THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SC WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2017-002396

Gennette Sowell, Employee,.....Respondent,

v.

Piggly Wiggly, Employer, and
Auto Owners Insurance, Inc., Carrier,.....Appellants.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This appeal is from the Award of the Commission in Ms. Sowell's workers' compensation case that was instituted by the filing of a claim for benefits on July 17, 2014. (R. pp. 116-122). A Form 50 Request for Hearing was filed on September 26, 2014 requesting benefits based on injury, illness, repetitive trauma and/or occupational disease which culminated in disability on January 6, 2014 and requesting temporary total disability benefits and medical care on and after January 6, 2014 and continuing. (R. pp. 110-115). No Form 51 was filed to that Form 50, thus waiving any affirmative defenses and constituting a general denial. An Amended Form 50 was filed with the Commission on November 11, 2014 which amended the Request for a hearing to allege that Ms. Sowell was totally and permanently disabled due to her compensable injury/condition under the Act. (R. pp. 123-131). A Form 51 to the Amended Form 50 was filed on December 11, 2014. (R. pp. 132-134). A hearing was set for February 12, 2015 but based upon the mandatory mediation rules and the agreement of the parties, the hearing was cancelled and set for mediation **(Hearing Notice, 12/18/14 - this Designation was left out of the Record on Appeal).** Mediation was conducted on March 27, 2015 which resulted in an adjournment for sixty (60) days to complete discovery; and the mediator recommending that an employer representative and/or a

representative of the carrier attend in person and that the hearing request be held in abeyance until rescheduled pursuant to the request of the parties. (R. p. 135). Mediation was not resumed until January 22, 2016 which resulted in an impasse. (R. p. 136). On February 11, 2016, the matter was reset for hearing on March 23, 2016. (R. p. 1131). By agreement between counsel for the parties with notice to the Commission on March 11, 2016 that hearing was continued to again allow for mediation and was reset for hearing on April 25, 2016. (R. p. 1133; p. 1134). On April 15, 2016, Respondent's Counsel filed an Amended Pre-Hearing Brief and APA Submissions to those initially submitted March 8, 2016 with a cover letter. That cover letter made a part of this Record specifically noted the prior agreement with new defense counsel to have the Claimant submit to an additional evaluation by Dr. Gordon Early, and that that evaluation and the report from the evaluation had been received weeks prior to that by both counsel and noting Respondent was waiting for confirmation as to whether further mediation would be conducted. (R. p. 150; 138-400; 148). On April 19, 2016, Appellants filed a Motion to Postpone to Conduct Additional Discovery and to mediate the case. On and at the re-scheduled hearing April 26, 2016, the Commissioner, based on the agreement of the parties to further mediate the case, continued the matter for the purpose of mediation, closed the Record except for the depositions of

Dr. Gordon Early and the current treating family doctor, Dr. Mendez. Those depositions were allowed because their reports had been submitted (Dr. Early's second evaluation report) subsequent to the original hearing set for March 23, 2016. (R., pp. 1137-1138). A third mediation was attempted (no Employer/Carrier representative present) on June 3, 2016 which again resulted in an impasse. (R. p. 137).

The matter was then reset for hearing and was finally heard on two separate days June 22nd and July 21st, 2016. (R. p. 1135; 1139). Appellants filed a Supplemental Pre-Hearing Brief on June 13th including their previous APA Submissions of April 15, 2016 and subsequently filed a revised Pre-Hearing Brief on June 21, 2016 making no substantive changes. (R. pp. 401-717). At the hearings held on June 22 and July 21, 2016, pre-hearing conferences were held, rulings were made, evidence was excluded and admitted and testimony was taken from various witnesses. (R., pp. 718-846; 847-985).

Subsequently in October of 2016, the Commissioner issued a draft of her notes for decision and scheduled and held a conference with all counsel of Record including Ms. Kenya Miller, Preston F. McDaniel and Gerald Malloy to go over her notes for decision. (R. p. 1140-1149). A proposed Order was requested from Respondent's counsel and the hearing Commissioner's final decision was filed May 16, 2017. (R. pp.

1-55). Request for Commission Review was filed by the Appellants on May 30, 2017 and after briefing a Commission Review hearing was held on August 22, 2017. Subsequently, the Full Commission issued its decision on October 17, 2017. (R. pp. 56-109). While a Notice of Intent to Appeal was filed with the Court from this Workers' Compensation Commission award, S.C. Code §1-23-380, S.C. Code §42-17-60 and SCACR Rule 203(d)(2)(B) all have specific requirements in reference to the Notice and the Notice is not made a part of the Record. This Appeal follows.

STATEMENT OF THE FACTS

While the evidence presented and history of the onset of Ms. Sowell's work-related injury is meticulously covered in the Commissioner's Order, with detailed citations/references to the Record in her Findings of Fact, in reference to the specific issues argued, this brief supplemental undisputed factual Statement is submitted.

Ms. Sowell was the Deli Manager for Piggly Wiggly between 1999 and when she had to leave work in January of 2014. Prior to the Spring of 2011, there is absolutely no history of any problems with allergies, asthma, bronchitis or other respiratory or immune system problems. It is undisputed by all the witnesses and everyone involved at Piggly Wiggly that in the Spring of 2011 and particularly in March and April, the deli

developed a severe waste water drain backup problem wherein raw sewage and waste water would back up out of all of the drains with the exception of one next to the meat department. This was a constant almost every day problem. All of the people directly involved in the cleanup that testified, in particular Mr. Harrington and Ms. Sowell, testified that the water was all over the entire floor and was inches deep and required pumping and mopping of the entire area of the deli during this time period. This was a constant problem almost every day. (R., p. 749; 972; 975).

