THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2018-001237

Kenneth L. Barr, Claimant, ...Appellant,

v.

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

APPELLANT'S INITIAL REPLY BRIEF

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GENERAL ARGUMENT

OBJECTION TO RESPONDENTS BRIEF FOR NON-COMPLIANCE WITH SCACR RULE 208(b)(1)(A)-(E) AND (b)(2).

In reference to Respondent's Brief, SCACR Rule 208(b)(2) provides that the Brief shall conform with Rule 208(b)(1)(A)-(E) and may also add/any other additional sustaining grounds(s)/ arguments appearing in the Record under Rule 220(c).

The Rule 208(b)(2) contemplates that the Respondent will respond "to the arguments made and may add thereafter any "sustaining grounds". The Court and the Appellant should not be left to having to cull through Respondents' Brief to find or to correlate what part of the Brief correlates/responds to what argument that is being made by the Appellant and is being responded to by that part of the Brief.

That is not to say that the Respondents may no rephrase the caption of any of Appellant's arguments. In this appeal, the Appellant presented seven arguments to the Court for review. Respondents' Brief lists six arguments. The first Argument appears to be an additional sustaining ground. Respondents' Argument IV appears to be in response to Appellant's Argument I.

The Rules are not mere technicalities and their purpose is to "provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992), (emp. added).

Under Rule 208(a)(4) the Court should not consider Respondents' Brief or should at a minimum require an Amended Brief. The Appellant will reply to the Brief as submitted.

RESPONDENTS' ARGUMENT 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.

This Argument is in actuality an additional sustaining ground alleging that Mr. Barr did not make any argument in his Brief concerning certain injuries set out in his claim for benefits; and/or raised the issue(s) on appeal but did not argue it in his brief.

The Respondents confuse injuries with legal issues. In his Form 50 request for benefits, Mr. Barr alleged that the evidence would show that he had sustained various injuries "as a result of": injury by accident; and/or repetitive trauma; and/or occupational disease that would entitle him to benefits under the Act.

In Finding of Fact #13, the Hearing Commissioner found the greater weight of the evidence did not establish he had sustained any of these bases for benefits; and also based other Findings of Fact on evidence from Drs. Wagner, Waid, Eagerton and Pritchard. (Comm. Order 9/20/17). No where does the Commissioner find that any of the injuries listed were not real. In Argument IV, the Appellant specifically argues that the reliable, probative and substantial evidence in the Record establishes his injuries

stemmed from his exposure to commercial paints in the workplace. That argument cites to the evidence in the Record establishing his right to benefits under the Act. The Appellant has raised and argued all of these essential issues, injury by accident, repetitive trauma and occupational disease; in reference to and in the context of the alleged errors of law argued to the Court. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793 (1989); Nettles v. Spartanburg School District, 341 S.C. 580, 535 S.E.2d 146 (S.C. App. 2000).

These issues were raised and argued.

RESPONDENTS' ARGUMENT II. A., B. AND C.

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.

The Hearing Commissioner made Finding of Fact (No. 13) finding that the, "preponderance of evidence" did not establish either injury by accident, repetitive trauma or an occupational disease. Whereas, on appeal, Appellant argues that the reliable, probative evidence in the Record establishes his injuries stemmed from his exposure to commercial paints in the workplace; and further that the information from Drs. Wagner, Waid, Eagerton and Pritchard, which formed in part the basis for that finding, was improperly admitted (errors of law) into evidence.

So, appellant wants to make sure he understands Respondents argument. Are they arguing that it would be the law of the case that Mr. Barr did not sustain injury by accident, repetitive

trauma or an occupational disease even if: 1) this Court found there was substantial evidence to support any of those bases for benefits under the Act; 2) the doctors information (only evidence if properly admitted) was not properly put into evidence; and/or 3) Mr. Barr was denied due process? If a decision is reversed and/or reversed and remanded, there is no law of the case.

A. INJURY BY ACCIDENT S.C. CODE §42-1-160

Evidence: 3/16/15, Mr. Barr taken to the emergency room after severe sudden onset while at work: headache 9/10, dizziness, confused, disoriented (Cl. APA p. 85); hosp. admit: workers compensation (APA p.22). Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479(S.C. App.1987), (one exposure cascading effect).

B. S.C. CODE §42-11-10

Evidence: Commercial painter continually exposed to VOCs (Volatile Organic Compounds) in commercial paints (toxic exposure), neurotoxicity. MSDS Sheets (APA pp. 49-73). See Pre-Hearing Brief P. 1-2 - factual allegations; p. 4-law.

