

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL COMMISSION

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Appellate Case No.: 2018-001526

SC Court of Appeals

Monica Murphy, Employee.....Appellant,

v.

Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o
AIG Claims, Inc., Carrier.....Respondents.

[INITIAL] BRIEF OF APPELLANT

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I. Issues on Appeal

- 1. Under South Carolina Workers' Compensation law a party has right to present rebuttal witnesses or evidence identified in the party's Pre-hearing Brief. Reg. 67-611 does not impose a deadline for disclosure of new information which is provided to amend a prior response. Claimant identified Dr. Philip Edelman in her Pre-hearing Brief 15 days before the hearing. Did the Commission err in holding that the Claimant's rebuttal expert (by report) was not timely identified?**
- 2. The substantial evidence rule provides that evidence cannot be viewed blindly from one side. There is undisputed evidence from the Employer's own experts, which is consistent with evidence from Claimant's experts, that Murphy had a significant exposure to HF which could have caused the Claimant's heart and lung injuries. The Commission ignored this evidence. Is the Commission's decision based on substantial evidence?**

II. Statement of the Case

This is a medically complex workers' compensation case involving an admitted exposure to a lethal chemical known as hydrofluoric acid (HF). The Single Commissioner heard the case in a hearing which lasted approximately 4 hours on April 27, 2017. The Single Commissioner entered an order denying compensability of the claim on March 12, 2018, finding that although there was an injury, it was not of sufficient magnitude, duration or amount to have caused any permanent heart or lung injuries. She further found that the Employee's version of the facts was not credible, though the evidence was in conflict. The Employee (Murphy) filed a Form 30 Request for Commission Review on March 22, 2018 setting forth 12 assignments of error and questions for appeal on her

attachment to the Request. An Amended Attachment A was filed to correct certain matters in the assignments of error on April 11, 2018.

Ms. Murphy alleged she was injured on August 11, 2015 while she was taking waste to an outside disposal area, when she was suddenly overwhelmed by a draft of chemical odors, fumes and vapors as she proceeded to open a door to a satellite area in the plant near the end of her shift at approximately 5:30 a.m. Murphy alleged she sustained serious and permanent injury to her heart, lungs, and suffered post-traumatic stress disorder, all of which has been causally related by her treating doctors to her exposure to HF, which is one of the most lethal chemicals used in all of industry.

HF is well-known to cause delayed, as well as immediate, symptoms to the heart, lungs and systemic parts of the body. Murphy sought an order from the Commission finding that she was injured in the course and scope of her employment due to her exposure to HF, and a finding of permanent and total disability, payment of all causally related medical expenses, Dodge Medical expenses, medical evaluations for the claimant's inability to smell, taste and such other medical evaluations as in the opinion of the Commission could lead to further delineation as to the extent of Ms. Murphy's injuries.¹

¹ Claimant proceeded at the hearing only on the issue of compensability, temporary total benefits and additional medical treatment, and held in abeyance the issue of permanent disability.

In an appeal to the Full Commission, Murphy requested that the Commission find that the Single Commissioner's findings were not supported by the substantial, reliable and probative evidence on the whole record, and were clearly erroneous. Additionally, Murphy alleged that the Single Commissioner's finding that the expert report of Dr. Philip Edelman, a highly qualified physician, environmental toxicologist and who served as a medical doctor at the Centers for Disease Control in medical toxicology was not timely submitted rebuttal evidence is manifest legal error and should be reversed.

The Appellate Panel of the Full S.C. Workers' Compensation Commission entered an Order affirming the Single Commissioner's findings on July 23, 2018. Murphy timely served and filed Notice of Appeal on August 16, 2018.

III. Statement of Facts

This incident arises out of Monica's Murphy's employment as a lab technician at Halocarbon Products, Corp. (Halocarbon), which is a chemical manufacturer of products such as sevoflurane. Sevoflurane is used in general anesthesia. (Tr. pp. 14-17) One of the chemicals used in the process of manufacturing sevoflurane is hydrofluoric acid (HF). (Id.) HF or Hydrogen Fluoride Anhydrous is very pure and has no water in it. It fumes at concentrations greater than 40% and at 67° Fahrenheit. (Tr. p. 18; Mackinnon Dep. pp. 26-27) It is very corrosive and a serious health hazard. (Id.) Prior to her employment at Halocarbon, Murphy had worked many years at the Savannah River Plant as a lab

technician. (Id.) Her duties ranged from metallurgy to liquid process sampling. She had also worked as an E.N.T. and OSHA Coordinator. She takes safety very seriously.

During the early morning hours of August 11, 2015, as Ms. Murphy's shift was ending around 5:30 a.m., she was taking waste to an organic satellite area for disposal. (Tr. p. 20) Ms. Murphy was in full acid gear or personal protective equipment at the time, which included a lab-coat, acid apron, neoprene gloves, face-shield, and safety glasses. (Id.) In order to reach what Murphy described as the process area where the chemicals are manufactured, she had to go through the control room and entered through a door which is pictured in APA No.23, at p. 222. The danger sign on the door is on the outside of the door, opposite from where Murphy entered into the satellite area to dispose of waste. (Tr. pp. 21-24) There is a grated floor or walkway upstairs on the second floor. (Id. p. 22) On the morning of the accident, as she pushed the door open, Murphy got resistance. She pushed harder to open the door and a draft of air entered, which she inhaled and she immediately noticed a pungent, sharp, chemical odor. (Id. p. 25) She began coughing, like a choking cough and got "several breaths." (Id.) She then pulled the door closed and felt as she was going to collapse. (Id.)

