THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC File No. 0825491

Robbin 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 REPLY BRIEF OF APPELLANTS

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Appellants Goodman Conveyor Company, Inc., d/b/a Joy Mining Machinery ("Employer") and Indemnity Insurance Company of N.A. hereby reply to Respondent Robbin Cole's ("Claimant") Brief to this Court.

I. Substantial evidence does not support the Commission's finding that Claimant suffered an injury by accident on or about September 8, 2008.

Despite Claimant's various arguments, the Commission's finding that Claimant "sustained an injury by accident arising out of and during the course of his employment through the exposure to chemicals . . . specifically, but not limited to, exposure on September 8, 2008," (Commission Decision, R. p. 3), is not supported by substantial evidence and should be overturned. For the reasons set forth in Appellants' Brief and below, there is no evidence that Claimant suffered a work-related injury on September 8, 2008. He was not even at work on that date.

Absent findings to support an award for an occupational disease, discussed in more detail below, Claimant is limited to his claim for an injury by accident, which the Commission specifically found occurred on September 8, 2008. (Commission Decision, R. p. 3).[1] This finding is not supported by substantial evidence in the record. Defendants' Exhibit No. 1, introduced at the hearing, demonstrated that Claimant was not at work on September 8, 2008. (R. p. 130). Contrary to Claimant's assertions, (Resp. Br. p. 14), Defendants' Exhibit No. 1 does **not** indicate that Claimant worked five out of eight hours on September 8, 2008. (R. p. 130). The symbol above the number eight on September 8 on that exhibit is an "S" that indicates sick leave, not a notation that

[1] Although the Commission referred to a "continuous exposure to chemicals," (Commission Decision, R. pp. 4, 6), Claimant has not alleged a repetitive trauma injury, (R. p. 28), and, as discussed below, the Commission's findings are insufficient to support an award for occupational disease through repeated "exposures."

Claimant worked 5 hours on that date. This is confirmed by the three days in November 2008 that are marked "S/8," which are the three days Claimant testified that he spent in Greenwood Hospital. (R. p. 50, lines 14-22). Claimant presented Employer with a doctor's note for these three sick days, (R. p. 50, line 23 – p. 51, line 5) (R. p. 375), which is also supported by the notation at the bottom of Defendants' Exhibit No. 1 (indicating "11-17 → 11-19 Dr's Note"). (R. p. 130). Further evidence that the symbol over the "8" on Defendants' Exhibit No. 1 is an "S" rather than a "5", appears on the entry for October 31, 2008, where "0/.25" is clearly written with the notation at the bottom that, on that date, "No clock in." The "5" in the "0.25" is distinctly different from the "S" that shows a sick day. Claimant was out sick on September 8, 2008 and admitted as much at the hearing. (R. p. 81, line 23 – p. 83, line 5) (*see also* R. p. 176, line 23 ("I was out of work sick 9/8/09")). Thus, the evidence in this case does not support the Commission's finding that Claimant sustained an injury by accident on September 8, 2008 and should be overturned.

To be sure, at the hearing before Commissioner Roche, Claimant revised his story to allege that he was injured "on or about" September 8, 2008. However, until it was pointed out to Claimant and his counsel that he was not at work on that date, he unambiguously alleged an injury date of September 8, 2008. (R. p. 28) (R. p. 185, lines 10-13 ("Q: We're here today because you've claimed that you were injured on the job back on September 8, 2008. Is that right? A: 9/8/08.")). This is one more instance of Claimant's unreliable testimony. In a case where the occurrence of an accident relies entirely on a claimant's unsubstantiated testimony, such a discrepancy and change of story line does not constitute credible substantial evidence.

Although Claimant marked both "Injury by Accident" and "Illness" on his Form 50, (Form 50), and although the Commission appeared to consider Claimant's COPD both an accidental injury and an occupational disease, (Commission Decision, R. pp. 3-4, 6), there are insufficient findings in this case to support a finding that Claimant has suffered an occupational disease. *See*, Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995) (listing the six of the elements necessary to prove an occupational disease). Therefore, Claimant's assertions regarding Section 42-11-10(B)(5) are irrelevant. If, in fact, this Court finds that Claimant has suffered an occupational disease, this case must be remanded to the Commission for findings of fact and law to support such an award. Fox, 319 S.C. at 282, 461 S.E.2d at 394-95.

