THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File No. 0825491

Robin Bradley Cole, Employee ....Respondent,

v.

Goodman Conveyor Company,
d/b/a Joy Mining Machinery, Employer, and
Indemnity Insurance Company of N.A., Carrier..Appellants.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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Statement of Issues on Appeal

I. Whether the Commission erred in finding that Claimant suffered a compensable injury by accident on or about September 8, 2008?

II. Whether the Commission erred in determining that Claimant's work exposure contributed 29 percent impairment to each lung?

III. Whether the Commission erred in finding that Claimant was permanently and totally disabled as a result of a compensable aggravation of his COPD?

IV. Whether the Commission erred in ordering Appellants to pay Claimant the uncommuted value of 145 weeks of compensation?

STATEMENT OF THE CASE

Respondent Robbin Bradley Cole ("Claimant") was hired by Goodman Conveyor Company, d/b/a Joy Mining Machinery ("Employer") on August 11, 2008 to work as a maintenance technician. Prior to working for Employer, Claimant enlisted in the Navy for approximately two years and was given a less-than-honorable discharge. (R. p. 72, lines 6-19).[1] While enlisted, Claimant worked on old ships where he was exposed to asbestos. (R. p. 72, line 22 – p. 73, line 4). After the Navy, he worked at the Sudan Company as a press operator and die setup/repairman for approximately four years, after which he worked at the Townhouse Restaurant where he worked off an on for approximately eleven years. (R. p. 37, line 22 – p. 38, line 3). He then worked for Hydro Aluminum until 2006 where he was a saw operator and then a maintenance technician. (R. p. 38, lines 4-18). He was recommended to Employer by his supervisor at Hydro Aluminum. (R. p. 39, lines 1-5).

For the majority of his time with Employer, Claimant worked in maintenance, (R. p. 40, lines 8-15), although for the last several months he worked with the safety coordinator. (R. p. 57, line 18 – p. 58, line 7). As part of his job, he was tasked to try "to solve hydraulic leaks on the presses and air leaks." (R. p. 44, lines 3-15). Claimant was known as a good employee, and was awarded a merit pay increase in February 2009. (R. p. 128, lines 8-12) (R. p. 363). Claimant was laid off in March 2010, along with about 60 other employees, because business had slowed down. (R. p. 121, line 17 – p. 122, line 5).

Claimant alleges that, on September 8, 2008, while removing a directional valve on a press, a fluid later identified as Reactobond "saturated" him, covering his face, hair, knees and

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[1] Although Claimant stated on his job application with Employer that he had been in the Navy from 1987 to 1991, (R. pp. 359-360), he later admitted that he had been discharged in 1989. (R. p. 72, lines 6-14).

chest. (R. p. 28) (R. p. 44, line 16 – p. 45, line 16) (R. p. 185, line 10 – p. 186, line 21). Keavin Ramey, Claimant's supervisor, testified that he was unaware of any such incident. (R. p. 119, line 13 – p. 120, line 1). Claimant later acknowledged that he did not actually work that day, (R. p. 81, line 23 – p. 82, lines 14), and echoed his attorney's phrasing to state that the injury occurred, "on or about" that date. (R. p. 83, lines 2-5) (R. p. 44, lines 16-18).

Claimant admitted that, when the alleged incident occurred, he did not tell anyone about it, because it didn't bother him at the time. (R. p. 85, lines 6-12). However, Claimant testified that the following day or night, he started experiencing shortness of breath, and went to see his primary care physician, Dr. Martin. He testified that he was given a breathing test, albuterol and antibiotics. (R. p. 45, line 24 – p. 47, line 8). Medical notes from Primary Care Associates indicate that he was seen on September 17, 2008, complaining of "cough x/ 1 month worse over 2 weeks." (R. p. 216). There is no mention of any exposure to work-related fluids or chemicals.

Claimant testified that he had never had this type of treatment previously. (R. p. 47, lines 11-13). However, medical notes from AnMEd Health indicate that he was seen in October 2006 – approximately two years before he started working for Employer – for bronchitis/bronchospasm. (R. pp. 395-400). At that time, he was prescribed an Albuterol inhaler and a "Prednisone taper." (R. p. 400). Furthermore, the September 17, 2008 medical note from Primary Care Associates indicates that Claimant reported having a "Hx of asthmatic bronchitis." (R. p. 216). Between March and July 2009, Claimant was seen in the emergency room a total of four times, complaining of shortness of breath. (R. pp. 222-239, 261-268, 295-310) (R. p. 50, lines 12-22) (R. p. 52, line 12 – p. 53, line 5).

Claimant was referred to Dr. Stephen Hand in March 2009, (R. pp. 261-262, 265), but did not see him until August 2009. Claimant testified that he did not suspect that the Reactobond

was the cause of his breathing problems until he was so advised by Dr. Hand. (R. p. 85, line 21 – p. 86, line 8). However, Dr. Hand's notes of Claimant's very first appointment reveal that Claimant told Dr. Hand that he, Claimant, felt "his respiratory problems are related to exposure at work." Based on the history provided by Claimant and his examination of Claimant, Dr. Hand's diagnoses/impressions were: 1) asthma with possible/probable coexisting COPD, 2) exposure to toxins at work; 3) ongoing tobacco abuse; 4) alcohol abuse; 5) history of anxiety; and 6) history of asbestos exposure. (R. pp. 335-336).

