

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 BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	4
STATEMENT OF THE CASE	5
STANDARD OF REVIEW	10
ARGUMENTS	11
CONCLUSION	22

TABLE OF AUTHORITIES

CASES:

<u>Bundrick v. Powell's Garage,</u> 248 S.C. 496, 151 S.E.2d 437, 441 (1966).....	11
<u>Coleman v. Quality Concrete Prods., Inc.,</u> 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965).....	23
<u>Etheredge v. Monsanto Co.,</u> 349 S.C. 451, 562 S.E.2d 679, 682 (S.C. App. 2002).....	22
<u>Forrest v. A.S. Price Mech.,</u> 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007).....	11
<u>Hanks v. Blair Mills,</u> 286 S.C. 378, 381, 384, 385, 335 S.E.2d 91, 93, 95 (S.C. App. 1985).....	20, 24
<u>McLeod v. Piggly Wiggly Co.,</u> 280 S.C. 466, 471, 313 S.E.2d 38, 41 (S.C. App. 1984).....	11
<u>Mintz v. Fiske-Carter Const. Co.,</u> 218 S.C. 409, 63 S.E.2d 50 (1951).....	22
<u>Shealy v. Aiken County,</u> 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).....	11
<u>Taylor v. S.C. Dep't of Motor Vehicles,</u> 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006).....	12
<u>Teigue v. Appleton Co.,</u> 221 S.C. 52, 68 S.E.2d 878 (1952).....	20
<u>Thompson v. S.C. Steel Erectors,</u> 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006).....	11
<u>Tiller v. National Health Care Ctr. of Sumter,</u> 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).....	11
<u>Wynn v. Peoples Natural Gas Co. of SC,</u> 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961).....	26

**STATUTES, TREATISES AND
REGULATIONS:**

Larson's Workers' Compensation Law §126.03[1][b](2001)	22
S.C. Code Ann. §42-1-160(E)	16
S.C. Code Ann. §42-1-160(G)	16
S.C. Code Ann. §42-11-10	12
S.C. Code Ann. §42-11-10(B)(5)	12
S.C. Code Ann. §42-11-40	12
S.C. Code Ann. §42-15-20	20, 22
S.C. Code Ann. §67-1605	25
S.C. Code Reg. §67-1605(A)	25

STATEMENT OF ISSUES ON
APPEAL

- I. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT SUFFERED A COMPENSABLE INJURY BY ACCIDENT ON OR ABOUT SEPTEMBER 8, 2008?

- II. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT'S WORK EXPOSURE CONTRIBUTED TWENTY-NINE PERCENT (29%) IMPAIRMENT TO EACH LUNG?

- III. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT EMPLOYER HAD ACTUAL NOTICE OF CLAIMANT'S WORK-RELATED INJURY?

- IV. WHETHER THE COMMISSION CORRECTLY DETERMINED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF A COMPENSABLE AGGRAVATION OF HIS COPD?

- V. WHETHER THE COMMISSION APPROPRIATELY AWARDED CLAIMANT THE UNCOMMUTED VALUE OF 145 WEEKS OF COMPENSATION?

STATEMENT OF THE CASE

On August 11, 2008, Goodman Conveyor Company, d/b/a Joy Mining Machinery ("Employer") hired Respondent Robbin Bradley Cole ("Claimant") as a maintenance technician after recruiting him from Hydro Aluminum. (R. p. 39, lines 1-16). With only a ninth grade education, Claimant's work history began when he enlisted in the Navy where he served as a hull maintenance technician for approximately two years. (R. p. 37, lines 3-5 and p. 72, lines 13-14, 22-23). Following his service in the Navy, he worked as a press operator and die setup/repairman for the Sudan Company and later worked for his friend at the Townhouse Restaurant before working as a saw operator and maintenance technician with Hydro Aluminum. (R. p. 37, lines 15-16, 22-25 and p. 38, lines 15-18).

Claimant's position with Employer as maintenance technician required him to inspect and fix all of the machines' air leaks and hydraulic leaks and to vacuum and transfer excess oil from drip pans to containment barrels. (R. p. 44, lines 3-13). He also periodically replaced belts as all were typically not functioning at one time. (R. p. 43, lines 6-8). Claimant described Employer's plant as "the filthiest one I've ever worked in my life," with "saw chip particles to hydraulic fluids on the floors to any kind of fluids-coolants on the floors." (R. p. 43, lines 13-19). He also described the plant as "dark," "dusty," and "smoky." (R. p. 42, lines 20, 23 and 25). A "bone yard" was located in a field behind the plant where old and often non-functioning machinery from other plants were stored and later cleaned and re-purposed into serving a different function than its original design. (R. p. 42, lines 9-16).