As to causation, Claimant argues that the compensability of his COPD is proven by the facts that his pre-employment physical did not show "signs of COPD or lung abnormality," and that he developed COPD after working for Employer. (Resp. Br. p. 13).[2] First, there is no indication that a FVC/FVL or any other lung functionality tests were performed as part of this physical. Therefore, it is pure speculation to compare Claimant's November 17, 2008 FVC/FVL to his pre-employment physical to conclude that his lung problems "were caused by toxic chemical exposure at Defendant's plant rather than smoking." (Resp. Br. p. 13). Claimant's argument that, "Claimant smoked and worked without significant respiratory problems until he took a job at [Employer] when he was exposed to toxic chemicals and not until then was he ever diagnosed with

[2] Claimant incorrectly cites Keavin Ramey as stating he would not have hired Claimant "had there been an indication that he was suffering from COPD or any other lung condition." (Resp. Br. p. 13). What Mr. Ramey said was simply that he would not have hired Claimant if he had not passed his pre-employment physical. (R. p. 128, lines 4-7). Furthermore, Dr. Hand noted that someone, either Claimant or the doctor performing the physical, had underlined "allergies and then asthma" on the pre-employment physical. (R. p. 149, line 10 – p. 150, line 2). Thus, the pre-employment physical did reveal a lung condition.

COPD," (Resp. Br. p. 27), essentially asks this Court to uphold the Commission Decision based solely on the sequence of events. The mere fact that, after a 25-year history of cigarette smoking, Claimant's condition became worse while he was working for Employer does not constitute substantial evidence to support the award. *See*, Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 492-93, 499 S.E.2d 253, 255-56 (Ct. App. 1998) (holding that, just because a claimant is injured or becomes ill at work does not mean the injury or illness is work-related); Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) (compensation denied where the cause of the claimant's fall or injury could not be attributed to his work). Claimant's argument is nothing more than pure speculation. It is axiomatic that Workers' Compensation awards "must not be must not be based on surmise, conjecture or speculation." *See, e.g.*, Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); Shealy v. Algernon Blair, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). Furthermore, Dr. Hand opined that it was likely that Claimant had some degree of air flow obstruction, some degree of permanent impairment as a result of his cigarette smoking, before he even started working for Employer. (R. p. 146, line 24 – p. 147, line 10).

Claimant makes much of Mr. Ricky Joe Beasley's testimony. (Resp. Br. p. 15). Mr. Beasley is Employer's Regional Environmental Health and Safety specialist. (R. p. 102, lines 14-20). His job is to ensure that Employer's facilities are in compliance with OSHA standards and regulations. (R. p. 103, lines 1-16). Mr. Beasley testified that, during the time Claimant worked for Employer, all the air sampling results demonstrated that the facility was "under OSHA permissible exposure limits on air quality." (R. p. 104, lines 3-13) (R. p. 105, lines 18-22). He also testified that, during the 15 years he

worked for Employer, he had never had an employee out of work on workers' compensation for respiratory problems. (R. p. 105, line 23 – p. 106, line 6). When Mr. Beasley first met Claimant in September of 2008, Claimant showed him his inhaler and Mr. Beasley told Claimant that he should keep it with him in case he needed it. (R. p. 106, lines 12-24). When asked whether a respirator was available to Claimant, Mr. Beasley said, "No, **not that I'm aware of**." (R. p. 109, lines 7-9) (emphasis added). Thus, contrary to Claimant's assertions, Mr. Beasley did **not** state uncategorically that Claimant was denied access to a respirator but, rather, simply that he was unaware of whether Claimant had been provided one. Mr. Beasley also explained that, had Claimant required a respirator, he would not have been the person who would have handled the request but, instead, "that would have been handled at the facility." (R. p. 112, lines 11-18).

More importantly, however, Mr. Beasley testified that none of the employees was required to wear a respirator around Reactobond, "because it's based off of our air sampling studies and our – there's an air sample study laying there in front of – that proves that we're way below the OSHA permissible exposure limits for eight hour time related average. So it does not require a respirator." (R. p. 110, lines 8-15). He stated uncategorically that, "[h]ad [Claimant] operated a station that required a respiratory he would have been provided one." (R. p. 112, lines 7-10).

