

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
Aisha Taylor, Commissioner

Appellate Case No. 2018-001237
W.C.C. 1507304

Kenneth L. Barr, Employee,.....Appellant,

v.

Darlington County School District, Employer, and
SC School Boards Insurance Trust, Carrier,.....Respondents.

INITIAL BRIEF OF THE RESPONDENTS

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SC Court of Appeals

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Counter-Statement of Issues on Appeal

- I. Barr abandoned his claims for encephalopathy, brain damage, memory loss, fatigue, confusion, and alleged injuries to the “neurological/central nervous system;” therefore, issues regarding these claims are not before the Court of Appeals.
- II. The Workers’ Compensation Commission’s finding and conclusions that Barr’s claim does not meet the requirements of S.C. Code Ann. §§ 42-1-160, 42-11-10, or 42-1-172 is the law of the case.
- III. The Workers’ Compensation Commission’s unanimous finding and conclusion that Barr’s headaches were not caused by his employment is supported by substantial evidence and the applicable law and should be affirmed by the Court of Appeals.
- IV. Barr’s allegations regarding the admissibility of documentary evidence are without merit.
- V. Barr’s allegations regarding the propriety of Dr. Pritchard’s neurological evaluation are untimely, moot, and otherwise without merit.
- VI. Both the Hearing Commissioner and the Appellate Panel made detailed findings of fact and conclusions of law

Counter-Statement of the Case

The Appellant, Kenneth Barr, filed a Form 50, workers’ compensation claim, against the Darlington County School District on June 17, 2015, alleging that he sustained undefined injuries on May 21, 2015 involving his “Head/Brain” and affecting the following body parts: “Encephalopathy, Brain (headaches, memory, fatigue, confusion), neurological/central nervous system.” (Form 50 dated 6/7/15). Barr alleges that these injuries were caused either by repetitive trauma or some “occupational disease” involving his job as a painter for the District. Barr filed a second Form 51, requesting a hearing, on September 29, 2015 on the same grounds

as his original claim. (Form 50 dated 9/20/15). The Respondents, the Darlington Count School District and the South Carolina School Boards Insurance Trust, filed a Form 51 answering the claim on October 28, 2015 and denied Barr sustained any injury by accident, repetitive trauma, or occupational disease arising out of or in the course of his employment. (Form 51 dated 10/28/15). A hearing on the Forms 50 and 51 was then scheduled before Commissioner T. Scott Beck for January 7, 2016.

In anticipation of that hearing, the Respondents scheduled a neuropsychological evaluation with Dr. Mark Wagner, the director of Neuropsychological Services and Professor of Neurology at the Medical University of South Carolina, after the Claimant's personal physician recommended a neuropsychological exam. Barr refused to attend the scheduled evaluation with Dr. Wagner and the Respondents filed a Motion to Compel on November 5, 2016. (Respondents' Motion to Compel dated 11/5/16). This Motion was granted by Commissioner Beck by Order dated November 23, 2015. (Beck Order dated 11/23/15).

Immediately after Commissioner Beck ordered Barr to submit to a neuropsychological evaluation at MUSC, Barr sent an email to Commissioner Beck, informally requesting reconsideration, and he also filed a Motion and Complaint for Writ of Mandamus and Writ of Prohibition in the Darlington County Court of Common Pleas. (Barr's Motion and Complaint dated 12/9/15). Without any notice to the Respondents, Judge Paul Burch, presiding judge of the Fourth Judicial Circuit, issued a Temporary Restraining Order on December 11, 2015, as follows:

“...SC School Boards Insurance Trust by and through its Attorney, be and is hereby ordered and restrained from requiring and [Barr] is not compelled to attend any evaluation; and the Commission is hereby restrained from issuing any Order

or taking any further action to enforce the Order or on the subsequent Motion and email filed electronically on December 4, 2015, until such time as a hearing may be held on the Motion requesting a Temporary Restraining Order pursuant to the Motion filed with the Court.” (Order of Judge Burch dated 12/11/15).

At Judge Burch’s request, the Respondents notified Judge Burch of their objection to the Temporary Restraining Order. (Respondents’ Letter date 12/16/15). The Respondents also filed a Motion for Dissolution of the Temporary Restraining Order on December 21, 2015. (Motion for Dissolution dated 12/21/15).

The Workers’ Compensation Commission made no appearance before the Circuit Court, despite being subject of the Temporary Restraining Order issued without notice. Instead, Barr’s Brief to this Court indicates that the Commission engaged an attorney to negotiate, *ex parte*, with Barr’s attorneys regarding the matter. Thereafter, Commissioner Beck issued an Order dated December 23, 2016, vacating his previous Order to Compel and Barr withdrew his Mandamus petitions. (Beck Order dated 12/23/15, Form 4 Order of 12/28/15).

Commissioner Beck postponed the January 7, 2016 hearing and rescheduled it for February 24, 2016. (Beck Order dated 12/23/15). In advance of the hearing, the Respondents scheduled Barr for an evaluation by neurologist Dr. Paul Pritchard and, again, Barr refused. The Respondents then filed their Motion to Compel Barr’s submission to evaluation by Dr. Pritchard on January 27, 2016, to which Barr ultimately submitted on February 2, 2016. At a pre-hearing conference with Commissioner Beck on February 24, 2016, Barr requested that he be allowed to depose Dr. Pritchard, Commissioner Beck granted this request, and rescheduled the hearing for April 20, 2016. Dr. Pritchard was deposed on March 3, 2016.

During this time, the Respondents learned that Barr – *who went so far as to obtain a TRO in an effort to avoid submitting to neuropsychological testing at the Respondents' expense* – had actually undergone neuropsychological testing at his own expense --- and the Respondents endeavored to obtain these records; however, both Barr and his neuropsychologist (Dr. Rainwater) refused to provide them. The Respondents were forced to file a third Motion to Compel, this time for the release of Dr. Rainwater's records. (Motion dated April 13, 2016). At that time, Barr withdrew his Form 50 Hearing request and Commissioner Beck cancelled the hearing scheduled for April 20, 2016 at Barr's request.

Barr then filed a third Form 51, requesting a hearing, on April 29, 2016 on the same grounds as his original claim. (Form 50 dated 4/29/26). By Form 51 dated May 23, 2016, the Respondents again denied the claim in its entirety. (Form 51 dated 5/23/16). The Defendant's third Motion to Compel was granted by Commissioner Avery B. Wilkerson, on May 2, 2016. (Wilkerson Order dated 2/2/16). A hearing was subsequently scheduled for August 31, 2016 before Commissioner Campbell.

At the hearing on August 31, 2016 in Florence South Carolina, Commissioner Campbell heard testimony from Barr and a former pharmacist he hired (Dr. Bennett) and received 498 pages of documentary evidence, as well as the deposition testimony of Dr. Paul Pritchard, Dr. Roland Skinner, Dr. Nicholas Lind, and Dr. Marty White. The record was left open for the deposition of Dr. Joseph Healy, whom Barr had seen on the eve of the hearing, and this deposition was taken on September 27, 2016 and thereafter submitted into evidence. After receiving, reviewing, and weighing all of the evidence in the record, Commissioner Campbell issued his Decision and Order on September 2017, denying Barr's claims in their entirety.

Barr sought review of Commissioner Campbell's Decision and Order by his Form 30 dated October 2, 2017, alleging 29 exceptions. (Form 30). However, those exceptions were largely abandoned by Barr in his brief to the Commission's Appellate Panel, including his claims for encephalopathy, brain damage, memory loss, fatigue, confusion, his claim for injuries to the "neurological/central nervous system," his claims of an occupational disease, and his claims for medical and compensation benefits. In his revised arguments to the Appellate Panel, Barr alleged only that he is entitled to a finding that his headaches were caused by repetitive trauma in his employment. After recognizing Barr's abandonment of the majority of his claims, including his claim for physical brain damage, his occupational disease claim, as well as his claim for medical and compensation benefits, the Appellate Panel entered the Commission's Final Decision and Order on June 5, 2018 and entered its own findings of fact and conclusions of law denying the claim, including the headache allegations, in its entirety. The present appeal to the Court of Appeals ensued.

Counter-Statement of the Facts

Testimony of Kenny Barr

The Claimant, Kenny Barr, testified on his own behalf. Barr owned and operated his own painting business for 4 or 5 years before coming to work at the School District in 2009. Barr continued to operate his own business, Kenny's Painting, after he began working at the School District.

Barr testified that he did not paint with oil-based paints during the school year and when he painted in the summer, he could leave the doors open because sometimes the air conditioning was not on in the school rooms. Barr testified that he primarily worked on interior painting, but did do some painting outside. According to Barr, he "rarely" used a sprayer to apply paint at the

School District, though he did use a sprayer when doing his own jobs with Kenny's Painting because he had a sprayer at his disposal. (Hrg. T. p.138, lines 13-16).

For protection, Barr initially testified that he "regularly" wore latex gloves and a respirator with particulate and fume filters. Upon persistent questioning from his attorney, Barr subsequently testified that

"I didn't wear 'em regularly. I wear – I wore 'em sometimes. I mean, I don't know – I mean, this week, I might not wear 'em. It depends on what I'm using and where I'm at." (Hrg. T. p. 91, lines 4—7).

Regarding the respirator, Barr testified that if he could not ventilate a room by opening doors and windows and using fans, he would wear his respirator. Barr then testified that he would

"put it on no matter if I had the doors open, the windows open or whatever. So, therefore, I would wear it." (Hrg. T. p.92, lines 1—10).

Apparently, the respirator did not cover his eyes; however, Barr wears eyeglasses and was always wearing his eyeglasses while painting at the School District, sometimes with goggles. (Hrg. T. p.138, line 20 – p.139, line 4).

On cross-examination, Barr admitted that he "[m]ostly always" used a respirator indoors. (Hrg. T. p. 125, lines 16—23). When confronted with his sworn deposition testimony, Barr admitted that he had previously testified, under oath, that he had used a respirator ever since he started work at the School District and could not remember an instance when he ever painted inside without a respirator.