The injury for which this claim is based occurred on or about September 8, 2008, approximately one month after Claimant's hire date. Claimant was lying on his back changing a directional valve located under a press when a fluid that was later identified as Reactobond "saturated" his face, hair, chest and arms. (R. p. 45, lines 1-16). Claimant initially thought it was only hydraulic fluid and, because he did not immediately notice any side effects from the saturation, he did not feel the need to report the event to his supervisor. (R. p. 45, lines 22-23).

Still not making the correlation between the saturation and any physical complications arising from it, Claimant began experiencing shortness of breath to the point of inciting a panic attack while at home later that same day. (R. p. 46, lines 1-14). He went to his primary care physician and was examined by the physician's assistant and given a breathing test and Albuterol, only temporarily relieving his symptoms. (R. p. 46, lines 16-21 and p. 47, lines 4-10). Shortly thereafter, he experienced increased breathing difficulties, especially when he would get over-heated or after walking from machine to machine at the plant. (R. p. 47, line 25 and p. 48, lines 1-2). Claimant was still unsure of the cause of the sudden breathing changes when he was admitted to Self Regional Hospital and given several breathing treatments, missing three excused days of work. (R. p. 50, lines 14-24).

Even though Claimant had not forgotten about the saturation event, he was still searching for possible explanations as to why his breathing had suddenly become so labored, which he discussed with Sandra Ricketts who worked in the employer's human resources department when he turned in his medical excuse. (R. p. 51, lines 1-9). One possible explanation that he initially considered was his exposure to asbestos while serving in the Navy, but this was later ruled out by both Veterans Affairs and by Dr.

Stephen Hand, a pulmonary specialist. (R. p. 51, lines 12-24 and p. 86, lines 6-10). Claimant testified that Employer was aware that he was going to the hospital and seeking treatment for his breathing problems through both verbal interactions and medical excuses. (R. 53, lines 6-15). Claimant was diagnosed with chronic obstructive pulmonary disease ("COPD") on March 12, 2009 at Self Regional Hospital, which is also when he was referred to a pulmonary specialist, Dr. Stephen Hand. (R. p. 222-254). It was not until Dr. Hand asked him about his employment, which coincided with Claimant's third exposure to Reactobond, that Claimant realized that there was a connection between his disease and the chemicals at work. (R. p. 99, lines 17-22). Dr. Hand provided the only medical opinion as to causation and aggravation of Claimant's COPD and asthma. (R. p. 342) Dr. Hand further stated that Claimant would require "long term" medications to control his disease. (R. p. 343)

While Claimant was admittedly a smoker for approximately twenty years, his pre-employment physical examination conducted on August 4, 2008 revealed no lung abnormalities, and Claimant was experiencing none of the symptoms that developed after his exposure to the chemicals Reactobond and AW68 while working for Employer. (R. p. 79, lines 22-23, p. 95, lines 8-24 and p. 96, lines 3-4). Keavin Ramey ("Ramey"), Employer's plant engineer and Claimant's supervisor, testified that he performed a reference check on Claimant, that he was highly recommended with no indication that he had breathing issues or attendance problems, and that Employer would not have hired Claimant had the pre-employment physical indicated that there were breathing problems. (R. p. 123, lines 12-21 and p. 128, lines 4-7).

Claimant clarified during his hearing on April 6, 2011, before Commissioner Andrea C. Roche that, even though he testified during his deposition that he was

diagnosed with asthma or possibly bronchitis as a child, it was actually his mother that told him that, and he was not sure if she said "asthma" or "bronchitis" or whether the two are "the same thing." (R. p. 73, lines 15-21). He also repeatedly explained that he did not remember if he had breathing problems as a child and could not remember if certain doctor's visits were due to breathing problems. (R. p. 73, lines 22-25, p. 74, lines 2-19 and p. 98, lines 8-21). Claimant also admitted to not really understanding the difference between asthma, bronchitis, and COPD, and that he would classify colds and congestion as "breathing problems." (R. p. 97, lines 5-8, p. 98, lines 22-25 and p.99, lines 1-4).

Following a hospital referral, Claimant began treatment with pulmonary specialist Dr. Stephen Hand in August 2009. (R. p. 53, lines 16-24). It was not until Claimant's third exposure to Reactobond that he realized that he was experiencing an adverse reaction to the chemical and notified Ramey. (R. p.54, lines 17-21 and p.55, lines 1-3). Ramey instructed Claimant to avoid the chemical, which was fairly unrealistic considering Claimant's job description. (R. p. 55, lines 7-12). Claimant discussed his reaction to Reactobond with Dr. Hand on his first or second visit and was instructed to consult Employer's safety coordinator about getting a fitted respirator with special cartridges to filter out specific vapors. (R. p. 55, lines 23-25 and p. 56, lines 1-2).