Finally, Mr. Beasley did not "substantiate[] Claimant's claim that the Belton Plant had poor ventilation . . ." (Resp. Br. p. 15). Mr. Beasley simply testified Joy Mining was working on projects and that the plant needed "some improvement" for ventilation and machinery. (R. p. 114, lines 13-22). There is a wide gap between a plant needing "some

improvement" and a plant having "poor ventilation," and Claimant's attempt to put words in Mr. Beasley's mouth should be rejected.[3]

Claimant next points to Dr. Hand's medical evidence. (Resp. Br. p. 16). Dr. Hand's statement, on the check-the-box form sent to him by Claimant's counsel, that Claimant's exposure to Reactobond and AW68 was the cause of Claimant's worsening respiratory problems, (R. p. 343), was clarified by Dr. Hand in a number of respects. First, on the form itself, Dr. Hand indicated that it was "difficult to say how much of [Claimant's] impairment is due to work exposure." (R. p. 343). At his deposition, Dr. Hand stated that cigarette smoking was "a significant contributing factor" to Claimant's respiratory condition and estimated that half of his impairment was due to smoking. (R. p. 139, lines 17-21) (R. p. 147, line 17 – p. 148, line 4). 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, once Claimant was removed from the work environment, he would have returned more or less to a baseline condition, (R. p. 148, lines 5-15), later qualifying this statement by explaining that any permanent impairment was attributable to both his exposure and his continued smoking. (R. p. 162, lines 13-18). This record supports no other conclusion than that Claimant's condition worsened after he was laid off by Employer because he continued, and even increased, the amount he was smoking. (R. p. 80, lines 5-17) (R. p. 145, line 20 – p. 146, line 13).

[3] Although Mr. Beasley confirmed that there was a "bone yard" in back of the facility, he only agreed that some of the machinery was old. (R. p. 111, lines 14-21). The existence or non-existence of a "bone yard" is irrelevant to the claim at issue in this case. Furthermore, it is unclear how or where this testimony "is a direct contradiction to the allegations in Defendant's [sic] Brief." (Resp. Br. p. 15). As such, Claimant's arguments on this point should be disregarded.

II. Substantial evidence does not support the Commission's determination that Claimant's work exposure contributed 29 percent impairment to each lung.

Despite Claimant's arguments otherwise, the Commission's award of a 29 percent work-related impairment to each lung is not supported by substantial evidence, and is inconsistent with its own finding that Claimant's life-long smoking greatly contributed to his COPD and impairment. (Commission Decision, R. p. 4). Therefore, the Commission Decision must be reversed and remanded for a determination of how much of the 29 percent impairment is due to work-related exposure and how much is due to other causes, including Claimant's life-long history of smoking cigarettes.

This is not a case where there is a conflict in the evidence and the Commission, as the fact finder, chose between two competing opinions. Instead, as the only medical witness, the Commission relied on Dr. Hand's evaluation of Claimant's condition and the relative causes of his impairment. Claimant points out that Dr. Hand was Claimant's treating physician and the only medical expert to testify. Appellants have not suggested that Dr. Hand's testimony or opinions are unreliable or irrelevant; Appellants do assert that Dr. Hand's testimony and evidence must be considered in its totality – that where Dr. Hand qualified his responses, as is the case with respect to how much of Claimant's impairment is work-related – the Commission and this Court must consider the record as a whole, including all of Dr. Hand's opinions and testimony, and not rely solely on a few statements taken out of context. Claimant incorrectly states that Dr. Hand opined that Claimant's work-related exposure caused all of the impairment to his lungs – Dr. Hand's handwritten qualification of his response on the check-the-box form itself clarifies that Dr. Hand believed it was "difficult to say how much of his impairment is due to work

exposure." (R. p. 343). Thus, there is no evidence in this record, let alone substantial evidence, to support the Commission's finding that **all** of Claimant's 29 percent impairment is work-related.