There was no barricade or warning at the door she opened. (Tr. p. 26) No one had told Murphy not to open the door. (Id. p. 27) No one had told her there was an HF leak in the area, which violated safety protocols. (Id. p.27) Murphy

took at least three, no more than four breaths because she was coughing and choking. (Id.) She saw no one in the area at that moment, but she had seen another operator, Lonnie Parsons, in the area earlier when she was dumping organic waste. (Id. p. 29)

After she closed the door, she took her container, held her breath and proceeded down an interior corridor to another door where she had previously dumped organic waste and observed that Lonnie Parsons was out there. He was up on the second level where they process sevoflurane and other chemicals. (Tr.,p. 30) The area is pictured in APA No. 23, page 217).²

Murphy then heard Parsons coming down the steps from above her and he was waving his arms at her to not come where he was. Her heart was pounding, and she was experiencing shortness of breath. (Tr. p. 31) Murphy told Parsons she had inhaled an awful chemical when a draft of air came in on her. Parsons told her it was HF. (Id.) She was in a state of disbelief. Parsons told Murphy he would dump her flammable waste. (Id. at p. 32)

After Parsons dumped the waste, Murphy, still stunned, walks toward Parsons to get the empty waste container and notices two carboys (black, plastic, industrial containers) one of which is unvented and is fuming a billowing white smoke, over two feet high. (Tr., p. 33) The area in which the carboys were located

² References to some APA Submission page numbers have been corrected from some of the designated APA page numbers which are in the Appellant's Brief as filed with the Commission because they did not refer to the correct APA page numbers. Many of these pages were renumbered because of supplemental submissions made after the first hearing was continued.

is pictured in APA No. 23, at p. 217. The carboy that was fuming was located closest to the door where the fumes entered the building and is not shown in APA No. 23, at page 217, but was in the area. Murphy asked Parsons if the fuming carboy that was billowing was HF and he looked at Murphy as if he were in a state of shock. (Tr. at p. 35)

At this point, Murphy's heart is pounding out of her chest and she is short of breath. She feels overwhelmed. As she gets to the top of the stairs, she hears a noise and turns toward the way she goes back to the lab. She vaguely recalls seeing another operator George Campbell, coming up the other stairs. She went straight to the lab and told her workers that she had inhaled HF. (Tr. p. 36) She also told the assistant production supervisor, Chip Babb, that she had inhaled HF and had seen a billowing carboy. (Id. p. 38) Although safety protocol required that she be given calcium gluconate, she was not administered this antidote. (Id. p. 39) She did ask Babb for it. (Id.) Babb then told Murphy that there were leaks in the 3-K system. (Id.)

When Murphy asked for the calcium gluconate nebulizer, Babb told her she just needed fresh air. (Id. p. 40) Murphy's mouth was dry and her sinuses were burning. (Id.) She testified, "I was having coughing, and then my throat started feeling as if it was closing up." (Id. at p. 41) She asked for some water. (Id.) Her co-worker, Janice Tierney told Murphy her face was red, except where her safety glasses fit. (Id. p. 42) Before she left work around 7:00 a.m., Murphy notified her

supervisor in writing about what had happened. (Id. p. 43) She then went home and began having abdominal pain, diarrhea, and weakness. She self-medicated with calcium chews, but was still having headaches, and burning in her throat and sinuses. (Id. p. 44) She also received a text from Emily Parrish, her supervisor, and responded with a request to get medical attention. (Id.) She then returned to work for her evening shift on the same day, August 11, 2015. She also received a call from either Ken McDowell- the Safety Supervisor- or Ms. Parrish and that they wanted her to go to Urgent M.D. (Id. p. 45) When she arrived at Urgent M.D. she saw a physician's assistant by the name of Timber Wages, and heard Ken McDowell, who met her there, tell the P.A. that Ms. Murphy had been exposed to 40 % HF. She was not given any medication, but did receive a "regular check." They checked her reflexes, and listened to her chest and heart. (Tr.p.45) She was released to go back to work with no restrictions, but continued having symptoms, including headaches, burning in her throat, shortness of breath and coughing. (Id. p. 46) Prior to this event, Ms. Murphy's general health was very good. (Id.)

Murphy went through a divorce in 2007 and had what she described as a racing heart, but her cardiologist, Dr. Cundey, attributed this to the stress of her divorce. (Id. pp. 47-48) She was also hospitalized with kidney stones in 2010 and had a little tachycardia. (Id. p. 48) Her doctor told her that this was attributable to body's response to fever and infection. (Id.)

When Murphy returned to work on the evening shift on August 11, 2105, the same day of the accident, her symptoms worsened. She was having shortness of breath, and all of the symptoms described above. She returned to Urgent M.D. on August 13th, 2015, but did not receive any treatment there. (Tr. p. 54) She was referred to the emergency room at University Hospital in August, Ga. for evaluation. She did receive a nebulizer treatment of albuterol on August 13, 2015 at the hospital, which is the first treatment she had received. (Tr. p. 55)

After the visit to the ER on August 13, and being out for several days, Ms. Murphy returned to work on August 19th to light duty. (Tr. p. 56) But her condition deteriorated. Her headaches and pain worsened and she asked Ken McDowell, Halocarbon's safety director, if she could go to the emergency room. He did not grant her permission. (Tr. pp. 58-59) No one helped her.

Eventually, Murphy did go to Urgent M.D. on August 19th in North Augusta, which documented that Ms. Murphy had an abnormal EKG, read as a conduction abnormality- reported as chronic in nature, but which her treating cardiologist, Dr. Kellie Lane, later read as 3rd degree heart-block. According to Dr. Lane, Ms. Murphy should have been hospitalized at this point. (Dr. Kellie Lane Dep. pp. 8-9) A patient in complete heart block is at risk of sudden death. (Id. p. 11: 1-11) Dr. Lane opined in her deposition that the exposure was the cause of a vasovagal response triggered by severe coughing and choking related to Ms. Murphy's exposure to HF. She testified, "We did think that this was very much

related to what had been going on with the respiratory issues.” Q. And therefore with the exposure? A. Yes, was the cause, yes.” (Dr. Kellie Lane Dep. pp.17: 25 to 18: 1-5) The chemical HF is well-known to cause cardiac arrhythmia and Ms. Murphy did have this. (Lane Dep. p. 15: 13-15) Dr. Lane opined within a reasonable degree of medical certainty that, “Ms. Murphy had an issue with [her heart] the rhythm related to the exposure [to HF] primarily related to the severe respiratory issues she was experiencing.” (Dr. Lane Dep. p. 15: 22-25) She testified:

13 Q. And did Ms. Murphy have cardiac
14 arrhythmias?

15 A. She did.

16 Q. Do you have an opinion, within a
17 reasonable degree of medical certainty, whether her
18 temporal exposure to hydrofluoric acid had any impact
19 on these arrhythmias?