The Appellants appropriately note that Ms. Sowell was first treated June 3rd but fail to note she was actually taken to the emergency room on June 3rd with severe bronchospasm and bronchitis, was treated with IV steroids and then released. She then returned to the emergency room on June 11th with a condition so severe that she was admitted and spent three days in the hospital. After that, she was under continual medical care which continued to increase in the level and frequency of care necessary to control her condition as she continued to work between June 2011 and December 2013 (R. pp. 275-285).

As is reflected in the Commissioner's Order, particularly in 2013 while expressing varying diagnoses, Dr. Hammett, the Claimant's treating physician, became more and more of the opinion that her pulmonary, immune and asthmatic condition was

related to her work. (R. pp. 36-39).

Ms. Sowell testified uncontested that in November of 2013, Dr. Hammett indicated to Ms. Sowell that she, "felt" it was job related and that she needed to come out of work to confirm, "it was". Ms. Sowell testified that she wanted to wait until after Christmas and at that time talked to Ms. Quick about her doctor's visit. Ms. Quick, the Store Manager and Ms. Sowell's boss, agreed and confirmed in testimony that she talked with Ms. Sowell at that time and that Ms. Sowell was going to work through the holidays; and agreed that Ms. Sowell told her that her doctors had told her she needed to be out of work in order, "to have her lungs scraped" so that they (the doctors) could find out what was causing her problems (R. p. 859, ll. 14-23; p. 870, ll. 9-23).

In December of 2013 (which the Commissioner found was consistent with and supported Ms. Sowell's other testimony), while still working Ms. Sowell applied for Social Security, and on the Social Security form she indicated that she had not filed nor did she intend to file for workers' compensation. The Commissioner viewed this as confirming Ms. Sowell's testimony that she did not know at that time that her condition was being caused by her work. (R. p. 39).

In January 2014, Dr. Hammett referred Ms. Sowell to Dr. DeDios, a pulmonologist, who took her out of work and told Ms.

Sowell that if her work was in fact causing her condition with her being out of work that they would be able to confirm whether that was the cause. Two weeks later when her condition improved, he confirmed that in his opinion her problems were related to and being caused by her work. Thus, the first definitive diagnosis either of a repetitive trauma exposure and/or an occupational disease was Dr. DeDios' opinion which is reflected in his February 4, 2014 note. It is agreed that Ms. Sowell reported to her supervisor, Ms. Quick, in March of 2014 that the doctors were saying her condition was work-related and on March 25, 2014, a First Report of Injury was filed.

Both of her family doctors, her treating pulmonologist and the Board-Certified Toxicologist and Occupational Medicine Specialist, Dr. Gordon Early, all expressed the opinion that Ms. Sowell developed, "occupational asthma", due to her, "exposures" at Piggly Wiggly. There is no contradictory medical evidence.

STANDARD OF REVIEW

By way of amendment to the Standard of Review set out by the Appellants as part of their Appellants' Brief, this appeal involves an appeal from the SC Workers' Compensation Commission and therefore is not only an appeal filed under the SC Administrative Procedures Act, SC Code §1-23-380, but is more specifically an appeal filed under the Workers' Compensation Act under SC Code §42-17-60. The Workers' Compensation Act is a

statutorily created scheme of "swift and sure" benefits payable in derogation of the common law and which takes away the fundamental right to trial by jury and replaces it with an appointed Commissioner (factfinder) system for which our Appellate Courts have established specific fundamental review principles that apply to appeals from a Commission decision to insure the purposes of the basically no fault system are being met. In that regard, the Appellants do not set out the entire Standard of Review applicable in a workers' compensation case. those principles must be addressed and are part of any recitation of the Standard of Review recited by any party or by the Court. Those fundamental principles of law that specifically apply to workers' compensation cases as part of the Standard of Review on appeal are:

First, it is the established law of this State that the Act and its provisions must be "liberally construed" and that any reasonable doubts as to the construction of the Workers' Compensation Act must be resolved in favor of the injured worker and,

> "its provisions reconciled if possible, its purposes effectuated, and its presumptions and penalties directed towards the end of providing coverage rather than non-coverage . . . Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the

> industry in which they are employed a share of the burden resulting from industrial accidents and to prevent the burden of injured employees and their dependents from becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws **shall be liberally construed in favor of the employees and their dependents, in furtherance of the beneficent purposes** for which they were enacted and to avoid any incongruous or harsh results." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). (Emp. add.).

Second, since the workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, the reviewing Court must strictly construe such statutes, leaving it to the Legislature to amend and define any ambiguities. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). Cox v. BellSouth Communications, 356 S.C. 468, 589 S.E.2d 766 (SC App. 2003, reh. den., cert. den.).