Furthermore, the Commission found as a factual matter that Claimant's life-long smoking habit "has greatly contributed to his COPD and lung impairment," (Commission Decision, R. p. 4), but at the same time awarded Claimant disability for the entire amount of his impairment – 29 percent – suggested by Dr. Hand. This is despite the fact that Dr. Hand stated that as much as half of Claimant's impairment was due to his smoking. (R. p. 147, line 20 – p. 148, line 4). Therefore, the Commission's findings in this regard are not only internally inconsistent, but are in conflict with all of the evidence on this issue. Claimant may have a 29 percent impairment to his lungs, but all of the evidence in this record leads to the conclusion that a significant amount of that impairment is due to his cigarette smoking. For this reason alone, the award of 29 percent impairment to each lung must be reversed and remanded for a determination of how much of that impairment is work-related and how much is caused by Claimant's life-long smoking habit.

III. Substantial evidence does not support the Commission's determination that Employer had timely notice of Claimant's alleged work-related injury.

The evidence in this case supports a finding that Claimant knew or could have known that something in his work environment was affecting his breathing long before he provided actual notice. Despite his earlier claims otherwise, Claimant now admits that he "immediately recognized a change in his breathing shortly after his first exposure to Reactobond . . ." (Resp. Br. pp. 13-14). Further, Claimant testified at his deposition that he noticed he was having breathing problems because of his contact with Reactobond

later the very evening after his alleged exposure to Reactobond on September 8, 2008. (R. p. 187, lines 6-8). Claimant also admitted that, although he was paying for all his medical treatment through his private insurance, he had no doubt in his mind that his problems were related to his exposure to chemicals on the job. (R. p. 208, line 12 – p. 209, line 4). Therefore, according to Claimant's recitation of the events leading to his alleged injury, Claimant knew "shortly after" September 2008 that there was a link between his exposure and his breathing difficulties. Given this admission, Claimant's claim is barred by Section 42-15-20 because he failed to give Employer notice of his injury within 90 days of this knowledge.

To start the 90-day notice period, it was not necessary that he knew his precise diagnosis but only that he realized his health problems were work-related. *See, e.g.*, Johnston v. Bowen, 313 S.C. 61, 64-65, 437 S.E.2d 45, 47 (1993) (statutory period begins to run when a person of ordinary knowledge and experience has been put on notice that some right has been invaded or a claim might exist "and not when advice of counsel is sought or full-blown theory of recovery is developed. [*citation omitted*] The date of discovery is not when the plaintiff discovers a witness to support or prove his case"); *see also* Holmes v. National Serv. Indus. Inc., 394 S.C. 305, 309, 717 S.E.2d 751, 753 (2011) (the clock begins to run when a claimant knew or should have known his or her "work environment was negatively affecting [his or her] health"). Even if the Commission's finding that Claimant provided actual notice in March or August 2009 is correct, which Appellants do not concede, both of those dates are well over 90 days from September 2008 and Claimant's claim should be barred.

As explained in more detail in Appellants' Brief, there is no credible evidence to support the Commission's findings regarding notice, which rests solely on Claimant's self-serving statements. As Claimant is the only witness in this proceeding with credibility issues, his self-serving testimony on the issue of notice is suspect. *See* Lowe v. Am-Can Transp. Servs, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984) (denying benefits where the sole evidence that the claimant provided notice was his own testimony, which was countered by employer's witnesses who said they did not recall the claimant ever giving notice and where none of the doctor's notes provided by the claimant indicated the injury was work-related).

Neither Claimant's work excuses nor evidence of Mr. Ramey's knowledge that Claimant suffered from breathing problems, (Resp. Br. p. 16), constitute notice to Employer. Not one of the medical excuses indicated that Claimant was absent due to any work-related injury or illness, (R. pp. 254, 302, 303-306, 375), which renders Claimant's reliance on Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985) misplaced. In Hanks, the claimant's doctor sent his employer a letter stating that the claimant had "chronic lung disease and recommended that he be moved to an area in the mill with a lower level of cotton dust." 286 S.C. at 380, 335 S.E.2d at 93. No such notice was provided in this case. As noted previously, the medical notes Claimant presented to Employer simply indicated that he had been absent due to medical reasons. (R. pp. 254, 302, 303-306, 375).

