

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. GARRISON HILL, Circuit Court Judge

---

Case No. 2009-CP-23-2535

---

Archie Eddie Jones..... Respondent

vs.

3M Corporation.....Employer/Appellant

- and -

Old Republic Insurance Company.....Carrier/Appellant

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**BRIEF OF APPELLANTS**

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VERNON F. DUNBAR  
Turner Padgett Graham & Laney, P.A.  
Post Office Box 1509 (29602)  
200 East Broad Street, Suite 250  
Greenville, SC 29601  
Telephone: 864-552-4600  
ATTORNEYS FOR APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

1. **DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT RESPONDENT SUFFERED A PHYSICAL TRAUMATIC BRAIN INJURY?**
2. **DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT ERR AS A MATTER OF LAW IN FINDING AND CONCLUDING THAT RESPONDENT IS ENTITLED TO MEDICAL TREATMENT FOR PROSTATITIS AND ERECTILE DYSFUNCTION?**
3. **DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR AS A MATTER OF LAW AND ABUSE ITS DISCRETION IN DENYING APPELLANTS' REQUEST TO COMPEL RESPONDENT TO SUBMIT TO A MEDICAL EVALUATION WITH REGARD TO ALLEGATIONS OF A PERMANENT PHYSICAL INJURY?**
4. **DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN ORDERING RESPONDENT TO PAY ATTORNEYS' FEES FROM THE AWARD PRIOR TO THE APPROVAL OF A FORM 61 (ATTORNEY FEE PETITION)?**

## STATEMENT OF THE CASE

Archie Eddie Jones, Claimant/Respondent [hereinafter "Respondent"], is a sixty-eight (68) year old, married male. Respondent graduated from high school and attended college. (*R. p. 30*). Respondent began working at 3M on May 9, 1983. On June 3, 1997, Respondent suffered a work related accident in which he sustained compensable third degree burns over forty (40%) percent of his body. (*R. pp. 31, 197 & 298*). Respondent suffered burns to his legs, arms, feet, and trunk/torso. (*R. pp. 31*). Respondent's burn injuries required extensive skin grafting during his hospitalization at

the Medical University of South Carolina Burn Center. (*R. pp. 227, 237, 243-245, 251-252, 256, 258-262, 285-288 and 295-301*).

Respondent's burn injury accident caused tissue and nerve damage to the lower extremities, pulmonary dysfunction and damage to the urethra. (*R. pp. 309-331, 385, 401, 412-437*). Respondent was also treated for depression. (*R. pp. 342-347, 385, 403, 446-493*). Because of the aforesaid compensable injuries, the Respondent was paid permanent and total disability compensation benefits or 500 weeks of indemnity benefits and lifetime medical benefits. (*R. pp. 31 & 397*).

After Respondent had been paid permanent and total disability compensation benefits, he filed a Form 50, Claimant's Request for Hearing, dated July 5, 2007, alleging additional injuries. (*R. p. 51*). Specifically, Respondent alleged injuries to the brain and urinary tract system, i.e., erectile dysfunction, and prostatitis syndrome as a consequence of the admitted work related accident of June 3, 1997. (*R. p. 54*). Appellants denied Respondent's new allegations of erectile dysfunction and a physical brain injury. (*R. pp. 31 & 53*).

On November 20, 2007, this matter was heard by Commissioner J. Alan Bass to adjudicate the issues contained on the Forms 50 and 51 and issues raised in Appellants' Motion. (*R. pp. 27-49*). Commissioner Bass [hereinafter the "Hearing Commissioner"] first addressed Appellants' Motion and Request to Compel Claimant to attend medical appointments with Dr. Maria Recio, a Neurologist, and Dr. David Price, a Neuropsychologist. (*R. pp. 55, 132-138*). Appellants were unaware the alleged brain injury was supported by a psychological or neuropsychological opinion until receipt of

Respondent's Pre-Hearing Brief dated November 5, 2007, containing a neuropsychological report of Dr. Robert Moss. Dr. Moss' opinion about a physical brain injury was rendered ten years after Respondent's accident. (*R. pp. 29 & 54*).