20 A. Yes.

21 Q. What is your opinion?

22 A. I believe that this patient had an issue
23 with the rhythm related to the exposure primarily
24 related to the severe respiratory issues that she was
25 experiencing.

[Dr. Kellie Lane Dep. p. 15: 13-25]

Ms. Murphy's symptoms deteriorated further on August 21, 2015 while she was at work when she started feeling light-headed, like she could faint. (Tr. pp. 63-64) She was weak and sick but was told she could not go to the ER. Her supervisor said "I have a place back where you can work." She did a breathing treatment and as she entered the warehouse workspace area, but felt as if she was going to faint. (Tr. p. 64) Shortly thereafter, she began feeling like she was having problems breathing, worse than shortness of breath and told her supervisor that she was "in respiratory distress." (Id. 66) Murphy began having chest pain.

Halocarbon called EMS and when they arrived they began administering calcium gluconate. (Id. pp. 66-67) Ultimately EMS transported Murphy to University Hospital where she had a pacemaker put in as she was on the verge of complete cardiac arrest. She has had a constellation of symptoms and diagnoses related to this exposure, including Reactive Airways Dysfunction (RADS), heart-block, cardiac arrhythmias, and dysrhythmias, and post-traumatic stress disorder.

The Chemical Hydrofluoric Acid

The Safety Data Sheet published by LanXess, the manufacturer of the brand of HF used by Halocarbon Products, Corp. (Halocarbon) denotes HF as a dangerous chemical in the Hazards Identification Section of the Safety Data Sheet. (SDS) The Hazards Identification Section of the SDS states that HF is “Fatal if Swallowed, in contact with skin, or if inhaled.” APA page No. 183. If the product is inhaled, the SDS urges the victim to “Get medical attention immediately.” APA page No. 184. The SDS also instructs to “Call a physician immediately,” if inhaled. (Id.) Halocarbon did not comply with this safety dictate, and thus, this lead to serious medical complications which the SDS warns against. Specifically, inhalation of HF “may cause pulmonary edema with symptoms of breathing difficulty, and tightness of the chest.” Further, “[the] product may have a direct toxic action, resulting in a fall of blood pressure and cardiac arrhythmia.” APA page No. 185. The product is also “corrosive with symptoms of coughing, burning, ulceration and pain.” (Id.) Pulmonary symptoms may be delayed for several hours up to several days. (Id.) According to a SDS Revision date of March, 18, 2015 in the case of inhalation, the protocol requires safety personnel to “Take victim immediately to hospital.” APA page No. 197. The Revised SDS of March 18, 2015 denotes the “Most important symptoms and effects, both acute and delayed,” are in cases of inhalation: Breathing difficulties, sore throat, and nose bleeding. There is a risk of hypocalcemia and cardiac arrhythmia. APA page No. 197.

Halocarbon's own Contingency Plan in cases of inhalation calls for the immediate movement of the victim to fresh air and to "arrange immediate transportation to University Hospital." APA page No. 201. It goes further to state that, "Even in case of suspect slight inhalation, the victim should be brought to the hospital for observation. The symptoms of HF inhalation (pulmonary edema) can be delayed and serious." Id. page No. 201.

According to Halocarbon's Safe HF Handling protocol:

Hydrogen Fluoride is a very strong acid used at Halocarbon as a source of fluorine in the production of several different chemicals. Hydrogen fluoride is used in its anhydrous (meaning without water or dry) form at Halocarbon. **Pure liquid anhydrous HF fumes copiously when exposed to the atmosphere (its normal boiling point is only 67°F),** as do mixtures containing more than about 50 % HF. HF, even in low concentrations, can severely burn the skin and eyes and be fatal if swallowed. The fumes from pure HF or HF- containing mixtures are dangerous to the skin, eyes and respiratory system. Exposure to HF can cause serious and painful burns if not treated promptly. **HF can also cause a range of delayed effects that may not show for many hours or days after initial exposure if not treated properly, even when the exposure is minimal.** (Emphasis added) (Halocarbon Products Corporation Safe Handling, APA page No. 204)

IV. Argument

- I. **Under South Carolina Worker's Compensation law a party has right to present rebuttal witnesses or evidence identified in the party's Pre-hearing Brief. Reg. 67-611 does not impose a deadline for disclosure of new information which is provided to amend a prior response. Claimant identified Dr. Philip Edelman in her Pre-hearing Brief 15 days before the hearing. The Commission erred in holding that the Claimant's rebuttal expert (by report) was not timely identified.**

At the time of this hearing before the Single Commissioner, Reg. 67-611 provided in pertinent part that:

B. Each party representing a party at a hearing shall file and serve a Form 58 according to the following:

(1) File a Form 58 and proof of service at least ten days before with the Hearing Commissioner's office identified on the hearing notice. Complete the Form 58 and give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements including video recordings and /or transcribed audio recordings have been taken from one of the witnesses, including the claimant and indicate who has possession of the same. **A party is under a duty to promptly supplement a response with respect to any question directly addressed on the form** and amend a response if the party obtains information upon the basis of which the party knows the response was incorrect when made, or the party knows the response thought correct when made is no longer true and the circumstances are such that the failure to amend the response is in substance knowing concealment. ³ (emphasis added)

There is perhaps no more axiomatic a statement in modern day jurisprudence than that the law abhors "trial by ambush." This principle is true in worker's compensation cases as well. "The purpose of the prehearing brief is to prevent trial by ambush and unfair surprise. *Morse v. Sodetal USA and Manufacturers Alliance Insurance Co.*, 2007 WL 983808 (S.C. Work Comp. Comm., citing R. 67-611)

³ Reg. 67-611 has been amended, effective February 23, 2018, to impose a 5 day deadline within which amendments and supplements must be made.