Similarly, Mr. Ramey testified that he had no idea what was the cause of Claimant's breathing problems. (R. p. 116, line 20 – p. 118, line 20) (R. p. 51, lines 6-24). Even Claimant acknowledges that Mr. Ramey did not know that Claimant was

requesting cartridges for his own personal respirator because of a doctor's order. (Resp. Br. p. 21 (noting that Mr. Ramey "testified that Claimant had asked him to purchase cartridge filters to fit his mask, **even though he was unaware that it was through Dr. Hand's recommendation**") (emphasis added)) (R. p. 126, line 9 – p. 127, line 5).

Claimant next asserts that Mr. Ramey and Ms. Sandra Rickets should somehow have been "aware of the possibility of a workers' compensation issue," thus absolving Claimant of the duty to provide timely notice. (Resp. Br. p. 22). Such is not the law. Instead, it is the Claimant's burden to prove that he provided timely notice to his or her employer. *E.g.*, Lizee v. South Carolina Dept. of Mental Health, 367 S.C. 122, 623 S.E.2d 860 (Ct. App. 2005) (explaining that the "claimant bears the burden of proving compliance with [the] notice provisions"). An "employer's knowledge of the fact that an employee became ill while at work does not necessarily, of itself, charge the employer with notice that such illness constituted or resulted in a compensable injury." Teigue v. Appleton Co, 221 S.C. 52, 57, 68 S.E.2d 878, 880 (1952). However, this is precisely what the Commission appears to have done in finding that Employer had actual notice in August 2009 and on March 12, 2009. (Commission Decision, R. p. 4).

Claimant also asserts that, "[e]ven though Ramey witnessed Claimant suffering on several occasions, particularly the day that Ramey thought Claimant may die due to his short breaths, he negligently failed to explore the possibility that Claimant's suffering was work-related." (Resp. Br. p. 21). Contrary to Claimant's suggestion, negligence is not a part of the workers' compensation analysis. Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73, 77, 61 S.E.2d 654, 656 (1950). There simply is no requirement that employers "explore" or "intuit" the causes of their workers' various conditions, or whether there

might be "a workers' compensation issue," particularly where, as is the case here, the worker has given no indication that he or she believes the condition is work-related. Tellingly, Claimant does not cite any case law for this novel proposition, which should be rejected.

As this Court pointed out in Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002), and as Claimant acknowledges, "[f]or adequate notice, there must be 'some knowledge of accompanying facts **connecting the injury or illness with the employment**, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'" 349 S.C. at 457, 562 S.E.2d at 682 (emphasis added). In this case, Claimant's breathing problems were well-known to Employer; what was missing was any notice by Claimant that his breathing problems might be related to his work conditions. Therefore, the fact that Employer was aware that Claimant was having breathing problems in March 2009 (when Claimant had an acute breathing episode (R. p. 61, lines 6-25)) and in August 2009 (when Claimant discussed getting respirator cartridges with Mr. Ramey, which he now concedes Mr. Ramey did not know was on doctor's order (Resp. Br. p. 21)), does not constitute notice under Section 42-15-20. In fact, Claimant testified that Mr. Ramey accommodated his breathing issues because Mr. Ramey's "mother had asthma real bad, so he kind of understand – understood my breathing problems and everything." (R. p. 60, line 19 – p. 61, line 1). This testimony underscores the fact that Employer did not know or even suspect that Claimant's breathing problems were work-related.

Claimant highlights the language in Section 42-15-20(B) that provides for reasonable excuse for not providing timely notice. (Resp. Br. p. 22). First, to the extent

Claimant is attempting to argue he has a reasonable excuse for not providing timely notice, he is basically conceding that his notice to Employer was untimely. Moreover, Claimant did not raise the issue of reasonable excuse before the Commission and is, therefore, barred from making that argument on appeal. *E.g.*, Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (issues cannot be raised for the first time on appeal). Finally, even if Claimant had made this argument below, there are no findings to support any argument that his excuse for late notice is reasonable or that Employer was not prejudiced thereby. This Court should dismiss Claimant's argument on this point, except to acknowledge that he has basically conceded that he failed to provide timely notice.