Barr testified that on Monday, March 16, 2015 he reported to Carolina Elementary School for approximately 10 minutes and talked to Ms. Barrett, the principal. The principal told him they were going to have a drill of some kind, so he went to Lowe's to buy supplies. Barr did

not do any painting that day. According to Barr, when he left the school, he went down Marlboro Avenue and took a left on Carolina Avenue and the next thing he knew he was sitting a block from the school behind the chiropractor's office, feeling confused. He testified he was having a headache, but does not remember how bad it was. (Hrg. T. p.107). Barr took his work vehicle back to the shop a few miles away and his then took him to the Emergency Room, where he was given pain medicine. According to Emergency Room records from the March 16, 2015 visit, Barr's complaints of dizziness, confusion, and headache that "occurred at home." (APA p. 88).

Barr was asked about his condition when he saw Dr. White on May 21, 2015 and Barr testified that he had a

“[t]ypical every day headache, every day, hard. It wasn't a secluded area of my head. It was my entire head like it always is. And it's – I mean, I don't – I mean, nothing – nothing really changed.” (Hrg. T. p. 112, lines 10—16).

Barr is currently receiving treatment with a new family physician, Jennifer Lynch at CareSouth, and a neurologist, Dr. Healy and, as of the time of the hearing, he had not seen Dr. White in over a year. Barr has not worked anywhere since May 2015. He testified that he gets confused and disoriented and has bouts of sudden fatigue. Barr admitted that he wakes up in the morning with headaches, as recorded in Dr. White's records, and his headaches even wake him up from his sleep, as noted by Dr. Healy. (APA p. 4, p. 231). Barr testified that Dr. Healy is currently treating him with medications and a CPAP machine after performing a sleep study that showed Barr to have severe sleep apnea. In addition, Dr. Healy has diagnosed the Claimant with restless leg syndrome, which is treated with medications including Depakote and Requip.

Records and Testimony of Dr. Paul Pritchard

Barr was evaluated by Dr. Paul Pritchard, a board-certified neurologist and clinical neurophysiologist at the Medical University of South Carolina, on February 2, 2016, at which time Dr. Pritchard also reviewed Barr's medical records. After review of Barr's medical records, meeting with Barr, and performing an examination, Dr. Pritchard offered the following opinion to a "reasonable degree of medical certainty":

"Although he has been diagnosed as having an encephalopathy [by Dr. White], the neurological exam today was normal, including normal scores for orientation, memory, calculations, and language function on exam and the Montreal Cognitive Assessment. [Barr] did not have findings to support a diagnosis of encephalopathy on today's exam." (APA p.407).

In addition, Dr. Pritchard testified by way of deposition that he reviewed the CT and MRI of Barr's brain and found it to reveal "unidentified bright objects," or nonspecific changes related to small vessels, which are uncommon in a person of Barr's age and are seen in people who have chronic migraines, diabetes, and hypertension. Dr. Pritchard did not believe these changes were relevant to Barr's cognitive complaints.

In addition to reviewing the medical records (including the reports of the neuropsychologists) and other documents provided by Barr, as well as meeting with Barr and his wife and performing a physical exam, Dr. Pritchard testified that he administered the Montreal Cognitive Assessment Exam, which showed Barr to have normal comprehension, naming, and fluency. Dr. Pritchard testified that

"[a]ll components of his language were normal as were calculations and, in fact, memory. We tested that as well." (Pritchard T. p.12, lines 13—19).

Barr actually made a perfect score on the Montreal Cognitive Assessment Exam. Barr's score on the Weschler Memory Scale was also normal. In fact, nothing about Barr's neurological examination was abnormal according to Dr. Pritchard. Therefore, Dr. Pritchard testified that, to a reasonable degree of medical certainty, Barr did not have encephalopathy, or any evidence of memory problems, or any evidence of any neurological impairment or injury. Dr. Pritchard further testified that, to a reasonable degree of medical certainty, Barr does not have physical brain damage as a result of his alleged exposure to volatile organic compounds at the School District. (Pritchard T. p.27, lines 8-15).

Dr. Pritchard's assessment was that Barr has simple chronic daily headaches, which could be migraines or muscle tension headaches. Dr. Pritchard testified that if Barr was taking up to three Goody's Powders per day, that could cause rebound headaches, as could overuse of caffeine. Cigarette smoking can also play a role in headaches because it triggers changes in the small blood vessels and complicates treatment. Dr. Pritchard also testified that, based upon what the Claimant had reported, he has a chronic headache problem and there is nothing that can prove or disprove the cause of that headache. (Pritchard T. p.83). According to Dr. Pritchard, the number one reason for doctor visits in the United States is headache.

When Dr. Pritchard was asked about whether objective testing could confirm whether volatile organic compound exposure had caused brain damage, Dr. Pritchard was quick to remark that the very concept of volatile organic compounds as a cause of chronic encephalopathy is "highly controversial." Dr. Pritchard further testified that Barr

"didn't have encephalopathy. His neurological exam was normal. His memory was normal. His language, his calculation, all the things we do on a neurological exam were normal."

Ultimately, Dr. Pritchard confirmed his opinion that – to a reasonable degree of medical certainty -- there is no objective evidence that Barr has dementia and that there is no objective evidence that Barr has any permanent impairment of his brain or neurological system from any cause. Finally, Dr. Pritchard testified, again to a reasonable degree of medical certainty, that Barr’s current complaints of headaches have no causal relationship to his employment at the School District.

Records and Testimony of Dr. Roland Skinner

Dr. Roland Skinner testified at a deposition on December 10, 2015 and his medical records are contained at APA #5. Dr. Skinner is a neurologist in private practice and first evaluated Barr in September 2010. At that time, Barr’s presenting complaints were primarily headache, with some dizziness, which had been constant over a five-week period. Apparently, Barr experienced nausea with the headache, felt off-balance when he looked down, and had both trouble concentrating and fatigue. Barr also gave a history of chronic anxiety, for which he was taking several medications. According to Dr. Skinner, his neurological examination “really was pretty normal.” (Skinner T. p.8, lines 11-12). Dr. Skinner’s diagnosis was tension type headache, based upon Barr’s description of the pain and the lack of other findings and symptoms.

Dr. Skinner testified that he prescribed Nortriptyline for Barr’s tension type headaches; however, when Barr returned to Dr. Skinner in December 2010, but Barr had stopped taking the Nortriptyline and Dr. Skinner could not determine its efficacy. At that time, Dr. Skinner still believed Barr’s headaches were due to tension and he again prescribed Nortriptyline. Dr. Skinner wanted to avoid prescribing narcotics as they are habit forming. In addition, Dr. Skinner explained a phenomenon called “analgesic rebound,” in which people who take analgesics

frequently get temporary relief from headaches only to have them come back progressively more frequently.

When Barr returned to Dr. Skinner in February 2011, Dr. Skinner still believed Barr's headaches were tension-type and that there was a component of depression. Dr. Skinner testified that Barr

“was very focused on somatic things and even asked...if I thought he had a tumor in his spinal cord.” (Skinner T. p. 18, lines 3—8).

At that time, Dr. Skinner counseled Barr about analgesic rebound because he was taking Aspirin, Goody Powders, Tylenol, and Aleve ... “a whole lot of short acting analgesic medications” that could be causing his headaches. (Skinner T. p.19, lines 2—10).

Dr. Skinner next evaluated Barr on May 18, 2011, at which time Barr was doing better, but his headaches were still not resolved. Nevertheless, Barr demonstrated no objective physical or neurological abnormalities and Dr. Skinner's diagnosis remained tension type headaches. Barr did not return to Dr. Skinner until August 2011, at which time he was still having daily headaches and “still taking a lot of over-the-counter analgesic medications.” (Skinner T. p.22, lines 11—12). However, there were still no physical or neurological abnormalities on exam in August 2011 and Dr. Skinner still felt that the most likely diagnosis was tension headaches. Nevertheless, Dr. Skinner prescribed Depakote in hopes it would decrease the frequency of his headaches.

On November 15, 2011, Barr returned to Dr. Skinner and was still complaining of daily headaches, which were worse with changes in barometric pressure or with certain smells, which Barr did not describe. Unfortunately, Barr was still taking three Goody Powders daily about four days per week, which Dr. Skinner testified could alone trigger rebound headaches. Because Barr

was also taking Tylenol, Aspirin, and Ibuprofen, Dr. Skinner was still concerned about analgesic rebound headaches.

Dr. Skinner evaluated Barr on one final occasion in February 2012 and Barr “seemed to be about as he always had been.” (Skinner T. p.29, lines 17—18). Barr was stable at that time and Dr. Skinner felt that there were psychological factors (anxiety) were playing a part in his headaches, so Dr. Skinner recommended counseling. However, the underlying diagnosis remained tension-type headaches.

According to Dr. Skinner, his opinion – to a reasonable degree of medical certainty -- remains that Barr’s headaches were tension-type headaches complicated by analgesic rebound. When asked what causes tension-type headaches, Dr. Skinner responded that this was the proverbial “\$64,000 question.” Nevertheless, at the time Dr. Skinner last evaluated Barr, he did not believe him to have any evidence of physical brain damage. Dr. Skinner further testified that at no time during his treatment of Barr did he ever complain of his work environment impacting his headaches.

Records and Testimony of Dr. Nicholas Lind

Nicholas Lind is a psychologist in private practice in Columbia who evaluated Barr at the request of his attorney on December 16, 2015. Dr. Lind’s report of his one-time evaluation is contained in the record and he was deposed by the parties prior to the hearing. According to Dr. Lind’s deposition testimony, he reviewed the records of Dr. White, but did not review any of Barr’s other medical records. Dr. Lind administered neuropsychological testing. The results of these tests were considered valid, but demonstrated that Barr could be affected by a somatoform disorder, which could in turn affect his test results. The tests also revealed a severe level of depression, which Dr. Lind believed was a long-standing problem for Barr. Dr. Lind explained

that depression and anxiety (which Barr also has) affect the results of neuropsychological testing by way of inattention.

