THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2007-CP-14-00150

Diane C. Dingle, Claimant, ... Appellant,

v.

Federal Mogul Corporation, Employer, and
Travelers Property Casualty Company of America, Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO MEET HER BURDEN OF PROVING THAT SHE SUSTAINED COMPENSABLE INJURIES BY ACCIDENT AND, FURTHER, THAT SHE SUSTAINED COMPENSABLE INJURIES AS A RESULT OF AN OCCUPATIONAL DISEASE.

2. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO PROVE THE NECESSARY SIX ELEMENTS SET FORTH IN THE CASE OF MOHASCO CORP., DIXIANA MILL DIV. V. RISING, 289 S.C. 130, 345 S.E.2d 249 (CT. APP. 1986), ORDER REVERSED BY MOHASCO CORP. V. DIXIANA MILL DIV. V. RISING, 292 S.C. 489, 357 S.E.2d 456 (1987).

3. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO MEDICAL OPINION AS EVIDENCE THAT THE APPELLANT HAD AN UNDERLYING CONDITION OR WAS PARTICULARLY SUSCEPTIBLE TO ANY CONDITIONS THAT EXISTED IN HER WORK.

4. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING OF A REPETITIVE TRAUMA.

5. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO EVIDENCE THAT THE APPELLANT SUSTAINED AN AGGRAVATION OF AN UNDERLYING CONDITION.

6. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT HAS PROVIDED NO MEDICAL EVIDENCE TO SHOW THAT EXPOSURE IN THE WORK EITHER CAUSED, AGGRAVATED OR EXACERBATED THE APPELLANT'S CONDITION.

7. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO ESTABLISH THAT THE DECISION AND ORDER OF THE WORKERS' COMPENSATION COMMISSION DATED DECEMBER 17, 2008, IS UNSUPPORTED BY THE SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE IN THE RECORD.

8. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO PROVE SHE SUSTAINED A COMPENSABLE CLAIM UNDER EITHER § 42-1-160 OR § 42-11-10, *ET SEQ.*

9. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO ESTABLISH THAT SHE IS ENTITLED TO BENEFITS UNDER §§ 42-15-60, 42-9-10, 42-9-20 OR 42-9-30 FOR MEDICAL CARE/TREATMENT, TEMPORARY TOTAL/PARTIAL DISABILITY BENEFITS AND/OR PERMANENT PARTIAL DISABILITY BENEFITS.

STATEMENT OF THE CASE

This Workers' Compensation action commenced on December 19, 2000, upon the filing of Diane C. Dingle's ("Appellant") Workers Compensation Commission Form 50 requesting a hearing on her claim seeking compensation for injuries under the South Carolina Workers' Compensation Act, S.C. Code Ann. § 42-3-10, et seq. (1976), as amended (hereinafter the "Act"). The first hearing on Appellant's claim was commenced on April 16, 2004, before the Honorable J. Michelle Childs, Single Commissioner. On March 24, 2005, Commissioner Childs

filed her Order awarding benefits to the Appellant. On April 7, 2005, Federal Mogul Corporation, Employer, and Travelers Property Casualty Company of America, Carrier, ("Respondents") filed Form 30, Request for Commission Review of the Single Commissioner's Order and Award. The Appellate Panel review was held on September 26, 2005. On October 18, 2005, the Appellate Panel issued its Order affirming the Order of the Single Commissioner, as amended by the Panel. On November 17, 2005, Respondents appealed the Appellate Panel's Decision and Order to the Court of Common Pleas. On September 25, 2006, Circuit Court Judge Thomas W. Cooper, Jr., filed his Order deciding the appeal. Judge Cooper remanded the case to the Commission to make specific findings of fact and conclusions of law. On October 23, 2006, Respondents filed a Motion for New Hearing and Memorandum requesting that the case be set for a hearing to take additional evidence and testimony. On November 22, 2006, the Full Commission issued its order remanding the case to the Appellate Panel. On January 23, 2007, the matter came before the Appellate Panel for review on remand. On February 26, 2007, the Appellate Panel issued its Order affirming the Order of the Single commissioner dated March 24, 2005, as amended by the Panel. By letter dated February 28, 2007, Respondents requested the Commission to reconsider the Order of February 26, 2007, and include for consideration the Respondents' Motion (Petition) for a New Hearing. By Order dated March 29, 2007, the Full Commission denied Respondents' Motion for a New Hearing. By notice dated March 28, 2007, Respondents gave Notice of Intent To Appeal to the Court of Common Pleas from the Orders of the Single Commissioner filed March 24, 2005, and of the Appellant Panel filed October 18, 2005. On June 13, 2007, Respondents' appeal to the Court of Common Pleas was heard by Circuit Court Judge George C. James, Jr. On June 18, 2007, Judge James' Order was filed, which Order incorporated the September 18, 2006, Order of Circuit Court Judge Thomas W. Cooper, Jr. Judge James remanded the case to the Commission to make specific findings of fact and conclusions of law, if any exists, to support its Decision and Order. Judge James also ordered that the Commission may take additional evidence and testimony as it sees fit in order to

arrive at a determination of such findings of fact and conclusions of law. On January 28, 2008, the matter came before the Full Commission on remand. On January 31, 2008, the Commission issued its Order 1) denying Respondents' Motion requesting a hearing to be heard in conjunction with the remand; and 2) remanding the case to the Appellate Panel to take such action and enter an Order consistent with the Court's directive. On March 11, 2008, the Appellate Panel issued its Order vacating in its entirety the Order of the Single Commissioner and Ordering that the case be set for a hearing before the Jurisdictional Commissioner for a hearing *de novo*. On May 22, 2008, the hearing *de novo* was held before Commissioner David W. Huffstetler and the record was closed May 22, 2008. On July 15, 2008, Commissioner Huffstetler filed his Order denying Appellant's claim for benefits. On July 25, 2008, Appellant filed Form 30, Request for Commission Review. The hearing was held before the Appellate Panel on November 19, 2008. On December 17, 2008, the Panel issued its Order affirming the Single Commissioner's Order of July 15, 2008, and denying Appellant Benefits. On January 15, 2009, Appellant filed Notice of Appeal, including grounds, in the South Carolina Court of Appeals appealing the Decision And Order of the Panel filed December 17, 2008. On March 4, 2009, the Court of Appeals issued its Order transferring the appeal to the circuit court pursuant to Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007), and Rule 204, SCACR. On November 22, 2010, the case came on for hearing before Circuit Court Judge R. Ferrell Cothran, Jr. On August 3, 2011, Judge Cothran filed his Order in which he affirmed the Decision and Order of the Commission dated December 17, 2008.

On August 15, 2011, Appellant filed a Motion to Alter or Amend Judgment on the grounds that the Findings of Fact and Conclusions of Law in Judge Cothran's Order filed August 3, 2011, either misconstrued or disregarded substantial evidence in the record with regard to several crucial factors supporting Appellant's entitlement to benefits under the Act. On December 12, 2011, Judge Cothran denied Appellant's Motion to Alter or Amend Judgment.

On February 8, 2012, Appellant filed Notice of Appeal and asserted timeliness for filing pursuant to Rule 203(b)(1).