When Claimant approached the safety coordinator and Ramey, he was told that a purchase order must first be approved by upper management, which ultimately never produced the required respirator. (R. p. 56, lines 6-21). In fact, the only safety equipment that Employer required when Claimant was employed were safety glasses and steel toed shoes. (R. p. 49, lines 11-14). Claimant did occasionally wear a cloth

mask that he brought with him from Hydro Aluminum, but a cloth mask provided nowhere near the same level of protection to Claimant's already-damaged lungs as the respirator cartridges prescribed by Dr. Hand. (R. p. 50, lines 1-9)

While Claimant was still employed, Employer changed ownership and operated under various names, which Claimant testified, was likely due to financial problems. (R. p. 58, lines 12-25 and p. 59, lines 1-9). During this time, Claimant retained the same job title but was moved to the safety department due to an alleged lack of work in the maintenance department. (R. p. 57, lines 18-23 and p. 58, lines 8-11). Unfortunately, Claimant's breathing problems were not alleviated by the position change as he was still exposed to a strong epoxy used in patching and would experience an adverse reaction to being overheated after vacuuming and sweeping the outside parking lot. (R. p. 57, lines 24-25, p. 59, line 25, and p. 60, lines 1-9). When Claimant would get overly heated, his breathing worsened, and he would have to sit down, seek air conditioning, and at times even go so far as to stick his head in the freezer for relief. (R. p. 60, lines 10-15). Ramey noticed Claimant's breathing struggles on several occasions and attempted to accommodate Claimant by permitting him to sit down and cool off in the maintenance office. (R. p. 60, lines 19-21). On one occasion, sitting down and cooling off provided no significant relief and Claimant told his supervisor George Keach that he needed to go to the doctor or to the hospital. (R. p. 61, lines 6-18). Keach sat with Claimant outside until his girlfriend arrived to pick him up. (R. p. 61, lines 20-23).

Claimant may have been suffering, especially after overexertion, but he needed a job and felt that he had no other option but to work sick. (R. p. 62, lines 19-23). Even though Claimant was struggling just to breathe, preventing him from performing his job

duties to his previous ability, he was still receiving raises. (R. p. 68, lines 1-9). Unfortunately, Employer terminated Claimant's employment due to an alleged lack of work and assisted Claimant in obtaining unemployment benefits. (R. p. 63, lines 11-19 and p. 91, lines 6-8). When Claimant completed the application for unemployment benefits, he was aware that he was alleging that he was able to work and must actively seek employment, even though he doubted his ability to fully perform. (R. p. 63, lines 20-25 and p.687, lines 13-23). He felt like he had no choice but to at least attempt to work in some capacity even though he doubted the reality of actually being able to physically handle any employment. (R. p. 63, lines 20-25 and p. 64, lines 6-10).

Claimant testified that he could not afford his prescriptions and was using the last of his prescribed Albuterol sparingly to make it last. Claimant was also using his sister-in-law's nebulizer and an over-the-counter inhaler that was not as effective as the prescribed alternative. (R. p. 69, lines 3-20). Compared to his breathing in 2006, Claimant's breathing post-injury and employment at Goodman Conveyor was dramatically changed in the form of shortness of breath, wheezing, congestion and coughing. (R. p. 99, lines 5-16). As a result, his enjoyment of life decreased dramatically. Shortness of breath kept him awake at night, he could no longer walk or play with his dog, his sexual relationship with his wife suffered, and he experienced prolonged depression. (R. p. 70, lines 11-22).

ARUGUMENT

Standard Of Review

"The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission."Forrest v. A.S.

Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder."Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606,612, 632 S.E.2d 874, 877 (Ct. App. 2006). Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Forrest, 373 S.C. at 306, 644 S.E.2d at 784. An award in a workers' compensation case cannot be based on surmise, conjecture or speculation. McLeod v. Piggly Wiggly Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (S.C.App. 1984), see also Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E.2d 437,441 (1966). A court "may not substitute its judgment for that of any agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. "Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d843, 845 (1999). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006).

I. The Commission correctly determined that Claimant suffered a compensable injury by accident on or about September 8, 2008.