Since June 1997, Appellants had provided medical treatment to Respondent and had authorized a number of medical evaluations and diagnostic tests, in order to evaluate the allegation of a permanent physical brain injury emanating from the admitted work related accident. (*R. pp. 276, 300, 839-843, 863-869, 889-890, 947-953, 957 & 984-985*). Despite Dr. Moss' neuropsychological report being produced at the eleventh hour and ten years after the work related accident, and after Respondent had suffered at least three intervening strokes, the Hearing Commissioner denied Appellants' Motion to have Respondent evaluated by Drs. Recio and Price. At the time of the scheduled hearing, appointments with the aforesaid had been scheduled. (*R. p. 132, lines 17-25*). The case was litigated on November 20, 2007 and a decision was rendered seven (7) months later. (*R. p. 14*).

By Order dated June 27, 2008, the Hearing Commissioner found and determined that Respondent had suffered a physical brain injury and suffered from erectile dysfunction as a consequence of the June 3, 1997 work related accident. (*R. pp. 42-44*).

Appellants timely appealed the Hearing Commissioner's Decision to the Full Commission Appellate Panel. By Order dated February 25, 2009, the South Carolina Workers' Compensation Full Commission Appellate Panel affirmed the Hearing

Commissioner's Decision. (*R. pp. 13-26*). From this Decision, Appellant's timely appealed to the Greenville County Court of Common Pleas.

By Order dated May 20, 2011, The Honorable D. Garrison Hill, Circuit Court Judge, promulgated an Order affirming the South Carolina Worker's Compensation Commission's Decision and Order. (*R. pp. 3-12*). From this Decision, an Appeal was timely filed to this Honorable Court.

### **FACTS**

Respondent suffered chemical burns to his body on June 3, 1997, during the course and scope of his employment at 3M Corporation, Employer/Appellant. Respondent was initially treated at Greenville Memorial Hospital. (*R. pp. 187-190*). He was later transported to the Medical University of South Carolina Burn Center in Charleston. (*R. pp. 191-200*).

Respondent was hospitalized for approximately three months at the Medical University of South Carolina. During Respondent's hospitalization, he was treated for urethral erosion, which was caused by long term catheter placement. (*R. p. 961*). Respondent received treatment for burns to the lungs. (*R. pp. 593-595 & 613-754*). Respondent underwent surgeries for scarring of the nose, left eyebrow, left ear, neck, trunk, and right arm. Respondent was also treated for symptoms of depression. (*R. pp. 446-592*).

After recovering from the chemical burn injury, Respondent returned to work in 1998 for approximately eight to ten months in a modified capacity. (*R. p. 117, lines 12-21; pp. 593, 955-956 & 982-983*).

Respondent later complained of problems with lethargy, fatigue and decreased mental alertness. (*R. pp. 446-450*). On April 30, 1999, Dr. Robert W. Richards, a psychiatrist, ordered an MRI. (*R. pp. 452, 800-801*). Dr. Richards had been authorized to treat Respondent for depression and post-traumatic stress disorder emanating from the chemical burn injury. (*R. p. 446*).

Because of Respondent's complaints of mental problems and Dr. Richards impression of a brain injury, Appellants authorized a neurological evaluation. (*R. p. 801*). On May 18, 1999, Dr. Terence Clark issued a report on the results of the cranial MRI. (*R. p. 800*). Dr. Clark noted that Respondent's MRI study of the brain was within normal limits, although the MRI did reveal some small scattered deep white matter signals. (*R. p. 800*). In a subsequent report dated July 1, 1999, Dr. John F. Pilch, neurologist, opined that the MRI scan reflecting the deep white matter was suggestive of subcortical vascular disease and was associated with Respondent's age. (*R. pp. 956-957*). Dr. Pilch stated the subcortical vascular disease was not the cause of Respondent's fatigue and decreased alertness, but rather the symptoms resulted from sleep apnea and the consumption of prescriptive medications, namely Neurontin and Atarax. (*R. pp. 955-958 & 973*). Dr. Pilch noted that Respondent was "alert and appropriate in complex conversation." (*R. p. 955*).