STANDARD OF REVIEW

S. C. Code Ann. § 1-23-380 (Supp. 2011), the Administrative Procedures Act ("APA"), establishes the standard of review for decisions by the South Carolina Workers compensation Commission.

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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

S. C. Code Ann. § 1-23-380(5)(a)(b)(c)(d)(e)(f), (Supp. 2011).

"The substantial evidence rule of the APA governs the standard of review in a Workers Compensation decision. ... This Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." (Internal cites omitted) Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610 (Ct. App. 2004). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard" Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011). "An appellate court may reverse or modify a decision if the findings or conclusions of the commission are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Adkins v. Georgia-Pacific Corp., 350 S.C. 34, 37, 564 S.E.2d 339, 340 (Ct. App. 2002), Reh'g Denied June 20, 2001, (internal cites omitted).

ARGUMENT

1. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO MEET HER BURDEN OF PROVING THAT SHE SUSTAINED COMPENSABLE INJURIES BY ACCIDENT AND, FURTHER, THAT SHE SUSTAINED COMPENSABLE INJURIES AS A RESULT OF AN OCCUPATIONAL DISEASE.

Appellant would respectfully show that she has met her burden of proving that she sustained compensable injuries by accident under the Act, but that the flawed findings of fact, conclusions of law, and standard of proof applied have resulted in erroneous decisions and orders which denied her claim for compensation. The Court should reverse the Decisions and Orders denying her claim for compensation because substantial rights of the Appellant have been prejudiced because they are in violations of § 1-23-380(5)(a)(b)(c)(d)(e) and (f). From the date of the hearing before Circuit Court Judge Thomas W. Cooper, Jr. on June 14, 2006, and his Order filed September 25, 2006, this case has been infected with errors of fact and law, such that all the proceedings thereafter have been rendered unreliable. The following colloquy occurred between the court and Appellant's counsel at the June 14, 2006 hearing:

MR. MOORE: Now the Panel in its Order gives the standard that they have to go by. In that Order it was -- it was stated as such. In appellate review, the appellate panel should, pursuant to Section 421750(sic), review the award, weigh the evidence as presented at the initial hearing, and if grounds be shown therefor, make his own findings of fact and reach his own conclusion of law consistent with or inconsistent with those of the hearing commissioner.

The funny thing about this, they did not change any facts except for clerical issues where they required code sections to be inserted in her order. That's all they did. Other than that, they accepted her entire order unanimously. Unanimously.

And so the entire Panel, except for the insertion of code section, accepted what she did and her findings as to this case, a finding as to -- as to award and her findings as to the facts. The total panel did that.

And this Court, as an appellate court, pursuant to Section 123380(sic) may not substitute its judgment for that of the commission as to the weight of the evidence, question -- or questions of fact, but may reverse where the decision is effected by error of law.

In this case there is no error of law. We have a commissioner who in her order was ample and precise, we have the panel reviewing that order and adopting it -- adopting it as its finding of fact and conclusions of law, so we are comfortable and believe that the -- the appellate(sic) is simply asking you to go back and re-hash his case when I don't think the appellate standard and terms of review allows(sic) this court to do that.

THE COURT: Mr. Moore, what do you say to Mr. Roberts' claim that the order of either the single commissioner or the full commission did not comfort(sic) with the Mohasco case and the case that cited -- the Fox versus Newberry Hospital Case -- regarding the six elements that has to be proven for an occupational disease claim to sustain -- be sustained, the fact that the court admonished the Court of Appeals for not remanding the matter for a more complete finding in regard to some of those elements.

The Court of Appeals cautioned and urged the Commissioners to structure and draft orders of this kind in completeness of all elements involved to resolve any doubt.

However, we find that the Court of Appeals erred in not remanding the matter for further findings on the fact that the elements set out in Mohasco. What do you say to that argument?

MR. MOORE: I say two things. One is, as I said earlier, that issue wasn't raised before the first Panel. The second thing I say is this, that the Single Commissioner found it to be an injury based upon the evidence in the record. And to the extent that she found this to be an injury and was not -- that was confirmed by the Panel, then she speaks to that -- speaks to that in the Order and speaks to it sufficiently.

THE COURT: You say she found an injury as opposed to a disease?

MR. MOORE: That's how -- that's how the order is written.

THE COURT: Right. Okay. Thank you, Mr. Moore. ...

(R. p. 552, line 8 - p. 554, line 25, Tr. 6/14/06, p. 32, line 8 - p. 34, line 25)

Judge Cooper spoke candidly about the time constraints under which he was operating at the time of the hearing and the fact that he was immediately issuing an oral order.

THE COURT: ... I have been announcing to others in Sumter yesterday where I conducted non-jury court that I don't have the luxury of time to take this matter under advisement and to cogitate on this file which is in front of me, about 5 inches thick it appears, in addition to the very well written briefs, about 25 pages each that have been presented to me today.

I'm retiring at the end of September. I will lose jurisdiction to deal with all of these matters after that date. . . . and I simply don't have the luxury quite frankly of reviewing these matters in the detail that -- that you have asked me to take them into today, and so I'm going to rely on what you told me, I will rely on your arguments and your briefs, and order accordingly on that basis.

. . .

ERROR: THE COURT: **The issue of the statute of limitations, which is the threshold issue in this regard, and my ruling there is somewhat determinative as a springboard to my ruling otherwise in this case.**

The Single Commissioner's Order of March the 24th, 2005, according to the brief of the Plaintiff, indicates that the date of the accident is June the seventh, 1998. And that was agreed upon by stipulation as I understand it.

She states further as a finding that the claimant filed her Form 50 on February the 12th, 2002. Claimant timely met the statute of stations(sic).

There's no way that those two things could in my view go together in the case of an occupational injury because it far exceeds the statute of limitations.

ERROR: The Claimant claims in her brief that the statute of limitations has been met because this is a case of repetitive trauma, but that was not found and apparently was not --it was not proven.

However, in the case of an occupational disease, the statute of limitations might also be relaxed to allow the state -- the commissioner to make that finding.

ERROR: And so I find that in order for the statute of limitations to have been met in this case in my view, there would have to have been a finding of an occupational disease.

And in that regard, the requirements set out by our Court of Appeals and our Supreme Court, the Court of Appeals in Mohasco, M-O-H-A-S-C-O, Corp versus Rising cited in the case of Fox, F-O-X, versus Newberry County Memorial Hospital, that's found at 319 South Carolina 278, which is a Supreme Court case, indicates that in cases of occupational diseases, specific findings are required to be met and specified in some detail.

I need not set out what those things are. The case law is uncontroverted in that regard. Suffice it to say that the Order of the Single Commission or the Full Commission does not meet the test of addressing those six requirements.

ERROR: And for that reason this must be remanded to the Commissioner or Commissioners, as the case might be, to comply with the findings of Mohasco in regard to the occupational disease claim.

In that regard as to the second ground of the appeal in which the respondent -- excuse me -- the appellant claims the Commissioner erred in determining that she timely notified her employer because the record is devoid of substantial evidence to support that, I have ruled in effect that in the case of an occupational disease that standard was met. That claim was denied.

The remaining claims under Paragraph Three of the appeal will all be addressed on remand. They are all, each in my view, one of the six issues which have to be addressed on remand by the compliance with the order and the -- excuse me -- court's opinion in Mohasco and in Fox.