Dr. Lind also tested Barr's intelligence and found it to be average. Dr. Lind did not believe there had been any change in Barr's intellectual functioning. Dr. Lind explained that Barr's processing speed was also within the low average range, but could be affected by stress, pain, and depression. Barr reportedly performed "very well" on the Weschler Memory Scale and average to above average on the Rey Complex Figure Test and the Hopkins Verbal Learning Test. According to Dr. Lind "all the tests of memory, there was no compromise." (Lind T. p.13, lines 4—5). Therefore, Dr. Lind was asked:

Q. Is there any objective evidence of any memory loss or memory impairment in Mr. Barr's case?

A. No. Not from this testing.

Q. Would his memory testing be consistent with dementia or severe cognitive impairment?

A. No. (Lind T. p.14, lines 7—12).

Dr. Lind also admitted that he only has an "assumption" that the Claimant was exposed to anything. (Lind T. p.16, p.17). Dr. Lind further acknowledged that any abnormalities revealed on his testing for be explained by things other than Barr's alleged exposure at work.

Regarding the test of executive functioning, Dr. Lind was forced to concede that Barr's performance was only "abnormal" on a single sub-test, which had not been validated by retest. Dr. Lind was also forced to concede that while testing suggested disinhibition, neither Barr, nor his wife complained of any symptoms of disinhibition or impulse control, and Barr demonstrated good impulse control in his interview with Dr. Lind. With respect to impaired motor control, Dr.

Lind acknowledged that there are multiple possible explanations unrelated to any alleged chemical exposure and that, not only did Barr not complain about any problem with coordination, Barr had been treated for a complex tendon laceration in his dominate hand, of which Dr. Lind was not previously aware. In addition, Dr. Lind admitted that “disinhibition” and “impaired dexterity” were the only parameters he measured that are even potentially consistent with an alleged brain injury, and he further admitted that he can’t specifically relate these issues to any toxic exposure -- they may, in fact, simply represent a constellation of unrelated symptoms. Lastly, Dr. Lind testified that Barr’s cognitive function is not preventing him from working or earning wages. (Lind T. p.39, lines 10—19).

Ultimately, Dr. Lind admitted that his tests results were not consistent with a diagnosis of memory impairment.

Records and Testimony of Dr. Marshall Allyn White

Dr. White was deposed on November 23, 2015. Dr. White is a neurologist who first evaluated Barr on October 17, 2012, at which time Barr complained of a two and a half year history of headaches and back pain. While Dr. White was aware that Barr was previously treated by Dr. Skinner for headaches, Dr. White did not review those records. According to the new patient questionnaire Barr completed for Dr. White, Barr was actually waking up in the morning with his headache. Barr also admitted to being a cigarette smoker, which Dr. White admitted can cause or exacerbate headaches. According to Dr. White, after his initial evaluation of Barr,

“...he just complained of headache. I mean, I wasn’t that concerned about it.”

(White T. p.9, lines 7—9).

Barr apparently complained about paint fumes, so Dr. White recommended that he stay away from paint fumes for six weeks to see if his headaches went away. Despite staying out of work

for 6 weeks, Barr's headaches were unchanged when he returned to Dr. White in November 2012, so Dr. White prescribed medication used to treat migraines. When Barr returned to Dr. White in January 2013, Barr's headaches had improved with the use of Topomax and Dr. White added Clonazepam to treat Barr's anxiety. When Dr. White prescribed these medications, he was unaware of Barr's use of other prescribed medications, including Klonopin and narcotic pain medications. In addition, Dr. White did not place Barr on any work restrictions.

Barr did not return to Dr. White until April 2015, after an absence of over two years. Dr. White testified that Barr returned because he was continuing to have headaches, in addition to complaints of memory loss, fatigue, disorientation, and confusion. When pressed to explain the nature of Barr's headaches, Dr. White admitted that he didn't know how frequently Barr was experiencing headaches, he couldn't describe the headaches, and he "didn't document" any symptoms associated with Barr's headaches. (White T. p.19). Dr. White admitted that did not review any of Barr's prior medical records and had no idea about why Barr was taking Lorcet, Tramadol, Meloxicam, and Tizanidine in 2015 or who was prescribing them, nor did he inquire about Barr's use of over-the-counter analgesics.

Dr. White then prescribed Klonopin and Topirimate for Barr, as well as a steroid dose pack. On follow up in May 2015, Barr's headaches were apparently unchanged; however, Barr was complaining of more memory loss and fatigue and he discussed Barr's workplace exposures, which Barr felt were "making him sick."

According to Dr. White, it is his opinion that Barr's "symptomatology and his syndrome is the result of VOC exposure." (White T. p.26, lines 17—21). When asked if he had any objective evidence to support his opinion, Dr. White testified that he "used [his] experience and the pattern of illness" to reach his conclusion. Dr. White then speculated that Barr's headaches

could not be due to muscle contraction headaches, because muscle contraction headaches are not associated with memory loss. Dr. White speculated that Barr's headaches weren't due to analgesic rebound, because Barr believed they were work-related and because analgesic rebound does not cause memory loss. Dr. White further suggested that Barr's cigarette smoking was not a cause of his headaches because smoking doesn't cause memory loss. Of course, objective testing showed Barr to have no evidence of any memory loss. (*See Lind T. p.13, lines 4—5; Pritchard T. p.12, lines 13—19*).

Dr. White admits that he knows nothing about the personal protective equipment used by Barr at work; however, he speculates that Barr has been exposed to volatile organic compounds on a near daily basis for years. Dr. White further admits that there is no evidence of the alleged dose or duration of any exposure, but believed that his opinion as to cause was more important than evidence of exposure. In fact, when confronted with the fact that Barr testified to wearing a respirator and asked how Barr could be exposed to volatile organic compounds while wearing a respirator, Dr. White testified,

“I’m not going to make a comment in that regard. That’s not, that’s not within the purview of my testimony. My opinion is that there was an exposure, and how that exposure took place is not for me to determine.” (*White T. p.31, lines 19—25*).

Dr. White further testified that he diagnosed Barr with encephalopathy based upon Dr. White's personal opinion that Barr has memory deficits and slow processing speeds. In fact, Dr. White testified that he ordered neuropsychological testing to objectively evaluate Barr's memory and processing speed. Of course, neuropsychological testing done by Barr's own psychiatrist, Dr. Lind, revealed average processing speeds and normal memory. According to Dr. Lind:

“Q. Is there any objective evidence of any memory loss or memory impairment in Mr. Barr’s case?

A. No. Not from this testing.

Q. Would his memory testing be consistent with dementia or severe cognitive impairment?

A. No.” (Lind T. p.14, lines 7—12).

Dr. White did not have benefit of Dr. Lind’s testing or testimony at the time he rendered his speculative opinions about Barr’s neuropsychological functioning. However, he was specifically asked whether any objective evidence supported his opinions at the time:

“Q. Because at this point there’s no objective evidence he has neuropsychiatric or neuropsychological or memory deficits?

A. You’re here today to hear my opinions and, you know, as an expert, I’m free to opine, and I would assume that’s true.” (White T. p.32, line 22 – p.33, line 2).

Instead of providing evidence to support his opinion about alleged exposure and alleged memory loss, Dr. White continued to deflect by stating that he didn’t believe Barr “is sophisticated enough to carry on a charade like this.” (White T. p.33, lines 13-14). According to Dr. White, “his story and the evolution of his symptoms over the years is entirely consistent with exposure to a toxin.” (White T. p.33, lines 17—19). Dr. White was then questioned as follows:

“Q. Well, tell me what else other than the subjective statements of [Barr] have you based your opinions on?

A. It’s based upon the pattern of the illness. I think I’ve answered those questions.

Q. All right. So what evidence is there that he has suffered any memory loss or currently has any memory problems?

A. My observations.” (White T. p.34, lines 8—14).

According to Dr. White, he has given his opinions regarding a diagnosis and causation “before [he] finished working him up.” (White T. p.34, lines 24—25). Dr. White then suggested that he was still “working him up” and had ordered neuropsychological testing to provide objective evidence: “If there are signs of dementia, then that’s going to show up. If there’s signs of encephalopathy or dementia, that’s going to show up.” (White T. p.40, lines 14—18). Dr. White believed that neuropsychological testing would “validate” his opinions; however, it did not, despite Dr. White’s claim that

“...I really can’t recall but on rare occasion the neuropsychiatric testing or the neuropsychological testing was substantially different from what my opinions are. So my opinions are typically right on target with respect to neuropsych testing.”
(White T. p.44, lines 12—17).

Dr. White last saw the Claimant on July 16, 2015. At that time, Dr. White prescribed Topomax, on top of the Prozac and Tramadol and Adderall Barr was already taking, which Dr. White admits put Barr at risk of developing Serotonin Syndrome, which causes headaches, confusion, elevated blood pressure, potentially seizures and even death. (White T. p.47--49). Dr. White does not know why Barr never returned to him and has no knowledge of his condition after July 2015. Despite prescribing a six-month supply of Topomax, he never follow-up with Barr.

Dr. White was then asked,

“Q. Is there any objective evidence that he has brain damage at all of any

degree?

A. Well, there hopefully will be [sic] after neuropsychology testing.” (White T. p.53, lines 16—19).

Dr. White further volunteered that “neuropsych testing is the best objective measure we have for evaluating patients with encephalopathic conditions.” (White T. p.54, lines 10-12).

Records of Dr. L. Randolph Waid

Dr. Waid is a private-practice neuropsychologist who reviewed and evaluated Barr’s neuropsychological test data and medical records. Dr. Waid opined that Barr’s neuropsychological evaluation by Dr. Lind

“revealed [Barr] to perform well, particularly on tests assessing anterograde memory. Indeed, [Barr’s] performance of a battery of neuropsychological tests failed to reveal evidence of severe impairment affecting brain behavior functioning. Some of the test performances that were in the low average range would be considered as being consistent with [Barr’s] premorbid intellectual abilities.” (APA p.446).