On a follow-up visit on August 26, 2009, Dr. Hand "encouraged [Claimant] to utilize proper protective gear at work and asked him to talk to the safety supervisor at his plant about this matter." (R. p. 337). Dr. Hand also offered to "send records to the plant if necessary." (R. p.337). However, there is no evidence that Claimant requested Dr. Hand to send any information regarding his condition to Employer. Mr. Ramey testified that he was unaware that any doctor had recommended that Claimant wear a mask when he was at work. (R. p. 126, lines 22-24). Claimant admitted that, when asked about wearing a respirator at work, he told his supervisor that, on certain jobs, by the time he got "all that stuff on," he would already have finished the job. (R. p. 93, line 22 – p. 94, line 2). Mr. Ramey testified that, although Employer provided respirators and protective suits for employees, they were not required and Claimant refused to wear one. (R. p. 120, line 16 – p. 121, line 16) (R. p. 125, line 24 – p. 126, line 8). Claimant's testimony and Dr. Hand's notes support this latter point. (R. p. 93, line 22 – p. 94, line 2) (R. p. 333 (Dr. Hand's notes indicating that Claimant told him he "wears respirator mask that he reports, but he does not think the mask is properly maintained by the company")). Mr. Ramey did recall Claimant asking him to buy cartridges for Claimant's own personal mask, which Employer declined to do as there were 3M respirators already available to Claimant. (R. p. 121,

lines 10-16) (R. p. 126, lines 9-18). Joe Beasley, Employer's Environmental Health and Safety officer for the region, (R. p. 102, lines 14-25), testified that, during the time Claimant worked for Employer, all air sampling results were under OSHA permissible exposure limits. (R. p. 104, lines 3-13). This meant respirators were not needed for the chemicals to which employees were exposed. (R. p. 110, lines 8-15).

Dr. Hand testified that Claimant's "exacerbation related to the work exposure was temporary. As an addendum to that, I don't think he can go back into a toxic environment again." (R. p. 141, lines 18-21). Dr. Hand also agreed that it was "difficult to say how much of [Claimant's] impairment is due to the work exposure." (R. p. 142, lines 7-16). Dr. Hand explained that, when he saw Claimant in December 2010, his FEV1 was 40 percent predictive, whereas in August 2009, it had been 71 percent predictive, which Dr. Hand explained was "as good as I've ever seen" for Claimant. (R. p. 143, lines 1-14). Claimant's latest lung function test revealed severe air flow obstruction; however, Dr. Hand could not estimate how much of Claimant's lung function "would be recoverable if he stopped smoking . . . [because] **He'd have to stop smoking for us to find out**." (R. p. 143, line 18 – p. 144, line 6) (emphasis added). Dr. Hand estimated that the maximum Claimant's job exposure would have contributed to his lung impairment was 29 percent, based on the August 2009 spirometry results, but "**there's a lot of guesswork involved in this to be perfectly honest**." (R. p. 144, lines 7-23) (emphasis added). When asked whether he could state to a reasonable degree of medical certainty whether 29 percent of Claimant's loss of lung function was attributable to his work exposure, Dr. Hand admitted that he could not, (R. p. 144, line 24 – p. 145, line 9), and stated that "you really can't" break down what degree of impairment is attributable to Claimant's employment and how much is due to non-work exposures, including his life-long smoking habit. (R. p. 147, lines 7-16).

Finally, Dr. Hand testified that Claimant's continually worsening condition after he was laid off in March 2010 was attributable to his continued smoking and not to his employment with Employer. (R. p. 145, line 20 – p. 146, line 13). Dr. Hand estimated that, of the 29 percent impairment Claimant experienced in August 2009, probably **only half** was attributable to his work environment. (R. p. 147, line17 – p. 148, line 4). Furthermore, Dr. Hand agreed that it was most likely that, whatever level of impairment may have been caused by work-related exposures, Claimant would have returned to a baseline condition once he was removed from that environment. (R. p. 148, lines 5-15).

Claimant testified that he first thought his lung problems were related to the chemicals he was exposed to at work "on about [his] third exposure with the Reactobond . . ." (R. p. 54, lines 17-21). Claimant testified that this would have been around his first or second visit with Dr. Hand, which would have been August 19 or 26 of 2009. (R. p. 54, line 17 – p. 56, line 9). Although Claimant testified that he did not suspect his lung problems were related to chemicals at work until he started seeing Dr. Hand, he admitted that, after going to the hospital a couple of times, he suspected "it's got to be something I was exposed to at work because it hit me so fast and so hard." (R. p. 86, lines 11-14) (R. p. 87, lines 3-16). As noted above, Claimant was seen in the emergency room a total of four times, complaining of shortness of breath between March and July 2009. (Single Commissioner Decision, R. pp. 20-21) (R. pp. 222-239, 261-268, 295-310) (R. p. 50, lines 12-22) (R. p. 52, line 12 – p. 53, line 5).