ERROR: For that reason the case is remanded for further findings and more complete findings in that regard to comply with the requirements of case law. <u>And this matter will have to come back up so that somebody will have a better record upon which to determine the issues that have been raised.</u> (Emphasis supplied)

As I heard counsel for both sides set out your specific positions here today, I was frankly add(sic) odds to understand whether the Commissioner or the Commission heard the same case that I was hearing today." (Emphasis supplied) (R. p. 563, line 8 - p. 567, line 4, Tr. 6/14/2006, p. 43, line 7 - p. 47, line 4)

Referring to the Commission Order filed October 18, 2005, Judge Cooper noted the following in his written order; which statement Appellant alleges to be errors of fact controlling his disposition of the controversy:

> During oral argument before this Court, the parties recognized and agreed that the (a) date of injury was June 7, 1998; (2) the Claimant's Form 50 was not filed until February 12, 2002; and (3) the Single Commissioner's Order implicitly found a compensable injury as a result of occupational disease. (R. p. 75, pa. 2, Cooper Order 9/25/06, p. 2)

Judge Cooper remanded the entire matter to the Workers' Compensation Commission to make specific findings of fact and conclusions of law, if any exist, to support its Decision, and ordered that the Commission may take additional evidence and testimony in order to arrive at a clear and cogent determination of the issues raised by the respective parties.

ERROR: (2) The Claimant's Form 50 was not filed until February 12, 2002

The Findings of Fact in the Order of Single Commissioner filed March 24, 2005, states "[t]he file and the Commissioner's notes are made a part of the record." (R. p. 96, pa. 1, Childs' Order filed 3/24/2005, Findings of Fact, p. 4.) The Commission file, which was before the Court, contained Form 50's filed by the Appellant on December 18, 2000, February 13, 2002, and January 14, 2003.

ERROR: (3) the Single Commissioner's Order implicitly found a compensable injury as a result of occupational disease.

Appellant is unable to discern anywhere in the Findings of Fact in the Single Commissioner's Order any implicit or explicit reference to a compensable injury as a result of occupational disease. (R. p. 95 - p. 98, Childs' Order filed 3/24/2005, Findings of Fact, pp. 3-6) It appears that this issue, which gave rise to the statute of limitations issue, was injected into the case by Judge Cooper at the hearing before him on June 14, 2006.

Appellant contends that the Single Commissioner's Order is in compliance with § 42-17-40(A) and they are "sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence." In affirming the case of Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995), our Supreme Court concluded that "[t]he circuit court found that the Commissioner's order included "concise, explicit statements of fact, preceded by a summary of what he considered to be the important events and testimony supporting such Findings of fact."" Parsons, 318 S.C. at 66, 456 S.E.2d at 368.

Additionally, the Single Commissioner's Order contains findings of fact sufficient to present issues of fact for determination by the Circuit Court, and it was an abuse of discretion to remand when the aforementioned errors constituted the basis for the remand.

> In the performance of its duties as the fact-finding body, the Industrial Commission is required by Section 72-354 of the 1962 Code of Laws to file its award which must contain "a statement of the findings of fact, rulings of law, and other matters pertinent to the question at issue: We have held that "this duty on the part of the Commission requires that, not only must findings of fact be made upon the essential factual issues, but that they be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. (Internal cite omitted) Hill v. Jones, 255 S.C. 219, 222, 178 S.E.2d 142, 144 (1970), Appeal after Remand, Hill v. Jones, 260 S.C. 183, 194 S.E.2d 888 (1973)

After the review conducted pursuant to remand, the Appellate Panel filed its order dated October 18, 2005, in which it affirmed the Order of the Single Commissioner filed on March 24, 2005, stating: "After careful review in the instant case, the Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated with the only amendment being to add the following Code Sections as Conclusions of Law:

1. Section 42-9-10, which governs compensation for periods of total disability.
2. Section 42-9-30, which provides compensation for disability to specific body members.
3. Section 42-15-60, which governs medical treatment.
4. Section 42-15-20, which governs notice of accident.
5. Section 42-15-40, which governs time for filing a claim."

(R. p. 84, pa. 5 - p. 85, item 5, Panel Order, 10/18/05, pp. 4-5)

Respondents appealed and the appeal was heard by Circuit Court Judge George C. James, who issued his order filed June 18, 2007, in which he again remanded the case to the "Commission for specific findings of fact and conclusion of law, if any exist, to support its Decision and Order." Judge James referenced Judge Cooper's finding that the decisions below were not clear as to whether the award of benefits was based on a determination of injury by accident or an occupational disease, and specifically that the decisions below did not include specific and definite findings with regard to the six (6) elements of an occupational disease as outlined in pertinent case law. Judge James referred to the Decisions and Orders of the Appellate Panel dated February 26, 2007, and March 29, 2007, and stated: "Neither of these two orders addresses the issues remanded by Judge Cooper. For example, in the Decision and Order dated February 26, 2007, in finding of fact number 7, the Commission again concludes that "Claimant met the Statute of Limitations." " (R. pp. 57- 58, James Order, 6/18/07, pp. 1-2).

With regard to the prejudicial effect of the errors in the case, the Full Commission's Order filed January 31, 2008, remanded the case to the Appellate Panel with instructions to "take such action and enter an Order consistent with the Court's directive." (R., p. 55, Commission Order, 1/31/08, p. 2) In order to "comply with the Court's directive", the Appellate Panel, in its Order filed March 11, 2008, vacated the case in its entirety and ordered that the case be set for a hearing before the Jurisdictional Commissioner for a hearing de novo. (R. p. 52, Panel Order, 3/11/08, p. 5)

On July 15, 2008, the Commissioner filed his Order from the de novo hearing. In the Statement of The Case, the Order acknowledged that "[t]his was a de novo hearing but the record does not disappear." (R. p. 39, pa. 6) Nevertheless, the Commissioner found that the Appellant failed to meet the burden of proving that she sustained compensable injuries causally related to her employment with Federal Mogul, failed to prove the necessary six elements set forth in Mohasco, supra, and denied her claim for benefits under the Act. The Appellant appealed from the Order. On December 17, 2008, the Appellate Panel filed its Order affirming

the Order of the Jurisdictional Commissioner. Clearly, the subsequent Orders of the Commission construed the "directive" of the circuit court as ordering it to make findings based upon the errors emanating from the June 14, 2006, hearing - all of which was done to the detriment and prejudice of the Appellant and in disregard of the substantial, probative and reliable evidence in the record.

Appellant appealed to the Circuit Court and on August 3, 2011, Judge R. Ferrell Cothran, Jr., filed his Order which continued the erroneous line of issues infecting the case since 2006. However, in finding that Appellant failed to meet the six elements to establish an occupational disease under Mohasco, supra, Judge Cothran, found "[t]here is no medical opinion as evidence that Claimant had an underlying condition or was particularly susceptible to any conditions that existed in her work." (R. p. 25, item 3) Thereby, further erroneously infecting the proceedings with the mandate that Appellant introduce medical opinion as evidence under § 42-1-172, which became effective July 1, 2007, and is not applicable to Appellant's 1998 injury.