In fact, Dr. Waid specifically disagreed with the speculative opinions offered by Dr. White. According to Dr. Waid:

“Review of the records including previous reports of evaluations conducted by multiple practitioners as well as Dr. Lind’s neuropsychological test results simply do not support Dr. Marshall White’s opinion that [Barr] suffers from an encephalopathic condition that has led to severe permanent brain damage with severe compromise in brain behavior functions... [Barr’s] performance on objective tests assessing anterograde memory was in the average to above average

range. Review of records failed to reveal any biological markers to support that [Barr] is suffering from a neurobehavioral syndrome consistent with VOC exposure. [Barr] is not suffering from a dementing disorder as that would involve evidence of severe cognitive impairments via conduction of neuropsychological testing...Indeed, [Barr's] primary complaint is one of disruptive headaches that existed prior to his engagement in employment with Darlington County School District.” (APA p. 446).

In summation, Dr. Waid concluded,

“there is no evidence to indicate that [Barr] suffered physical brain injury as a direct result of his employment...Nor is there any compelling evidence that [Barr] currently suffers from an encephalopathic condition that has resulted in severe brain damage.” (APA p.446).

Records of Dr. Mark T. Wagner

Dr. Wagner is a neuropsychiatrist at the MUSC Department of Neurology. The Respondents attempted to have Barr tested and evaluated by Dr. Wagner; however, Barr refused. Therefore, Dr. Wagner reviewed Barr's medical records and Dr. Lind's neuropsychological test data and offered his opinions regarding the claim. According to Dr. Wagner, Barr's

“neuropsychological test scores are primarily related to below average intellect and poor academic standing, [but] one cannot ignore other confounding factors, notably the abnormal MRI with hyperintensities mostly in the frontal white matter bilaterally and chronic noncompliance with smoking cessation.” (APA pp.418—419).

With regard to the speculative opinions of Dr. White, Dr. Wagner offered the following:

“With the exception of Dr. White’s opinions, all objective basic neurologic exams with associated mental status examination by numerous physicians that have examined [Barr] have been unremarkable from a neuropsychiatric perspective. Even Dr. White’s examination failed to demonstrate any objective neurological findings and his documentation is so limited that his notes do not allow for peer-review of his opinions. Additionally, his documentation does not allow for any other doctors to replicate abnormal findings to confirm or refute his opinions...To the extent that Dr. White relied on the neuropsychological test results to form his opinions, those findings were also normal...Indeed, [Barr’s] objective memory performance was exceptionally strong and exceeded that of most neurologically intact people in the US reference population.” (APA p.419)

Dr. Wagner ultimately concluded that there

“was no objective evidence in the examinations or reports that [he] reviewed that would support a neurobehavioral syndrome consistent with VOC exposure. There were not biological markers to support exposure. There is no document of any other organ system involvement to support exposure. Additionally, not only is there no objective evidence of any distinctive neuropsychiatric assessment there is no evidence to support that [Barr] has dementia related to severe encephalopathy as opined by Dr. White. Dementia requires **severe** [emphasis original] cognitive impairment (not documented in any of the objective cognitive testing by Lind, Pritchard, White)...” (APA pp. 419—420).

Dr. Wagner went on to explain that the episodic memory loss Barr described as having with his headaches “is a common complaint with anyone that experiences severe headaches.” (APA p. 420).

Records of Dr. William Woodbury

The Claimant was evaluated by Dr. William Woodbury in April 2005 – years prior to his employment with the School District. Even at that time, Barr complained of a 4-year history of Vertigo. (APA p.247). Apparently, Barr was experiencing dizziness, imbalance, trouble walking and nausea, for which he was treated with the prescription medical Anitvert.

Testimony of Robert Bennett

The first witness called by Barr at the August 31, 2016 hearing was a Dr. Robert Bennett. Dr. Bennett has a pharmacy degree from the Medical University of South Carolina. According to Dr. Bennett, he practices as a forensic toxicologist. However, Dr. Bennett admitted that he is not a medical doctor and has no professional licenses whatsoever, as his pharmacy license has expired. Dr. Bennett also admitted that the South Carolina Department of Labor has issued a “Cease and Desist” Order against him, prohibiting Dr. Bennett from holding himself out as a pharmacist. Apparently, the bulk of his work is in drug, alcohol, and DNA testing. No organization has certified Dr. Bennett as a specialist in toxicology. Over the objection of the Respondents, Dr. Bennett was permitted to testify at the hearing.

According to Dr. Bennett, he was given documents by Barr’s attorney to review, including medical records, material safety data sheets (“MSDS”), and Barr’s job description. Dr. Bennett believed that Barr worked as a commercial painter “and used chemicals that are required in performing those duties.” (Hrg. T. p.33, liens 18—20). Dr. Bennett testified that Barr primarily used brushes and rollers to paint, as opposed to aerosol spray tools, and worked both

inside and outside. Dr. Bennett further testified that Barr used a respirator while working inside buildings, which were also ventilated.

Dr. Bennett opined that based upon his review of Barr's job description and the MSDS sheets, he believes Barr was exposed to volatile organic compounds. Dr. Bennett admitted that the most important factor "is what quantity does get into the brain." (Hrg. T. p.37, lines 9—10). Of course, Dr. Bennett has no evidence that any quantity "got into the brain." Apparently, Barr could have his blood or urine or hair tested to check for the presence of volatile organic compounds, but he did not. Dr. Bennett admitted that he cannot objectively quantify the degree or extent to which Barr may have been exposed to volatile organic compounds at the School District, or in his work as a private painter. Dr. Bennett conceded that "dose" is the most relevant factor in determining whether an alleged exposure was toxic, but he cannot quantify "dose" in this claim.

Records of Dr. David H. Eagerton

Dr. David Eagerton is an Assistant Professor of Pharmacology at Presbyterian College and former Chief Toxicologist for the South Carolina Law Enforcement Division. Dr. Eagerton reviewed voluminous records in this claim, including the MSDS for the product Barr used most often at work – DTM and Pre-catalyzed epoxy. According to Dr. Eagerton, these products

"contain compounds that have a relatively low vapor pressure and are not considered by some sources to be a VOC." (APA p.448).

Dr. Eagerton noted that Barr's professed to using a respirator on inside jobs and that "[u]tilization of a properly fitted air-purifying respirator (APR) eliminates the exposure to VOCs."

After reviewing and summarizing Barr's medical and vocational records, Dr. Eagerton issued the following statement:

"It is my opinion that, within a reasonable degree of scientific and medical certainty, [Barr's] symptoms are not likely due to exposure of VOCs while he was employed by the Darlington County School District. This is based on the fact that 1) there is no toxicological evidence of exposure; 2) there is no definitive medical evidence that VOC exposure occurred; 3) there is no definitive medical evidence that [Barr's] symptoms are caused by exposure to VOCs; 4) the products that were used most frequently by [Barr] did not contain highly volatile VOCs; 5) when [Barr] was painting inside, he used an APR and the area was ventilated; 6) [Barr's] headaches are not associated with exposure to pain fumes; 7) [Barr's] medications can cause impairment of neurologic functions; 8) [Barr] suffered no ill effects that are commonly seen with acute exposure to VOCs; 9) [Barr] has no renal or hepatic injury which can be attributed to VOC exposure; and 10) even if [Barr] had an exposure to VOCs, it is more likely that it occurred at a previous job or while he was moonlighting as a self-employed painter..." (APA p. 449).

Records of Carolina Pines Regional Medical Center

Records from Carolina Pines are contained in the record at APA #3. According to a report dated March 16, 2015, Barr reported to the Emergency Room with complaints of dizziness, confusion, hand pain, and headache on that date, which "[o]ccurred at home." (APA p.88).

Records of Hartsville Medical Group

Records from Hartsville Medical Group (Dr. Raymond Chapman) are contained in the record at APA #4 and APA #11. These detail Barr's history of anxiety, depression, right arm pain, stomach problems, sinus issues, neck pain, back pain, and chest pain, as well as his tobacco dependence. Regarding his headaches, Dr. Chapman noted on April 14, 2015 that Barr

“Has seen 4 neurologists....didn't like any. They told him they had nothing to offer him. Will start decreasing meds as he has had no real improvement clinically when any meds were increased.” (APA p.105).

In addition, Dr. Chapman's records detail Barr's health problems prior to his work at the School District. As early as May 12, 2006, Dr. Chapman believed that Barr's complaints of fatigue were due to sleep apnea and a sleep study was recommended on February 2, 2007. (APA p. 250). Apparently, Barr never obtained this sleep study or treatment for sleep apnea until he started seeing Dr. Healy in 2016. (APA p.224). In 2007, Dr. Chapman treated Barr for vertigo and by 2008 Dr. Chapman had prescribed Voltaren for Barr's headaches. (APA p.252). According to Dr. Chapman's May 2, 2011 office note, he had diagnosed Barr with tension headaches which “occur for no reason.” (APA p.260). Dr. Chapman referred Barr to Dr. Skinner for treatment of his tension headaches.

Records and Testimony of Dr. Joseph Healy

Records of Dr. Joseph Healy are contained in the Record at APA #8 and Dr. Healy gave deposition testimony on September 27, 2016. According to Dr. Healy's records, Barr has been diagnosed with “severe” Obstructive Sleep Apnea. (APA p.223). In fact, Barr's sleep apnea is so severe, he required an emergency CPAP during his sleep study. (APA p.223, 224). In addition to obstructive sleep apnea, Dr. Healy's records reveal that analgesic rebound headaches

were being treated in April 2016, at which time Barr was also referred to a pulmonologist for possible Chronic Obstructive Pulmonary Disease secondary to his cigarette abuse. (APA p.225).