Claimant acknowledged that not one of the doctors he saw for his breathing problems told him that he could not work around the chemicals or irritants at Employer's facility. (R. p. 88, line 14 – p. 89, line 12). Claimant admitted that, although he thought the chemicals at his workplace were causing his breathing problems, he kept working regular eight-plus hour shifts

because, "I needed a job and I didn't realize the severity of the condition I had either." (R. p. 90, lines 12-16). Although his supervisor, Mr. Ramey, was aware that Claimant was having breathing problems from the time he was hired, and observed him using an inhaler as early as August 2008, the only reason Claimant ever suggested for his breathing problems was his prior work with the Navy. (R. p. 116, line 20 – p. 118, line 20) (R. p. 51, lines 6-24).

Although Claimant was provided with various medical excuses from work, none of them indicated that he was being treated for any work-related injury or exposure. (R. pp. 254, 302, 303-306, 375).

Although Claimant initially testified he had never had breathing difficulties prior to working for Employer, (R. p. 39, line 22 – p. 40, line 2), he later admitted that he had had asthma as a child. (R. p. 73, line 15 – p. 74, line 6). He also acknowledged that it was "highly possible" he had experienced breathing difficulties prior to working for Employer. (R. p. 74, line 12 – p. 76, line 14). He also admitted that medical papers he personally filled out when he was in the Navy stated that he had experienced asthma and shortness of breath in the past. (R. p. 91, line 19 – p. 92, line 21).

Practically all of Claimant's medical notes indicate that he was a long-term smoker, (R. pp. 226, 232, 238, 261, 292, 311, 333, 335, 340, 386, 390, 395), and Claimant admitted to smoking approximately a pack of cigarettes a day for 25 years. (R. p. 79, lines 22-25) (R. p. 137, lines 12-23). Claimant was told repeatedly by his healthcare providers to stop smoking. (R. pp. 221, 265, 291, 333, 335, 336, 400). In fact, Dr. Hand specifically "advised [Claimant] that it is absolutely imperative that he stops smoking at this time," and "warned him regarding problems associated with ongoing tobacco abuse including worsening lung function, MI, CVA, cancer, and other problems." (R. p. 335) (*see also* R. p. 138, lines 11-19 (noting that Claimant's cigarette

exposure is related to his respiratory condition)). Dr. Hand stated that cigarette smoking was "a significant contributing factor" to Claimant's respiratory condition. (R. p. 139, lines 17-21). Claimant testified that doctors have told him to quit smoking but admitted that, "I smoke now more than I did prior." (R. p. 80, lines 5-17). Although Claimant first asserted that he had reduced the amount he smokes, (R. p. 80, lines 9-12), he immediately conceded that he only "periodically" reduced his smoking, "but no, not on a consistent basis though." (R. p. 80, line 18 – p. 81, line 12).

This proceeding was initiated by Claimant's filing a Form 50 with the South Carolina Workers' Compensation Commission, contending that he suffered an injury by accident or illness to his lungs as result of chemical exposure on September 8, 2008. He further contended that he was permanently and totally disabled from the aggravation of his pre-existing COPD and sought benefits accordingly along with payment of causally-related medical treatment. (R. p. 28).

Employer and its workers' compensation carrier, Indemnity Insurance Company of N.A. ("Appellants"), denied that Claimant sustained a compensable injury at all and argued that his COPD and respiratory conditions and symptoms were the result of a pre-existing condition caused by twenty-five years of smoking a pack of cigarettes per day. Further, they contended that Claimant refused to wear any of the protective safety equipment made available to him. Lastly, they contended that, even if Claimant was found to have suffered a compensable injury, he was laid off due to lack of work and not any physical condition meaning that if there had been ongoing work available, he would still be working in the same capacity. They denied that he was permanently and totally disabled. (R. p. 30).

This matter was heard before Single Commissioner Andrea C. Roche on April 6, 2011.

In an Order dated July 14, 2011, the Single Commissioner found that, pursuant to Section 42-1-160, Claimant sustained a compensable injury by accident, "specifically, but not limited to, exposure on September 8, 2008, when [Claimant] was drenched in hydraulic oils." (Decision and Order of the Single Commissioner, dated July 14, 2011, R. pp. 23, 26) ("Single Commission Decision") (*see also* R. p. 26 (holding that Claimant "suffered an injury arising out of and in the course of his employment when he was exposed to toxic chemicals in the workplace on September 8, 2008, and continuing which aggravated his COPD which caused permanent impairment to his right and left lungs")). Further, she found that his pre-existing COPD had been aggravated by "continuous exposure to chemicals." (R. pp. 23-24).

The Single Commissioner found that Claimant was not credible with regard to testimony relating to his pre-existing lung problems but that this lack of credibility did not "undermine his claim." (R. p. 24). She further found that Employer had "actual notice of the Claimant's work injury and aggravation on several occasions, including in August 2009, when the Claimant discussed getting a respirator with Keavin Ramey as advised to do so by his doctor because of his breathing problems," and "when the Claimant was unable to breathe on or about March 12, 2009, and Mr. Ramey called [Claimant's] girlfriend to come and pick him up." (R. p. 24). She found that Claimant was permanently and totally disabled as a result of the aggravation of COPD, but that his smoking habit had contributed significantly to his condition and lung impairment and, therefore, found that he was entitled to 145 weeks of permanent partial disability benefits, representing 29% of total disability. (R. pp. 24-25) (*see also* R. p. 26 (holding that Claimant "sustained permanent impairment to each lung of twenty nine percent (29%) based on the preponderance of the medical evidence"). She also awarded Claimant past and future causally related medical treatment. (R. pp. 25-26).