The Commission correctly determined that Claimant suffered a compensable injury by accident when he was initially exposed to Reactobond on or about September 8, 2008, and his continued exposure while working. Appellants contend that the Commission erred by seemingly contemplating that Claimant suffered both a

compensable injury by accident to both of his lungs as well as an occupational disease. It should be noted, however, that "a disease that meets the definition and requirement under South Carolina law of an occupational disease should be treated as compensable regardless of the fact that it might qualify as an injury by accident; thus, in determining whether a disease is compensable, the inquiry is not focused on whether the disease arose from a single accidental contact, but whether the disease is distinctly associated with employment as defamed in §42-11-10." (S.C. Code Ann. §42-11-40, Note of Decision 1.) Even though §42-11-10(B)(5) of the South Carolina Code exempts "any disease of the cardiac, pulmonary, or circulatory system" from the occupational disease defamation, there is an applicable exception to this exemption. The above subsection also states that it is an occupational disease if the pulmonary disease, such as COPD in this case, results from "abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein." Therefore, regardless of whether it was classified as an occupational disease or an injury by accident, Claimant's initial exposure to Reactobond on or about September 8, 2008, and the repeated exposure to both Reactobond and the similarly toxic hydraulic oil AW68 thereafter constitutes a compensable injury.

Appellants opine that the substantial evidence in the record does not support that the Claimant suffered an injury on September 8, 2008, and his continued exposure to hydraulic fluid AW68 and lubricant Reactobond did not cause his breathing difficulties and ultimate diagnosis of COPD. However, substantial evidence in the record not only supports the Commission's finding that Claimant suffered a compensable injury by accident to his lungs, there is no evidence whatsoever to the contrary. Claimant had only

been working for Employer for a few weeks when he was saturated with Reactobond on or about September 8, 2008. Just prior to beginning his job with Employer, Claimant's pre-employment physical showed no signs of COPD or lung abnormality, and his supervisor confirmed that Claimant would not have been hired had there been an indication that he was suffering from COPD or any other lung condition. (R. p. 79, lines 22-23, p. 95, lines 8-24, p.96, lines 3-4, p. 123, lines 12-21 and p. 128, lines 4-7). On November 17, 2008, Claimant had FVC/FVL tests to determine his lung function. This test indicated that the Claimant's risk for COPD was 89% at that time and 79% if he stopped smoking. (R. p. 219). This supports that the Claimant's lung disease and impairment were caused by toxic chemical exposure at Defendant's plant rather than smoking.

If Claimant was not experiencing breathing problems before he was hired but immediately recognized a change in his breathing shortly after his first exposure to Reactobond, there is an apparent correlation. Claimant testified that, when the accident occurred, he was under the mistaken impression that it was "a regular hydraulic fluid or coolant" and not the more toxic Reactobond. (R. p.44, line 25 and p. 45, line 1).

Had Claimant realized at that time that he was soaked with Reactobond, he would have been able to take the proper steps to cleanse himself of the fluid, he would have had the opportunity to report the saturation to his supervisor, and he would have likely realized much sooner that his exposure was the reason for his breathing problems. Claimant, after all, had never had an adverse reaction to "regular hydraulic fluid" before, so there would be no reason for him to initially believe that his exposure that particular day was the cause of his breathing changes. Unfortunately, by the time that Claimant finally realized that his breathing problems were due to his exposure to

Reactobond and AW68, he had already been exposed several more times (albeit not saturated as he was on or about September 8, 2008), and the damage had been done.

Appellants also contend that the Claimant was not even at work on September 8, 2008, apparently to attack not only his exposure but his credibility. Attendance records submitted into evidence by Defense counsel as Defense Exhibit #1 not only show that he was at work on September 8, 2008, but that he did not work a full shift possibly as a result of the breathing difficulties which began when he was drenched by the toxic chemicals. (R. p. 97, lines 13-17). The records show that the Claimant worked five out of eight hours on September 8, 2008.

Defense witnesses also support the Claimant's exposure to toxic chemicals and that these chemicals are harmful to the respiratory system when inhaled. Ricky Joe Beasley, a purported Environmental and Health Specialist with Goodman Conveyor based in Alabama, testified that he was aware that the Claimant had to use an inhaler while in the workplace sometime in September 2008. (R. p. 48, lines 17-23). Mr. Beasley testified that he would visit the Belton Plant where Claimant worked only once a month. (R. p. 103, line 16). He substantiated that Claimant was exposed to Reactobond and AW68 when, as a maintenance technician, he would repair leaks on machinery. The witness stated that Reactobond is an acid-based chemical lubricant classified as a Level III risk on its MSDS (Material Safety Data Sheet). (R. p. 108, lines 8-23; R. p. 345-350,). Contrary to Appellants' allegation that the Claimant refused to wear a respirator while on the job, witness Beasley testified that respirators were not available to employees at the Belton plant. Furthermore, the witness said that, in order to provide respirators, OSHA required each employee to be tested and fitted with the respirator. (R. p. 111, lines 5-25; p. 112, lines 1-6).