PRESERVATION OF ISSUES FOR REVIEW

Finally, as part of the Standard of Review on appeal from a final Commission decision, the Appellants must establish that the specific legal issues argued to the Court were presented to and were ruled upon by the Full Commission. The Court will not find the Brief of the Appellants nor the Brief of the Respondent to the Full Commission nor the transcript of the oral arguments made to the Full Commission which would establish the specific issues that were specifically raised and addressed before the Full Commission for Review. In fact, not even the SCWCC Form 30 which is the Form used for Commission Review is made a part of

the Record. The recitation from the Form 30 in the Full Commission Order is simply that, a pleading, and does not establish which specific issues were actually presented to and ruled upon by the Full Commission. The Full Commission Order as the Court will find is simply a full affirmation of the hearing Commissioner's Findings of Fact and Conclusions of Law and Award in this matter. Only issues that are raised and ruled upon by the Commission are cognizable on appeal. Smith v. NCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (SC App. 2006). There is simply nothing in the Record including the transcript of the Full Commission Argument or the Briefs presented to the Full Commission to establish that the specific issues raised on Appeal before this Court were raised as errors of law and were ruled upon by the Full Commission. Shealy v. Aiken Co., 341 S.C. 448, 535 S.E.2d 438 (2000). The Appellant has the burden of providing the Court with a sufficient Record upon which to make a decision which includes making sure that the transcript and any briefs that presented an issue to the Commission are before the Court as part of the Record. Where the Record fails to contain information sufficient to establish that the issue was presented to and ruled upon by the Full Commission, the issue is not preserved for appeal. Johnson v. Sunoco Products Co., 381 S.C. 172, 672 S.E.2d 567 (2009).

ARGUMENTS

I. THE COMMISSION APPROPRIATELY FOUND THAT THE RESPONDENT'S OCCUPATIONAL ASTHMA CONSTITUTED A REPETITIVE TRAUMA INJURY UNDER §42-1-172.

Repetitive physical movements are no more or no less a series of micro or mini traumas than are repetitive inhalations and/or absorptions. The issue is manifestly without merit. Rule 220(b)(2), SCACR.

As it set out by the Hearing Commissioner in her Conclusions of Law No. 2 and 3, (R. pp. 51-52) as firmed by the Commission, repetitive exposures through inhalation and/or absorption have been awarded as constituting injury by accident since the inception of the Act. Strawhorn v. Chapman Constr. Co., 202 S.C. 43, 24 S.E.2d 116 (1943) (months of inhalation of lead dust); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120, (1977), (months of dust inhalation resulting in emphysema); Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (SC App. 1987), (continued exposures and massive exposure to petrochemicals resulting in immune system breakdown); Pee v. AVM, Inc., 344 S.C. 162, 543 S.E.2d 232, affirmed, 352 S.C. 167, 573 S.E.2d 785 (2001), (gradual exposure to work conditions compensable as injury by accident). In awarding this as a repetitive trauma injury, the Commission took into particular consideration Grayson v. Gulf Oil Co., supra wherein the Claimant had worked from 1965 until January 1984. During 1982

and 1983 there was a massive loss of 300,000 gallons of petroleum due to loss by vaporization from storage tanks which resulted in a much greater than usual exposure to gasoline and petroleum fumes by Claimant. Her immune system had been triggered/sensitized by this period of greater exposure and thereafter minor exposures continued to trigger and exacerbate her condition leading to her "disability" triggered by a minor exposure.

Contrary to the position taken by the Appellants in their Brief, in Pee v. AVM, supra, the Supreme Court did not limit repetitive trauma injuries to external physical injuries and in fact in deciding that repetitive trauma injuries were compensable as injury by accident under South Carolina law, the Supreme Court cited to an exposure case for that proposition citing Hiers v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211 (1952). After noting that a repetitive trauma injury and an occupational disease have many elements in common and that repetitive trauma is more in reference to repetitive exposures versus an occupational disease being due to a more continuous exposure, the Court awarded Ms. Pee's condition as a series of repetitive exposures in the workplace finding that repetitive trauma was compensable in South Carolina because of the findings of the Commission. The Supreme Court stated,

"in any event, the Commission found Claimant's

> repetitive trauma injury was compensable as an injury by accident. We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma."

In this case, the Commission reviewed the evidence and found it was more in the nature of a series of repetitive exposures in the workplace after a series of extreme exposures that lead to the development of the Claimant's occupational asthma. (R. p. 46).

Further, repetitive trauma was specifically codified as a definition and as an injury under S.C. Code §42-1-172 in 2007 and since then, this Court has had numerous opportunities to review the definition of what constitutes the cumulative effect of, "repetitive traumatic events". The Commissioner under Finding of Fact No. 46 referred to those decisions from a factual standpoint in reaching her factual conclusion,

> "The development of Ms. Sowell's repetitive trauma injury is very similar to the facts in Rhame v. Charleston County School District, 415 S.C. 162, 781 S.E.2d 151 (SC App. 2015) cert. denied (2016); King v. International Knife, 395 S.C. 437, 718 S.E.2d 227 (S.C. App 2011) cert. denied 2014; and Murphy v. Owens-Corning, 393 S.C. 77, 710 S.E.2d 454 (S.C. App. 2011)." (R. p. 46).

The repetitive trauma statute simply does not refer to or add the words either internal or external forces or inhalation versus the necessity for a physical act.

Traumatic is defined in the dictionary as meaning, "injurious or physical injury". Ms. Sowell's condition resulted

from a series of traumatic meaning, physical or injurious, inhalation exposures in her workplace. Her condition began with a series of massive injurious exposures which were not continuous, but which occurred on a repetitive basis in the Spring of 2011 which triggered the start of and which made her more desensitized. Then due to repetitive exposures, not constant and continuous, but repetitive exposures in her workplace, she developed a higher and higher sensitivity and also developed a greater and more severe asthmatic condition. Further, the lack of any intent on behalf of the Legislature to limit the definition of repetitive trauma so as to exclude an absorption and/or inhalational-type injury and/or external versus an internal type injury is made clear by the wording under the limitation for filing a claim under S.C. Code §42-15-40 wherein that section provides that a claim must be filed within two (2) years of the, "last date of injurious exposure". Finally, the provisions of the Act are to be liberally construed in favor of benefits to the injured worker and the wording is to be strictly construed leaving it to the Legislature to amend or to define any ambiguities. Cokeley v. Robert Lee, Inc., supra and Wigfall v. Tidelands Utilities, Inc., supra. The Commission appropriately found that Respondent's injury constituted a repetitive trauma injury under §42-1-172.