Finally, although Claimant correctly cites Mintz v. Fiske-Carter Const. Co., 218 S.C. 409, 63 S.E.2d 50 (1951) for the proposition that the notice provisions "should be liberally construed in favor of claimants," what Claimant fails to note is that the Supreme Court's full sentence instructs that "there are limitations upon that rule and the statutory requirement cannot be disregarded altogether." 218 S.C. at 414, 63 S.E.2d at 52; *see also* Teigue, 221 S.C. at 57-58, 68 S.E.2d at 881-82 (although the Workers' Compensation Act, including notice provisions, should be construed liberally, "such liberality will not be indulged to such an extent as to do violence to the provisions of the Act in such a way as to change its meaning").

Therefore, for all the reasons stated in Appellants' Brief and herein, this Court should hold that his claim is barred for failure to provide timely notice.

IV. Substantial evidence does not support the Commission's finding that Claimant was permanently and totally disabled as a result of a compensable aggravation of his COPD.

There is insufficient evidence in this case to support the Commission's conclusion that claimant is permanently and totally disabled. In his Brief, Claimant makes exaggerated claims that are not supported by the evidence in order to bolster his argument that he is totally disabled solely as the result of a work-related injury. For example, Claimant asserts that "his breathing would be greatly affected by odors, heat/cold, and exertion." (Resp. Br. p. 23). There is no evidence in this case that Claimant's breathing is affected in any way by odors or cold.[4] In addition, Claimant's claim that his work history is "limited to very technically specific positions," (id.), is also not supported by any evidence. In fact, Claimant worked a number of different jobs, ranging from the Navy, (R. p. 72, line 22 – p. 73, line 4), to machine maintenance, (R. p. 37, line 22 – p. 38, line 3) (R. p. 38, lines 4-18) (R. p. 40, lines 8-15), to restaurant work for eleven years. (R. p. 37, line 22 – p. 38, line 3). At his deposition, Claimant testified that, after the Navy, he "kind of bounced from whatever was paying the best at the time. So I have quite an extensive work record." (R. p. 182, lines 19-23). Thus, Claimant's current assertion that he "lacked any transferable skills where he could work in an environment not related to mechanical machinery repair or other manual duty," (Resp. Br. p. 27), is not supported by the facts of this case. Simply because Claimant cannot return to his job with Employer or a similar job does not mean he is totally disabled. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 163, 584 S.E.2d 390, 395 (Ct. App. 2003).

[4] In fact, Claimant testified that, when he had difficulty breathing, he often sought out cold areas – either air conditioning or the freezer. (R. p. 60, lines 10-15).

The only objective evidence in this record that Claimant cannot work is Dr. Hand's response to the check-the-box form provided to him by Claimant's attorney. (R. p. 343). However, at his deposition, Dr. Hand clarified that what he meant was that he did not believe that Claimant could 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). Thus, Dr. Hand did not say there were **no** jobs Claimant could perform; he just could not return to an industrial setting with dust, fumes, chemicals and smoke. As noted previously, Dr. Hand did not know anything about Claimant's vocational or educational history and is not a vocational expert.

Claimant argues that his own testimony proves that he is totally disabled. (Resp. Br. p. 24). First, Claimant's testimony on this point, as well as others, is suspect. Claimant testifies that he told the employment commission that he essentially was ready, willing and able to work, (R. p. 63, lines 10-25), but admits that "he was physically unable to perform at any position." (Resp. Br. p. 24). Only one of those two statements is true: either Claimant is able to work and actively looking for jobs, or he is totally disabled and "unable to perform at any position." However, Claimant is saying to the employment commission what he needs to say in order to obtain unemployment benefits, and saying to the Commission what he needs to say in order to obtain workers' compensation benefits. Such unreliable evidence is insufficient to uphold a workers' compensation award.

Claimant admitted that, despite his claims that he was "struggling just to breathe," (Resp. Br. p. 10), he was nonetheless getting raises. (Hr'g Tr. p. 67, line 22 – p. 68, line 9). Obviously, regardless of what Claimant now says about his condition, his work

performance was good enough to warrant a merit raise during the time he says he was suffering from his alleged work-induced COPD. Thus, until he was laid off, Claimant was able to fully and successfully perform his job.