As this principle pertains to this case, the employee in this case, Monica Murphy timely filed and served her original Pre-hearing Brief under R. 67-611 on February 20, 2017 for a hearing before the Single Commissioner set for March 7, 2017. The Employer and Carrier in turn served their responsive Pre-hearing Brief February 27, 2017 on the Murphy's counsel via U. S. Mail, which was received on February 28, 2017. This did not leave Murphy's counsel the typically required 10 days to move for postponement of the hearing. The Employer (Halocarbon) in its responsive Pre-hearing Brief named three (3) new experts whose names and reports had not been previously provided to Murphy's counsel, either at or before mediation of this case which occurred on November 4, 2016. One of these opinions, from a pulmonologist, Dr. Selwyn Spangenthal, is dated September 28, 2016 (Defendant's APA No. 29) Halocarbon also named a family physician who purports to be an expert in the field of hydrofluoric acid, Dr. M. A. MacKinnon, whose report is dated January 27, 2017 (Defendant's APA No. 26). Halocarbon did not provide Murphy's counsel with these reports until the Halocarbon filed its Pre-hearing Brief on February 27, 2017 which was not received in time to allow 10 days to notice the depositions of these newly named experts who had neither seen nor examined Ms. Murphy, as had Dr. Mitchell and Dr. Early who had already provided their reports. Claimant's counsel deposed Dr. Mitchell. Halocarbon also named a cardiologist, Dr. Barry Feldman, M.D., who likewise did not examine Murphy but provided a written report.

The naming of these new experts was completely beyond the Murphy's control and while Halocarbon's Pre-hearing brief was timely served before the hearing, it was fundamentally unfair and an abuse of discretion by the Single Commissioner to then disallow the rebuttal expert report of Dr. Philip Edelman, whose report was submitted as a rebuttal to Dr. MacKinnon. (See Edelman Report, Ex. "A," Cl. APA No. 28). On March 7, 2017, the day which was set for the hearing on Murphy's Form 50 which sought additional medical treatment and temporary-total wage benefits, her counsel filed a motion for continuance on two grounds. The first was that counsel's mother had been admitted on an emergent basis to the hospital for a heart attack and counsel is her duly appointed Power of Attorney. Secondly, counsel also moved for additional discovery due to the naming of three new experts. (See Motion for Continuance, Exhibit B)

R. 67-613 provides in pertinent part as follows:

A. Each party shall arrange and present all evidence at the hearing. Testimony of a necessary witness unable to appear at the hearing may be presented by deposition.

B. A commissioner may postpone a hearing for good cause.

(1) Good cause includes but is not limited to:

(a) The attorney is actually engaged in another court;

(b) Illness;

(c) Additional discovery is necessary;

(d) A conflict of interest exists requiring another Commissioner hear the case;

(e) It is premature to hear the case.

(2) To request a postponement, file and serve a motion pursuant to R.67-215 at least ten days before the hearing. If the moving party can show emergency or other circumstance beyond its control, the motion may be filed and served as soon as reasonably possible before the hearing. (emphasis added)

By the time Murphy's counsel received the Halocarbon's Pre-hearing brief, the ten day window for moving for a postponement had passed, as the Defendant's Pre-hearing Brief was not received until February 28th, which was only 9 days prior to the hearing. Therefore, due to the fact that counsel's mother had been emergently admitted to the hospital and the circumstances of Halocarbon's naming of three new experts, all of which was beyond Murphy's control, the Motion for Continuance was filed on March 7th, the morning of the hearing.⁴

This court has ruled that a claimant has a right to offer rebuttal testimony when confronted with new evidence, and that there is no express time requirement for amending a prehearing brief when that information is provided in an effort to amend a prior response. *Fore v. Griffco of Wampee, Inc.* 409 S. C. 360, 762 S.E.2d 37, 44 (Ct. App. 2014). In *Fore*, after receiving Defendants' Pre-

⁴ Claimant's counsel argued this motion from his cell phone at the hospital and raised both the grounds of his mother's illness and the fact that Claimant needed more discovery because of the naming of 3 new experts who had not been previously disclosed and the possibility Claimant might need rebuttal testimony. This was confirmed in an email to the Commissioner's Administrative Assistant on March 8, 2016, attached as Exhibit C. No written Order on this motion was filed to counsel's knowledge, but the Commissioner continued the hearing.

hearing Brief, the Claimant there filed an Amended Prehearing Brief in order to name a rebuttal witness.

This Court stated in *Fore*:

Fore served her original Pre-hearing Brief and Notice of Witnesses on September 12, 2011, more than ten days before the hearing on September 27, 2011. On September 20, 2011, the day she received Respondents' Pre-hearing Brief and Notice of Witnesses, Fore immediately filed and served her Amended Pre-hearing Brief and Notice. Regulation 67–611, though expressly imposing a deadline for filing and serving the Pre-hearing Brief, also requires parties to supplement their responses when warranted. This regulation, however, does not impose a deadline for disclosure of new information when that information is provided in an effort to amend a prior response. **Absent any express time constraint for amending a Prehearing Brief, we hold that Fore, in promptly supplementing her Pre-hearing Brief to include Owens as a witness, complied with Regulation 67–611 and that the single commissioner erred in refusing to allow Fore to call Owens as a rebuttal witness.** See *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 130 n. 2, 623 S.E.2d 860, 864 n. 2 (Ct.App.2005) (recognizing “the informal nature of administrative proceedings before the Commission”). (emphasis added)

Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 373, 762 S.E.2d 37, 44 (Ct. App. 2014)

In the present case, after the March 7, 2017 hearing was continued, Murphy's counsel promptly noticed and took the deposition of Dr. MacKinnon and obtained a written report from Dr. Philip Edelman, a former Director of the Centers for Disease Control and Prevention, who has opined that Claimant's exposure to HF did in fact cause the Murphy's heart block. Dr. Edelman was formerly with the CDC and has handled numerous HF exposure cases and has written and published peer reviewed journal articles regarding HF injuries. (See

Edelman Report, Exhibit A, APA No. 28, pages 295 -302) Further, Murphy's counsel filed a completely new Pre-hearing Brief on April 12, 2017 which supplemented and named Dr. Edelman 15 days prior to the rescheduled hearing set for April 27, 2017 for the purpose of rebutting Dr. MacKinnon's report.