C. S.C. CODE §42-1-172

Argument VI sets out in bullet-point fashion the factual evidence and medical opinions that his problems were caused by repeated exposure to the VOCs in the commercial paints.

RESPONDENTS' ARGUMENT III.

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.

The Respondents couch the argument in terms of substantial

evidence but then again argue law of the case and failure to appeal. The substantial evidence issue will also be addressed.

First and again, Appellant lists in his claim, his Pre-Hearing Brief, etc. that his medical problems or conditions, i.e., injuries, stemmed from injury by accident, repetitive injury and/or occupational disease, including headaches, dizziness, memory, fatigue, psychological. The body "parts, organs or systems affected," are the brain, neurological/ central nervous system and psychological. Whether or not there is substantial evidence and whether or not there is properly admitted evidence upon which those findings are based are the issues on appeal.

Dr. Skinner specifically testified that he did not know Mr. Barr was a full-time commercial painter for the district at any time during his treatment (Dep. p. 43, l. 10). He testified specifically that he was not an expert in the area of industrial medicine and was not an expert nor did he usually address environmental exposure issues in his practice and did not in this case. (Dep. p. 37; l. 6 - p. 40, l. 15).

Dr. Pritchard testified he was not an expert and recommended an evaluation by an occupational medicine specialist trained in toxicology. (Def. APA p. 407; Dep. p. 98, ll. 15-23). He expressed no opinion as to the cause of Mr. Barr's headaches and only opined he did not have an encephalopathy.

RESPONDENTS' ARGUMENT IV.

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

So, a worker's right to trial by jury is taken away and his entitlement to benefits is placed in the hands of a one man or woman jury and the worker is entitled to a lesser standard of due process than he would be in a trial by jury?

No Judge hearing this appeal and no law under our Constitution would allow any report of any kind that would deprive any person of property to be placed into evidence and considered by a jury without guaranteeing to the party whose property interest is at stake the right to cross-examine their accuser; i.e., the witness(es) making the statement(s).

The Appellant implores the Court to think about what we are saying or doing to rule otherwise. The injured worker who has the burden of proof and who is injured and is without pay has to pay to cross-examine the experts hired by the insurance industry to deny his claim. By history in workers' compensation not until after 2000 and not then until after the recent interpretation of the Commission's APA regulation was that true. The right of cross-examination was held inviolate like it is in every other Court. In every other Court, every litigant has to pay the cost of putting their evidence before the Judge or jury.

RESPONDENT'S ARGUMENT IV. A.

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

First, since Dr. Eagerton "alleged" credentials as a Ph.D. were made a part of the Record, without cross-examination and over objection and over a denied request for subpoenas, the statements/credentials are hearsay and are not admissible.

Second, the purpose of the citation to Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004) is to support that part of the argument alleging it was an abuse of discretion to submit the "alleged" opinion of the alleged "Ph.D." because there is no substantial evidence in the Record that the "Ph.D." who expressed a, "medical" opinion is a licensed, "medical" doctor. Like a physical therapist, a Ph.D. is not qualified to give a, "medical" opinion, Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (S.C. App. 2001). Dr. Eagerton, Ph.D. is not a licensed "medical" doctor and cannot express a medical opinion. This is reversible error both because he is not qualified to give a medical opinion and because Mr. Barr was not provided due process. Most respectfully, due process is not a diatribe and is one of our most precious rights.

RESPONDENT'S ARGUMENT IV B.

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

The Respondents misstate their quote from Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971) and its holding. The Appellant stands by the holding in that case which is that the right of cross-examination extends to medical reports and holds such documentary evidence **may not** be admitted where the Claimant has specifically preserved his right to cross-examination **by requesting** that subpoenas be issued to exercise that right at the hearing. Citing the holding in pertinent part from the Richardson decision as quoted by the Respondents and reciting from their own quote in their Brief at footnote #8,

> "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 ..., may constitute substantial evidence ... 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." (emp. added).

As the Court is well aware, in a Social Security Administration proceeding the Administrative Law Judge for the Social Security Administration (like a Commissioner) upon request will issue subpoenas for witnesses/documents requested by the Claimant. Identically, S.C. Code §42-3-140 provides that the Commission or any member thereof may issue subpoenas for witnesses and S.C. Code §42-3-130 provides that the County Sheriffs and their Deputies shall serve all subpoenas, "of the Commission". S.C. Code §42-3-150 specifically provides for criminal penalties and for contempt where a party does not obey a Commission subpoena issued by the Commission. The Commission has money built in its budget specifically for this purpose and other purposes such as evaluations.