Notwithstanding the dubious state of the case record, Appellant respectfully asserts that there is reliable, probative and substantial evidence in the record proving that she sustained compensable injuries by accident and compensable injuries as a result of an occupational disease, both categories of injuries arising out of and in the course of her employment with Federal Mogul Corporation ("Employer") and for which she is entitled to compensation for injuries sustained in either category.

The Transcript of Record from the SC Workers' Commission Hearing on May 22, 2008, reflects the following testimony by the Appellant concerning her medical condition when she started work at the Employer's facility.

Q. When did you first begin your employment with Federal Mogul?
A. In November of '96.
Q. Prior to that time had you ever been diagnosed with -- with -- asthma?
A. No.
Q. Did you have any documented sinus problems prior to that time?
A. Just little sinuses.
Q. Okay. Anything that required a prescription medication?

A. No, sir.

Q. Did you have any other kind of respiratory problems prior to your taking employment at Federal Mogul --

A. No.

(R. p. 575, lines 9-23, Tr. 5/22/08 p. 7, lines 9-23)

The following note to Appellant's Employer is written on the RX notepad of her physician, Edward C. Keith, MD., dated 7/21/00, concerning Diane Dingle: "To Whom It May Concern Ms Dingle is suffering from recurrent pharyngitis, laryngitis, & tonsillitis assoc. with exposure to fumes at work. She cannot be exposed to irritating fumes under any circumstances." (R. p. 154, Exh. A, Appell. APA Submis., p. 30)

Beginning in 1998, Dr. Rocco Cassone also treated the Appellant and his notes from 1998 to 2000 in the records before the court including the following:

Diane Dingle
09/14/98
HISTORY: She is seen for evaluation of difficulty with her nose and sinuses.

REVIEW OF SYSTEMS: Cardiac and respiratory status are stable. She has had a CT scan of her sinuses which we will review. She has been noted to have headache for a long period of time. She works around a press making oil seals. She is a nonsmoker and says that she is not around cigarette smoke that often. Pollen and dust do seem to aggravate it. Her headache is severe at times in the glabella area.

Diane Dingle
09/21/98
HISTORY:She is seen for evaluation of difficulty with allergies and stopped up nose.
Her CT scan was reviewed and her report is not in the chart. She has significant blockage in her OMC and I believe paradoxical turbinates. These may need to be resected. She has significant problems at work and wonders if the problem is related to her press.

Diane Dingle
02/24/00
HISTORY:
Diane is seen for evaluation of hoarseness, sore throat, clogged up throat and lump sensation in her throat. She has been having more difficulty with this. Her sinuses are doing a little bit better at the present time. She is not having the drainage she was having before. The voice is still hoarse and this concerns her greatly.

Diane Dingle
04/25/00
HISTORY: Diane is seen for evaluation of difficulty with hoarseness and sinus congestion. She had been doing fairly well, but again became hoarse over the past few days.
IMPRESSION: Laryngitis, sinusitis.

(R. pp. 212 - 212, Exh. A, Appell. APA Submis., pp. 87-89)

"Laryngitis, sinusitis," is Dr. Cassone's two-word diagnostic impression on April 25, 2000. The larynx is the organ of voice that is part of the air passage connecting the pharynx, with the trachea. "Laryngitis is an inflammation of the mucous membrane lining the larynx, accompanied by edema of the vocal cords with hoarseness or loss of voice occurring as an acute disorder caused by a cold, by irritating fumes ... or exposure to irritating fumes." Mosby's Medical Dictionary, 5th ed (1998).

After seeing the Appellant for a medical evaluation, Dr. James A. Atkison of Sumter Asthma & Allergy Center submitted a report dated June 13, 2000, to Dr. Keith and stated, in pertinent part:

She mainly states that she has complaints with her chest consisting of wheezing which might be on inspiration, chest tightness, shortness of breath, her chest will hurt or she cannot breathe, and her voice closes down or she gets hoarse, mainly at work. She is fine at home, but soon after arriving at work, she begins having problems. She noted that her throat hurts or gets sore, her tongue gets numb, and this progresses to the respiratory problems including the voice changes. **This apparently has been going on for about two years. She has seen an ENT doctor for this, and apparently has been treated some for sinus infection, but that has not helped this problem. She has been put on medical leave because of this.** She is not sure what other medicines she has been given. She apparently has had pulmonary functions testing done, that might have shown changes consistent with asthma, she is not real clear on this, but she has not been given any medicines at home. She has had numerous emergency visits for this problem.

She complains of sinus headaches, congestion, a yellowish post-nasal drip, itchy nose and eyes, and a yellowish nasal discharge, that seems to happen in the spring and the fall, but she seems to be clear in the winter. This started six or seven years ago. Nasonex apparently helped it. She has had no prior allergy testing done.

Current medicines are some headache pill that she took a few days ago that makes her sleepy, and some type of allergy pill she took yesterday. Of note is that she just got off working the night shift.

She has no known drug or food allergies and has not been a smoker.

She gets an itchy small bumpy rash, after working in some parts of the plant, that occurs even on unexposed skin. She has had problems with loss of weight and appetite, her stomach and ear problems. She apparently has had an MRI and head CAT scans done a few years ago before she was referred to Dr. Cassone.

There is a family history of allergy problems but not of asthma. There is also a family history of hypertension.

The home environment would be unremarkable for this problem.

He work environment shows that she works with oil seals that have been coated with some type of chemicalines She promises to bring me the MSDS for these things.

On exam, Ms. Dingle was alert and in no distress. No cough was noted, but she had a very hoarse or cracking whispery voice. Her nose showed a mild to moderate soft pink congestion with scant clear discharge. She did not have allergic shiners or a nasal crease. Her lungs were clear, and there was no wheeze over her trachea.
Pulmonary functions were within normal limits, and did not change after she used an inhaler. The inspiratory loop, however, showed a slight "cut off" pattern, which might be consistent with upper-airway obstruction. She was instructed in the proper use of an asthma inhaler, following this, however, her voice did not change.

Ms. Dingle has a problem with wheezing, shortness of breath and hoarseness, which might like sound like asthma or occupational asthma, although I could prove none of that today. She may be having some laryngospasm or laryngeal edema, perhaps secondary to some airborne chemicals or irritants at work. We cannot do any specific testing for these chemicals, as they are not recognized as allergens, and we are unable to test for them. I would like to, however, perform a rhinoscope exam on her to evaluate her for sinus disease and especially her vocal cords after she gets off of work, and we have arranged to do that. She will try using a Proventil inhaler as needed to see if this helps with any of this, but I doubt that it willines

I discussed with her the use of Proventil, and the nature of occupational asthma and how difficult it can be to diagnose. The best treatment for this in the long run may be avoidance, which might mean a change in her job. ...(Emphasis supplied)

(R. pp. 220 - 221, Exh. A, Appell. APA Submis., p. 93-94)

In addition to the medical evidence before the Commission and before the Circuit Court judge, the Appellant testified at the hearing on May 22, 2008, concerning discharges emitted by the machine she operated:

Q. Okay. Now, when that door opens and swings upward what comes from this press?
A. Smoke comes out of it.
Q. Okay, Is it steam or smoke or --
A. -- smoke.
Q. -- okay. Describe for the Commissioner what kind of smoke this is?
A. I guess it's from the -- rubber or whatever because that's what it smells like. The rubber and the solution that they put on the oil seals, that they dip the oil seals in. That's what it smells like when -- when the heat has mended the -- the -- the -- rubber to the --

MR. ROBERTS: Commissioner, I'm going to object to this. I don't thing there's enough foundation about what this stuff smells like.