On June 9, 2001, Respondent was admitted to the Anderson Area Medical Center after suffering a transient ischemic attack (TIA) or stroke. (*R. pp. 819-829, 962-966*). Respondent's stroke occurred four years after the admitted work related accident. (*R. pp. 963-966*). At the time of the stroke on June 9, 2001, Respondent had been

extremely active around his house. Respondent reported working on his car and repairing plumbing under his house, when he began experiencing right arm numbness and a left sided headache. (*R. p. 829, 834-835 & 963-964*). During the Respondent's hospitalization, he was found to be neurologically intact, and he was alert and oriented. (*R. pp. 303, 327, 329, 397 & 965*).

In assessing a correlation between the admitted burn injury of June 3, 1997 and the stroke of June 9, 2001, Dr. Bruce R. LeForce opined that the burn injury resulted in no increased risk factors for a stroke; and that there was no association between the stroke and the burn injury. (*R. pp. 984-985*). There was no medical evidence of a compensable brain injury four years after the work related accident nor any correlation between Respondent's work related accident in 1997 and the stroke suffered on June 9, 2001. (*R. p. 397*). This lack of a brain injury is supported by the MRI scan of the brain, (*R. pp. 952-953*), an MRI angiography (*R. p. 954*), and a CT scan of the brain (*R. p. 962*).

In April 2004, Respondent was treated at ANMED Health, for a second stroke. (*R. pp. 860-869*). Dr. Oliver prescribed Plavix and aspirin as a consequence of the symptoms of a stroke in April 2004. Dr. Oliver noted the stroke was as a consequence of poor posterior circulation. (*R. p. 951*).

In 2005, Respondent suffered a third stroke which required him to seek treatment at ANMED Health. (*R. pp. 881 & 947-951*). A report from Dr. Frank Oliver dated December 14, 2005 reflects that Respondent underwent another MRI of the brain

for vertigo and the stroke. (*R. pp. 950-951*). Again, there were no clinical or diagnostic medical findings to support a brain injury allegation (*R. p. 397*).

Respondent alleges his purported physical brain injury is related to the 1997 chemical burn injury. Respondent's purported cognitive dysfunction is complicated by Respondent's diagnoses of ADD and bipolar disorder. (*R. p. 93, lines 14-19; pp. 397, 526-527, 978*). Respondent's forty-eight (48) year old son also has ADD. (*R. pp. 94-95, lines 1-2*). Respondent's three strokes, which occurred after his work related accident, undoubtedly, have resulted in a decline and decrease in Respondent's cognitive function. Despite three intervening strokes, sleep apnea, and the medical diagnostic tests refuting a brain injury, Dr. Robert Moss, a psychologist, concluded Respondent suffered a brain injury stemming from an accident that happened ten years before Dr. Moss performed a neuropsychological evaluation. (*R. pp. 936-941*).

Respondent also alleges he has suffered injuries to his penis, namely erectile dysfunction and prostatitis syndrome. There is no dispute the placement of an indwelling Folly catheter caused an erosion of the distal urethra and a urethral stricture. (*R. pp. 423 & 961*).

Dr. William Hinnant, an urologist with Anderson Urology Associates, opined that the urethra had been repaired and that Respondent would only need to undergo periodic dilation for the stricture. Again, Appellants do not question that the initial injury to the urethra was as a direct and proximate consequence of the work related accident. (*R. p. 96*). Appellants have provided Respondent with continued lifetime medical treatment with respect to all causally related symptoms associated with the

injury to the urethra. However, Appellants deny Respondent's erectile dysfunction and prostate problems are related to the work related accident. (*R. p. 435*). Appellants rely upon the opinion of Dr. Hinnant that the prostatitis is not related to the admitted work related accident as the basis for its denial of Respondent's allegations of compensable maladies involving erectile dysfunction and prostate problems. (*R. p. 961*).