II. THE COMMISSION DID NOT ERR BY FINDING THAT THE RESPONDENT'S OCCUPATIONAL ASTHMA WOULD ALSO QUALIFY AS AN OCCUPATIONAL DISEASE UNDER SOUTH CAROLINA LAW.

Unless the Court finds that there is no substantial evidence to establish repetitive trauma and/or that the Claimant's injury as a matter of law does not constitute a repetitive trauma injury, the basis for the award, the Court need not reach this issue as it is a point which is not, "necessary to the decision of the appeal". Rule 220(b), SCACR. The Commission awarded this case as a repetitive exposure trauma injury resulting in her condition of occupational asthma under S.C. Code §42-1-172.

While awarding the claim on that basis, the Commission also found that the Claimant's condition of occupational asthma would qualify as an occupational disease under South Carolina law. All the elements of an occupational disease claim are addressed in Finding of Fact No. 47 in the hearing Commissioner's Order and the law in reference to an occupational disease claim is copiously set out under Conclusions of Law No. 1 in the hearing Commissioner's Order as affirmed by the Full Commission on Appeal. (R. pp. 46-48; 51). The recognizing body for purposes of satisfying the requirement of §42-11-10 that the disease is recognized as peculiar to the employment in order to qualify as an occupational disease, is the Workers' Compensation Commission. Fox v. Newberry Memorial Hospital, 316 S.C. 537,

457 S.E.2d 28, reversed in part, 319 S.C. 278, 461 S.E.2d 392 (1995); Mohasco Corporation, Dixiana Mill Division v. Rising (Mohasco II), 292 S.C. 489, 357 S.E.2d 456, (1987). All of the issues raised under this argument are manifestly without merit, Rule 220(b)(2), SCACR.

A/B. THE COMMISSION DID NOT ERR BY FINDING THAT THE RESPONDENT'S CONDITION ALSO CONSTITUTED AN OCCUPATIONAL DISEASE AND THAT HER CONDITION WAS DUE TO HAZARDS PECULIAR TO HER EMPLOYMENT.

Under South Carolina law, a disease that meets the definition or requirement of an occupational disease is compensable as an occupational disease regardless of the fact that it may also qualify as an injury by accident. The inquiry is not focused on whether the disease arose from a single accidental contact but whether the disease is succinctly associated with the employment. Fox v. Newberry County Memorial Hospital, supra. The occupational disease statute within the Workers' Compensation Act is satisfied where the Claimant is able to show simply that the employment increased the risk of the disease. Pee v. AVM, Inc., supra. See also: Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C. App. 1999). In reference to whether the exposure is peculiar to the employment, it is not whether or not the general public is exposed to a particular substance, chemical or toxin, the inquiry and essential issue is whether the employment increased that risk

and increased that exposure level. In this case, the use of the chemicals and exposure to the molds, bacteria, fungi and other items identified by the doctors to which Ms. Sowell was exposed, and to which she was exposed on a daily, continual basis are peculiar to the food service industry. In the food service industry on a daily basis employees, Ms. Sowell in this case, are exposed to raw meats, poultry and fish blood and fluids and their associated molds, fungi and micro toxins and to raw vegetables and the fungi, molds and micro toxins prevalent in raw vegetables. The workers are also exposed to all of the oils and greases necessary for preparation of the raw products and turning them into cooked products. They are also exposed before, during and after the process and preparation to all of the cleaning products including degreasers on a continual basis throughout the day which is necessary to properly sanitize and clean the food production utensils and equipment. While the general public may use a product, they are not consistently, regularly and continually exposed on a daily basis, as Ms. Sowell was in this case, to all of these cleaning/sanitizing and degreasing products and in addition and more importantly, to all of the other associated asthmagens, toxins and the sensitizers to which she was exposed in her occupation in the food production occupation.

Respondent will not bore the Court by reiterating the

plethora of testimony from the various doctors stating the opinion that the Respondent's occupational asthma stemmed from her employment and exposures in her employment other than to quote the opinion of her treating pulmonologist, Dr. Angelo A. DeDios, M.D. who stated the opinion that the,

> "triggering factor triggering her adult onset asthma, was her daily and repeated and unusual and extraordinary exposure during that two (2) to three (3) month period prior to June, 2011 to the deli waste water containing all the molds, fungus, bacteria, etc., involved in the preparation of meat, fish, poultry and vegetable products and the chemicals necessary to clean and sanitize that sewage water ..."

Dr. DeDios stated the further opinion that,

> "where a person has developed or has the onset of asthma, thereafter if that person is continually exposed to the offending agent that triggered the condition that continual repeated exposure will cause an ever-increasing hypersensitivity and severity of their condition." (R. p. 327).

As to the opinions of Dr. Gordon Early, those are simply misstated by the Appellants. In his deposition, he specifically stated that the waste water is well known to be infected with bacteria, molds and viruses. (Depo. p. 1081, ll. 7 - 14). He then restated and reaffirmed his opinion that this was a case of occupational asthma. There was no qualification to that opinion and the only thing that he qualified was simply that by 2013 her immune system had been triggered and had been certainly stimulated and that due to her sensitivity and weakened immune system by that time other items such as allergies to pollen and

dust mites may also be contributing to her condition. After that, he restated his opinion again, contrary to what the Appellants would want the Court to think and stated to a reasonable degree of medical certainty that her immunologic trigger was her exposure at work, specifically in reference to her asthma. (R. p. 1083, l. 25 - p. 1085, l. 8). He specifically stated that the amount of immunologic trigger is less for someone who has severe asthma than it is for someone who has moderate or mild asthma. (Depo. p. 1076, ll. 18 - 21).