At his deposition, Dr. Healy testified that he initially evaluated Barr on March 31, 2016 for complaints of headache and fatigue. Dr. Healy explained that Barr's smoking addiction could be affecting both the headache and fatigue symptoms Barr described. (Healy T. pp.8--9). At the time he came to Dr. Healy, Barr was taking prescription medications for Hyperthyroidism, High Blood Pressure, and the prescription pain-killer Hydrocodone. (Healy T. pp.9—10). It was unclear who was prescribing the Hydrocodone, or for what purpose, but Dr. Healy explained that chronic daily headaches can be related to too much medication, whether prescribed or over-the-counter. (Healy T. p.10). Dr. Healy testified that he performed a minimal mental exam, on which Barr obtained a perfect score, meaning he had normal cognition. (Healy T. pp.11—12). According to Dr. Healy, he didn't see any evidence of dementia or cognitive impairment. (Healy T. p.12, lines 14—18).

Dr. Healy saw Barr on follow-up on April 19, 2016, at which time Barr was apparently taking "[a] lot of over-the-counter medications." (Healy T. p. 13, lines 1—6). Dr. Healy felt that Barr may have "chronic daily headaches," which is also known as rebound or "medication overuse" headaches. (Healy T. p.13). Dr. Healy noted that Barr often woke in the morning with headaches, which and testified that:

“...the whole time I'm thinking, you know, this fellow's breathing is bad. He's got a lot of reasons to be relatively hypoxic, which leads to stress, fatigue and that might be what causes his headache.” (Healy T. p.15, lines 20—24).

As a result, Dr. Healy ordered a sleep study on April 27, 2016, which showed two different sleep disorders :

“that he had severe sleep apnea, and so, I mean, in anybody that has headaches, you got to correct your sleep, you got to correct your breathing and then, too, it showed that he was a kicker...He kicks all night long which is a pattern that means you have a periodic leg movements of sleep...then I put him on Requip at bedtime...” (Healy T. p.17 lines 4—14).

Dr. Healy was testified that with sleep apnea, “you stop breathing,” which can cause headaches and fatigue and lead to mental effects, including confusion, and problems with concentration. (Healy T. p.18). Dr. Healy noted that the symptoms of sleep apnea often mimic dementia or Alzheimer’s. (Healy T. p.18, lines 22—25).

When Barr returned to Dr. Healy on May 4, 2016, Dr. Healy prescribed Requip for the restless leg issues and a CPAP machine for his sleep apnea. In addition, Dr. Healy diagnosed Barr abnormal arterial blood gas, which is due to structural lung disease. (Healy T. pp.19—20). Dr. Healy was asked about this abnormal arterial blood gas due to lung disease and its relationship with Barr’s complaints of headache and fatigue:

“Q...As so could that be playing a role in his headaches and fatigue as well?

A. Oh, I think it definitely is.”

(Healy T. p.20, lines 11—16). As a result, Dr. Healy referred Barr to a Pulmonologist.

In addition to the sleep apnea, the restless leg, and the low arterial blood gas, Dr. Healy also found Barr to have problems with his vision, which he described as “very poor and getting worse.” (Healy T. p.21, lines 6—7). Poor vision, in turn, can contribute to headaches, and; therefore, Dr. Healy referred Barr to an eye doctor. Dr. Healy also prescribed an iron supplement because his iron level was borderline. (Healy T. p.21, lines 21—22).

On June 28, 2016, Barr

“was having [heart] palpitations. He was having episodes where he would get palpitations. He would get chest discomfort. He would start to and then get disoriented and have his headache worsening. He’d had two episodes the day before and then I started wondering since he was such a heavy smoker and whether or not he had any cardiac issue.”

(Healy T. p.22, lines 10—16). Dr. Healy believed he may have Coronary Artery Disease and he told Barr he needed to see a Cardiologist.

Apparently, the last time Barr saw Dr. Healy was July 21, 2016. At that time, Barr was still smoking and had not seen a Pulmonologist as recommended. (Healy T. p.24--25). Dr. Healy testified that Barr did not ever take the Requip he prescribed for the restless leg (Periodic Limb Movement Syndrome, or PLMS) and it is unclear whether he ever took his prescribed iron supplement. Apparently, Barr had seen an eye doctor and was diagnosed with bilateral retinal hemorrhages, the cause of which he left to the ophthalmologists. (Healy T. p.38, lines 7—10).

According to Dr. Healy, he believes that Barr has primarily a pulmonary problem, which has led to his other problems, including fatigue and headaches. Dr. Healy acknowledged that pulmonary disease not uncommon for heavy smokers and that he could not say with any certainty what portion of any pulmonary problems are caused by smoking, as opposed to other alleged exposures: “that would be a question for the pulmonologist.” (Healy T. p.28, lines 23--24).

While Dr. Healy endorsed a questionnaire prepared by Barr’s attorney indicating that his headaches and fatigue were causally-related to the alleged exposure to volatile organic compounds, he admitted on direct examination that alleged VOC exposure was merely

“contributory” and given the smoking history, he would defer to a pulmonologist as to “which is felt to be the larger issue.” (Healy T. p.30, lines 16—21).

On cross-examination, Dr. Healy was asked if anything other than medication excess could cause Barr’s chronic daily headaches. Dr. Healy responded:

“Well, I’m sure there’s a lot of... I think this fellow walks around relatively hypoxic. He retains carbon dioxide. The blood chemistry isn’t exactly ideal for a properly functioning [sic] in any organ system you can name.”

(Healy T. p.36, lines 4—11). Dr. Healy also explained that Barr’s elevated carbon dioxide levels

“doesn’t produce a milieu for the brain to exactly work properly and from a metabolic standpoint, headache is the end result. So that, that’s my reason for thinking that his breathing is contributory to his headaches. But what’s to his breathing beyond smoking, **again I would defer to a pulmonologist...**”

(Healy T. p.38, lines 17—25; emphasis added).

Dr. Healy was also asked about Barr’s “spells” of dizziness and headache. Dr. Healy testified that:

“...he was having these episodes where he would get headache. He would then get anxious, palpitations, and then he would stutter and have trouble talking. And so it was almost like a TIA, which he’s at risk of because of his vascular... You do see people with underlying lung disease who will get an area of mucus...and that’s enough to kick him over into being hypoxic...so **I was curious about what was causing these spells, although didn’t’ turn up a neurologic cause.**

(Healy T. p.42, lines 4—20; emphasis added).

Dr. Healy was also asked on cross-examination whether he had treated painters in the past with chronic headaches, to which he responded, “you don’t see it a lot.” (Healy T. p.43, line 4).

Standard of Review

The appellate court must affirm the Workers’ Compensation Commission’s findings of fact made if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is that which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995).

Importantly, where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Glover v. Columbia Hospital, 236 S.C. 410, 114 S.E.2d 565 (1960). Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s findings from being supported by substantial evidence (*see* Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996)) because an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence unless the agency’s findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996).

Of course, workers’ compensation awards must not be based on surmise, conjecture or speculation. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963). Instead, it “is settled by the decisions of the Supreme Court of this State that a Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation and there is no presumption in favor of compensability.” Rudd v. Fairforest

Finishing Co., 189 S.C. 188, 200, S.E.2d 727 (1939). In fact, the “difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party.” Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965)

Arguments

I. Barr abandoned his claims for encephalopathy, brain damage, memory loss, fatigue, confusion, and alleged injuries to the “neurological/central nervous system;” therefore, issues regarding these claims are not before the Court of Appeals.

Neither Barr’s brief to the Commission’s Appellate Panel, nor his brief to the Court of Appeals, makes any argument with respect to the alleged injuries for which he initially brought the May 21, 2015 claim: encephalopathy, brain damage, memory loss, fatigue, confusion, and alleged injuries to the “neurological/central nervous system.” Indeed, the “Argument” portion of Barr’s Brief to the Court of Appeals does not make any mention of brain damage. Therefore, Barr has abandoned these claims on appeal. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.” (internal quotation omitted)). Of course, an unappealed issue, right or wrong, is the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, “right or wrong, is the law of this case and requires affirmance.”). As such, the Court of Appeals is without jurisdiction or authority to disturb the Commission’s findings of fact and conclusions of law with respect to these alleged injuries on appeal and the Commission’s Decision and Order, by which Barr’s claims of encephalopathy, brain damage,

memory loss, fatigue, confusion, and alleged injuries to the “neurological/central nervous system” were specifically denied, must be affirmed on appeal. The sole injury alleged at this juncture is headaches, as it is the only one argued in his Briefs to the Appellate Panel and the Court of Appeals. (Barr’s brief to Ct. App. p.10, p.24, p.31, p.41 “VI”).

II. The Workers’ Compensation Commission’s finding and conclusions that Barr’s claim does not meet the requirements of S.C. Code Ann. §§ 42-1-160, 42-11-10, or 42-1-172 is the law of the case.

A. S.C. Code Ann. § 42-1-160

Barr’s Forms 50 alleges that he was injured as the result of an “accident” on May 21, 2015. However, both the Hearing Commissioner and the Commission’s Appellate Panel found that “the only significance of the May 21, 2015 date is that Dr. White evaluated [Barr] and issued a work excuse on this date.” The Hearing Commissioner and the Commission’s Appellate Panel both further concluded that Barr’s claim did not meet the statutory requirements of proving an injury by “accident” under S.C. Code Ann. § 42-1-160 because (1) Barr failed to prove that there was any event or condition on May 21, 2015 that caused his alleged injuries¹ and (2)

“[m]ore importantly, [Barr] alleges that his condition was gradual in onset and due to repeated alleged exposures over time; therefore, his alleged injuries cannot be considered injuries by ‘accident’ pursuant to the plain terms of S.C. Code Ann. § 42-1-160(F).”²

¹ The Hearing Commissioner and the Appellate Panel both found that “the only significance of the May 21, 2015 date is that Dr. White evaluated [Barr] and issued a work excuse.”

