, lines 11-20) (d) because the claimant was not taking Advair in May of 2011 when her lung function was normal, he does not believe that "not taking the Advair could account for her breathing test being lower in 2012 and 2013 than it was in the spring of 2011," (R. pg. 502, lines 23- pg. 493, lines 2), (e) hives are distinct from the respiratory symptoms that she experienced after exposure to chemicals at work. (R. pg. 500, lines 12-23).

Even the defendant's IME doctor, Dr. Herndon, diagnosed occupationally worsened asthma. Dr. Herndon had all the pertinent medical documents to review before his evaluation of the claimant, including the records of Dr. Bahadori. Dr. Herndon diagnosed the claimant with shortness of breath attributable to restrictive lung disease, as well as asthma, noting:

> I suspect that she did likely suffer from occupational asthma which has improved since being away from the exposures at work. She appears to have had significant allergic reactions to some exposure at her workplace. **I agree with her physicians, to a reasonable degree of medical certainty, she should no longer be exposed to these chemicals and should be restricted from working where the exposures occurred.**

Dr. Herndon went on to add, "[t]he chemicals that she was exposed to (sic) could have certainly exacerbated her asthma at the time of the exposure."

At his deposition, Dr. Herndon ultimately affirmed his original diagnosis. He testified he relied on all the past medical reports in addition to what the claimant reported to him in making his diagnosis, and he thought based on this information the claimant suffered from occupationally worsened asthma. (R. pg. 613, lines 17-23). Dr. Herndon stated that he had no reason to not believe the claimant, and did not feel she was trying to deceive him in any way. After an extensive line of questioning, Dr. Herndon testified he would stand by his report (R. pg. 59 22-25, 621 lines 1-3) and that "based on the history that she gave me, [occupationally-induced or worsened asthma is] the most likely diagnosis." (R. pg. 634 lines19-20). The history contained in Dr. Herndon's report tracks the claimant's testimony at the hearing.

At the hearing, the claimant testified regarding the new analysis she performed on June 1, 2012. She testified she developed problems in the form of facial pain and swelling as well as extreme lethargy. The claimant testified other people noted her wheezing. She testified as to the problems she experienced as a result of the exposure, including problems breathing.

In order to disregard the medical evidence in the record, the Commission must rely on other competent evidence. The order of the Commission, however, reveals the Commission either misread or misapprehended the evidence in the record and therefore, failed to rely on other competent evidence.

In its order, the Commission states the claimant "admits that she did not even take her asthma medication on June 1, 2012" and that "the Claimant admits that she didn't even need to take her long-prescribed asthma medications (Advair, Albuterol) on June 1, 2012 or the weeks that followed because she didn't 'note' any problems with her breathing." This is not an accurate reflection of the claimant's testimony. As to the medication, the claimant did, in fact, take her regularly prescribed Singulair. (R. pg. 122, lines 12-14) Although she was not regularly taking Advair at the time (R. pg. 122, lines 13-15), when she was asked if she took it on June 1, 2012, she testified she did not know. As for problems with her breathing, the claimant testified:

> A: Other people noted that they heard wheezing. I didn't note wheezing. I mean, my kids will note my wheezing sometimes before I will. So . . .
>
> Q: It wasn't bad enough for you to notice. If you had any breathing problems, it wasn't bad enough for you to notice, is that what you're saying?

A: A lot of times with the breathing issues, I tend to wait a little longer because the albuterol makes me jittery. It just – it gives me the shakes, so sometimes I will wait.

Q: But you weren't having any breathing problems that day?

A: I was not in direct respiratory distress. I may have had some breathing issues, but it wasn't at the point where I was taking – I need to take a puff on the inhaler.

Q: Okay. So you were not in respiratory distress and you did not need to take a puff on your inhaler that you had had for ten years on June 1st or any time in the week thereafter when you were working at Mead Westvaco.

A: I wouldn't say that.

Q: Well, what would you say? You just said you weren't in respiratory distress. . . . on June 1st. You were not in respiratory distress at any time on June 1st, 2012, were you?

A: I wouldn't say that either. . .

(R. pg. 131 lines 23-25; pg. 132 lines 1-25, pg. 133 lines 1-3) This testimony is a far cry from admitting she did not have any "problems with her breathing." These findings by the Commission are not supported by substantial evidence in the record.