A. -- well, it smells like that.

COMMISSIONER HUFFSTETLER: I expect she knows what she thinks it smells like.

MR. ROBERTS: I understand.

COMMISSIONER HUFFSTETLER: I mean I'm going to let her testify to that. You're not testifying as an expert. Go ahead, ma'am.

A. That's what it smells like.

COMMISSIONER HUFFSTETLER: Okay.

Q. What does -- what does it smell like?

A. It -- it smells like the -- the solution that they put on the metal and the -- and the rubber when it comes up. All the smoke smells just like -- it's real strong. It'll be like all in your clothes and in your underwear and everywhere. When I was working there that's how it was.

(R. p. 577, line 16 - p. 578, line 22, Tr. 5/22/08, p. 9, line 16 - p. 10, line 22)

Appellant also testified at the May 22, 2008, hearing about the onset of her health problems.

Q. Okay. Now, when did you start having problems from this process?

A. I started having problems July of '98, June, July of '98. I started having real bad headaches and my stomach hurt and like -- it was like bad sinuses or whatever. Whatever it was affected my sinuses, I don't know --

Q. Okay. Now, who --
A. -- during that time I didn't know.
Q. -- and what doctor did you see?
A. Dr. Keith.

(R. p. 580, lines 15 - 25, Tr. 5/22/08, p. 12, lines 15 - 25)

Q. Okay. And did Dr. Keith, during 1998, take you out of work for any period of time?
A. Yes.
Q. Okay. Do you recall how many times you were taken out of work?
A. Several times, I can't recall how many times.
Q. Okay. Would that have been during the year of 1998?
A. Yes.
Q. Now did you continue to see Dr. Keith through 1999?
A. I was -- Dr. Keith had sent me to Dr. Cassone --
Q. Okay.

A. -- because I was having these bad headaches. He gave me --he sent me for an MRI, a CAT scan because I was having these bad headaches and stuff. So, he sent me to Dr. Cassone, the ENT, because my ears and throat and everything was hurting so bad.

(R. p. 581, lines 6 - 21, Tr.5/22/08, p. 13, lines 6 - 21)

Q. When -- when did it come to your knowledge that -- that this was a job related problem as far as you were concerned?

A. It was January -- well, December of'99 and January of 2000.

Q. Okay. And was that from your conversation with a doctor?

A. No I knew that for myself.

Q. Okay. When-- did the doctor tell you that?

A. The doctor told me that after, you know, going in --

(R. p. 582, lines 6 - 18, Tr. 5/22/08, p. 14, lines 6 - 18)

Q. Okay. Now you -- describe how your condition changed, if it did at all, from 2000 until the time you actually left the plant?

A. It had got worser because I was -- when they was --while they was moving me around I started doing the inspections in molding. And then -- and they had moved me to the Wabash area. It's like different little areas in Federal Mogul and they moved me to the Wabash area where -- on the end where the -- where they hook up a trimmer. And these trimmers -- and these oil seals -- the girls do the top, they runs the press then, and they send the oil seals down the trimmer -- well, they put them in the little slot there where the little trimmer -- where the thing comes through. And they-- the little trimmer trims the -- the rubber off of the top of your oil seals and all -- and as it's doing this it's like knocking the dust off of the oil seals unto my table. It's like it's coming from up here, coming down to my table. This is my table with a bunch of oil seals on them, like, a couple of hundreds you know, whatever on the side right there. And that's like coming down and all the dust and stuff like that is falling on my table and I'm like inhaling it from that.

Q. Okay. Now --

COMMISSIONER HUFFSTETLER: Which job -- I'm just trying to understand your claim --

A. Inspection. I was in molding -- I was in molding working inspection.

COMMISSIONER HUFFSTETLER: --if you'll let me finish my question. Which job do you contend caused your problem?

A. It's the oil seals. It's not a specific job. It's the oil seals themselves.

Q. -- okay. Now, and the Commissioner needs to understand what you're referring to when you say oil seals. Describe the job that you did that -- which would require you to come in contact with the oil seals, themselves.

A. The mold press.

Q. Okay. So -- so, these oil seals are put into this mold press and then --

A. Yes.

Q. -- and then taken out?

A. Right.

Q. Now, would you tell the Commissioner how many times this press would open and close during a ten (10) minute period of time?
A. It depends on how fast I am or how fast a person is that's running the press. But it can -- it can open and close -- in ten (10) minutes you say?
Q. Yes.
A. I guess about five (5) times in ten (10) minutes. It all depends on how fast you load the board, get it in there; about five (5) times.
Q. Okay.

COMMISSIONER HUFFSTETLER: But you're -- if I understand your claim, you're saying you believe your exposure while running the mold press has caused your problem?

A. I --

COMMISSIONER HUFFSTETLER: That's a question. I'm not trying to tell you what it is. That's a question.

A. -- I -- I feel like this, I -- I -- it's the stuff that's on those oil seals. All that stuff that was on the oil -- oil seals. Those are the things that I know that did it and that's without a doubt.

COMMISSIONER HUFFSTETLER: And you worked with oil seals at the mold press?

A. Yes.

COMMISSIONER HUFFSTETLER: Okay.

Q. Now, you testified earlier about when this -- this -- this press opened and when it closed. Was it -- again, was there -- was there smoke or steam or heat that came from this press?
A. It -- it was smoke.
Q. Okay. Was it -- was it hot smoke or cold smoke or just normal temperature smoke?
A. Hot smoke.
Q. Okay. Any idea how -- how hot this -- this press was in terms of what came from it?
A. Four hundred (400 and something degrees.
Q. And how long did you work in this area?
A. For -- ever since '98 -- '99, I'm sorry.
Q. And up until the time you left?
A. Uh-huh.

COMMISSIONER HUFFSTETLER: Is that a yes.

A. Yes.

(R. p. 585, line 4 - p. 588, line 17, Tr. 5/22/08, p. 17, line 4 -p. 20, line 17).

Q. Describe the symptoms that you got -- well, how did feel on a daily basis starting from, if you can, from January of 2000 up until the time you left in August?
A. You mean what kind of symptoms was I having?
Q. Yes. After every day you left work if you had symptoms what would those symptoms be like?

A. I had itching around the mouth, headaches, my throat was burning, my lungs felt like they was burning, stomachache, my eyes was burning, my throat feel like a knife cutting it.

Q. Did you have problems breathing?

A. Yes.

Q. You did? You have answer that if you can.

A. Can I be excused, please.

COMMISSIONER HUFFSTETLER: Let's go off the record.

(Off the Record)

COMMISSIONER HUFFSTETLER: We're back on the record. Go ahead, sir.

Q. We were talking about what you -- what your symptoms were on a daily basis and you were telling me about the throat, issues with your mouth and your lungs. Was there anything else that -- that -- any symptoms you experienced on a daily basis from 2000, January, until the time you left, anything else?

A. Yes, severe pains in my throat. My nose feel like it's swollen up. I felt like I'm -- I'm going to throw up because I feel faint and nausea.