² According to S.C. Code Ann. § 42-1-160(F), the “word ‘accident’ as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. Any injury or disease attributable to such causes must be compensable only if

Barr did not raise any exception to this finding of fact or to this conclusion of law in his Brief to the Commission's Appellate Panel, nor did he make any argument regarding this finding or conclusion in his Brief to the Court of Appeals. In fact, neither Brief even mentions the operative statute, S.C. Code Ann. § 42-1-160. Therefore, the Commission's unanimous conclusion that Barr's claim, specifically including "his complaints of headaches," does not meet the requirements of S.C. Code Ann. § 42-1-160 is the law of the case and cannot be disturbed on appeal. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970). Regardless of any procedural or evidentiary argument Barr now makes, the fact remains that his headaches are not compensable under S.C. Code Ann. § 42-1-160 as a matter of law.

B. S.C. Code Ann. § 42-11-10

Barr's Forms 50 raises an alternative claim that his alleged injuries were caused by an "occupational disease" under S.C. Code Ann. § 42-11-10; however, he failed to specify any "disease" from which he claims to suffer. As a result of this failure, and further based upon the records and opinions of Dr. Healy, Dr. Lind, Dr. Waid, Dr. Pritchard, and Dr. Wagner, the Hearing Commissioner found that "the greater weight of the evidence...indicates that [Barr] does not suffer from any disease." Barr did not appeal this finding to the Appellate Panel, nor did he mention the Appellate Panel's own final finding in this regard in his Brief to the Court of Appeals.

culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease pursuant to the provisions of Chapter 11 of this title."

The occupational disease statute, in addition to requiring proof of an actual disease, specifically requires that such disease “result directly and naturally from exposure...to hazards peculiar to the particular employment.” Here, the Hearing Commissioner specifically found and concluded that “the conditions for which [Barr] seeks benefits do not ‘result directly and naturally from exposure... to the hazards peculiar to the employment’” and are not compensable under S.C. Code Ann. § 42-11-10. Like the concomitant finding, Barr did not appeal this legal conclusion to the Appellate Panel, nor did he mention the Appellate Panel’s own final conclusion in this regard in his Brief to the Court of Appeals. In fact, his Brief to the Court of Appeals makes no mention of S.C. Code Ann. § 42-11-10 whatsoever.

Because neither Barr’s brief to the Appellate Panel, nor his brief to the Court of Appeals, makes any argument with respect to any occupational disease statute, or the Commission’s findings of fact or rulings of law denying his claim pursuant to S.C. Code Ann. § 42-11-10, the Commission’s findings and conclusions regarding Barr’s failure of proof under that statute is the law of the case. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970). The Commission specifically determined that “his alleged headaches...do not qualify as an ‘occupational disease.’” Therefore, regardless of any procedural or evidentiary argument Barr now raises on appeal, his headaches are not compensable under S.C. Code Ann. § 42-11-10 as a matter of law, as it is well-settled that “[a]n issue is deemed abandoned and will not be considered on appeal” even “if the argument is raised in a brief but not supported by authority.” Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008).

C. S.C. Code Ann. § 42-1-172

There are only 3 ways for an alleged injury to be compensable under the South Carolina Workers' Compensation Act: (1) proof of an injury by accident under S.C. Code Ann. § 42-1-160, (2) proof of an occupational disease under S.C. Code Ann. § 42-11-10, or (3) proof of a repetitive trauma injury under S.C. Code Ann. § 42-1-172. Barr failed to prove that any of his alleged injuries, including his claims of headaches, were caused by an "accident" under S.C. Code Ann. § 42-1-160 or "occupational disease" under S.C. Code Ann. § 42-11-10 and his failure of proof under these statutes is the law of the case. Therefore, the only way Barr could conceivably be entitled to benefits under the South Carolina Workers' Compensation Act is to prove the requirements of the repetitive trauma statute, which include not only proof of "repetitive traumatic events," but also proof of a "direct causal relationship between the conditions under which the work is performed and the injury."

Here, the Hearing Commissioner found and concluded that Barr failed to meet these requirements of the "repetitive trauma" statute, S.C. Code Ann. § 42-1-172 because he had (1) failed to present "credible evidence of a 'direct causal relationship' between [his] work condition and his alleged injuries" and (2) his "alleged workplace exposures were neither repetitive, nor traumatic." On appeal to the Appellate Panel, Barr made no argument that this finding or conclusion were in error and, similarly, Barr's Brief to the Court of Appeals does not even mention S.C. Code Ann. § 42-1-172. As a result, the Commission's unanimous determination that Barr's headaches do not qualify as a compensable repetitive trauma injury under S.C. Code Ann. § 42-1-172 are the law of the case.

Even considering Barr's tangential arguments regarding evidentiary or procedural issues, he makes no argument regarding the applicability of S.C. Code Ann. § 42-1-172 or S.C. Code Ann. § 42-1-160, or S.C. Code Ann. § 42-11-10 and he goes no further than a conclusory statement

about his entitlement to benefits for headaches in the final paragraph of his 6th argument. Even then, Barr fails to mention, much less argue, by what statutory authority he could be legally entitled to such benefits. This is legally insufficient to preserve any argument under S.C. Code Ann. § 42-1-172, or § 42-1-160, or § 42-11-10, because "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When, as is the case *sub judice*, an appellant provides no legal authority regarding a particular argument, the argument is abandoned. State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Therefore, the Hearing Commissioner's findings and conclusions denying the Barr's occupational disease, repetitive trauma, medical, and compensation claims are the law of the case and cannot be disturbed on appeal. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance."). While Barr maintains a vague argument that his headaches are related to his employment, it matters not if he has not and cannot satisfy his statutory burdens under S.C. Code Ann. §§ 42-1-160, 42-11-10, or 42-1-172 as a matter of law.

III. The Workers' Compensation Commission's unanimous finding and conclusion that Barr's headaches were not caused by his employment is supported by substantial evidence and the applicable law and should be affirmed by the Court of Appeals.

Barr previously alleged that he sustained injuries to his brain, central nervous system, and psyche as a result of repetitive exposure to volatile organic compounds (VOCs) arising out of and the course of his employment with the School District on May 21, 2015 and the majority of the opinions elicited from the experts involved in this case centered on these claims of brain

damage and a nervous system injury. However, Barr has now abandoned his brain damage and nervous system claims and presently alleges only headaches, which were previously alleged to be a *symptom* of the alleged brain damage and not a discrete injury in and of itself.³ (Forms 50, Hrg. T. p.10, line 11—p.11, line 2; Transcript of FC Hrg). Even still, it remains unclear – even on appeal – whether he brings his headache claim under S.C. Code Ann. § 42-1-160 or § 42-1-172 or § 42-11-10, as neither his brief to the Appellate Panel, nor his brief to the Court of Appeals references any of these statutes and the Commission’s unanimous determination that the requirements of these statutes were not met by Barr are the law of the case. Regardless, substantial evidence supports the Workers’ Compensation Commission’s unanimous conclusion that Barr’s headaches did not arise out of his employment and should be affirmed, even if the Court determines that the Commission’s conclusions under S.C. Code Ann. § 42-1-160, 42-1-172, and 42-11-10 are not the law of the case and thus binding on appeal.

For example, Barr’s personal neurologist, Dr. Roland Skinner, first evaluated Barr for complaints of headaches in September 2010. Dr. Skinner testified to a reasonable degree of medical certainty that Barr’s headaches are tension-type headaches complicated by analgesic rebound and anxiety, which he did not believe were related in any way to alleged workplace exposures of any kind. In addition, Dr. Skinner testified that at no time during his treatment of Barr did he ever complain of his work environment impacting his headaches. The Respondents respectfully submit that Dr. Skinner’s opinions constitute substantial evidence in support of the Commission’s unanimous findings and conclusions that Barr’s headaches were not caused by an

³Barr never filed a claim or put the Defendants on notice that he was alleging any headache syndrome separate and distinct from his claim of physical brain damage/encephalopathy; therefore, the goal posts shifted significantly on appeal, to the prejudice of the Respondents.

accident, repetitive trauma, or occupational disease arising out of or in the course of his employment.

Similarly, neurologist Dr. Paul Pritchard of MUSC evaluated Barr on February 2, 2016 and testified, to a reasonable degree of medical certainty, that Barr's complaints of headaches have no causal relationship to his employment at the School District. (Pritchard T.p.105—106). According to Dr. Pritchard, Barr has simple chronic daily headaches, which could be migraines, muscle tension headaches, or rebound headaches caused by Barr's admitted abuse of caffeine and over-the-counter analgesics (Goody's Powders), all of which could be complicated by Barr's cigarette smoking. In addition, Dr. Pritchard determined that Barr's neurological exam was entirely "normal" and explained that the "#1" reason for doctor visits in the United States is a headache. Dr. Pritchard's opinions also constitute substantial evidence in support of the Commission's unanimous findings and conclusions that Barr's headaches were not caused by an accident, repetitive trauma, or occupational disease arising out of or in the course of his employment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

Barr relies, primarily, on the specious and controverted opinion of Dr. Marty White. White opined that Barr's "migraines" were due to exposures to Volatile Organic Compounds ("VOCs") at the School District. However, the Workers' Compensation Commission unanimously determined that White's opinion is "speculative, based on disproved hypotheticals, uncorroborated, and otherwise without objective basis" and; therefore, entitled to "little weight." (Orders of 9/20/17 and 6/5/18). Barr did not appeal this finding and it is the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177

S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

Furthermore, the Commission, as the finder of fact, is the sole arbiter of the weight to be accorded White's opinions. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005) (holding that a reviewing court "may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact."). Here, the Commission's diminution of White's opinion was well-founded, as the record is clear that White was forced to admit that, despite his opinions about the toxicity of VOC exposure, he has no expertise in toxicology and no direct knowledge of any alleged VOC exposure by Barr. Instead, White based his opinions as to causation based on a mere *assumption* that there had been such a toxic exposure. (White T. p.31, lines 19—25). White was also forced to admit that he didn't even know how frequently Barr was experiencing headaches, White couldn't describe Barr's headaches, and White "didn't document" any of the symptoms Barr associated with his headaches. (White T. p.19). Of course, an award of workers' compensation benefits "must not be based upon surmise, conjecture, or speculation." Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965) (citing Glover v. Columbia Hosp., 236 S.C. 410, 114 S.E.2d 565 (1960)).