Defense witness Beasley substantiated Claimant's claim that the Belton Plant had poor ventilation and that old machinery that was repaired by the Claimant leaked these toxic chemicals. Beasley admitted that the Belton plant needed much improvement and Goodman Conveyor, in the four years it had owned the Belton plant, had invested money to upgrade the ventilation and the old machinery. Beasley stated that he was aware that the MSDS sheet on Reactobond indicated that, because of the toxicity to the respiratory system, required proper open ventilation. (R. p. 114, lines 1-25)

Witness Beasley also substantiated the Claimant's testimony about the "bone yard" where old machines were stored behind the Belton plant and parts were removed and used from old machinery to repair machines in the plant. (R. p. 121, lines 5-25). This testimony is a direct contradiction to the allegations in Defendant's brief.

It was the opinion of Dr. Stephen Hand, the only medical expert in the evidence, that Reactobond and AW68 were the cause of Claimant's worsening respiratory problems. (R. p. 115, lines 1-3). Statutory law requires that in medically complex cases such as this, the Claimant shall establish by medical evidence that the injury arose in the course of employment. S.C. Code Ann. §42-1-160(E). Furthermore, that this "medical evidence" be stated to a reasonable degree of medical certainty. S.C. Code Ann. §42-1-160(G) Dr. Hand's opinion was so stated. (R. p. 343)

From the time that Claimant was initially exposed to the time that he and Dr. Hand realized the cause of his COPD, Claimant had provided medical excuses for the following days of missed work due to his breathing problems: November 17, 2008, November 19, 2008, May 18, 2009, July 7, 2009 and July 9, 2009. (R. p. 96, lines 20-25 and p.97, lines 1-3). Keavin Ramey, Claimant's supervisor, had observed Claimant's

labored breathing on several occasions and testified, "There was a couple of instances where, you know, I had-- I had to request that he go home." (R. p. 124, lines 19-21). He also testified to working with him almost every day and witnessing Claimant use an inhaler. (R. p. 117, lines 7-14). Ramey also testified to having personally checked Claimant's references, that he was a good employee and received raises, and that he would not have hired him if Claimant's pre-employment physical indicated breathing problems. (R. p. 128, lines 4-12). Since Claimant's pre-employment physical was clear in August 2008, and he was saturated with Reactobond on or about September 8, 2008, his breathing problems and his COPD clearly surfaced post-employment and post-exposure. Otherwise, he would not have passed his pre-employment physical and his references would have disclosed to Ramey that Claimant had either been witnessed with an inhaler or had missed work due to breathing problems.

Even though both Reactobond and AW68 are highly irritating chemicals, it was not until his third exposure to Reactobond that Claimant realized that there may be a connection between his breathing problems and the chemicals at work. (R. p. 54, lines 17-21). Claimant testified that Reactobond would "eat through" the latex gloves that Employer provided, which illustrates the potency of the chemicals to which Claimant was regularly exposed. (R. p. 54, lines 21-23). Dr. Hand similarly stated in a letter that "AW68 and Reactobond...have been described as causing irritation to the respiratory mucosa and have the potential to exacerbate respiratory disease." (R. p. 342). Reactobond's Material Safety Data Sheet describes the chemical as "highly irritating or corrosive to upper respiratory tract" and that those exposed to the chemical should wear impermeable gloves (as opposed to regular latex gloves as provided by Employer), chemical goggles, a face shield, impermeable boots, impervious protective clothing, and

a NIOSH approved acid mist mask (as opposed to Claimant's cloth dust mask), and the Employer should provide eye wash, emergency shower facilities and local and general area exhaust. (R. p. 345-346). This is far from the "regular hydraulic oil" that Claimant thought that he was drenched in during his initial exposure and that the Commission correctly determined caused a compensable injury by accident on or about September 8, 2008.

II. The Commission correctly determined that Claimant's work exposure contributed twenty-nine percent (29%) impairment to each lung.

The Commission correctly upheld the Single Commission's award of compensation based on a work-related impairment of 29% to each lung. (Commission Decision pp. 2, 7). The Commission relied heavily on Dr. Stephen Hand's medical opinion as a pulmonary specialist and as Claimant's treating physician. Dr. Hand was the only medical expert to evaluate the Claimant and, hence, his opinion was the only medical opinion in evidence. That expert opinion is required in medically complex cases and there is not a shred of medical evidence in the record to refute it.