## **ARGUMENTS**

### **I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT RESPONDENT SUFFERED A PHYSICAL TRAUMATIC BRAIN INJURY, THE ERROR BEING THAT THE GREATER WEIGHT OF THE EVIDENCE NOR THE LAW SUPPORT SUCH A FACTUAL FINDING AND LEGAL CONCLUSION.**

Section 42-9-10 (C) utilizes the adjective or term "physical" in defining and qualifying the type of catastrophic brain injury necessary for an injured employee to receive lifetime indemnity benefits. Compare S. C. Code Ann. § 42-9-10 (C) (2011) with S.C. Comm. Reg. 67-1101 (2011).

Webster's Ninth New Collegiate Dictionary defines the term *physical* as "having material existence perceptible through the senses". The term *physical* is something that is capable of being viewed or touched with respect to a physical brain injury. In the instant case, none of the medical diagnostic tests administered reflect a physical brain injury as a consequence of the chemical burn that occurred on June 3, 1997.

Aside from the objective medical reports refuting Respondent's allegation of a physical brain injury as a consequence of the 1997 work accident, the reports of the

authorized treating physicians relate Respondent's problems with memory problems and lack of alertness to sleep apnea and medication use. (*R. pp. 569, 616, 781, 891-893, 973, 978*). Sleep apnea causes cardiovascular problems, memory and concentration problems, fatigue and impotency.<sup>1</sup> (*R. pp. 956-958 & 960*). The diagnosis of sleep apnea and the diagnostic tests and medical reports (*R. pp. 303, 327, 329 & 397*) were obviously ignored by the Commission, which constitutes a legal error. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

Respondent's testimony does not corroborate the occurrence of a permanent physical brain injury that occurred on June 3, 1997. A review of Respondent's deposition testimony taken on October 30, 2007, reflects an individual who was capable of recalling the accident and precisely the injuries sustained because of the accident. Respondent was able to identify the medication he consumes and the amount of dosage of each medication, and the number of times the medications are taken daily. (*R. pp. 98-102, 149, lines 13-25 & 150, lines 1-21*). Respondent further testified that he works around his house (*R. pp. 109-110*) and that he had driven to Chisholm, Minnesota to help move a friend. (*R. p. 111, lines 2-25, p. 112, lines 1-16*).

Respondent tutored his niece, when she was in the ninth grade, in the subject of physical science. (*R. p. 152, lines 20-25 & p. 153, lines 1-10*). During the hearing, Respondent corrected his wife and advised that he had been hospitalized in 2005 for

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Anahad O'Connor, *Really? The Claim: Sleep Apnea Causes Sexual Problems*, New York Times, October 19, 2011 and Mayo Clinic *Obstructive Sleep Apnea*, <http://www.MayoClinic.com/help/obstructive-sleep-apnea> (2010). Sleep apnea as opposed to a brain injury causes the exact problems of which Respondent complains and associates with a purported brain injury, which has not been medically diagnosed.

treatment associated with stroke symptoms. (*R. p. 159, lines 24-25 & p. 160, lines 1-2*). These facts do not support the Commission's award for a catastrophic brain injury as is discussed in *Section 42-9-10. S.C. Ann. §42-9-10* (2011).

In short, Respondent's activities, diagnostic test results and the credible objective medical reports do not support any cognitive deficits associated with a physical brain injury. (*R. p. 397, 800, 947-954*). For these reasons, the Commission's Decision must be reversed as a matter of law. *S. C. Code Ann. § 42-9-10 (C) (2008)*. See also *Crisp v. SouthCo, Inc.*, 390 S.C. 340, 701 S.E.2d 762 (2010) and *Walker v. City Motor Car Co.*, 232 S.C. 392, 102 S.E.2d 373 (1958).