The refusal to allow Dr. Edelman's properly supplemented report as rebuttal evidence in this case is manifest legal error, and therefore, the Commission's Order should be reversed.

II. The substantial evidence rule provides that evidence cannot be viewed blindly from one side. There is undisputed evidence from the Employer's own experts, consistent with evidence from Claimant's experts, that Murphy had a significant exposure to HF which could have caused the Claimant's heart and lung injuries. The Commission ignored this evidence. The Commission's decision is therefore not based on substantial evidence and must be reversed because it is clearly erroneous and unreliable.

The substantial evidence rule applies in South Carolina Workers' Compensation cases. *Lark v. Bi-Lo, Inc.* 276, S.C. 130, 276, 276 S.E. 2d 304 (1981). The standard of review in cases appealed from the South Carolina Workers' Compensation Commission is laid down in the South Carolina Administrative Procedures Act, which provides in relevant part as follows:

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been

prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) *affected by other error of law*;
- (e) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (emphasis added)

S.C. Code Ann. § 1-23-380

“Substantial evidence” is not a mere scintilla of evidence nor 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 that the administrative agency reached in order to justify its action. (emphasis added)

Lark v. Bi-LO, supra, citing, *Law v. Richland County School Dist. No. 1*, 270 S.C. 492, 243 S.E.2d 193.

Furthermore, substantial evidence is not just any evidence. It must be reliable and probative. Indeed, it must be “substantial.” The substantial evidence rule does not allow the administrative agency to mishandle the evidence or ignore evidence. To do so would be to allow the agency to “blindly view the evidence from one side.” The Single Commissioner and the Full Commission turned a blind eye to the evidence which follows.

The Exposure

There is no dispute in this case that Monica Murphy was exposed to HF. And indeed, the contemporaneous memos of this incident for the most part indicate that it was pure HF to which Murphy was exposed. The defense strategy and position, which the Single Commissioner bought into in her Order, is that the

exposure was so minimal as to not cause any lasting injury. But even a minimal exposure can cause serious health effects, though Murphy does not admit the exposure here was minimal in any regard.

The scientific evidence produced from the Halocarbon's own records squarely refutes the notion that a minimal exposure cannot cause injury.

According to Halocarbon's Safe HF Handling protocol:

Hydrogen Fluoride is a very strong acid used at Halocarbon as a source of fluorine in the production of several different chemicals. Hydrogen fluoride is used in its anhydrous (meaning without water or dry) form at Halocarbon. **Pure liquid anhydrous HF fumes copiously when exposed to the atmosphere (its normal boiling point is only 67°F)**, as do mixtures containing more than about 50 % HF. HF, even in low concentrations, can severely burn the skin and eyes and be fatal if swallowed. The fumes from pure HF or HF- containing mixtures are dangerous to the skin, eyes and respiratory system. Exposure to HF can cause serious and painful burns if not treated promptly. **HF can also cause a range of delayed effects that may not show for many hours or days after initial exposure if not treated properly, even when the exposure is minimal.** (Emphasis added)

Halocarbon Products Corporation Safe Handling, (APA No. 20, page no. 204).

The contemporaneous memos made by Halocarbon confirm that there was an HF leak, without regard to any dilution of the fumes.

Halocarbon's Safety Director, Ken McDowell, notes "We received a note from Monica at 0658 on August 11, alleging an HF inhalation exposure that she stated occurred at about 0545. Mark Frye stated at the 9 am morning meeting

that the economizer had an HF leak and that was the cause.” There is no mention of dilution. (Cl. APA No. 8, APA page No. 163). In another memo from McDowell to Mark Frye, Mark Harris, Mickey Brown and Chip Babb, McDowell writes about an upcoming “roundtable discussion” which “will center around the HF leak that occurred in the process side of the heat exchanger, 3k214. Probably related to wet HF.” (APA page No. 165).

The “root cause” of the event was noted to be a combination: 1. Improper venting: a. “Hazardous vapors should not be vented to a carboy.” 2. Improper Area Warning: a. “Anytime hazardous vapors are present, use a plant evacuation, an area evacuation, or a PA announcement as appropriate.” (APA No. 16, APA page no. 181)

The Halocarbon Products Corporation Supervisor’s Incident Report notes that there were “trace HF fumes,” but Ken McDowell, the company’s Safety Director, could not provide an estimate of the amount of HF that was present. (Hearing Transcript p. 145) And no measurement of the fumes was made. (Id. p. 142) According to the CDC publication on HF which was made an exhibit to Dr. MacKinnon’s deposition, the Defendants’ HF expert, HF which is more than 40% hydrogen fluoride fumes in the air. (Cl. Ex. 2 to MacKinnon Dep.) Ken McDowell provided information regarding the exposure to Urgent MD of Aiken that the amount of HF concentration to which Monica was exposed was 40%. (APA No. 1 at p. 7 – Urgent MD visit 8-11-15). Of course at this time McDowell was not

prompted to urge a diluted amount, and therefore, the Court should rely on what was more spontaneously reported. Murphy's health is at stake.

The Safety Data Sheet published by LanXess, the manufacturer of the brand of HF used by Halocarbon Products, Corp. (Halocarbon) denotes HF as a dangerous chemical in the Hazards Identification Section of the Safety Data Sheet. (SDS) The Hazards Identification Section of the SDS states that HF is "Fatal if Swallowed, in contact with skin, or if inhaled." (APA page no. 183) If the product is inhaled, the SDS urges the victim to "Get medical attention immediately. (APA page no. 184) "The SDS also instructs to "Call a physician immediately," if inhaled. (Id.) Halocarbon did not comply with this safety dictate, and thus, this lead to serious medical complications of which the SDS warns. Specifically, inhalation of HF "may cause pulmonary edema with symptoms of breathing difficulty, and tightness of the chest." Further, "[the] product may have a direct toxic action, resulting in a fall of blood pressure and cardiac arrhythmia." (APA page no.185) The product is also "corrosive with symptoms of coughing, burning, ulceration and pain." Id. Pulmonary symptoms may be delayed for several hours up to several days. (Id.)