Dr. Hand first evaluated Claimant on August 19, 2009, after Claimant had already been diagnosed with COPD/asthma during an emergency room visit. In his medical report following the initial examination, Dr. Hand noted that Claimant felt that "his respiratory problems are related to exposures at work...he does not think the [respirator] mask is properly maintained by the company. He gets exposed to AW68 and Unibond [Reactobond] at work... He complains of cough after exposure that is productive of clear sputum as well as shortness of breath and wheezing. He does not require the use of metered-dose inhalers if he is not working." (R. p. 333) He initially diagnosed Claimant with asthma with possible coexisting COPD, exposure to toxins at work, including Reactobond and AW68, ongoing tobacco use, history of anxiety, and a

history of asbestos exposure. (R. p. 335)

During a follow-up with Claimant on August 26, 2009, Dr. Hand noted in his medical report that Claimant had "recurrent episodes of bronchospasm, at least one of which was related to exposure to Reactobond...and possibly also to exposure to AW68 hydraulic fluid" and that Claimant had had not been exposed to Reactobond recently and had noticed an improvement in terms of shortness of breath and. (R. p. 337). It was also during this visit that Dr. Hand "encouraged him to utilize proper protective gear at work and asked him to talk to the safety supervisor at his plant." (R. p. 337). It is clear that Dr. Hand was already seeing a correlation between Claimant's medical condition and his exposure at work as he had already dismissed asbestos exposure at this point as a possible cause of Claimant's breathing problems.

Dr. Hand continued to treat Claimant throughout 2010 as Claimant's condition worsened. In a letter to Claimant's attorney dated October 11, 2010, Dr. Hand opined that Claimant "does have moderate to severe COPD combined with asthma. In a patient such as this, exposure to respiratory irritants clearly can be problematic...Both [hydraulic oil AW68 and Reactobond] have been described as causing irritation to the respiratory mucosa and have the potential to exacerbate respiratory disease. In my opinion, these exposures did contribute to worsening of the patient's respiratory condition." (APA p. 342).

Even though Dr. Hand noted throughout his medical reports that Claimant's smoking was likely a contributing factor in his breathing difficulties, he also recognized his work-related exposure to Reactobond and AW68 as the significant cause of Claimant's suffering and post-employment diagnosis of COPD. In a questionnaire dated March 11, 2011, Dr. Hand did indicate that it is difficult to determine how much

of Claimant's impairment is due to exposure at work, but he also opined that Claimant's exposure to chemicals at work exacerbated his COPD and asthma, that Claimant sustained a 73% impairment to the right lung and a 73% impairment to the left lung as a result of this exposure, that Claimant will require future medical care and treatment to control his respiratory disease and that Claimant is unable to perform any gainful employment as result of COPD and asthma. (R. p. 343-344).

In determining Claimant's work exposure contributed 29% impairment to each lung, the Commission relied heavily on Dr. Hand's testimony and medical opinion as he was in the only expert to evaluate Claimant's medical condition. He was not merely a detached physician reviewing Claimant's medical records but a reputable pulmonologist who personally treated Claimant for over a year. Appellants could have introduced their own expert witness to contradict Dr. Hand's findings but did not. The Commission, therefore, properly relied on Dr. Hand's testimony and medical opinion in determining Claimant's impairment rating.

III. The Commission correctly determined that Employer had actual notice of Claimant's work-related injury.

"Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability. "Hanks v. Blair Mills, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (S.C.App. 1985), quoting from Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952). Unfortunately, Claimant did not have the opportunity to immediately put Employer on notice that his breathing problems were work-related as he did not immediately know himself. Claimant's ninth grade education, coupled with the fact that he was initially under the impression that he was exposed to "just a dirty

hydraulic fluid" instead of the more toxic Reactobond, delayed Claimant's discovery that he was suffering from a work-related injury. (R. p. 37, lines 3-5 and p. 45, lines 20-23). As he had worked with hydraulic fluids in the past with no problem, he wanted to eliminate any other possible causes of his breathing problems before assuming it was work-related.

While Claimant was trying to discover the source of his breathing changes, he openly discussed his condition with Keavin Ramey, his supervisor, and Sandra Ricketts who worked in Employer's human resources department. When he turned in his medical excuses after missing work due to his condition, Claimant told Ricketts that he was exploring the possibility that his breathing condition was related to his exposure to asbestos while in the Navy, which was later dismissed by Veterans Affairs and by Dr. Hand. (R. p. 51, lines 12-22). Claimant further testified that Employer was aware through verbal interactions and through medical excuses that he had been going to hospitals and getting treatments. (R. p. 53, lines 6-15). Ramey testified to knowing that Claimant was being treated for his breathing condition and was missing work due to his lung problems. (R. p. 127, lines 2-11). He also 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. (R. p. 126, lines 11-14). Even 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. (R. p. 124, lines 14-21). When Claimant finally discovered the correlation between his condition and the chemicals, he reported it to Ramey who merely responded that Claimant should stay away from the chemicals. (R. p. 55, lines 1-8).