The Commission appropriately noted that the claim was both compensable as a repetitive trauma injury and also as an occupational disease under the decisions of this Court and the Supreme Court but decided to award the claim as a repetitive exposure trauma injury.

Again, assuming that the Court agrees under the substantial evidence in the Record and as a matter of law that the Claimant sustained a repetitive trauma injury, all of the arguments under Argument II are irrelevant and obiter dicta to the decision of the Commission awarding benefits and need not be addressed by the Court. Dent v. East Richland Public Service District, Opinion No. 5548 S.C. App. filed March 28, 2018), 2018 WL 1513963; King v. International Knife, supra. This issue is manifestly without merit. Rule 220(b)(2), SCACR.

C. **RESPONDENT'S CLAIM IS NOT BARRED PURSUANT TO S.C. CODE §42-15-20 WHERE THE RESPONDENT NOTIFIED HER EMPLOYER WITHIN 90 DAYS OF A DEFINITIVE DIAGNOSIS OF OCCUPATIONAL ASTHMA.**

The Respondent would ask the Court to note that while this Argument is made as a subsection under the arguments that the Respondent is not entitled to benefits on the basis of an occupational disease claim under S.C. Code §42-11-10, et. seq. the first line of this Argument II(C) states,

> "section 42-15-20(C) provides that in the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered or could have discovered by exercising reasonable diligence that his condition is compensable, unless reasonable excuse is made and the employer has not been unduly prejudiced." (Appellants' Initial Brief, p. 15).

Thus, the Argument is captioned under the notice standard applicable to an occupational disease claim of definitive diagnosis under §42-15-20 but the argument addresses whether or not the Claimant met the notice requirements under subsection (C) of the notice provision applicable to repetitive trauma injuries. For this reason alone, this Argument should not be considered by the Court.

However, applying the notice standard in reference to a repetitive trauma injury, the Commission as the arbiter of the facts and the Commissioner in her Order as affirmed by the Full Commission under Finding of Fact No. 23 found that the first time the Respondent was made aware by her doctors that the

doctors felt that her condition was, "work-related, and that she needed to come out of work and just see if that was what 'it was," was November 2013 (R., p. 776; 779; 794). At that time, she immediately, according to her testimony, "told" her employer/supervisor, Ms. Quick that her doctors felt that her condition, "may be" work related. In Finding of Fact No. 24, the Commissioner found the Respondent's testimony was credible. She found in Finding of Fact No. 25 that consistent with the Respondent's testimony that the Respondent did not know that her condition was definitively caused by her work at that time. Then in January of 2014, Dr. DeDios took her out of work and advised Ms. Sowell that if her work was exacerbating or causing her condition that her condition would improve. On February 9th, he recorded that her condition had improved, and the first definitive diagnosis was on February 9, 2014. (R. pp. 38-39).

The visit with Dr. Rochelle Hammett was on November 21, 2013, and Dr. DeDios' opinion was on February 4, 2014, (R. p. 313; 316). Therefore, according to the Findings of Fact of the Hearing Commissioner as affirmed by the Commission, the period between Dr. Hammett's visit when the Respondent could have discovered by the exercise of reasonable diligence that her condition was compensable (and assuming contrary to her testimony and the Commission findings, she did not tell Ms. Quick that day) and the date that she was actually definitively

diagnosed on February 4, 2014 is a period of less than 90 days. In addition, the period between January 7th when Dr. DeDios indicated that her condition may be work related and that her being out of work would tell whether or not in his opinion it was, and March 25th the date a formal First Report of Injury was filed, is a period of less than ninety days. The Commission is the finder of fact and this is the Findings of Fact made by the Commission and substantial evidence supports the conclusion that the Respondent met her burden of proof in reference to the notice provisions under §42-15-20.

D. THE RESPONDENT'S ACTIONS IN CONTINUING TO WORK FROM 2011 THROUGH 2014 DO NOT CONSTITUTE A WILFUL INTENT TO INJURY UNDER THE ACT.

First, in reply, the Respondent would note that there is absolutely no evidence that this issue was submitted to either the hearing Commissioner or to the Full Commission on appeal for decision. Based on a review of the Defendants' Pre-Hearing Brief filed April 15, 2016, legal issues involved; Defendants' Supplemental Pre-Hearing Brief filed June 13, 2016, legal issues involved; and the 66 Exceptions listed in the Full Commission Order that is a part of the Record, the Court will find there is no reference to S.C. Code §42-9-60 nor is an intent to injure referred to as having been presented as an issue to the Full Commission. (R. pp. 401-717; 56-109). Further, the Respondent would ask the Court to note that this again is presented as a

subsection to the occupational disease arguments under Argument II. Finally, this issue has not been preserved for argument; see: Preservation of Issues section of this Brief.