Appellants timely appealed the Single Commissioner's Decision to the Full Commission which heard oral argument on October 24, 2011. The Full Commission affirmed the Single Commissioner's Decision, repeating substantially verbatim the Single Commissioner's findings of fact and conclusions of law. (Decision and Order of the Full Commission, dated December 5, 2011, R. pp. 1-8) ("Commission Decision").

Appellants timely filed this appeal.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by S.C. Code Ann. § 1-23-380 (Supp. 2012) of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5).

Review of the Commission's factual findings is governed by the substantial evidence standard. "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *see also* S.C. Code Ann. § 1-23-380(A)(5)(e). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order

to justify its action." Frame v. Resort Services Inc., 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). In particular, Workers' Compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). In addition, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

ARGUMENTS

I. The Commission erred in finding that Claimant suffered a compensable injury by accident on or about September 8, 2008.

The Commission erred in finding that Claimant suffered an injury by accident on September 8, 2008 when he allegedly was exposed to chemicals, including Reactobond and AW68. (Commission Decision, R. p. 3). Further, the Commission found that Claimant's breathing problems, including asthma, bronchitis and COPD, were aggravated as a result of continuous exposure to chemicals at work. (Commission Decision, R. p. 4). The Commission's Decision thus appears to contemplate that Claimant suffered both a compensable injury by accident to his lungs as well as an occupational disease, although Claimant did not pursue and the Commission's Decision does not contain findings of fact to support a claim of occupational disease.[2] Thus, the Commission's Decision seems to blur the line between an injury by accident and occupational disease through repetitive exposure.[3] In the end, however, the evidence does not support a finding of compensability under either theory.

[2] In order to prove he or she suffers from a work-related occupational disease, a claimant must satisfy all six of the elements set forth in Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 461 S.E.2d 392 (1995).
[3] Claimant did not claim to have been injured as a result of a repetitive trauma. (R. p. 28).

A. The Commission's finding that that Claimant suffered a compensable injury by accident to his lungs on September 8, 2009 that aggravated his respiratory condition is not supported by substantial evidence in the record.

Claimant alleged that he was drenched in hydraulic oils on September 8, 2008 and that his lungs were injured as a result of that exposure. (R. p. 28). Specifically, he alleged that while removing a valve, he was "saturated" in fluid/oil. He testified the "back of my hair was laying in the fluid in the catch pan and I've got long hair, so---my arms, I mean I was pretty much fully exposed." (R. p. 45, lines 11-16). He further testified that he began having shortness of breath sometime the next day or night.

Claimant was not even at work on September 8, 2008. Although he testified in his deposition that the event occurred on that day and that he sought treatment that day at the emergency room, (R. p. 185, line 10 – p. 187, line 11), he did not actually see Dr. Martin until September 17, 2008 when Claimant complained of a cough for one month which had worsened over the past two weeks. (R. p. 216). The medical notes do not mention any "drenching" or "saturation" of hydraulic oils or chemicals. Further, the medical note indicates that Claimant reported a history of asthmatic bronchitis. (R. p. 216).

Claimant admitted that he did not report the alleged incident to anyone. There is no mention of this specific alleged incident in any of the medical reports, and the only evidence that it occurred is Claimant's self-serving testimony. Further, the Commission found that Claimant's testimony with regard to his pre-existing lung problems was not credible, but inexplicably held that "this lack of credibility" did not undermine his claim. (Commission Decision, R. pp. 3-4). This is key. Since the only evidence of the event that Claimant now claims occurred "on or about" September 8, 2008 is his own self-serving testimony, the Claimant's credibility is

particularly crucial. Claimant was untruthful or evasive in a number of respects. Claimant was untruthful about how long he served in the Navy. He stated on his job application that he was enlisted from 1987 to 1991, (R. pp. 359-360), but later admitted under oath that he had been discharged in 1989. (R. p. 72, lines 6-14). In addition, Claimant first alleged that he had been injured when he was exposed to chemicals **specifically** on September 8, 2008, (R. p. 28) (R. p. 185, line 10 – p. 186, line 21), but once it was pointed out to him that he was not even at work that day, hedged his testimony to state "on or about September 8, 2008." (R. p. 81, line 23 – p. 83, line 5). Also, Claimant was evasive and contradicted himself as to whether he had cut back on his smoking. (R. p. 80, line 9 – p. 81, line 12 (first asserting that he had reduced his smoking on his doctor's advice, but then admitting any reduction was only temporary; he was smoking more at the time of the hearing than previously).