Both Ramey, as Claimant's direct supervisor who worked closely with him, and

Ricketts, whose position in human resources should have made her aware of the possibility of a workers' compensation issue, were acting as Employer's agents, thus, imputing notice to Employer. "For 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. "Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679, 682 (S.C.App. 2002), quoting from Larson's Workers' Compensation Law §126.03[1][b] (2001) (footnotes omitted).

It would be inequitable for Claimant to be punished for not immediately realizing that his breathing problems were related to his exposure at work. The statutory notice requirements in §42-15-20 provide that "every injured employee or his representative shall immediately on the occurrence of an accident, **or as soon thereafter as practicable**, give or cause to be given to the employer a notice of the accident...**unless reasonable excuse is made to the satisfaction of the Commission** for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." The South Carolina Supreme Court has further found that §42-15-20 should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 63 S.E.2d 50 (1951). The Commission, therefore, correctly determined that Claimant provided adequate notice to Employer through his interactions with Ramey.

IV. The Commission correctly determined that Claimant was permanently and totally disabled as a result of a compensable aggravation of his COPD.

The Commission correctly determined that Claimant was permanently and totally disabled, thereby, satisfying his burden of proving that he 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). Claimant's lack of education, coupled with his work history being limited to very technically specific positions, already limited him in the type of employment he could reasonably gain. His COPD further limited his employment opportunities as his breathing would be greatly affected by odors, heat/cold, and exertion. Just walking to his car on a summer day could trigger an attack of labored breathing. Even Keavin Ramey, Claimant's supervisor, testified to noticing that Claimant's breathing was affected by something as uncontrollable as the seasons. (R. p. 124, lines 4-8).

Even though Claimant's COPD made working unbearable, Claimant needed a job. Even when he was working for Employer, he testified that he could not afford his much-needed medication and would use his prescriptions sparingly to make them last or buy over-the-counter alternatives that proved less effective. (R. p. 69, lines 5-20). Ramey also testified that, prior to Claimant's employment termination he was transferred to a different position due to his breathing difficulties. (R. p. 121, lines 19-25). It was thus apparent to even his Employer that Claimant's COPD interfered with his ability to work. Following his termination from Employer, Claimant felt that he had no choice but to apply for unemployment benefits despite his belief that he was physically unable to perform at any position. R. p. 68, lines 10-20). He felt like he would have to at least "go try" if offered a job, even though he was aware of his significant physical limitations. (R. p. 68, lines 13-17). Even daily activities, such as going outside to feed his dog, would take his breath away. (R. p. 64, lines 23-25 and p. 65, lines 1-2). This inability to carry out even the simplest of activities further illustrates that Dr. Hand was correct in opining that, due to Claimant's 73% impairment

to each lung, he would be unable to perform any gainful employment because of the job related causation and/or exacerbation of COPD and asthma. (R. p. 343).

Appellants contend that Claimant could have returned to his prior employment within the restaurant industry and that, if Claimant is totally disabled, it is due to his continued smoking. The South Carolina Court of Appeals has already addressed these arguments in *Hanks v. Blair Mills, Inc.*, sustaining a finding of total disability, and determined that, even though the testifying physician opined that the respondent could perform jobs requiring minimum physical activity, his medical report following his examination of the respondent revealed that he would get out of breath carrying out the garbage or taking a bath, which was confirmed by the respondent's testimony that he suffered from continual shortness of breath and tightness in his chest. "Hanks v. Blair Mills, Inc., 286 S.C. 378, 384, 335 S.E.2d 91, 95 (S.C.App. 1985)". The Court of Appeals further found that, even though the evidence revealed that the respondent smoked a pack and a half of cigarettes a day for years and that smoking can cause or contribute to COPD, the appellants presented no evidence of the percentage of disability caused by smoking. See id. at 384, 335 S.E.2d at 385. Even if Appellants' contention that Claimant's smoking contributed to his respiratory problems were deemed accurate, they have failed to provide any evidence of the percentage of disability caused by the smoking, thereby, failing to justify a reversal of the Commission's finding of total disability. In the case at hand, Appellants' presented not one bit of evidence to refute same.

V. The Commission appropriately awarded Claimant the uncommuted value of 145 weeks of compensation.

South Carolina Code, Title 42, §67-1605(A) provides that, where an award is for more than 100 weeks, the Commission may order a lump sum payment as opposed

to the mandatory lump sum payment required for an award that is less than 100 weeks. As the Commission has properly awarded Claimant the uncommuted value of 145 weeks of compensation and Appellants' arguments are not supported by substantial evidence to justify reversing the Commission's award of 145 weeks of compensation, it would be an error to amend the Order to provide for commutation of the award.