According to a [Safety Data Sheet] SDS Revision dated March, 18, 2015 in the case of inhalation, the protocol requires safety personnel to "Take victim immediately to hospital." (APA page no.197) The Revised SDS of March 18, 2015 denotes the "Most important symptoms and effects, both acute and delayed," are

in cases of inhalation: Breathing difficulties, sore throat, and nose bleeding. There is a risk of hypocalcemia and cardiac arrhythmia. (APA page no. 197)

Halocarbon's own Contingency Plan in cases of inhalation calls for the immediate movement of the victim to fresh air and to "arrange immediate transportation to University Hospital." (APA page no. 201) It goes further to state that "Even in case of suspect slight inhalation, the victim should be brought to the hospital for observation. The symptoms of HF inhalation (pulmonary edema) can be delayed and serious." (Id. page no. 201)

The Proof of Causation

The burden of proof in a medically complex case is upon the Claimant to establish within a reasonable degree of medical certainty that the injury claimed was caused by the conditions occurring or arising out of the Claimant's employment. S.C. Code § 42-1-60 (E). However, upon review of the evidence in this case, this claim may not arise to the level of a complex case, because the evidence is nothing short of substantial as to the fact of the Murphy's exposure to and injury from HF. And the Employer's own documents prove the case, including the manner and fact of a leak of HF, the claimant's undisputed exposure and injury and consequent medical proof of the kind and type of injury that is contemplated from such an exposure, even a minimal one.

University Hospital medical records record as "Final Diagnoses" a number of medical problems which are well-known to follow from an exposure to HF,

including, atrioventricular block, complete, bronchitis and pneumonitis due to fumes and vapors and cardiac dysrhythmias. (APA page No. 42)

Dr. Kellie Lane, who was the front-line treating cardiologist, opined that Ms. Murphy's heart block was related to a vasovagal induced response to extreme coughing and respiratory distress precipitated by her exposure to HF, as noted above. Dr. Lane testified that Ms. Murphy is completely dependent on the pacemaker, which is in essence evidence of 100 % impairment to the heart. (Dr. Lane Dep. p. 49: 8-9)

Importantly, **one of the most significant clinical factors associated with HF induced heart block is prolongation of the QT interval on electrocardiogram.** Defense expert, Dr. MacKinnon, conceded this in his deposition, along with other very salient points which were virtually ignored by the Commission. If the Commission gave great weight to Dr. MacKinnon's report, then it must of necessity yield to his honest opinions and admissions on cross-examination in his deposition. (Decision and Order Finding No. 62 at p. 43) In his deposition, Dr. MacKinnon concedes that prolongation of the QT interval would be a clinically important finding that was consistent with a significant HF exposure. He testified:

41

Q... Now, are you aware that in the hospital

23 records, Dr. Elgin Hobbs, who is an internist that

24 examined and treated Ms. Murphy, that -- that he noted a

25 prolonged QT interval with respect to her heart; is that

42

1 correct?

2 A... I don't have that information. And I don't

3 see -- looking at your -- the list that's here of

4 medical records, there's no Dr. Hobb.

5 Q...Dr. Elgin Hobbs.

6 A · Not on the list here

7 · · · Q · All right. Well, I mean, were you provided

8 · with the medical records from University Hospital?

9 · · · A · Some, yes. But I don't recall seeing the fact

10 · that there was prolongation of the QT interval

11 · specifically.

12 · · · Q · If that's true, if that was noted in the

13 · medical records, that would be clinically significant to

14 · you; would it not?

15 · · · A · Yes, indeed it would be.

16 · · · Q · It would be some evidence, would it not,

17 · that -- that that was consistent with an exposure to HF;

18 · correct?

19 · · · A · It could be. There are other causes for QT

20 · interval changes, but that's one of them; that had there

21. ·been an exposure, a significant exposure, yes, you're
22. ·going to get QT interval changes.

23. . . . Q. · All right. And so, you know, given the timing
24. ·of her alleged exposure on August the 11th and her
25. ·subsequent admission at the University Hospital with
·less than, what, approximately ten days, for the fact
·2. ·that there was a prolonged QT interval noted, if there
·3. ·was, that would be something that would be considered
·4. ·important in a temporal exposure to hydrofluoric acid;
·5. ·would it not?

·6. . . . A. · I'm not a cardiologist, so -- and I wouldn't
·7. ·be able -- I can't really answer that question, other
·8. ·than saying that I can't conceive of the QT interval
·9. ·staying prolonged for several days without having the
10. ·patient -- without the patient having some heart
11. ·complaints.

12. . . . Q. · Okay. · But you're an expert in HF exposures;
13. ·yes?

14. . . . A. · Yeah. · Yes.

15. . . . Q. · And a prolonged QT interval is a significant
16. ·finding subsequent to an exposure to HF; yes?

17. . . . A. · That's something we monitor for after an

18. exposure of any significance.

19. . . . Q . It would take a significant exposure to

20. precipitate a prolonged QT interval; would it not?

21. . . . A . It would take it, yes

MacKinnon Dep. p. 41: 22-25 – p. 43 1-21.

It is nothing short of damning, if not dishonest, that Dr. MacKinnon was not provided complete medical records from the Defendants since the Commission by adopting the Single Commissioner's Order has placed such great weight on his report. This is manifestly unfair and the Single Commissioner's finding on causation or lack thereof should be reversed as it is unreliable because this evidence was ignored. But it goes further. Dr. MacKinnon was asked in his deposition if the details of the exposure were important to which he replied they were. (See pages 16-18 of Dr. MacKinnon's deposition) He testified:

16

11 Q Did you --

12 Well, you would agree that the details of any

13 exposure to HF are very important?

14 A There is two things that --

15 My answer would be yes, but I have to say that

16 what's important with hydrofluoric acid is the

17 concentration of the acid, in whatever form it's in,

18 liquid or gaseous, and the duration of exposure. These

19 are the two most important factors.