Despite numerous instances where Claimant admitted on the record that he provided false or incorrect information, and despite the Commission's acknowledgement that his testimony was not credible in at least one respect, the Commission affirmed the Single Commissioner's finding of fact that the "saturation" incident occurred on September 8, 2008. (Commission Decision, R. p. 3). The evidence simply does not support that an incident took place on or about September 8, 2008, or that, even if it did, there is nothing to suggest that that event caused or aggravated any of Claimant's symptoms. Thus, Appellants contend the Commission's finding that Claimant suffered a specific injury by accident is supported only by Claimant's self-serving and unreliable testimony, and the opinion of Dr. Hand, which in turn, was based on the accuracy of Claimant's reporting to him. Thus, the Commission's key determination that Claimant suffered an injury by accident on September 8, 2008 is not supported by credible substantial evidence in the record and should be overturned.

B. Claimant did not suffer a compensable occupational disease by either a specific incident or repetitive exposure to chemicals.

Section 42-11-10 defines occupational disease and outlines specific findings needed to order to award benefits for same. S.C. Code Ann. § 42-11-10; *see also* Mohasco Corp. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986), *rev'd on other gds.*, 292 S.C. 489, 357 S.E.2d 456 (1987). None of those findings were made in the present case. As noted above, there simply is not substantial evidence in this record, and the Commission Decision is inadequate to support a finding that Claimant suffered an occupational disease. Appellants contend that Claimant did not suffer an occupational disease and address it here only out of an abundance of caution given that the Commission references that Claimant suffered breathing problems including asthma, bronchitis and COPD, all of which could be considered occupational diseases.

II. The Commission erred in determining that Claimant's work exposure contributed 29 percent impairment to each lung.

Assuming solely for the sake of argument that Claimant's work-related exposure resulted in an aggravation of his COPD or breathing problems, the Commission erred in awarding Claimant 29 percent impairment, and should be reversed. The Commission found as a factual matter that Claimant's "work exposure to toxic chemicals only contributed 29 percent impairment to each lung for 145 weeks of compensation." (Commission Decision, R. p. 5). Accordingly, the Commission upheld the Single Commissioner's award of compensation based on a work-related impairment of 29 percent to each lung. (Id., R. pp. 2, 7). However, the unrefuted medical evidence in this case establishes that the **maximum** that Claimant's alleged work exposure could have contributed to his impairment was 29 percent, and that even that conclusion was based on "a lot of guesswork . . ." (R. p. 144, lines 7-23). In fact, Dr. Hand

specifically agreed that he could not state to a reasonable degree of medical certainty that up to 29 percent of Claimant's loss of lung function was attributable to his work exposure. (R. p. 144, line 24 – p. 145, line 9 (Dr. Hand saying that was his "best guess")). Dr. Hand explained that he could not break down what degree of impairment was attributable to Claimant's employment and how much was due to non-work exposures, including his life-long smoking habit, in part because Claimant would not quit smoking. (R. p. 143, line 18 – p. 144, line 6) (R. p. 147, lines 7-16). Dr. Hand testified that, of the 29 percent impairment Claimant experienced in August 2009, probably **only half** could be attributed to his work environment. (R. p. 147, line 17 – p. 148, line 4).

This is the only evidence in the record supporting any impairment rating. And it is, at best, speculative. It is well established that a claimant must "establish by a preponderance of the evidence" the facts that show he or she is entitled to benefits under the Workers' Compensation Act, and "such award must not be based on surmise, conjecture or speculation." *See, e.g.*, Tiller, 334 S.C. at 339, 513 S.E.2d at 845; Shealy v. Algernon Blair, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). To the extent Dr. Hand's findings support any finding at all, they support a finding that, at most, only half of 29 percent (or 14.5 percent) impairment to each lung was attributable to Claimant's alleged work exposure. The Commission Decision improperly attributes all of Claimant's impairment as of the August 2009 FEV1 to his work exposure, when it is undeniable that his life-long cigarette habit contributed significantly to his lung and breathing problems. *See* (R. pp. 221, 265, 291, 333, 335, 336, 400) (R. p. 139, lines 17-21).

Finally, Dr. Hand testified that Claimant's worsening condition after he was laid off in March 2010 was attributable to his continued smoking and not to his employment with Employer. (R. p. 145, line 20 – p. 146, line 13). Furthermore, Dr. Hand agreed that it was most

likely that, whatever level of impairment may have been caused by work-related exposures, Claimant would have returned to a baseline condition once he was removed from that environment. (R. p. 148, lines 5-15).

Therefore, the Commission erred by finding that Claimant's work exposure contributed 29 percent impairment to both lungs and awarding 145 weeks of compensation based on that finding. There is no evidence in the record to support this finding. Instead, the only medical evidence in this record supports a finding that, at the very most, only half of 29 percent (or 14.5 percent) of Claimant's impairment was caused by his work environment. Therefore, this Court should reverse the Commission Decision and either remand to the Commission for it to determine the proper percentage of Claimant's impairment that was work-related, if any, or hold that the evidence only supports a maximum of 14.5 percent of Claimant's impairment was attributable to his job.