In addition, White testified that in forming his opinions he rejected all other possible causes of headaches because White *assumed* that Barr's headaches were accompanied by objective memory loss and *speculated* that neuropsychological testing would "validate" this assumption. (White T. p.53, lines 16—19). However, the actual neuropsychological test results showed no such thing. Instead, such testing showed no evidence of any memory loss or memory impairment, no evidence of dementia, and no evidence of cognitive impairment. (Lind T. p.14, lines 7—12). In fact, neuropsychological testing proved that Barr's memory was normal.

Therefore, the Commission properly rejected White's opinions and determined that White's opinions as to the cause of Barr's headaches are based upon a disproven hypothetical and are directly contrary to objective test results according to three neuropsychologists (Dr. Lind, Dr. Waid, and Dr. Wagner) and more recent neurological examinations by two neurologists, Dr. Pritchard and Dr. Healy (both of whom disagreed with White's speculative opinions). *See Smith v. Southern Builders*, 202 S.C 88, 24 S.E.2d 109 (1943) (holding that "that the probative value of expert testimony based upon hypothetical facts stands or falls with the existence of the facts upon which it is predicated"); *Hines v. Pacific Mills*, 214 S.C. 125, 51 S.E.2d 383 (1949) (holding that "medical evidence based on hypothetical questions has no value beyond the extent it is predicated upon facts actually proven in the record."). Therefore, the existence of specious opinions from Marty White do not constitute reversible error. *See Walsh v. U.S. Rubber Co.*, 238 S.C. 411, 120 S.E.2d 685 (1961) (holding that where there is "any competent evidence" to support the Commission's findings, the appellate courts are "without power to pass upon the force and effect" of contrary evidence.)

Furthermore, while Dr. R. Joseph Healy endorsed an opinion on a questionnaire proffered by Barr's attorney that Barr's chronic daily headaches were causally-related to his alleged exposure to VOCs between 2009 and 2015, Dr. Healy retreated from this opinion in his deposition testimony. Therefore, the Commission properly gave greater weight to the actual testimony of Dr. Healy, than to the questionnaire he had previously endorsed, in finding that Barr's headaches were not caused by alleged VOC exposure at work. *Glover v. Columbia Hospital*, 236 S.C. 410, 114 S.E.2d 565 (1960) (holding that "where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive.").

According to Dr. Healy's deposition testimony, he believed that any alleged VOC exposure was merely "contributory" and he admitted that he could not state with any degree of medical certainty what was causing Barr's headaches. (Healy T. p.30; p.38, lines 17—25). In fact, Dr. Healy testified that he could not even find any neurological cause for Barr's symptoms. (Healy T. p.42, lines 4—20). Instead, Dr. Healy believed Barr to have pulmonary problems for which he referred him to a Pulmonologist, cardiac problems for which he referred him to a Cardiologist, and severe vision problems for which he referred him to an Ophthalmologist, in addition to the severe sleep disorders (Obstructive Sleep Apnea and Periodic Limb Movement Syndrome) and abnormal arterial blood gas for which he required treatment and further evaluation. Dr. Healy admitted that Barr's severe sleep disorders alone, especially in combination with Barr's abuse of cigarettes, could be causing Barr's headaches. (Healy T. pp.8—9; Healy T. p.18; p.20). Dr. Healy further explained that:

"...the whole time I'm thinking, you know, this fellow's breathing is bad. He's got a lot of reasons to be relatively hypoxic, which leads to stress, fatigue and that might be what causes his headache." (Healy T. p.15, lines 20—24).

Of course, headaches caused by sleep disorders or cigarette smoking are not the responsibility of the Respondents.

Additionally, Dr. Healy was asked about the relationship between Barr's lung disease and abnormal arterial blood gas and his complaints of headaches:

"Q... so could that be playing a role in his headaches and fatigue as well?

A. Oh, I think it definitely is."

(Healy T. p.20, lines 11—16). Dr. Healy also explained that Barr's elevated carbon dioxide levels

“doesn’t produce a milieu for the brain to exactly work properly and from a metabolic standpoint, headache is the end result. So that, that’s my reason for thinking that his breathing is contributory to his headaches.”

Obviously, headaches caused by Barr’s pulmonary problems are not the responsibility of the Respondents and Barr never filed any claim alleging a pulmonary injury.

With regard to Barr’s cardiac issues and their relationship to his headaches, Dr. Healy testified that Barr

“was having [heart] palpitations. He was having episodes where he would get palpitations. He would get chest discomfort. He would start to and then get disoriented and have his headache worsening. He’d had two episodes the day before and then I started wondering since he was such a heavy smoker and whether or not he had any cardiac issue.”

(Healy T. p.22, lines 10—16). Dr. Healy believed Barr may have Coronary Artery Disease and he told Barr he needed to see a Cardiologist. Again, Barr does not allege any cardiac injury related to his employment and headaches caused by cardiac issues are not the responsibility of the Respondents.

When asked by Barr’s attorney whether he had treated painters in the past with chronic headaches, Dr. Healy responded, “you don’t see it a lot.” (Healy T. p.43, line 4). Therefore, the opinions of Dr. Healy, as weighed by the Commission, support the conclusion that Barr’s headaches are not compensable under the Act, as Dr. Healy opined that there were multiple, objectively-documented causes for the Barr’s headaches unrelated to his employment and only with speculation could Barr’s employment be considered such a cause. *See* S.C. Code Ann. § 42-1-172(D) (“repetitive trauma injury” is considered to arise out of employment only if it is

established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.”(emphasis added).

Therefore, the Respondents respectfully contend that substantial evidence supports the Workers’ Compensation Commission’s unanimous finding that Barr’s headaches did not arise out of his employment with the School District. Clearly, an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence and, here, the Commission’s findings are consistent with the reliable, probative, and substantial evidence on the record. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). In addition, the Commission committed no legal error by denying benefits despite Barr’s argument that he may have made a *prima facie* claim for benefits with the opinions of Dr. White, as White’s opinions were properly discounted and, indeed, overwhelmed, by the expert opinions to the contrary.⁴ Furthermore, Barr’s failure to appeal the Commission’s legal conclusions regarding his failure of proof under S.C. Code Ann. §§ 42-1-160, 42-1-172, and 42-11-10 are the law of the case and cannot be disturbed on appeal.

IV. Barr’s allegations regarding the admissibility of documentary evidence are without merit.

Barr’s Brief contains a lengthy diatribe about the documentary evidence submitted by the Respondents pursuant to the Administrative Procedures Act and the Workers’ Compensation Regulations; however, his various complaints are without merit and the Commission committed

⁴ It is unquestionably the law, as stated in Poston v. Southeastern Const. Co., 208 S.C. 35, 36 S.E.2d 858, and Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 40 S.E.2d 681, that expert testimony is not binding upon the fact-finding body if there be competent substantial evidence to the contrary. Here, there is abundant, competent, substantial evidence contrary to the unfounded opinions of Dr. White, which constitutes substantial evidence under the law. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). Clearly, Barr’s arguments that the Commission somehow misapprehended Barr’s burden of proof are without merit.

no legal error in admitting and weighing the opinions of Dr. Eagerton, Dr. Waid, Dr. Wagner, and Dr. Pritchard.

A. Dr. Eagerton's Report was properly admitted into evidence.

Barr argues that the Commission's unanimous decision should be reversed because the report of Dr. David H. Eagerton, Ph.D., is contained in the record and was cited by the Commission as cumulative evidence that Barr's "symptoms were not likely caused by any alleged exposure to VOCs at work" because "any VOC exposure would have been limited due to the low vapor pressure of the substances most commonly used by [Barr] and due to his use of a respirator." (Commission Order, APA pp.448-9). Apparently, Barr is arguing, without citation of authority⁵, that Dr. Eagerton's report is inadmissible because he is not a "medical" doctor. Instead, Dr. Eagerton has a Ph.D. in Pharmacology, is an Assistant Professor of Pharmacology at Presbyterian College, is the former Chief Toxicologist for the South Carolina Law Enforcement Division, and is Board Certified in Forensic Toxicology. The Hearing Commissioner expressly noted that Dr. Eagerton is pharmacologist and toxicologist (at p.30) and never mistook him for a medical doctor. In addition, there is no legal requirement that expert opinions regarding toxicology or pharmacology must be rendered by a "medical doctor."

Indeed, "the Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." Tiller v. National Healthcare, 334 S.C. 333, 513 S.E.2d 843 (1999). If Barr truly believed that the law so required,

⁵ Barr cites *Ellison v. Rivers*, 357 S.C. 447, 593 S.E.2d 603 (2004), ostensibly in support of his argument that the Commission erred in admitting the report of Dr. Eagerton because he is not a medical doctor. Reliance on this citation is grossly misplaced as *Ellison*, which is not even an administrative matter, actually stands for the proposition that "any defects in the amount of [an expert's] education and experience, if any, go to the weight of his testimony and **not its admissibility**." (emphasis added) (*citing* *Lee v. Seuss*, 318 S.C. 283, 457 S.E.2d 344 (1995)).

it begs the question why he hired Robert Bennett, who has a degree in pharmaceutical science, but no medical degree and no professional licenses whatsoever, to testify at the hearing on the very same issues addressed by Dr. Eagerton.