20 Q We're going to talk about that a little later.

21 A Okay. Fine.

22 Q We're going to talk about that a little later.

23 I just wanted to ask you whether or not you
24 thought that the details of an exposure, whether that
25 was important or not?

17

1 A It's always important.

2 Q All right. Now --

3 Well, it's like a medical history; yes?

4 A That's correct.

5 Q So in any case, do you recall being provided
6 the deposition of Monica Murphy to read?

7 A No.

8 Q Do you believe that Ms. Murphy's description
9 of what happened would be important, since she is the
10 person that is involved as the claimant in this case?

11 A Yes, it would be important.

12 Q All right. Now, I looked at your -- your
13 report.

14 MR. HALL: And, Madam court reporter, can you
15 hand Dr. MacKinnon -- I think I've given it to you.
16 Let me locate it real quickly. Bear with me just a
17 moment.

18 Q (By Mr. Hall) It's your report dated
19 January 25th.

20 A Yeah, I have it here.

21 Q All right.

22 A Yeah, I have it here.

23 Q Okay. Well, I want to get that to the court
24 reporter.

25 MR. HALL: Madam court reporter, do you have

18

1 it?

2 THE REPORTER: I have something here that says
3 January 27th on it. I don't know --

4 MR. HALL: That's it. Hand it to him and
5 let's let him identify it.

6 THE WITNESS: Yeah, that's my letter.

7 MR. HALL: Okay. Let's mark that as
8 Claimant's Exhibit Number 1, Madam court reporter.

9 (Claimant's Exhibit No. 1 marked.)

10 THE REPORTER: It's marked.

11 Q (By Mr. Hall) All right. Dr. MacKinnon,
12 you're familiar with your report; yes?

13 A Yes.

14 Q All right. And did you note the testimony
15 from Mrs. Murphy's deposition where she described the HF
16 was billowing out of a carboy --

17 A No.

18 Q -- in your report?

19 A I did not see that deposition.

The failure to provide defense experts with complete medical evidence calls into question all of the Commissions' findings and the Commission's failure to weigh this evidence makes its findings unreliable. Therefore, its Order should be reversed.

Nevertheless, there is independent testimony that substantial HF fumes were encountered. George Campbell, one of the Halocarbon's employees encountered the HF fumes and had a reaction which he stated "it took my breath away." (Tr., p. 175)

As to the concentration of HF, defense expert Dr. MacKinnon testified:

18

14 Q All right. And did you note the testimony
15 from Mrs. Murphy's deposition where she described the HF
16 was billowing out of a carboy --

17 A No.

18 Q -- in your report?

19 A I did not see that deposition.

20 Q All right. Are you familiar with the Centers
21 for Disease Control's publication on hydrofluoric -- or
22 hydrogen fluoride and hydrofluoric acid as a systemic
23 agent?

24 A Not particularly.

25 Q All right. Is it true, Dr. MacKinnon, that

1 hydrofluoric acid that is more than 40 percent hydrogen

2 fluoride fumes in the air?

3 A No. Usually it doesn't start fuming until

4 it's past 70 percent.

MacKinnon Dep. (Pages 18:14 to 19:4)

18 Q All right. Nobody quantified the amount of

19 fumes that had escaped; is that correct?

20 A Not that I know of.

21 Q All right. And you are aware that there were

22 fumes and vapors?

23 A I'm aware that there was some --

24 Q Is that correct?

25 A I am aware that there were vapors, yes.

1 Q All right.

2 A Or fumes.

3 Q And -- all right.

4 And --

5 So your -- you testified to us earlier that HF

6 that is greater than 70 percent fumes in the air; is

7 that correct?

8 A That's the normal, yeah, at room temperature

9 will start to boil.

10 Q All right.

11 A It's a range. If it's 70 percent or 75 or 80
12 or 90, as it gets more concentrated, it fumes more. And
13 pure HF, anhydrous, which is 99 percent, would fume very
14 readily, unless it was -- the temperature was below
15 freezing.

16 Q Okay. And if it was billowing, that would be
17 significant; would it not?

18 A Certainly if it was billowing.

19 Q Yeah.

20 So there were no monitors that you were aware
21 of that indicate -- that indicated how much HF had
22 escaped; is that correct?

23 A Correct.

MacKinnon Dep. (Pages 22:18 to 23:23)

Dr. MacKinnon, Defendants' HF expert, further acknowledged that HF can cause cardiac arrhythmia; that HF is a toxin and that HF can cause heart block. (MacKinnon Dep. p. 40: 19-25) He also testified on deposition that if you have a piece of equipment that is fuming that would indicate that the concentration was greater than 40%. (Id. p. 29: 19-25 to p.30: 1-4) MacKinnon acknowledged an electrolyte imbalance in the form of hypophosphatemia and that HF vapors were present. (Id. p.37:3-6) MacKinnon acknowledged that hydrogen fluoride likely has a direct adverse effect on the heart as a delayed onset of fatal dysrhythmias,

and they have been described despite normal calcium, magnesium and potassium concentration. (Id. p. 36: 17-21; 22-25 to p.37:1-2)

Beyond this, Dr. John F. Setaro, an Associate Professor of Cardiology at Yale University School of Medicine, has opined within a reasonable degree of medical certainty that “Ms. Murphy’s exposure to hydrofluoric acid (HF) at her place of employment was a substantial causative factor in the development of life-threatening third degree electrical heart block in her case, which required the placement of a permanent electronic pacemaker.” (APA No. 24, APA page Nos. 239-242).