III. The Commission erred in finding that Employer had actual notice of Claimant's alleged work-related injury.

Section 42-15-20(B) requires that, in order for compensation to be paid, a claimant shall give his or her employer notice within ninety days of the occurrence of a work-related accident. S.C. Code Ann. § 42-15-20(B). The Commission found that Employer had "actual notice of the Claimant's work injury and aggravation on several occasions, including in August 2009, when Claimant discussed getting a respirator with Keavin Ramey as advised to do so by his doctor because of his breathing problems," and "when the Claimant was unable to breathe on or about March 12, 2009, and Mr. Ramey called his girlfriend to come and pick him up." (Commission Decision, R. p. 4). However, because these findings are not supported by credible substantial evidence in the record, they must be overturned on appeal. The only testimony that arguably supports the first conclusion is Claimant's self-serving testimony in a proceeding where

Claimant was the only witness with credibility issues. Mr. Ramey, whose testimony was not found to be questionable in any respect, testified that he knew nothing about any specific incident on or around September 8, 2008 or at any other time when Claimant was "drenched" in any type of chemical or fluid. He further stated that no one, including Claimant, ever reported such an incident to him. (R. p. 119, line 13 – p. 120, line 1). In addition, Mr. Ramey testified that he had never been made aware that any doctor had recommended that Claimant wear a respirator at work. (R. p. 126, lines 19-24).

The Commission's conclusion that the March 12, 2009 incident constituted actual notice to Employer is not supported by substantial evidence either. Although there is ample testimony that Mr. Ramey was aware that Claimant had breathing problems, there is not one shred of credible evidence that he or Employer knew those breathing problems were related to his work conditions. *See* (R. p. 85, lines 6-12 (Claimant admitting that, when the alleged incident occurred, he did not tell anyone about it)) (R. p. 116, line 20 – p. 118, line 20 (Mr. Ramey testifying that he was aware that Claimant was having breathing problems from the time he was hired, and observed him using an inhaler as early as August 2008, but the only reason Claimant ever suggested for his breathing problems was his prior work with the Navy)) (R. p. 337 (although Dr. Hand offered to send a note to Employer regarding Claimant's need to wear a respirator, there is no evidence that Claimant ever requested him to do so)) (R. pp. 254, 302, 303-306, 375 (none of Claimant's medical excuses indicated he was absent for any work-related reason)) (R. p. 117, line 22 – p. 118, line 20 (Mr. Ramey recounting episodes when Claimant's breathing became difficult and he had to be sent home, but that Claimant only indicated that the cause of his breathing difficulties might have been his work in the Navy). In none of these instances did Claimant inform Mr. Ramey or anyone else with Employer that he believed his

breathing problems were associated with his job duties. (R. p. 118, lines 17-20). In fact, Claimant admitted that he told Sandra Rickets with the Employer that he believed his breathing problems stemmed from his work in the Navy. He told her that he had worked around asbestos in the Navy and that he was going to apply for Veteran's benefits based on that. (R. p. 51, lines 8-24). However, even if the alleged discussion regarding respirators occurred in August 2009, or the March 2009 incident provided actual notice to Employer, both of those dates are more than 90 days from Claimant's alleged work-related injury, which, according to Claimant, occurred on or about September 8, 2008. (R. p. 44, line 16 – p. 45, line 16) (R. p. 185, line 10 – p. 186, line 21).

Despite claiming that he made no link between the alleged saturation on September 8, 2008 and his breathing problems, Claimant remembers the alleged event in specific and vivid detail. (R. p. 44, line 16 – p. 46, line 9). It is implausible that, years later this event would stand out in such concrete detail if Claimant did not link it to some significant reaction, *i.e.*, his breathing problems later that evening. In fact, when Claimant was asked, "When did you **first notice any problems because of the contact**?" he responded, "It was later that evening." (R. p. 187, lines 6-8) (emphasis added). In addition, Claimant admitted that, after a couple of visits to the hospital, he suspected his breathing problems had to be related to chemicals on the job, (R. p. 86, lines 11-14) (R. p. 87, lines 3-16); however, there is no evidence he reported anything to Employer. Therefore, even if the discovery rule announced in Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), is applied in this case, Claimant knew or should have known his condition was compensable sometime between March and July of 2009. There is no credible evidence in the record to support the Commission's conclusion that Claimant provided notice of his alleged injury to Employer within 90 days of discovering his condition

was compensable.

There simply is not substantial evidence in the record to support a finding that Claimant timely notified Employer of a specific incident or that he believed his respiratory problems were related in any way to his employment with them. Therefore, because he failed to provide notice to Employer within 90 days of his alleged injury or of when he knew or could have known his breathing difficulties were compensable, this Court should reverse the Commission and hold that Claimant's claim is barred under S.C. Code § 42-15-20(B).

IV. The Commission erred in finding that Claimant was permanently and totally disabled as a result of a compensable aggravation of his COPD.