In addition, there is no evidence that the reason Claimant did not obtain employment after he was laid off was because of his breathing issues. He only testified that he had been looking for a job," but did not specify that he had actually applied for any specific jobs or, if he had applied, that the reason he was not offered a position had anything to do with his breathing. (R. p. 64, lines 1-5). Thus, even Claimant's testimony falls well short of what is required to prove total disability.

This Court's holding in Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985) does not resolve the issue of whether Claimant is permanently and totally disabled, as Claimant appears to believe. The determination of whether a claimant is permanently and totally disabled depends on the facts of each case. 286 S.C. at 384, 335 S.E.2d at 95 (the extent of a claimant's disability "is a question of fact to be proved as any other fact is proved"). The burden of proving total disability is on the claimant. Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). The evidence in this case – Dr. Hand's qualified statement that Claimant cannot return to his former employment and Claimant's self-serving and unreliable testimony that he cannot perform any jobs, while at the same time representing to the employment commission that he can work and is "looking for work" – is not substantial evidence that will support the Commission's determination that Claimant is permanently and totally disabled. For this reason, the Commission Decision must be overturned.

Furthermore, Claimant is simply wrong that there is no evidence in this record regarding what percentage of his disability is caused by his smoking. (Resp. Br. pp. 24-25). Dr. Hand stated that, as of the last time he saw Claimant eleven months after he had been laid off by Employer, Claimant "was **not** continuing to have respiratory irritation from occupational exposure **because he hadn't worked.**" (R. p. 140, line 7 – p. 141, line 2) (emphasis added). Dr. Hand stated that, as a result, Claimant's "cigarette smoking is clearly contributing," and that "**the exacerbation related to the work exposure was temporary.**" (R. p. 141, lines 6-19) (emphasis added). Significantly, when asked by Claimant's counsel whether the effects of exposure to chemicals at Employer's facility were temporary or permanent, Dr. Hand stated that he did not find any evidence of permanent scarring as a result of Claimant's exposure. (R. p. 151, line 15 – p. 152, line 8). Not only did Dr. Hand state that Claimant's life-long smoking habit was "a significant contributing factor" to his respiratory condition, (R. p. 139, lines 19-21) (*see also* R. p. 148, line 25 – p. 149, line 3), he estimated that **only half** of Claimant's impairment could be attributed to any job-related exposures. (R. p. 147, line 11 – p. 148, line 4) (emphasis added). Dr. Hand also stated that "the fact that [Claimant has] continued to smoke, I think has been a harmful thing to him over the time I've see him." (R. p. 139, line 25 – p. 140, line 2). Claimant's "cigarette smoking is clearly contributing. Whether his long term pulmonary function problems are entirely related to cigarettes would be hard to determine . . ." (R. p. 141, lines 6-8). Dr. Hand stated that Claimant's work-related exposure probably only "accounts for **at least some** of that." (R. p. 142, lines 11-16) (emphasis added). There simply is no statement in this case that unqualifiedly states Claimant's impairment (or any resulting disability) is entirely

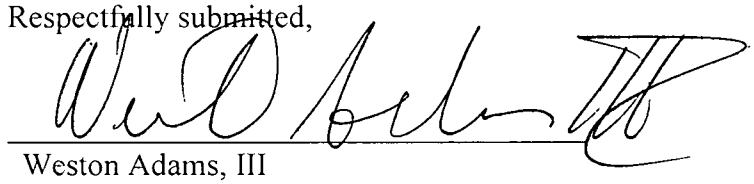
attributable to his work-place exposures. Furthermore, Dr. Hand testified that it was most likely that the increase in Claimant's impairment after he was laid off work by Employer was due to cigarette smoking or other causes, but not his work-related exposure. (R. p. 145, line 20 – p. 146, line 13). Thus, the only conclusion that can be reached on the evidence in this case is that, at most, half of any disability experienced by Claimant, if any, is attributable to his work-related exposures. The remainder is attributable to his long-term and continued smoking habit.

Therefore, this Court should reverse the Commission's finding that Claimant is permanently and totally disabled as the result of a work-related exposure or injury.

CONCLUSION

For the reasons set forth above and in Appellants' Brief, this Court should reverse the Commission Decision because it is not supported by substantial evidence.

Respectfully submitted,



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