S.C. Code §42-9-60 is a specific exception to the provision of workers' compensation benefits and must be narrowly construed under the guiding principles interpreting the Workers' Compensation Act. While our Supreme Court and this Court have both entered decisions interpreting the type of intent necessary to meet the exception created by §42-9-60, this Court and the Supreme Court have defined the term, "willful intention" under the Act as meaning a deliberate or formed intention to injure or kill oneself. Youman's v. Coastal Petroleum Company, 333 S.C. 195, 508 S.E.2d 43, (S.C. App. 1998) citing Reeves v. Carolina Foundry and Machine Works, 194 S.C. 403, 9 S.E.2d 919 (1940). Willful intention under that section of the Act which is an exception to awarding benefits means a deliberate, "formed" intention to injure. There is absolutely no evidence in the Record either that Ms. Sowell intended to injure herself by continuing to work or that she was ever told that by continuing to work that it would result in total disability or any disability for that matter. As this Court has held, simply knowing that chemicals in the work environment should be avoided and/or that they were potentially related to the development of occupational asthma not only are not evidence of an intentional

act but those facts are insufficient to even establish notice. See King v. International Knife, supra, (just knowing that the arm was tired, sore and achy for a couple of years was insufficient even to establish notice). The issue is not only patently without merit, it was not raised nor decided by the Commission and is frivolous as there is no basis in law to make this Argument.

III. THE COMMISSION APPROPRIATELY AWARDED THE RESPONDENT TOTAL AND PERMANENT DISABILITY BENEFITS BASED ON THE UNCONTRADICTED MEDICAL AND LAY EVIDENCE CONCERNING THE RESPONDENT'S DISABILITY.

The evidence establishes Ms. Sowell's right to an award to total and permanent disability as awarded by the Commission under either the basis of a repetitive trauma injury under S.C. Code §42-1-172 or under S.C. Code §42-11-10 et. seq. as an occupational disease.

Again, the Commission awarded this case based on the Respondent having sustained a repetitive trauma injury. However, in response to paragraphs 2 and 3 of Appellants' Argument which are based on an occupational disease award, the Appellants first misstate or maybe better put, do not accurately/completely recite the law. The law actually provides under S.C. Code §42-11-10(5) that any disease of the pulmonary system that results from the, "natural entrance into the body through the skin or natural orifices thereof of foreign, **organic**

or inorganic matter ..." is compensable. The Claimant's occupational asthma was a direct result of the inhalation (orifices, mouth/nose) and absorption (skin) of, "organic and inorganic matter" into her body.

As to the remaining part of the argument which does address the award of total disability, the Appellants do basically and accurately restate the definition of total disability established by our Courts but in making their argument, the argument is wrong under both the law and the facts.

While the frivolity of this argument is readily apparent under the law and facts of this case, (i.e. Respondent's testimony supported by four doctors opinions she is totally disabled from gainful employment), because of and since the 2007 amendments, direct appeal to this Court: 1) there is an ever increasing lack of experience with the fundamental principles of the Act; 2) there is a need to remind ourselves of the fundamental purposes of the Workers' Compensation Act; and 3) that the general principles applicable to a trial by jury in Circuit Court do not apply to the, "summary" no fault system enacted to provide "swift and sure" benefits to injured workers with the rarest of "exceptions" which are to be "narrowly construed", Mendenall v. Anderson Hardwood Floors, LLC, 401 S.C. 558, 738 S.E.2d 251, (2013); Cokeley v. Robert Lee, supra and this writer would be remiss if those were not reviewed here and

to avoid further distortion.

As the Court knows, total disability is not defined in the Act. It is defined by Court decision. The word, "disability" is a defined term in the Act under S.C. Code §42-1-120 wherein disability is defined as meaning the,

> "**incapacity** because of injury to earn the **wages** which the employee was receiving at the time of the injury in the **same** or any other **employment**."

As the Court also knows both the term "employee" and "employment" are defined under the Act. The insurance industry has spent billions of dollars over 80 years attacking and trying to rip apart and to shred those fundamental principles. The question was, is and hopefully will always be whether or not the Claimant is able to "**earn wages**" as an "**employee**" in an "**employment**".

This writer would be remiss not to remind the Court of and to restate the definition of total disability under the Act which was bought with blood of many workers including seven (7) on "Bloody Thursday" at the Honea Path Chiquita Mill, September 6, 1934. While the definition of total and permanent disability as defined by the Supreme Court entitling an injured worker to an award for total and permanent disability is referred to and used in Wynn v. People's Natural Gas Company of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961) it was actually established by the Supreme Court in the case of Colvin v. E.I. DuPont DeNemours

Co., 227 S.C. 465, 88 S.E.2d 581 (1955) which has been the definitive statement and opinion defining total and permanent disability in our state ever since. While the Respondent knows that this Court has repeatedly read that case and knows the definition, the definition is usually recited by our Courts in two sentences, but it is best put into one sentence. The definition established by the Supreme Court and applied by this Court repeatedly over the 80 plus year history of the Act is, "where based on the age, education, background and experience and the facts of the injury, the jobs which the claimant can perform on a residual basis are so limited in quality, quantity **or** dependability that a reasonably stable job market for them does not exist, the claimant is entitled to an award for total and permanent disability under the Act. Of course, as the Court knows, the Colvin decision goes through an exhaustive review of that definition of total and permanent disability as applied by Appellate Court decisions from across the United States applying that definition in numerous situations where the claimant could and did actually continue to perform work after injury in limited capacities. Among those are numerous cases analyzing total disability in situations where the claimant could earn wages performing part-time work but could not perform full duty work; where the claimant could residually (earn wages) performing a very limited number of jobs such as a night

watchman in a rural county but where was not a sufficient number of (**quantity**) those jobs available to prevent an award for total and permanent disability. Also, situations where the claimant after injury could go back to earning "wages" doing a menial labor type job but where prior to injury, the claimant was a highly skilled employee and thus a lack of, "**quality**" of employment after injury. Lastly, just because an employee can return to work earning wages in a fruit stand which job is only available certain months out of the year (dependability) that residual limited wage-earning ability would still justify and did result in an award for total and permanent disability.