One of the recognized indications of a toxic induced heart block due to HF exposure according to Dr. Setaro is a “prolongation of the QT interval” on ECG or other electrical disturbances. (APA page No. 240) Of note, according to Dr. Setaro, Ms. Murphy’s QT interval was abnormally prolonged at 0.496 milliseconds.” (Id. No. 240.) This is in the medical records from University Hospital. (APA page No. 45). Dr. Setaro further notes that fatal cardiac rhythm disturbances have been described following HF exposure in settings where serum calcium and magnesium remain normal. (APA page no. 240). According to Dr. Setaro, who is also a Board Certified Clinical Hypertension Specialist, as well as being Board Certified in Interventional Cardiology, Ms. Murphy’s diagnostic echocardiogram and Lyme studies during her stay at University Hospital were otherwise normal, pointing away from any other cause except HF poisoning to explain this cardiac electrical disorder. (APA page no. 241)

Ms. Murphy has permanent pulmonary problems associated with this exposure, which has been diagnosed as reactive airways dysfunction syndrome (RADS), which her treating pulmonologist and critical care expert has opined within a reasonable degree of medical certainty was caused by the exposure. (Alleyne Dep. pp.8, 12- 14) He assigned a permanent partial impairment to each of Ms. Murphy's lungs of 30%. (Alleyne Dep. p. 27) Dr. Alleyne's chart of Ms. Murphy's medical records document that "the patient is status post toxic inhalation injury due to hydrofluoric acid. This is an extremely toxic material that can be fatal. Her initial presentation in 24 hours would qualify as reactive airways dysfunction syndrome. RADS." (APA page No. 125-128; note page 127)

This is consistent with the University Hospital Medical Record. Dr. Varsha Kulkarni opined that Ms. Murphy may have some RADS related to her exposure. (Cl. APA No. 2, page 53) Dr. Elgin Hobbs of University Hospital noted at Ms. Murphy's admission that she was complaining of shortness of breath and symptoms of moderate to severe severity. Dr. Hobbs noted "possible delayed sequelae to hydrofluoric acid." His final diagnosis was "Toxic Inhalation Injury, Chemical Exposure." (APA page no. 46)

Dr. Alleyne also noted that the Ms. Murphy has post-traumatic stress disorder, in addition to 3rd degree heart block and a diffusion capacity of 40% of predicted, which qualifies as a class IV impairment to her lungs. (APA No. 4, page no. 127)

Dr. Early, Defendants' toxicologist, upon whom the Single Commissioner, in part, relied to reject any injury to the Claimant's lungs, found that Ms. Murphy was "worse now" after the exposure" insofar as her lungs are concerned. (See Early Report at p. 402, Defendant's APA No. 27) Interestingly, Dr. Early also notes that he did not find a low phosphate level in Ms. Murphy's medical records, which is clearly documented in the University Hospital records, which he refers to incorrectly as MCG records. Ms. Murphy was not taken to the Medical College of Georgia hospital. In fact, Ms. Murphy did have an abnormal electrolyte finding, which the Commissioner found she did not have in her Order at p. 56, finding no. 83. The hospital records note that Ms. Murphy had a low phosphorous level of 1.1 as noted on APA page no. 51, noted by Dr. Patel. Furthermore, Dr. Early's report cites to research which documents that "electrolyte abnormalities are rather uncommon in HF exposures." (Early Report, Defendant's APA No. 27, at page 400) Thus, the Single Commissioner's heavy reliance on the lack of abnormal electrolyte findings is seriously flawed and clearly erroneous, as are the Full Commission's findings, and Dr. Early's findings are inconsistent with his own research. Nevertheless, even Dr. Early thinks the Claimant's lungs were at least aggravated in the face of pre-existing restrictive lung disease. In addition, Dr. Early's report bolsters the findings of Dr. Setaro, Claimant's cardiology expert from Yale, as both agree that a prolonged QT interval on EKG is a finding clinically associated with HF exposure. See Early Report at page 400 and Setaro report. (Claimant's. APA 24 at p. 240) No

reasonable finder of fact should be allowed to turn a blind eye to this evidence. Nor could any reasonable fact finder conclude that such evidence pointed in any other direction than a compensable, permanent injury to Ms. Murphy's heart and lungs from her exposure to HF.


There is abundant evidence of causation and injury to the Murphy's heart and lungs to which the Commission turned a blind eye. There is also manifest evidence that Halocarbon's experts are grossly mistaken based on the reliable, substantial and probative evidence on the whole record. Therefore, because their opinions are riddled with error and incomplete, the Commission's Order should be reversed.

V. Conclusion

The Single Commissioner and Full Commission committed an abuse of discretion and error of law in failing to admit the timely submitted report of Dr. Philip Edelman. The Commission also committed an abuse of discretion in not granting the Claimant's motion to continue the original hearing to obtain additional discovery and submit rebuttal evidence in light of three newly named experts in a medically complex case. Additionally, the Single Commissioner and Full Commission turned a blind eye to clear evidence from both the Claimant's experts, and Defendants' experts, as well as the treating physicians, which unmistakably proves that Monica Murphy sustained a serious and permanent injury to her heart and lungs. Therefore, the Commission's findings should be reversed

on two grounds: the error of law in failing to admit Dr. Edelman's report and in the failure in ignoring the clear, probative and reliable evidence of injury to Ms. Murphy's heart and lungs, which shows the Commission's findings are not based upon substantial evidence.

BY:



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL COMMISSION

Appellate Case No.: 2018-001526

RECEIVED

OCT 19 2018

SC Court of Appeals

Monica Murphy, Employee.....Appellant,
v.
Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o
AIG Claims, Inc., Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included on the Record on Appeal, by depositing a copy of it in the U.S. Mail, postage prepaid, on October 19, 2018, addressed to the attorneys of record, James Lichty, Esquire and Helen F. Hiser, Esquire, at the addresses listed below:

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October 19, 2018
VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RE: Monica Murphy, Employee, Appellant, vs. Halocarbon Products Corporation, Employer, and Commerce Industry Insurance Company, c/o AIG Claims, Inc., Carrier, Respondents.

Appellate Case No.: 2018-001526

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Appellant's Initial Brief, Designation Of Matter To Be Included On The Record On Appeal, along with the Proof of Service, regarding the above referenced matter.

By copy of this letter, I am also serving a copy of the same upon opposing counsel.

Should you have questions regarding this matter, please feel free to contact me at my Lexington office.

Yours truly,


Frederick I. Hall, III

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OCT 19 2018

SC Court of Appeals

FIH,III/gmt
Enclosures

cc: James Lichty, Esquire
Helen F. Hiser, Esquire
Monica Murphy