The Commission's order, citing Dr. Davidson's July 3, 2012 report, states that "[e]ven a month after her alleged accident at work, the Claimant still had not experienced any problem breathing or any change in her pre-existing asthma." At that visit, however, Dr. Davidson noted "low spirometry off controller medication" and restarted her asthma medication Advair as well as continuing the Singulair. At his deposition, he testified that on July 3, 2012, "in the

summertime, when she normally was not having problems with her asthma, *we saw that her lung function was significantly reduced; and at that point, I recommended that she take the [asthma] medicine regularly in the summer.*" (R. p. 496 lines 3-7) (emphasis added). The Commission's finding in this regard is in direct conflict with the evidence and is therefore not supported by substantial evidence.

In its order, the Commission cites testimony by Dr. Bahadori. There was no testimony of Dr. Bahadori admitted into evidence. Any finding based on the testimony of Dr. Bahadori is both unsupported by substantial evidence and legal error.

The Commission's order states the claimant admitted on pages 73-74 of the transcript of the hearing before the single commissioner that she was not having any respiratory symptoms in the month following the alleged accident. A review of the transcript, however, reveals the claimant only admitted she was not having any respiratory symptoms the day she saw her doctor, not for the entire month. The finding by the Commission is not supported by substantial evidence.

The Commission states in its order that Dr. Herndon "testified that there is no objective evidence that the Claimant even has Asthma, as none of her physical exams have shown any abnormality and none of her Pulmonary Function Tests have ever shown any obstructive lung disease." This is a misrepresentation of Dr. Herndon's testimony. Dr. Herndon testified that "asthma is a clinical diagnosis. And you do not necessarily have to have abnormal pulmonary functions tests to diagnose asthma." (R. p. 469 lines 10-12.) He further testified "[i]n my opinion,

severity of asthma is a clinical diagnosis and not test-based necessarily (R. p. 570 lines 11-12) and that "based on a patient's symptoms, you can make a diagnosis of asthma." (R. p. 571 lines 12-13). Although he agreed there were no objective tests showing asthma, he opined the claimant had asthma (R. p. 602 line 18) and that asthma is typically diagnosed by what the patient tells the physician. (R. p. 630, lines 1-2) By seemingly requiring objective testing to establish asthma, the Commission improperly inserted its own medical opinion into the decision.

The Commission failed to make a credibility finding regarding the claimant's testimony. Without a credibility finding, the Commission essentially found the events and symptoms described by the claimant did not result in occupationally worsened asthma. This is an impermissible medical opinion by the Commission. All three medical experts in the record found that the events and symptoms described by the claimant did result in occupationally worsened asthma. Therefore, there is no reliable, probative and substantial evidence in the record to support the finding of the Commission.

II. BECAUSE ALL THE TESTIMONIAL AND MEDICAL EVIDENCE ESTABLISHED THE APPELLANT COULD NOT RETURN TO HER EMPLOYMENT AND ALL THE VOCATIONAL EVIDENCE SUPPORTED A FINDING OF WAGE LOSS, THE FINDING OF THE COMMISSION THAT THE CLAIMANT DID NOT SUSTAIN A LOSS OF WAGE EARNING CAPACITY AS A RESULT OF THE ACCIDENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The South Carolina Workers' Compensation Act provides benefits for loss of earning capacity. S.C. Code Ann. §§ 42-9-10, 42-9-20. "Such disability is to

be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Walker v. City Motor Car Co., 232 S.C. 392, 396, 102 S.E.2d 373, 375 (1958). All three medical experts opined the claimant could not return to working around chemicals. The claimant testified she could not return to working around the chemicals. The only vocational evidence in the record establishes that because the claimant could not return to working around chemicals, she has sustained a loss in earning capacity. There is no evidence in the record otherwise; therefore, any finding contrary to a loss of earning capacity is not supported by substantial evidence in the record.

The Commission found that because the claimant was out of work due to other problems, she sustained no wage loss because of the exposure to chemicals. Any other problems the claimant may have had are irrelevant in a determination of whether the chemical exposure and subsequent occupational worsened asthma caused a loss in earning capacity.

To the extent the claimant's other physical problems are relevant, there is no reliable, probative and substantial evidence that she is out of work solely because of other physical problems. The claimant had other physical problems that affected her ability to work. She had returned to work, however, when the June 1 exposure occurred. She did apply for short term and long term disability, but she testified and the evidence revealed that she was currently out on long term disability because of chemical sensitivity.