**II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN DENYING APPELLANTS' REQUEST TO COMPEL RESPONDENT TO SUBMIT TO A MEDICAL EVALUATION WITH REGARD TO ALLEGATIONS OF A PHYSICAL BRAIN INJURY.**

Section 42-15-80 permits an employer to require that an injured employee submit to an examination as long as he claims compensation. *S. C. Code Ann. § 42-15-80* (2006). Upon receipt of Dr. Moss' neuropsychological report, Appellants promptly scheduled appointments with Drs. David Price and Maria Recio. Respondent's counsel objected to the scheduled medical examinations arguing that the reports would have to be submitted by these medical providers after the hearing had concluded. Appellants had also requested that the record remain open or the matter be adjourned/postponed in order to submit these medical reports and allow Respondent to cross-examine Drs. Recio and Price. Appellants' request for a postponement and adjournment was denied,

although it took the Hearing Commissioner seven months from the date of the hearing to promulgate an Order. (R. p. 27).

The Form 50, Claimant's Request for Hearing, required Respondent to list all medical providers evaluating and treating Respondent because of the accident. Respondent only listed or identified the authorized treating physicians on line 11(b) of his Form 50 dated July 5, 2007. (R. pp. 51-52). At the point of the service of the Form 50, none of the authorized treating physicians had opined to a reasonable degree of medical certainty that Respondent had suffered a permanent physical brain injury. It was not until the receipt of Robert Moss' neuropsychological report that Appellants became aware of Robert Moss' diagnosis. Dr. Moss' report dated June 29, 2007 was not received until service of the Pretrial Brief dated November 2, 2007. (R. p. 54). The Form 50 on which Dr. Moss should have been disclosed on line 11(b) as having evaluating Respondent is dated July 5, 2007.

Under these circumstances, the Commission clearly abused its discretion in denying Respondent's Motion to have Respondent evaluated and/or treated by a neurologist and neuropsychologist. The Commission's error and abuse of discretion is even more evident when viewed from the perspective that in his deposition, Respondent had denied being evaluated or treated by Dr. Moss. (R. p. 120, lines 18-25; & p. 121, lines 1-10). Regulation 67-215 (2011). Respondent's failure to disclose Dr. Moss' report in the Form 50; or during his deposition; and disclosure of the report five months after it had been prepared, lend credence to Appellants' argument that the

Commissioner abused his discretion in denying Appellants' motion for an adjournment or postponement. Rule 407 SCACR and Rule 3.4 and Comment 2.

The Administrative Procedures Act affords all parties the opportunity to respond and present evidence on all issues involved. *S.C. Code Ann. §1-23-320(E - F)(2011)*. Administrative agencies must meet minimum standards of due process, and such due process requires at least an opportunity to present favorable witnesses and evidence. *S.C. Const. art. 1, § 3; Stono River Env. Protection Ass'n v. S.C. Dep't of Health & Env. Control*, 305 S.C. 90, 406 S.E.2d 340 (1990); *see, e.g., Brown v. S.C. State Bd. of Edu.*, 301 S.C. 326, 391 S.E.2d 866 (1990). Appellants requested this opportunity afforded to it by statute, but was arbitrarily denied the right to present evidence from a neuropsychologist and a neurologist which could have assisted the Commission in its Findings on the issue of causation.

The following inquiries cast a shadow on the reliability of Dr. Moss' findings: 1) whether the expanse of ten years between the injury impact the neuropsychological findings and diagnoses is reliable; 2) why three intervening strokes did not have an impact on Respondent's cognitive abilities and mental alertness; 3) the impact of sleep apnea on Respondent's emotional state, depression, erectile dysfunction and cognitive abilities; and 4) the importance of normal diagnostic medical tests in assessing a physical brain injury.

Appellants further contend that that the Commissioner's refusal to grant their motion to postpone/adjourn the hearing or leave the record open was an abuse of discretion. A commissioner has the authority to postpone a scheduled hearing on the

basis of "good cause." S.C. Code Ann. Regs. 67-613(B) (Supp. 2011). The major issue of the case at bar is whether Respondent's work accident caused a physical brain injury and erectile dysfunction. Appellants' request to leave the record open for the purpose of having Respondent evaluated by other physicians constituted "good cause" because such would have permitted Appellants the opportunity to present additional medical evidence in order to assist the Fact Finder in a medically complex case.