As set out in Appellant's Brief, since the inception of the Act, the Commission could receive into evidence written records but only where: both parties consented to those records being considered and specifically waived the right to cross-examine those witnesses. The Appellant was denied due process. Again, and to intentionally be redundant, where any person in this Country

has had their right to trial by jury taken away, it is absolutely abhorrent to think that We The People would countenance a lower level of due process. We might as well go to star-chamber justice.

"The vice is in the procedure which allows it in without testing it by cross-examination." Justice Douglas, Richardson v. Perales, supra.

RESPONDENTS' ARGUMENT V.

V. Barr's allegations regarding the propriety of Dr. Pritchard's neurological evaluation are, untimely, moot and otherwise merit.

Neither the Respondents nor the Commission can, as set out in Appellant's Brief, unring the bell. Either we are a Country of laws or we are not.

First, S.C. Code §42-15-95 provides that if any opinions or medical records are obtained in violation of that section then the evidence **"must be excluded from any proceeding under the provisions of this title."** Dr. Pritchard's reports and opinions were obtained in violation of that section. Are we going to ignore the law?

Next, the Respondents tried to schedule an evaluation in violation of §42-15-80 with a non-medical expert and not at reasonable times and places. The Commission ruled that they were only entitled to an evaluation by a medical doctor at reasonable times and places. They then scheduled an appointment with Dr. Pritchard, and over objection, they were allowed to have that

evaluation which was not at reasonable times and places. Another statutory violation so, do we ignore the law?

Mr. Barr timely requested the Commission issue subpoenas and require the attendance of Dr. Pritchard at the hearing under S.C. Code §42-3-130, 140 and 150. The Commission did not issue subpoenas. Are we to ignore the law?

Under Commission Regulation 67-613, a Commissioner may only, "adjourn" the hearing for a period of 30 days. Over objection, the Commissioner cancelled the hearing and Mr. Barr was only able to get his day in Court eight months later facing untimely and improperly submitted evidence which by the illegal and improper actions of the Commission were then timely. Are we to ignore that?

RESPONDENT'S ARGUMENT VI.

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

The Respondent's in their Brief misstate the argument being made by the Appellant as to the Commissioner and Full Commission Panel's decision concerning Mr. Barr's headaches. One basis upon which Mr. Barr requested benefits was his chronic headaches. It was brought to the Commissioner's attention after receiving his Decision Notes that he did not address and make findings of fact on that issue which was one of the essential issues before him for decision. Without the Commissioner making any decision or findings of fact on that issue, Respondents' counsel submitted a second proposed Order to him making those findings. There is

absolutely nothing in the Record to notify the Commissioner that additional findings had been made in that proposed Order.

It is the responsibility of the Hearing Commissioner and the Commission to make detailed findings of fact and not to allow a party to decide the case for them. Contrary to the Respondents' argument, all of the case law cited by Appellant specifically requires the Commissioner, not the defense counsel, to make detailed of findings of fact and conclusions of law. Respondents argue that there is nothing in the Record to substantiate that the Commission did not make these findings of fact, but while not true just as true is to say there is nothing in the Record to substantiate that they did make those findings of fact. Respondent's is a playground argument: "Did To", "Did Not".

CONCLUSION

Based on the numerous errors of law made by the Commission, the Appellant would respectfully request that this case be reversed or reversed and remanded for a decision based only on the evidence that should have been admitted into evidence.

Respectfully submitted,

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February 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2018-001237

Kenneth L. Barr, Claimant, ... Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the **APPELLANT'S INITIAL REPLY BRIEF** by depositing a copy of it in the United States Mail, postage prepaid, on February 5, 2019, addressed to:

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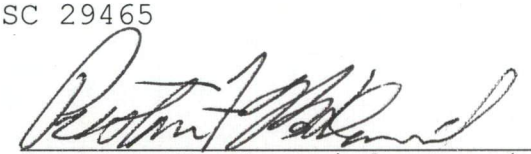

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February 5, 2019

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
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RE: Kenneth L. Barr, Claimant, Appellant, v. Darlington County School District, Employer, and S.C. School Boards Insurance Trust, Carrier, Respondents. Appellate Case No. 2018-001237

Dear Ms. Kitchings:

Please find attached the original and two (2) copies of the **APPELLANT'S INITIAL REPLY BRIEF** in the above-referenced matter. I would appreciate your returning a clocked-in copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter I am hereby serving Counsel of Record with a copy of this document.

Sincerely yours,

Preston F. McDaniel

PFM/abh
Enclosures

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