(R., p. 589, line 19 - p. 590, line 21, Tr. 5/22/08, p. 21, line 19 - p. 22, line 21)

The Appellant's testimony was explicit as to her work environment and the injurious effect such exposure had upon her body.

> Circumstantial evidence and lay testimony can be sufficient to support a finding of causal connection is(sic) a Workmen's Compensation case. Such evidence need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached by the Commission. It is sufficient if the facts and circumstances proved give rise to a reasonable inference that there was a causal connection between the disability and the injury. Whether the absence of medical testimony is conclusive on the question of causation depends upon the particular facts and circumstances of the case." (Internal cite omitted) Arnold v. Benjamin Booth Co., 257 S.C. 337, 341, 185 S.E.2d 830, 832 (1971).

The foregoing unambiguously details the causal connection between Appellant's work and her injury, which arose out of and in the course of her employment with Federal Mogul.

Appellant would respectfully show that her injury by accident is compensable under the Act.

> In determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself.. . . "Further, an injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing." . . . "Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident. . " . . ."Under South Carolina law, if the injury itself is unexpected, it is compensable as

an injury by accident." Pee v. AVM, INC., 352 S.C. 167, 172, 573 S.E.2d 785, 788 (2002)

Furthermore, there is substantial evidence in the record that Appellant sustained compensable injuries as the result of an occupational disease.

(A) "Occupational disease" means a disease arising out and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease is considered an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of continuous exposure to the normal working conditions of that particular trade, process, occupation, or employment. In a claim for an occupational disease, the employee shall establish that the occupational disease arose directly and naturally from exposure in this State to the hazards peculiar to the particular employment by a preponderance of the evidence.

S.C. Code Ann. § 42-11-10 (Supp. 2011)

> When employer and employee are subject to the provisions of this Title, the disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident and the employee, or in case of death his dependents, shall be entitled to compensation as for an injury under this Title ...

S.C. Code Ann. § 42-11-40 (1976)

In deciding Pee, supra, the South Carolina Supreme Court construed the statutory definition of an occupational disease and determined that "[t]he statute is satisfied where the Appellant is able to show simply that the employment increased the risk of the disease." Pee, 352 S.C. at 174, 573 S.E.2d at 789.

Appellant's substantial evidence in this record has proven by a preponderance of the evidence her entitlement to compensation under the Act not only for either accidental injury or injury sustained as a result of an occupational disease, but also injury by aggravation of a pre-existing sinus condition.

2. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT FAILED TO PROVE THE NECESSARY SIX ELEMENTS SET FORTH IN THE CASE OF MOHASCO CORP., DIXIANA MILL DIV. V. RISING, 289 S.C. 130, 345 S.E.2d 249 (CT. APP. 1986), ORDER REVERSED BY MOHASCO CORP. V. DIXIANA MILL DIV. V. RISING, 292 S.C. 489, 357 S.E.2d 456 (1987)

Appellant does not concede her claim that her disability resulted from injury by accident, injury by aggravation of a pre-existing condition and/or injury by repetitive trauma. Appellant filed WCC Form #50, Employee's Notice of Claim and/or Request for Hearing on three occasions; namely, December 19, 2000, February 12, 2002, and January 14, 2003. Beyond providing the information requested on the form, neither of her Form 50's specifically alleges injury sustained as a result of an occupational disease. (R. pp. 1 - 6)

Appellant's claim that these three categories of injury are not mutually exclusive is supported by the reasoning of the Supreme Court in Pee, supra, where the Appellant's injury was diagnosed as carpal tunnel syndrome. In the Pee case, the Court stated "[w]hether a repetitive trauma injury is compensable either as an injury by accident or an occupational disease has not been squarely addressed by this Court. As other courts have recognized, the difficulty in deciding this issue arises from the fact that repetitive trauma injury has some of the characteristics of both accidental injury and occupational disease - it is the cumulative effect of repeated and distinct events that ultimately produces the disability." Pee, 352 S.C. at 173, 573 S.E.2d at 788.

Accordingly, Appellant asserts that there is substantial, reliable and probative evidence in the record that her disability qualifies under Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986), Order reversed by Mohasco Corp, Dixiana Mill Div., 292 S.C. 489, 357 S.E.2d 456 (1987), as injury sustained as the result of an occupational disease.

Mohasco requires that the following six elements be proven in order to receive benefits under the Act for having contracted an occupational disease:

First: ***A disease.*** The Commissioner found that Appellant met the first element that she has a disease. (R. p. 43, item a, Commissioner's Order, 7/15/08, Finding of Fact 5a.)

Second: ***The disease must arise out of and in the course of the Appellant's employment.*** Dr. Keith wrote Appellant out of work from May 7, 1998, until May 20, 1998, for vertigo, sinusitis, and headaches. His notes that she "cannot be exposed to noxious fumes.." (R., pp. 133, 138-141, 148, 151-154, 170, 184, 210, Exhibit A, Appell. APA Submis. pp. 9, 14, 15, 16, 17, 24, 27, 28, 29, 30, 46, 60, 86.) Appellant described symptoms of allergies, stopped up nose, and sinuses to Dr. Cassone relating them all to her work at Federal Mogul. (R. pp. 212-

214, Exhibit A, Appell. APA Submis. pp. 87-89, Dr. Rocco D. Cassone's notes dated September 14, 1998, September 21, 1998, February 11, 2000, February 24, 2000, March 13, 2000, April 25, 2000, and May 1, 2000)

In his report dated September 1, 2000, Dr. James A. Atkison, stated: "I do not think it's likely that allergen immunotherapy will help her throat problem. The best treatment for this is the long run may be switching jobs, i.e., avoiding exposure. I cannot directly desensitize her for exposure to the smoke fumes and chemicals that she states that she has at work." (R. p. 233, pa. 2, Exhibit A, Appell. APA Submis. p. 106)

Although Dr. William M. Simpson, Jr., expressed in his letter dated May 14, 2004, that he could find no references that suggested a synergistic effect from any combination of these agents [listed in the Material Safety Data Sheets (hereinafter "MSDS")] that would produce persistent mucous membrane irritation, in that same letter, Dr. Simpson gave the opinion that one or a number of the chemicals in questions caused mucous membrane irritation which produced <u>what should have been</u> temporary voice alterations, but, which have persisted in the absence of speech therapy. (Emphasis added.)

Dr. Simpson, a physician and faculty member at the Medical University of South Carolina in Charleston, is an expert in his field of medicine. He has practiced medicine for twenty-nine years, the last fifteen of which have been part time in the area of Agromedicine and Occupational and Environmental Medicine. (R. p. 410 line 19 - p. 411, line 16, Deposition of Dr. William Simpson, 9/13/04, p. 4, lines 19 – p. 5, lines 16.) Dr. Simpson first saw Appellant in July of 2002. Appellant had been referred to Dr. Simpson with a complaint described as a four-year history of hoarseness that she related to her employment at the Federal Mogul Plant in Summerton (hereinafter "Plant"). The referring physician was Dr. Lucinda Halstead, an otolaryngologist who had been treating Appellant for the condition. The remainder of Appellant's medical history related to Dr. Simpson was intermittent difficulty getting a deep breath, all of which she related to her exposures at the Plant. (R. p. 412, line 23 - p. 13, line 22, Simpson Depo. 9/13/04, p. 6, lines 23 – p. 7, lines 22.)