The Hearing Commissioner erred in finding that Claimant was permanently and totally disabled as a result of any alleged aggravation of his COPD. Disability is defined by statute as the incapacity because of injury to earn the wages which an employee was receiving at the time of injury in the same or other employment. S.C. Code Ann. § 42-1-120. The term "disability," in the context of the South Carolina Workers' Compensation Act, means incapacity, because of injury, to earn the wages which the employee was receiving at the time of injury in the same or any other employment. S.C. Code Ann. § 42-1-120. The claimant bears the burden of "proving the facts essential to his right to compensation, and an award may not be based upon conjecture or speculation." Shealy, 250 S.C. at 110, 156 S.E.2d at 648. In order to establish total disability, a claimant has the burden of proving that he or she is "unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). As long as a claimant is capable of performing in some employment capacity, a claimant is not totally disabled merely because he is unable to return to the exact employment he undertook at the time of his injury. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 163,

584 S.E.2d 390, 395 (Ct. App. 2003). In addition, allowing a claimant to recover total disability payments at the same time that he or she is representing him or herself to the unemployment commission as ready, able and willing to work violates both the purpose and the language of our workers' compensation statute. *See* Shealy, 250 S.C. at 112, 156 S.E.2d at 649 (stating that the "object of the act is to relieve an injured workman from the loss or impairment of his *capacity* to earn wages").

Claimant first presented to Dr. Hand in August of 2009 for shortness of breath and wheezing. He reported having already been diagnosed with COPD and asthma and further noted that he, Claimant, felt his problems were related to exposures at work. (R. p. 333). Despite that, he continued to work for the Employer for several more months until he was laid off in March of 2010 for reasons unrelated to his breathing problems. He admitted that he worked full time, eight hours per day at his normal job, even though he missed some days of work. (R. p. 89, line 6 – p. 90, line 6). For at least an additional several months after seeing Dr. Hand, he continued to work a job with exposure to various chemicals. He did this despite his concern, as reported to Dr. Hand, that his employment was causing his respiratory problems and symptoms. (R. p. 333). He was laid off in March of 2010 due to lack of work. (R. p. 121, lines 17-21).

In addition, Claimant filed for and received unemployment benefits after his layoff in March of 2010. He admitted that he represented to the Employment Security Commission that he was able to work. (R. p. 90, line 23 – p. 91, line 1). Claimant also testified that he continued to look for work. (R. p. 63, line 20 – p. 64, line 2). Although the fact that Claimant applied for and received unemployment benefits, on its own, may not be serve as an absolute bar to disability payments, a representation that a claimant is ready, willing and able to work is persuasive, if not conclusive, evidence that the claimant is not, in fact, unable to work. *See*

Harvey v. Art Metal, 247 S.C. 443, 450, 147 S.E.2d 697, 701 (1966) (where the Supreme Court observed that a "claimant's application for and acceptance of unemployment compensation may be considered by the commission as evidence in deciding whether disability continued, and **may be conclusive** against the award of total disability benefits for the period of time during which unemployment compensation was drawn . . .") (emphasis added).

There is no evidence in the record that Claimant would not have continued working but for the economic climate. He admitted that he was never taken out of work for more than three days at a time prior to his layoff, and moreover, he admitted that none of his doctors have ever restricted him from working around chemicals or irritants. (R. p. 88, line 14 – p. 89, line 12).

Apparently, the Hearing Commissioner relied on the "check the box" questionnaire that Claimant's attorney provided to Dr. Hand. Although Dr. Hand's response to the "check the box" questionnaire indicates that Claimant was unable to return to gainful employment, Dr. Hand later clarified his opinion during his deposition and explained that he does not believe that Claimant can return to work in an industrial setting with exposure to significant respiratory irritants which would include dust, fumes, chemicals and smoke. (R. p. 159, lines 19-22). An inability to work in such a setting does automatically render one unable to return to gainful employment. In fact, Claimant testified that he worked in a restaurant setting for a friend off and on for 11 years. (R. p. 37, line 22 – p. 38, line 3).

In addition, Dr. Hand had no knowledge of Claimant's educational background or work history. Therefore, in this case in particular with respect to the disability issue, the medical testimony should not be held conclusive of other testimony. *See* Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Claimant testified that he worked for many years in his friend's restaurant and represented himself as ready, willing and able to work to the Employment Security Commission.

Claimant had not been prescribed an oxygen tank and in fact, at the time of the hearing, Claimant was only using a nebulizer and Albuterol, a rescue inhaler. (R. p. 69, lines 3-23). He admitted that he was able to cook and clean around the house. (R. p. 71, lines 8-12) (R. p. 64, lines 20-23). Claimant admitted that he continued to apply for jobs in order to maintain his unemployment benefits. (R. p. 64, lines 1-10). Thus, the evidence only supports the conclusion that Claimant could have worked in some capacity other than in an industrial setting after he was laid off by Employer.

Furthermore, Dr. Hand testified that any exacerbation related to work exposure was temporary. (R. p. 141, lines 18-21). Therefore, any of Claimant's symptoms which may have been caused by his work environment with Employer was temporary, at most. There is no evidence in this record that any alleged work-related "exacerbation" of Claimant's condition was permanent. Therefore, because there is no evidence in the record to support the Commission's conclusion that Claimant was entitled to an award for a permanent impairment due to a work-related injury, the Commission Decision must be overturned.