In fact, our Supreme Court applied the definition in Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (1996), and found that Mr. Stephenson was so disabled before he began to work in the one singular type job that he could perform with his disability and in which he was injured, that he was not entitled to an award for total and permanent disability because he was already totally and permanently disabled under the Act prior to the accident which took him out of that final and singular job. Of course, the Court is also aware of the plethora of cases applying this standard and is aware of the case of Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43 (1965) which is repeatedly cited along with Wynn and Colvin in reference to the definition. As the Court is aware, in

Coleman, Mr. Coleman was a heavy equipment operator who because of multiple hernia surgeries could not go back to that job and there was no evidence that there was any job to which he could return based on his age, education, background and experience and the physical facts of the injury. The Coleman Court also considered and reminded the bench and bar of the law which is lost or not addressed in many cases, wherein under S.C. Code §42-9-190 there is a requirement under the Act placed on the insurance carriers, which they ask the Court to conveniently disregard or forget which is that if they say that a claimant can work, they can be relieved of the responsibility of paying total and permanent disability by, "simply offering or procuring employment for the employee suitable to his residual capacity ..."

Finally, before applying our definition to the evidence in this case, which establishes beyond cavil and actually beyond a reasonable doubt and actually uncontradicted, that Ms. Sowell is entitled to an award for total and permanent disability, several issues or arguments indicated or made by Appellants must be addressed. First, Appellants apparently attempt to argue and actually state that Wynn requires vocational expert testimony. There is simply no requirement for vocational expert testimony established by Wynn or any other decision of the Supreme Court or of this Court nor, more importantly, of the Act. In

addition, the Appellants in this case and the insurance industry in general love to refer to Wynn but they fail to properly set forth the facts. Mr. Wynn testified that he was disabled. However, they do not refer to the fact Mr. Wynn actually went back to work after the injury, and more importantly, they fail to note that his doctors did not agree with him that he could not work, and all of the doctors opined that he could go back to work if he avoided physical and emotional stress. Finally, they fail to note as the Court is aware, that the Supreme Court did not deny Mr. Wynn benefits but simply found the evidence was insufficient to meet the definition of total and permanent disability and remanded the case to the Commission for further proceedings not inconsistent with the Opinion of the Court. Because the ultimate award made to Mr. Wynn was not appealed, what the Commission did on remand and the Award he received is lost in the mists of time.

Now, applying the definition of total and permanent disability to the facts of this case, not only is there a preponderance but the overwhelming, and actually uncontradicted, evidence establishes that Ms. Sowell is entitled to an award for total and permanent disability.

In addition to her testimony about not being able to work, (R. p. 790, ll. 7-15) Ms. Sowell testified that she was 66-years-old, had gone through the 9th grade and quit school in the

10th grade and prior to going to work with Piggly Wiggly she had worked for 27 years in a cotton mill and her only other work experience was as the Deli Manager at Piggly Wiggly for almost 15 years. She then testified as to her current condition (R. pp. 733-737), including that she cannot even take out the garbage due to strong odors hitting her in the face which will set off a severe reaction; that she does not drive because of fear that she will have an attack or a black-out spell; that her sister does all of her house cleaning; that her daughters do all of the cutting of the grass and yardwork because she cannot be around any household cleaners or around dust; and that she carries a prescribed Epi-pen everywhere to stop a life-threatening attack. (R. p. 783, l. 10 - p. 789, l. 9). She then testified that knowing her condition and with her 9th grade education and work experience that she knew of no job in the economy she could do 5-days a week, 8-hours a day, or in other words full-time "employment" to earn "wages". She testified she loved her Deli Manager job; that she wanted to stay working; and that she only left when the doctors made her go out of work. She also testified Piggly Wiggly had not offered or procured her any job for which they felt she had a residual capacity (S.C. Code §42-9-190); that she had applied for her disability and that Piggly Wiggly had assisted her in obtaining her long-term disability under the policy which she had paid for at work. She

also confirmed, uncontested, that she had been declared totally disabled by the Social Security Administration (R. p. 788, l. 25 - p. 792, l. 8).

Contrary to the assertions of the Appellants, which are totally inaccurate in reference to the Record, Dr. Yolanda Mendez, the Claimant's current treating family physician, stated the opinion that Ms. Sowell is totally and permanently disabled from gainful employment. (R. p. 399). Dr. DeDios her treating physician stated the opinion that Ms. Sowell is totally and permanently disabled from gainful employment and that her condition is permanent. (R. p. 258).

The Appellants also misstate the testimony of Dr. Gordon Early. After testifying, he would "defer" to her treating doctors as to her disability to work (R. p. 1078, l. 20 - p. 1079, l. 3), Dr. Early testified:

> "Question: ... before I ask you this question, and I am going to ask you a question about how sensitized she is as far as her ability to go to work, you would defer to her treating physicians that see her day in and day out as to whether or not she is disabled from gainful employment; would that be fair?
>
> Answer: I would defer to them, yes. Uh-huh.
>
> Question: Now, if she is that sensitized, and we refer to that she could possibly go back to sedentary work, I believe there is also a further classification in that, and, that

is, it would have to be in a clean air environment?

Answer: Correct."

(R. p. 1078, l. 21 - p. 1079, l. 9).