South Carolina precedent pertaining to the present issue supports Appellants' contention that the Commission abused its discretion in denying their motion. The Supreme Court, in Cord v. E.H. Hines Const. Co., found that it was an abuse of discretion when the Commissioner denied Defendant's motion to leave the record open so Claimant could be examined by a nearby specialist. 220 S.C. 356, 67 S.E.2d 677 (1951). The Court of Common Pleas had found that the Commission did not abuse its discretion and pointed to the fact that Defendants had not acted with due diligence. Id. at 361, 678. The Supreme Court reversed the decision, as it reasoned that Defendants did act diligently, particularly because the delay in making the appointment was attributed to the Commissioner's lack of promptness when deciding to take the motion under advisement until the second hearing. Id. Like the Defendants in Cord, Appellants in the present case acted diligently when upon receipt of Dr. Moss' neuropsychological report, they immediately scheduled appointments with Dr. Price and Dr. Recio.

Although Appellants' alleged delay in having Respondent evaluated cannot be attributed to the Commissioner's lack of promptness as in Cord, Appellants' delay can

be attributed to Respondent's counsel's submission of Dr. Moss' report fifteen days before the hearing and counsel's failure to disclose the existence in the report in the Form 50. Therefore, the Supreme Court's decision in Cord, which focused on the defendants' due diligence, should be followed in this case, and Appellants' motion should have been granted.

The South Carolina Supreme Court reversed Trotter v. Trane Coil Facility, where the Court of Appeals found that the Commission abused its discretion when it denied the employer's motion for a continuance. 383 S.C. 637, 714 S.E.2d 289 (2011). However, the facts of the case at issue can be distinguished and the basis for the reversal is inapplicable to this case. In reaching its decision to reverse the Court of Appeals' decision, the Supreme Court focused on two facts: (1) the employer had the opportunity to depose one of the physicians prior to the hearing, yet chose not to do so for strategic reasons, and (2) the Commissioner had twice granted motions to hold the record open for the other physician's deposition, yet no deposition was ever scheduled. Id. at 646, 294.

The first factor is clearly inapplicable, as Appellants had no strategic motives underlying their request for a postponement or adjournment of the matter. In fact, it was Respondent's strategic tactics that put Appellants in the position of having to make the request at the hearing since Respondent failed to list Dr. Moss on the Form 50. Appellants' prompt scheduling of the appointments with Dr. Price and Dr. Recio before the date of the hearing eliminates any contentions regarding strategic motives. Second, unlike the situation in Trotter where the Commissioner had twice granted the

employer's motions, the motion in this case was Appellants' first request, which was based upon good cause.

The Supreme Court in Trotter v. Trane Coil Facility, also reasoned that the employer did not demonstrate that any prejudice would occur as a result of the Commissioner's denial of the motions. Id. In the present case, Appellants argue that they were greatly prejudiced as a result of the Commissioner's denial because it prevented Appellants from having the Respondent medically evaluated in a complex case, which inevitably limited Appellants' opportunity to present evidence and properly defend the prevailing issue in this case. Appellants were afforded less than fifteen days notice of Dr. Moss' neuropsychological report, thereby further supporting the argument that the Commissioner erred in depriving Appellants an opportunity to present evidence. S.C. Code Ann. §1-23-320(E) (2011).