To the extent Claimant was not able to work following the March 2010 layoff, there is no evidence that the reason Claimant continued to be unemployed was due to any alleged work-related injury. Dr. Hand's records indicate that Claimant's condition continue to worsen even after he stopped working for Employer in March 2010. (R. p. 143, line 25 – p. 144, line 6) (R. p. 145, line 20 – p. 146, line 13). If his condition was being aggravated by exposure to chemicals and those chemicals were removed from his environment, his condition should have improved or, at the very least, remained the same. However, although Claimant was no longer exposed to chemicals, he continued to smoke. Dr. Hand opined that smoking contributed significantly to his respiratory problems. (R. p. 139, lines 17-21). The only logical conclusion is that Claimant's

worsening symptoms were caused by his continued smoking, as opposed to any work-related exposure. Therefore, even if he was unable to work at the time of the hearing, it was not because of his previous exposure to any chemicals while working for Employer.

The only conclusion the evidence in this record supports is that, at the time of the hearing, Claimant was not permanently and totally disabled as he was able to continue working in his job with Employer for several months after he first began seeing Dr. Hand and would still have been working in that same job but for a decline in business and a plant-wide layoff of half the workforce. Dr. Hand's "check the box" opinion should be given little, if any, weight as he is not a vocational expert and has no knowledge about Claimant's previous work history or education. Further, at the time of the hearing, Claimant was taking minimal prescriptions at best and offered no reason as to why he could not return to work other than that he could not find a job. In fact, he represented to the Employment Security Commission that he was able to work and continued to apply for jobs. Claimant has prior experience working in the restaurant industry which would likely comply with the restrictions Dr. Hand imposed of no exposure to significant respiratory irritants including dust, fumes, chemicals and smoke. Therefore, even if the Commission's finding that Claimant's respiratory problems were a result of his work environment is upheld, the award should have been limited to partial disability to the lung, at most. Finally, if Claimant is found to have been totally disabled, the only conclusion this record supports is that such total disability was due to Claimant's continued smoking, and not to his job environment.

V. The Commission erred in ordering Appellants to pay Claimant the uncommuted value of 145 weeks of compensation.

In the event that the finding and award of 145 weeks of permanent partial disability is upheld, Appellants are entitled to commute that award in accordance with Regulation 67-1605,

which provides that, where an award is for more than 100 weeks, the Commission may order a lump sum payment. S.C. Code Reg. § 67-1605(A). In the alternative, if this Court orders an award that is less than 100 weeks, which Appellants argue is the only award supported by substantial evidence in this record, the lump sum payment would be mandatory under Regulation 67-1605. Id. (providing that "[t]he employer's representative shall pay, in lump sum, a settlement or award which is less than one hundred weeks"). Appellants therefore respectfully request, as they did below, that the Order be amended to provide for commutation of the award.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission Decision and find that: 1) substantial evidence does not support the Commission's finding that Claimant suffered a compensable injury under Section 42-1-160, nor does it support any finding that Claimant suffered a compensable occupational disease; 2) substantial evidence does not support the Commission's finding that Claimant's work exposure contributed 29 percent impairment to each lung; 3) substantial evidence does not support the Commission's finding that Employer had actual timely notice of Claimant's injury as required by Section 42-15-20(B); and 4) the Commission erred in ordering the Appellants to pay the uncommuted value of 145 weeks of compensation.

Respectfully submitted,

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July 23, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File No. 0825491

Robin Bradley Cole, Employee .... Respondent,

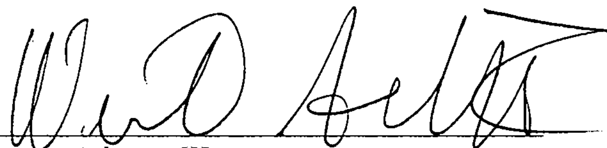
v.

Goodman Conveyor Company,
d/b/a Joy Mining Machinery, Employer, and
Indemnity Insurance Company of N.A., Carrier .... Appellants.

PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief and Final Reply Brief of Appellants Joy Global and ACE USA/ESIS comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief and Final Reply Brief of Appellants Joy Global and ACE USA/ESIS comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

July 23, 2012



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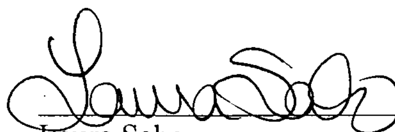
PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANTS** and **FINAL REPLY BRIEF OF APPELLANTS** on the attorney of record for Robbin Bradley Cole by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2012, addressed as follows:

Lynn Shook, Esquire
906 Augusta Street
Greenville, South Carolina 29605



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July 20, 2012

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
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RECEIVED
JUL 23 2012
SC Court of Appeals

RE: Robbin Cole vs. Joy Global and ACE USA/ESIS
Date of Accident: September 8, 2008
WCC File No.: 0825491
Our File No.: 2062.10533
Claim No.: 494C1733402
Case Tracking No.: 2012-205507

Dear Ms. Kitchings:

Enclosed for filing please find the original and 16 copies of the Final Brief and Final Reply Brief of Appellants Joy Global and ACE USA/ESIS in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service for each final brief. Please file these documents and return a clocked in copy to my courier.

Yours truly,

McAngus Goudelock & Courie, LLC

Weston Adams, III

WA/lhs
Enclosures

cc: Lynn Shook, Esquire (w/enclosures)
Donna Richards, ESIS (w/enclosures)