Appellant's prior work history given to Dr. Simpson reflected that she had worked in a sewing factory before coming to the Plant, where she worked in another area prior to moving to the inspector position and gasket inspection position and that she had no exposures of significance during that previous job at the Plant. Appellant used no alcohol or tobacco.

At the time Dr. Simpson first saw Appellant in July of 2002, she had been seen by "a number of doctors and had some speech therapy at the time without benefit." . . . "[H]er voice was hoarse, and she appeared to force her voice when she was speaking." (R. p. 414, lines 16 - 19. Depo. 9/13/04, p. 8, lines 16-19) On her second visit with Dr. Simpson in September of 2002, Appellant brought an MSDS for a liquid adhesive that did not fit the description of a pungent-tasting power that she reported had gotten onto her clothes and in her throat. When he saw her again in November of 2002, Appellant's condition had not changed. Her last visit was in March of 2004 at which time, Dr. Simpson noted there was " mild nasal mucosal edema and some erythema, and she really was no different than she had been two years previously." He suggested follow-up with Dr. Halstead and speech therapy. (R. p. 416, line 1 - p. 417, line 7, Simpson Depo. 9/13/04, p. 10, lines 1- p. 11, lines 7.)

In response to examination by Appellant's counsel concerning Dr. Simpson's statement that he found no reference that suggested a synergistic effect from any combination of these agents that would produce persistent mucous membrane irritation, Dr. Simpson explained that

the MSDS he had received from Appellant's counsel April 22, 2004, contained a list of chemicals and the references he refer to are other literature that look at these particular chemicals and any synergistic effect they might have. He pointed out that MSDS sheets don't have any synergistic information. He went on to say that "there is admittedly a limited amount of data on combinations of products like this. We don't know what they do." (Emphasis added.) (R. p. 410, line 24 – p. 421, line 17, Depo. 9/13/04, p. 4, line 24 - p. 15, line 17.) Hence, Dr. Simpson's observations in his letter of May 14, 2004, that "the chemicals in question caused mucous membrane irritation which produced what should have been temporary voice alterations" and his deposition testimony that her condition remained basically unchanged from her first visit in 2002 to her last visit in 2004, two years later, leads to the inescapable conclusion that Appellant's medical conditions are connected to her employment. (Emphasis added.) (R. p. 420, line 20 – p. 421, line 23.

Although there is ample other evidence in the record that Appellant's disability resulting from an occupational disease arose out of and in the course of her employment with Employer, Appellant asserts that the substantial evidence in the record from Dr. Simpson alone establishes a causal connection between Appellant's occupation and her employment at the plant.

> If a medical expert is unwilling to state with certainty a connection between an accident and an injury, the 'expression of a cautious opinion' may support an award if there are facts outside the medical testimony that also support an award. ... Thus, if medical expert testimony is not solely relied upon to establish causation, the fact finder must look to the facts and circumstances of the case. ... Proof that a Appellant sustained an injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident. However, such evidence need not reach such a degree of certainty as to exclude every reasonable or possible conclusion other than that reached by the Commission. (Internal cites omitted)

Hargrove v. Titan Textile Co., 360 S.C. 276, 294, 599 S.E.2d 604, 613 (2004)

Dr. William Alleyne, II, was presented as an expert witness for Appellant. He practices in the area of pulmonary and critical care medicine. (R. p. 356, line 25 – p. 4, line 4, Depo. of Dr. William Alleyne, 9/24/04, p. 3, lines 25 – p. 4, lines 4.) Appellant was seen by Dr. Alleyne on May 3, 2004, when he took a complete history, performed a physical examination, a pulmonary function test, and reviewed her chest x-ray. He also reviewed her medical records from other physicians. Armed with an awareness of Appellant's medical history and the results of his examination and tests, Dr. Alleyne found that there was an impairment in her ability to get oxygen out of the air, into her lungs, and into the bloodstream. He concluded that Appellant's symptoms were the result of Reactive Airways Dysfunction Syndrome (RADS), an illness that involves a narrowing of the airways or irritation of the airways as a result of an inhaled insult. RADS is closely related to Reactive Upper Airways Dysfunction Syndrome (RUDS) that involves the upper airways, specifically the nasal passages and vocal cords, commonly called the upper airway. Further, given the fact that she had ongoing pain in her throat and hoarseness, he determined that she may have also had a component of RUDS. (R. p. 357, line 12 – p. 358, line 11, p. 369, line15 – p. 372, line 5, Depo. 9/24/04, p. 4, line 12 - p 5, line 11; p. 16, line 15 – p. 19, line 5.)

In considering a causal connection to Appellant's medical condition and the Plant, Dr. Alleyne reviewed the MSDS that included chemical agents to which the Appellant had been exposed (including Thixon 7505), a sketch of the Plant area involved and related these to his

discussions with the Appellant about her job and work environment in the Plant. (R. p. 358, lines 7 – 9, p. 361, line 21 – p. 363, line 13, Depo. 9/24/04, p. 5, lines 7-9; p. 8, line 21 – p. 10, line 13.)

He reviewed the Report of the Industrial Hygiene Survey conducted by Mr. Richard Bennett and ruled out the cockroach allergens and mold spores as a cause of her problems. (R. p. 364, lines 20 – 25, p. 373, line 19 – p. 373, line 20, Depo. 9/24/04, p. 11, lines 20-25; p. 20, line 19 – p. 21, lines 20.)

Based upon the foregoing, Dr. Alleyne formed a medical opinion, stated to within a reasonable degree of medical certainty, that Appellant's condition is going to be lifelong. (R. p. 374, line 23 – p. 374, line 5, Depo. 9/24/04, p. 21, line 23 – p. 22, line 5.)

"Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Once admitted, expert testimony is to be considered just like any other testimony. Accordingly, in deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence." (Internal cite omitted) Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 106 (1999).

Appellant maintains that the opinions of Dr. Simpson and Dr. Alleyne established that Appellant's medical problems are connected to her employment at the Plant. Nonetheless, "medical testimony was not solely relied upon but rather in addition to such medical testimony the circumstances before and following the injury show that the conclusion of causal connection was not without competent evidentiary support and was not the result of conjecture, surmise and speculation." Kennedy v. Williamsburg County, 242 S.C. 477, 485, 131 S.E.2d 512, 516 (1963).