Although merely persuasive authority, it is worth noting that the South Carolina Workers' Compensation Commission has held that a refusal to leave the record open to receive physicians' reports and to grant Claimant's motion for continuance amounted to an abuse of discretion. Ewald v. Dep't of Trans., S.C. Wrk. Comp. LEXIS 374, WCC File No. 0304923 (2008). The Full Commission found that there was no prejudice to Defendants to allow Claimant's reports into the record. Id. In contrast, the Commission denied Claimant's motion to leave the record open for the receipt of a doctor's deposition in Willis v. ARD Trucking Co., S.C. Wrk. Comp. LEXIS 176, WCC File No. 0810274 (2011). Nonetheless, the facts of the case at bar are easily distinguishable. The Commission denied Claimant's motion in Willis because Claimant

was the moving party who had the opportunity to withdraw the request for a hearing in order to take the deposition. Id. Claimant was also offered an option to allow for the deposition to be entered into the record by withdrawing his request for the hearing, yet he refused the offer. Id. But for Claimant being the moving party, the Commission would have presumably granted the motion, particularly because the Commission pointed to the fact that Claimant's refusal to withdraw the hearing showed a lack of due diligence. It follows then, that because Appellants in the present case, did not request the hearing and were not in the position to withdraw the Form 50 hearing request, the Commission should have been granted Appellants' motion, because unlike Claimant in Willis, Appellants demonstrated due diligence

The aforementioned case law shows that the courts have decided the question pertaining to abuse of discretion by mainly focusing on the requesting party's due diligence and the prejudicial effect the denial or granting of the motion will have on the opposing parties. Because Appellants were diligent in scheduling the appointments upon discovery of Dr. Moss' evaluation and because Appellants were greatly prejudiced, the motion should have been granted.

**III. THE COMMISSION ERRED AND ABUSED ITS DISCRETION IN FAILING TO EXCLUDE THE REPORT OF DR. ROBERT MOSS, A PSYCHOLOGIST, AND BY RELYING UPON SUCH IN ADJUDICATING RESPONDENT'S ALLEGED PHYSICAL BRAIN INJURY CLAIM COMPENSABLE.**

Robert Moss performed a psychological evaluation upon Respondent ten (10) years after the compensable work related accident. Given the remoteness in time

between Claimant's accidental injury and Robert Moss' evaluation, such cannot be deemed reliable. Although the Commission has discretion to place weight upon lay and expert testimony as it deems such is warranted, a finding of compensability and reward of benefits cannot be based upon surmise, conjecture and speculation. *Dykes v. Daniel Construction Co.*, 262 S. C. 98, 202 S.E. 2d 646 (1974); *Rollins v. Wunda Weve Carpet Co.*, 255 S.C. 1, 177 S.E.2d 5 (1970); and *Bundrick v. Powell's Garage and Wrecker Service*, 248 S. C. 496, 151 S.E. 2d 437 (1966).

The report of Robert Moss should have been excluded or not given any weight in view of the opinions of the other medical providers, three MRI scans, CT scans and other tests showing no physical brain injury resulting from the 1997 chemical burn. More importantly, Dr. Moss expressed his opinion on causation after Respondent had suffered three strokes; and had been diagnosed with sleep apnea.

Robert Moss is a psychologist and not a medical doctor. (*R. p. 941*). Therefore, Dr. Moss is not qualified to render a medical opinion as to whether an individual has suffered physical brain damage. Dr. Moss does not possess a medical degree or a license to read x-rays, radiographs, CT scans or an MRI. (*R. p. 941*). At best, a neuropsychological examination can only determine the effects of a brain injury and cannot distinguish whether such results stem from occupational, non-occupational or congenital factors. *S.C. Reg. 100-4 (C)(1) (2011)*.

A psychologist's practice and supervision is limited "to the area(s) of competence in which proficiency has been gained through education, training and experience as demonstrated to the board..." *Id.* Simply, there is no evidence that Dr. Moss has the

education, training or experience to interpret or re-interpret diagnostic medical tests and conclusions reached by board certified neurologists.

**IV. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT RESPONDENT IS ENTITLED TO MEDICAL TREATMENT FOR PROSTATITIS AND ERECTILE DYSFUNCTION, THE ERROR BEING THAT SUCH MALADIES ARE NOT CAUSALLY RELATED TO THE COMPENSABLE WORK RELATED ACCIDENT.**

*Section 42-15-60* states that compensable injuries are subject to medical treatment that is deemed reasonable and necessary. S. C. Code Ann. § 42-15-60 (2008). Dr. William Hinnant opined that only the urethra problems requiring periodic dilation resulted from Respondent's work related accident. (*R. p. 961*). On the contrary, Respondent's erectile dysfunction and prostatitis are not related to the 1997 work accident. (*R. p. 427*).