Of course, "great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Act." Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 601 (Ct. App. 1999) (internal citations omitted). Therefore, the Commission committed no legal error in admitting Dr. Eagerton's report and it was firmly within its discretion to accord that opinion the weight it deemed proper in denying Barr's claim for benefits. Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943) (holding "[a]fter expert testimony is admitted...it is to be considered by the fact-finding body just as other evidence and given such weight as, in the opinion of the body, it should receive.").

B. Barr's Right to Due Process was Not Violated.

Similarly, specious is Barr's argument that his right to "due process" was violated by the admission of the written expert reports that were properly submitted into evidence in accordance with S.C. Code Reg. 67-611 and 67-612. Barr alleges that he was somehow prevented from cross-examine these experts, when in actuality he chose not to exercise his rights in this regard. Barr is afforded the right to cross-examine the Respondents' experts by S.C. Code Ann. § 1-23-330(d), which states that "[a]ny party may conduct cross-examination," as well as S.C. Code Reg. 67-612, which guarantees that the procedure for admission of written expert reports shall not be "construed to limit a party's right to call a witness (lay or expert) or present evidence (lay or expert) in the form of a deposition."⁶ The Commission did not abridge Barr's rights under the

⁶ To the extent Barr argues that S.C. Code Ann. § 1-23-330 requires his consent to the admission of written expert reports where their admission would cause "substantial prejudice," Barr has failed to elucidate any such "substantial prejudice." Certainly the cost of cross-examining expert

Administrative Procedures Act, or the Workers' Compensation Regulations, or the Constitution of the United States as Barr alleges—the Commission didn't prohibit Barr from cross-examining anyone at any time.

Instead, Barr simply chose not to exercise his right of cross-examination, as he never noticed a single deposition and never subpoenaed any expert to the hearing, as was his right under S.C. Code Ann. 42-3-150 and S.C. Code Reg. 67-214.⁷ See Gadson v. Mikasa Corp., 628 S.E.2d 262 (Ct. App. 2006) (upholding the admissibility of documentary evidence under S.C. Code Reg. 67-611 and 67-612 where the party failed to exercise his right of cross-examination). Even Barr acknowledges that due process affords him only the “opportunity” to confront adverse witnesses (Barr Brief p.26, citing Goldberg v. Kelley, 397 U.S. 254, 90 S.Ct. 1011 (1970)). Having declined the opportunity to cross-examine the Respondents' experts at either a deposition or at the hearing, Barr failed to exercise his due process rights cannot now be heard to complain of some constitutional deprivation. See Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971)⁸.

witnesses fell equally upon the School District, as Barr submitted the written reports of Dr. White, Dr. Lind, Dr. Skinner, and Dr. Healy and the School District cross-examined each one by issuing Form 27 subpoenas, conducting depositions, and paying for the same according to the Commission's Fee Schedule. In fact, the School District even assumed the cost of Dr. Pritchard's deposition at Barr's request in an effort to placate him.

⁷ Barr disingenuously argues that cross-examination of the Respondent's expert witnesses required that the Commission issue subpoenas to these witnesses. This is false. As Barr's attorney is well-aware, S.C. Code Reg. 67-214A clearly and unequivocally allows that “[a] party may subpoena a person or document(s), by completing and serving a Form 27.” (See McDaniel Form 27 to Stegner).

⁸ In Richardson v. Perales, the United States Supreme Court held “that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.”

Furthermore, as our courts have explained:

“The utilitarian efficacy of admissibility under Workers’ Compensation regulations is salutary and salubrious. Historically, the regulations allow for written reports and documentation in lieu of live testimony, concomitantly saving time and expense in the presentation of testimony before the single commissioner.” Gadson v. Mikasa Corp., 628 S.E.2d 262 (Ct. App. 2006).

Respectfully, not only are Barr’s arguments regarding the admissibility of the expert reports submitted by the Respondents without merit, but his arguments regarding the admissibility of documentary evidence serve to undermine the utility of our Workers’ Compensation system.

V. Barr’s allegations regarding the propriety of Dr. Pritchard’s neurological evaluation are, untimely, moot and otherwise without merit.

Barr made no objection to the submission of Dr. Pritchard’s report or Dr. Pritchard’s deposition becoming part of the Record when submitted to the Hearing Commissioner at the ____ Hearing. (Hrg.T. pp.1—19). In fact, Barr actually argued that Dr. Pritchard’s opinions were somehow favorable to him. It was not until *after* the Hearing Commissioner denied Barr’s claim, based in part on Dr. Pritchard’s opinions, that he argued for their exclusion. Therefore, any error now alleged is not preserved for review, as it was neither raised before or ruled upon by the Hearing Commissioner. Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 299 (2005); *see also* Toal, *et al.*, Appellate Practice in South Carolina (2nd Ed. 2002).

Furthermore, the basis for Barr’s argument is moot and otherwise without merit. Barr argues that the neurological evaluation performed by Dr. Paul Pritchard at the Medical University of South Carolina on February 2, 2016 was not at “a reasonable time or place” and that; therefore, the Commission somehow erred in considering Dr. Pritchard’s opinions in deciding this case.

Because Barr actually attended the appointment, his arguments regarding the propriety of the time and place of that appointment are now moot and of no consequence. Furthermore, the Respondents respectfully contend that it was, in fact, very reasonable to request that an employee who allegedly sustained physical brain damage at a local school be evaluated by a neurologist at the state's medical university, especially when he had already been evaluated by 2 of the very few neurologists in the Pee Dee. Lastly, Barr cites no statute or case law that would impact the weight accorded medical evidence based on the time or location of the medical evaluation.

Barr further alleges that Dr. Prichard's opinions were inadmissible because the Respondents provided Dr. Pritchard with Barr's medical records for consideration prior to Dr. Pritchard agreeing to evaluate Barr. Again, this objection was not raised before or ruled upon the Hearing Commissioner and is not preserved for review. *Id.* Barr was provided all of the medical records reviewed by Dr. Pritchard and cross-examine Dr. Pritchard prior to the hearing at the Respondents' expense. The Respondents did not violate the terms of S.C. Code Ann. § 42-15-95, as that statute deals with the confidentiality of doctor-patient relations, which quite simply had not attached prior to Dr. Pritchard's appointment with Barr, and Dr. Pritchard's medical reports and opinions were not obtained in violation of that statute.

VI. Both the Hearing Commissioner and the Commission's Appellate Panel made detailed findings of fact and conclusions of law.

Barr inexplicably argues that the Hearing Commissioner's forty-eight-page Decision and Order and the twenty-nine-page Final Decision and Order issued by the Appellate Panel were somehow not sufficiently detailed with respect to Barr's headache allegations. Barr further argues that the Orders bearing the signatures of Commissioners Campbell, Taylor, Barden, and McCaskill do not represent the actual decisions of these Commissioners. However, both Orders

are replete with detailed and specific findings of fact regarding the weight of the evidence on the headache issue and legal rulings applying the law to those findings. (See Findings #1, 4, & 11 and Conclusions #1, 2, & 3). Furthermore, there is absolutely no evidence that these Orders bearing Commissioners' signatures do not constitute their actual decisions. Barr cites no authority for his argument⁹ that the appellate courts should look beyond the 4 corners of the Commission's Orders to determine their meaning or intent. Therefore, the Claimant's argument with regard to the sufficiency of the Hearing Commissioner's Decision and Order are without merit.

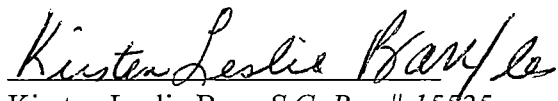
Conclusion

Based upon the foregoing arguments, the Respondents respectfully request that the unanimous Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in its entirety in accordance with the substantial evidence in the record and the applicable law, which supports the Commission's finding that Barr's headaches did not arise out of his employment with the Darlington County School District. The Respondents further request that the Decision and Order of the South Carolina Workers' Compensation Commission be affirmed on the basis that its legal conclusions regarding Barr's failure to satisfy the mandatory requirements of S.C. Code Ann. §§ 42-1-160, 42-1-172, and 42-11-10 are the law of the case and binding on appeal (given Barr's failure to appeal these conclusions or even cite these statutes in his Brief to the Court of Appeals), rendering any alleged procedural or evidentiary error entirely moot.

⁹ Barr cites Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), and Aristizabal V. I.J. Woodside, 268 S.C. 366, 234 S.E.2d 21 (1977), suggesting these cases support his argument that it is reversible error for a Commissioner to adopt and endorse by signature a proposed order prepared by a party at the Commission's request. These cases suggest no such thing and there is simply no legal authority for such a preposterous argument.

January 7, 2019

Respectfully submitted,

A handwritten signature in cursive script that reads "Kirsten Leslie Barr". The signature is written in black ink and is positioned above the printed name.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
Aisha Taylor, Commissioner

Appellate Case No. 2018-001237
W.C.C. 1507304

RECEIVED
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SC Court of Appeals

Kenneth L. Barr, Employee,.....Appellant,

v.

Darlington County School District, Employer, and
SC School Boards Insurance Trust, Carrier,.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant, Kenneth L. Barr, was served with a copy of the attached Initial Brief of the Respondents and Designation of Matter to be Included in the Record on Appeal this 7th day of January, 2019, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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January 7, 2019

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WORKERS' COMPENSATION DEFENSE

Reply to
Kirsten L. Barr
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January 7, 2019

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

Re: Kenneth L. Barr v. Darlington County School District
W.C.C. File No.: 1507304
Appellate Case No.: 2018-001237
Carrier File No.: WC016314
Date of Accident: May 21, 2015

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Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Brief of the Respondents and Designation of Matter, with accompanying Proof of Service, in the above-referenced matter. By copy of this letter, I am serving the other counsel of record with a copy of these documents. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

Kirsten L. Barr/les
Kirsten L. Barr

KLB/lmc/les
Enc.

cc: Eric Mayer, SC School Boards Insurance Trust (w/enc.)
Christy Sandifer, Darlington County School District (w/enc.)
Preston F. McDaniel, Esq. (w/enc.)
Gerald Malloy, Esq. (w/enc.)





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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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