Furthermore, the defendant's own witnesses do not support the Commission's finding. Mrs. San Pedro testified that the claimant was initially not

working due to her ten-pound weight lifting restriction, but conceded that if the claimant's current restriction was 20 pounds, the employer would likely be able to accommodate her. (R. pg. 235, line 13 – pg. 256, line 10). Further, the witness then confirmed, given that the claimant's current weight restriction actually is 20 pounds, that the claimant could probably go back to her job in the laboratory. (R. pg. 237, lines 11-18). She also testified, however, if doctors restricted the claimant from returning to lab work around chemicals—as they have—the claimant would not be able to return to her previous job in the laboratory. (R. pg. 237, line 23 – pg. 238, line 2).

The claimant's supervisor testified that, "[a]fter June 1st, there was a weight restriction and [the employer] put [the claimant] on . . . light duty as far as just handling the paperwork [because] she was not to handle any chemicals in the lab." (R. pg. 225, lines 8-19). She further testified that the claimant was told not to handle chemicals in June 2012 because she had a reaction to toluene in the laboratory on June 1, 2012, the date of accident in this claim. (R. pg. 228, lines 5-9).

The Commission's finding is this regard is not supported by substantial evidence in the records.

III. BECAUSE THE MEDICAL AND TESTIMONIAL EVIDENCE ESTABLISHED THE CLAIMANT HAS SUSTAINED A LOSS OF USE OF HER LUNGS, THE FINDING OF THE COMMISSION THAT THE CLAIMANT HAS NO PERMANENT IMPAIRMENT OR LOSS OF USE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Under the South Carolina Workers' Compensation Act, a claimant may

recover benefits for loss of use of certain body parts. S.C. Ann. § 42-9-30. Both Dr. Davidson and Dr. Spandorfer independently assigned impairment ratings to the claimant. On August 23, 2013, Dr. Davidson opined that the Claimant sustained a 25% impairment rating to each lung. On September 12, 2013, Dr. Spandorfer assigned a 35% impairment to the lungs. Dr. Spandorfer clearly stood by his rating of 35% in his deposition:

> Q: Okay. Now in terms of the rating that she has now, I was a little bit confused when Ms. Barr was just questioning you. Previously, in September of '13, you'd assigned a 35 percent impairment to the lung. Is it still 35 or is it 38?
>
> A: I'd like to keep it at 35, I believe.

(R. pg. 384 lines 18-25; pg. 385 lines 1-3).

The claimant's own testimony confirms that she has sustained a loss of use of her lungs. Since the accident, the claimant has been forced to use her rescue inhaler more frequently, and testified that she is sensitive to new things such as perfumes, aerosol cleaners, and even markers. (R. pg. 107, lines 7-18). She has a greatly reduced energy level due to her decreased lung function. (R. pg. 107, lines 19-25). Due to her work-related accident, she is now taking several medications, including Xyzal, Singulair, Advair, and an Albuterol inhaler. (R. pg. 108, lines 1-9).

The claimant also described a respiratory episode she had in which a marker being used in the same room as her at her daughters' school left her unable to breathe. (R. pg. 108, line 10 – pg. 109, line 20). She also explained that she has not worked since the accident because the pulmonologist instructed that

she can no longer work around chemicals due to her condition, despite her schooling and training as a chemist and a biologist. (R. pg. 110, line 12 – pg. 111, line 10). The claimant conceded that she did have asthma prior to this accident, but explained that she worked at the employer for nearly a decade after childbirth with no asthma-related problems until June 1, 2012. (R. pg. 112, lines 1-14).

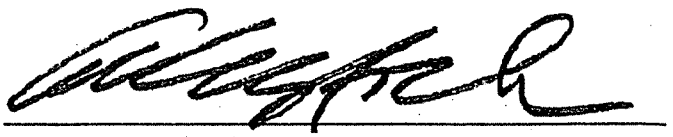
Although Dr. Herndon testified the claimant would not likely suffer permanent damage as a result, Dr. Herndon only saw the claimant one time and was not in a position to judge whether she had permanent damage. Drs. Davidson and Spandorfer treated the claimant regularly both before and after the exposure. The findings by the Commission regarding loss of use are not supported by substantial evidence.

CONCLUSION

For the reasons stated, this Court should reverse the decision and order of the South Carolina Workers' Compensation Commission and remand to the Commission for a determination of benefits.

Respectfully submitted,

November 30, 2017



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

Appellate Case No.: 2015-002041

Mortesha Mouzon-Johnson, Claimant, Appellant,

v.

Mead Westvaco, Self-Insured Employer, Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Amended Final Brief of Appellant complies with Rule 211(b), SCACR.

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