Despite Appellants' allegation that Reg. 67-1605 of Title 42 of the S.C. Code Ann., 1976, states that the award should be commuted, the regulation does not state this. The regulation states that the hearing Commissioner may order a lump sum payment. Nowhere does it state that it "shall" be commuted.

CONCLUSION

There is no evidence in the record which refutes the Claimant's case. Defense witnesses substantiated that, after he began working for the employer, Claimant began experiencing breathing difficulties; was written out of work several times for trips to doctors and the medical records substantiate it was for bronchitis, etc.; that, on occasion, Claimant was sent to the air conditioned front office to help his labored breathing difficulties that occurred while at work in the plant. Further, that, on one occasion, Claimant's respiratory function was so bad that defense witness Keavin Ramey testified he thought Claimant may die and wanted to call EMS but that the Claimant asked that he call his girlfriend instead and she picked him up and carried him for medical treatment. Defense witness Beasley acknowledged the toxicity of Reactobond and AW68 to the respiratory system and that open ventilation was required during the use of these chemicals and that Joy Mining was spending money to improve same. Mr. Beasley further stated that Claimant had to fix leaks of these chemicals on old machinery during the course of his employment.

There is only one medical expert opinion and that is of Dr. Stephen Hand. The
24

principal that reliance on lay testimony and administrative expertise is not justified when the medical question becomes a complicated one and carries the fact finders into realms which are properly within the province of medical experts, is applicable to testimony of extent of disability. Wynn v. Peoples Natural Gas Co. of SC, 238 S.C. 1, 118 S.E. 2d 812 (S.C. 1961). Dr. Hand causally related the Claimant's progressive respiratory problems and COPD to having been aggravated by exposure in the workplace to Reactobond and AW68. (R. p. 342-344). Dr. Hand testified in his deposition that the Claimant would be unable to work in a plant environment around dust, fumes or chemicals, and that he would require medications for life to aid his breathing. (R. P. 163) Dr. Hand stated that, once the lungs have been damaged to the extent of the Claimant's, they do not regenerate and that the damage is not reversible. The decision of the Single Commissioner was based on the preponderance as well as the substantial evidence in the record. The Claimant had a limited education having only a 9th grade education and had worked all of his life. His pre-employment physical required by the Defendant employer showed no lung or respiratory problems upon hire. His references were stellar. He lacked any transferable skills where he could work in an environment not related to mechanical machinery repair or other manual duty, therefore, the substantial evidence supported that the Claimant is permanently and totally disabled as affirmed by the SCWC Appellate Panel.

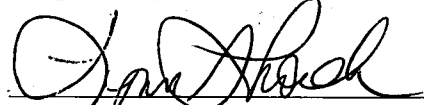
The Claimant smoked and worked without significant respiratory problems until he took a job at Goodman Conveyor when he was exposed to toxic chemicals and not until then was he ever diagnosed with COPD.

It is respectfully submitted that the decision of the Court of Appeals affirm the

SCWC in its entirety. Not only does the substantial evidence support the SCWCC Appellate Panel but there is no evidence to refute claimant's case.

For the foregoing reasons, this Court should sustain the Commission's Decision that: (1) substantial evidence supports the Commission's finding that Claimant suffered a compensable work-related injury on or about September 8, 2008; (2) substantial evidence supports the Commission's finding that Claimant's work exposure contributed 29 percent impairment to each lung; (3) substantial evidence supports the Commission's finding that Claimant was permanently and totally disabled as a result of a compensable aggravation of his COPD; and (4) the Commission appropriately awarded Claimant the uncommuted value of 145 weeks of compensation.

Respectfully Submitted,



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Attorney for Respondent

August 17, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

RECEIVED

AUG 22 2012

SC Court of Appeals

WCC File No. 0825491

Robbin Bradley Cole, Employee Respondent,

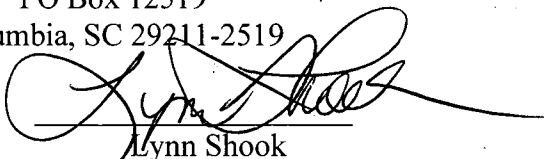
v.

Goodman Conveyor Company, d/b/a/
Joy Mining Machinery, a/k/a Joy Global
And ACE USA/ESIS, Employer, and
Indemnity Insurance Company of N.A., Carrier Appellants.

PROOF OF SERVICE

I hereby certify that I have served **RESPONDENT'S REVISED FINAL BRIEF**
On the attorney of record for Goodman Conveyor Company and Indemnity Insurance Company
of N.A. by depositing a copy of it in the United States Mail, postage prepaid, on August 20,
2012, addressed as follows:

Weston Adams III
McAngus, Goudelock & Courie LLC
PO Box 12519
Columbia, SC 29211-2519



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