The Claimant testified to her age, education, background and experience and the physical facts of the injury and that there was no job ("employee", "employment", "earn wages") based on those factors that she knew she could do on a full-time basis within the economy. That testimony is uncontradicted. Piggly Wiggly helped her get on her long-term disability insurance and she has been declared (uncontested) totally disabled by the Social Security Administration which has an even higher standard for total disability than under the Workers' Compensation Act. In addition, her two treating physicians, her family doctor and her treating pulmonary specialist all expressed the opinion that Ms. Sowell is totally and permanently disabled from gainful employment. In fact, her condition is so bad, and this is not undisputed by anyone, that when this case had originally been set for hearing at the Hartsville City Hall, wherein City Hall had a time-released air freshener, that when she entered the building, she had to immediately leave the building and take medications in the form of a nebulizer treatment to control her severe reaction. (R., p. 787, ll., 8-21; p. 811, ll. 8-19). None of those existed in the Wynn case relied on by the

Appellants.

Therefore, not only did the Claimant meet her burden of proof but the evidence is undisputed that she is totally and permanently disabled as defined under the Act.

IV. THE COMMISSION DID NOT ERR IN THE AWARD OF FUTURE MEDICAL TREATMENT, WHICH IS NOT OVERLY BROAD AND WHICH IS IN ACCORDANCE WITH LAW.

The simple and straight-forward answer to this argument concerning the award for future medical is that the Commission did nothing more and nothing less than, having found that Ms. Sowell was totally and permanently disabled, to award medical care as provided for in the Act. The Appellants criticize the Award and its wording wherein the Commission awarded "all such causally related medical care for life which specifically shall include all treatment necessary and related to the treatment of her occupational asthma and all causally related conditions," and which specifically included all of the treatment as contained in the records of Dr. Hammett, Dr. Mendez, Dr. DeDios and Dr. Dyce. The Appellants also challenge the wording wherein the Commissioner awarded future medical care which will, "affect a cure or provide relief" from the Claimant's disabling symptoms, "and which is reasonable and necessary" for treatment of Claimant's occupational asthma and related conditions.

The first part of the argument is as to this wording of the award. The wording of the Award comes specifically and

straight out of the wording of §42-15-60 the phrase, "affect a cure or provide relief" is found in subsection (A), and subsection (C) specifically uses the terms, "reasonable and necessary".

The Court will actually find under the wording of subsection (C) that there is no limitation as to lifetime medical care being just for the injuries sustained in the accident. The limitation that lifetime medical care is limited to "causally related" injuries sustained and/or conditions that stem from the accident is established by case law. Our Appellate Courts have held that the Claimant's entitlement to lifetime medical care is for, "all causally related" medical conditions stemming from the injuries in the accident. Munn v. Nucor Steel, 336 S.C. 28, 518 S.E.2d 289 (S.C. App. 1999). Our Appellate Courts have also held in reference to an Award of lifetime medical benefits under an Award for total and permanent disability that there is no requirement that the medical care has to have a tendency to reduce the degree of disability and that under the current statute, the Legislature intended lifetime care to mean all reasonable and necessary medical care throughout the lifetime of the injured worker which is causally related to the injuries sustained in the accident. Quoting from Pearson v. JPS Convertor and Industrial Corporation, 325 S.C. 393, 489 S.E.2d 219 (S.C. App. 1997), reh. and cert. denied:

> "the Legislature explicitly anticipated the need for lifetime medical care for those persons totally and permanently disabled. See S.C. Code Annotated §42-15-60 (1985)('in cases in which total and permanently disability results, reasonable and necessary ... treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit"). Indeed, here the Record demonstrates that **further medical care may improve Pearson's quality of life and his ability to cope without improving his overall disability rating**." (Emp. add.)

In reference to the Lifetime Medical Award, the Commission's wording is specifically in accordance with the statutory mandate.

Next the remainder, and the majority, of this argument is based on the Appellants' desire to cut out the Xolair treatments. The Court will find throughout the medical records that all treatment including the Xolair shots was being provided as part of the treatment for the Claimant's occupational asthma. Dr. Early in his deposition made this perfectly clear and stated that usually to even be prescribed Xolair that the patient has, "got to have severe persistent asthma." (R. p. 916, ll. 3-4.) Then at p. 930, he makes this perfectly clear:

> "Question: And I think you and I discussed earlier that to get the Xolair, that means your asthma has got to be probably in the severe persistent range?
>
> Answer: Right.

Question: Is that accurate?

Answer: It's got to be really bad asthma to get on Xolair."

(R. p. 930, ll. 4-12.)

He went on to explain that in his opinion that Ms. Sowell's work environment had triggered and was triggering her immune response and that while she had continued to work that was causing her to become more and more desensitized creating a more and more significant or severe reaction to even minor, and continually less and less minor, exposures. (R. p. 931).

All of the doctors testified and/or stated the opinion that Ms. Sowell suffers from occupational asthma and the only difference between asthma and occupational asthma is the source of causing and/or triggering and aggravating her asthma causing it to be symptomatic. In this case, the doctors opined, and the Commission found her asthma related to her job-related, (occupational) exposures. Xolair is necessary to treat her occupational asthma and the issue is without merit.

CONCLUSION

For all of the forgoing reasons, the Court should affirm the Award of the Commission. Further, all of the issues raised on appeal are controlled by existing precedent and case law and are all manifestly without merit. After review of the Record, Briefs and Issues presented, the Court should decide the appeal

without oral argument pursuant to Rule 215, SCACR, and Rule 220(b)(2), SCACR, and should issue a decision finding all issues and points raised to be manifestly without merit and affirming the Award of the Commission.

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August 24, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SC WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2017-002396

Gennette Sowell, Employee,.....Respondent,

v.

Piggly Wiggly, Employer, and
Auto Owners Insurance, Inc., Carrier,.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Dated: August 24, 2018

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