Accordingly, the Commission's finding that the conditions of erectile dysfunction and prostatitis is compensable must be reversed because such is based upon surmise, conjecture and speculation and is not supported by substantial evidence. See *Dykes v. Daniel Construction Co., supra*.

**V. THE COMMISSION ERRED IN ORDERING APPELLANTS TO PAY RESPONDENT'S COUNSEL ATTORNEY'S FEES FROM THE AWARD.**

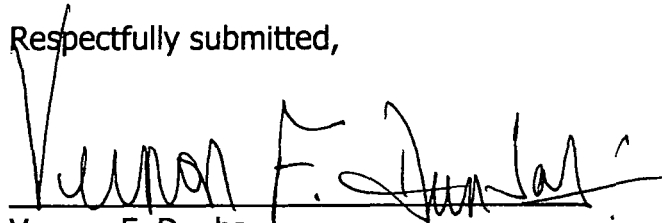
*Regulations 67-1204 - 1206* govern the payment of attorney's fees and reimbursement of costs. These regulations require that the injured worker agree to the

attorney's fees and costs as stated in a Form 61. In the instant action, the Order does not reference an approved Form 61. In the absence of approved legal fees on a Form 61, Appellants are not legally obligated to pay a portion of the award to satisfy legal fees and costs.

**CONCLUSION**

Based upon the foregoing arguments, it is respectfully submitted the Commission's Decision be reversed as a matter of law. In the alternative, Appellants request that case be remanded to permit a neuropsychologist and neurologist to evaluate Respondent.

Respectfully submitted,



Vernon F. Dunbar  
TURNER, PADGET, GRAHAM & LANEY, P.A.  
P.O. Box 1509  
Greenville, SC 29602  
Telephone: 864-552-4600  
Facsimile: 864-552-4620  
Attorneys for the Appellant/Defendants

Greenville, South Carolina

July 9, 2012

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. GARRISON HILL, Circuit Court Judge

---

Case No. 2009-CP-23-2535

---

Archie Eddie Jones..... Respondent

vs.

3M Corporation.....Employer/Appellant

- and -

Old Republic Insurance Company.....Carrier/Appellant

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**CERTIFICATE OF COMPLIANCE**

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The undersigned hereby certifies this **Brief of Appellants** contains all material proposed to be included by any of the parties and not any other material.

The undersigned also certifies that this **Brief of Appellants** complies with the South Carolina Supreme Court's Order dated August 13, 2007, concerning personal data identifiers and other sensitive information.

Turner/Padget Graham & Laney, P.A.

By: 

VERNON F. DUNBAR  
Post Office Box 1509 (29602)  
200 East Broad Street, Suite 250  
Greenville, SC 29601  
Telephone: 864-552-4600  
ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA  
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**CERTIFICATE OF SERVICE**

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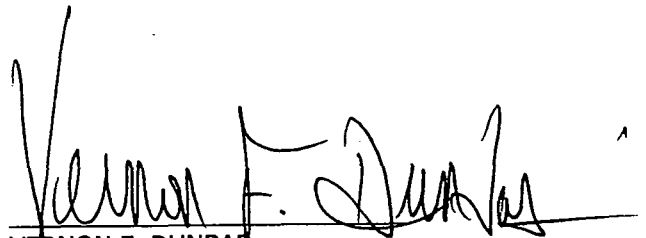
I certify that I have served the **Brief of Appellants and Certificate of Service** on Archie Eddie Jones, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on July 9, 2012, addressed to the attorney of record, Kathryn L. Williams, Esquire, Post Office Box 10693, Greenville, SC 29603:

Kathryn Williams, Esquire  
Attorney at Law  
Post Office Box 10693  
Greenville, SC 29603

- and -

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

July 9, 2012

  
VERNON F. DUNBAR