Third: ***The disease must be due to hazards in excess of those hazards that are ordinarily incident to employment.*** Dr. William Alleyne testified on deposition that the Appellant was seen by him on May 3, 2004, at which time he took a complete history and performed a physical exam, pulmonary function test, and reviewed her chest x-ray. The pulmonary function test revealed a mild obstructive defect most notable in the small airways. There was a positive bronchodilator response. There was a diffusion impairment, meaning that she does not blow air out as well as she should, ... and she had an impairment in her ability to get oxygen out of the air into her lungs and then into the bloodstream. Dr. Alleyne stated that at that time, he did not diagnose the Appellant with asthma or any other respiratory problem that would have caused this problem. He testified that at that time his impression was that her symptoms were the result of reactive airways dysfunction syndrome. He also felt that, given the fact she had the ongoing pain in her throat and the hoarseness, that she may have also had a component of reactive upper airways dysfunction syndrome. Dr. Alleyne gave his opinion, stated to within a reasonable degree of medical certainty, that Appellant's condition is going to be lifelong. (R. p. 369, line 15 – 375, line 5, Depo. 9/24/04, p. 16, line 15 - p. 22. line 5)

Dr. Allene testified concerning the chemicals in use at Appellant's workplace at the Plant that caused him to be concerned; namely, alcohol or phenol formaldehyde, hexamethylenetetramine methanol, both of which were shown on the Material Safety Data Sheet. He stated that the phenol formaldehye resin raised a red flag for him because it is one of the known causes of RADS. (R. p. 375, line 19 – p. 376, line 10, Depo. 9/24/04, p. 22, lines 19 - p. 23. lines 10)

There is substantial evidence in the record referring to Appellant's chronic throat pain, persistent hoarseness, difficulty speaking and swallowing, along with other problems attributed to injury of her larynx as well as from RADS and RUDS, all causally connected to Appellant's employment at the Plant. (R. p. 326, lines 12 – 24, p. 330, lines 4 – 9, p. 331, lines 16 – 20, p. 333, lines 8 – 14, p. 334, lines 24 – 25, p. 345, lines 3-11, p. 346, lines 2 – 6, p. 348, lines 10 - 16, Dingle Depo. 3/18/02, p. 20, lines 12 – 24; p. 24, lines 4 – 9; p. 25, lines 16-20; p. 27, lines 8 – 14; p. 28, line 24 - 25; p. 39, lines 3-11; p. 40, lines 2 - 6; p. 42, lines 10-16.) Medical notes of Dr. Rocco D. Cassone, 4/25/00, Impression: Laryngitis, sinusitis (R. p. 214, pa. 4, Exhibit A, Appell. APA, p. 89).

The Clinical Impression of Dr. Wynne English, Speech/Language Pathologist, dated May 2, 2001, referenced the chemicals in Appellant's Plant worksite and stated: "Although she has been removed from that environment by being placed on medical leave (reportedly secondary to her response to the chemicals), she continues to experience hoarseness and burning in her throat. Environmental chemicals have been known to have a significant effect on the vocal cords (such as drying of the cords), however, information in the MSDS sheet on Thixon 7500 doesn't specifically mention the vocal cords. This particular chemical does have a variety of potentially severe effects on the body if ingested or put in prolonged contact with the skin." (Emphasis added.) (R. p. 244, Exhibit A, Appell. APA, p. 119)

The Federal Mogul facility where Appellant worked manufactured automobile gaskets. The environmental breathing hazards in the Mold Department and Gasket Department exceeded those hazards that are ordinarily incident to employment. As part of the process involved, a mold press is heated to 400 degrees to process the rubber and form the oil seal. Smoke accompanied by a strong smell was a by-product of the process. (R. p. 576, line 14 – p. 579, line 23, Tr., 5/22/08, p. 8, line 14 – p. 11, line 23)

Fourth: ***The disease must be peculiar to the occupation in which the Appellant was engaged.*** Appellant worked as a press operator in the Mold Department, a press operator in the Gasket Department, and later resumed work in the Mold Department. As a press operator using the Mold Release Thixon 759 product, Appellant was exposed to formaldehyde. She inhaled fumes from rubber molding heated to 350 degrees to be affixed to metal to form seals. Additionally, the press is sprayed with the Mold Release compound at approximately five minute intervals throughout the process. REPORT OF INDUSTRIAL HYGIENE SURVEY, by Risk Tech, L.L.C., March 4, 2004, Introduction, p. 2, Results/Discussion, p. 4[1]. In her deposition taken March 18, 2002, the Appellant described her work at Employer's plant. She would run a press for gaskets, and she handled the parts. There are two different parts and she would put the part in the machine. Mold has oil seals, gaskets have gaskets, and they are two different parts. She would put them in a machine, but different machines. (R. p. 341, lines 6 – 24, Dingle Depo. 3/18/02, p. 35, lines 6 - 24)

Dr. William Simpson, Jr., testified on deposition that he saw the Appellant in July of 2002 as a result of her four-year history of medical problems that she related to her exposure to chemical substances at the Plant. He stated that in the early part of September of 2002, the Appellant brought him a Material Safety Data Sheet for an adhesive that did not fit the description that she gave him of a pungent-tasting powder that got onto her clothes and throat at work. He stated that it was a liquid adhesive, so it would not have been a powder. He testified

[1] It is noteworthy that **the survey in question was performed in 2004 using two employees other than the Appellant.** Additionally, there is no evidence of any surveys performed between 1998 and 2000 to reflect the level of exposure at the time Appellant worked in the Mold Department.

further that in March of 2004, the Appellant brought him a four page list of chemicals used in the plant. (R. p. 413, lines 23 – p. 416, line 12, Depo. 9/13/04, p. 7, line 23 - p. 10, line 12)

Mr. Kellis Thacker, Plant Manager for the Federal Mogul Summerton Plant, testified on deposition concerning the Appellant's work environment. (R. p. 498, lines 21 -23, Depo. 1/13/03, p. 4, lines 21 - 23) According to Mr. Thacker, the molding process is a "hot mold, running about 350 degrees, and inserted are our prepared metals and . . . and rubber preps and the mold comes down on tonnage and with heat and it forms the ... it binds the rubber to the metal and forms the rubber into a seal shape. (R. p. 503, lines 2 – 8, Depo. 1/13/03, p. 9, lines 2 - 8) In coming up with the seal, a stamping oil is applied and the metal is prepared for molding. On the ionic line, the oil is removed and a liquid chemical by the common name of phoscoat is applied as a metal preparation material and then adhesive is applied. (R. p. 504, lines 4 – 24, Depo. 1/13/03, p. 10, lines 4 - 24) The mold operator does a simultaneous visual inspection of multiple seals numbering up to close to 100. Mr. Thacker testified that Employer does an exposure testing across the plant biannually both at chemical sensitive process, which would be the ionic process, and the operators that are in and around that. The chemical application process is automated and "anyone that has interaction with ...with that process in the past there are respirator requirements, etcetera. Beyond that and in the general molding and inspecting areas the PPE requirement, personal protective equipment requirement is eyeglasses and ear plugs." (R. p. 507, line 4 – p. 508, line 4, Depo. 1/13/03, p. 13, line 4 - p. 14, line 4)

Fifth: ***The hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment.*** The smoke, fumes, residue and airborne chemical residue inhaled by Appellant after they are released into the immediate area of Appellant's work environment is peculiar to the process employed at the Plant press operators. Appellant was processing hot rubber molding at 350 degrees in an application to form seals and gaskets. As a press operator, using the Mold Release Thixon 759 chemical product, Appellant was exposed to formaldehyde. The press is sprayed with the Mold Release compound at approximately five minute intervals throughout the work process. REPORT OF INDUSTRIAL HYGIENE SURVEY, by Risk Tech, L.L.C., March 4, 2004, Introduction, p. 2, Results/Discussion, p. 4. (R. pp. 2, 4) Additionally, Appellant was exposed to other chemicals used in the manufacturing process in the plant that she inhaled and which attached itself to her outer garments as she reported to Dr. Simpson. (R. p. 415, line 2 – p. 416, line 12, Depo. 9/13/04, p. 9, line 2 - p. 10, line 12) The smoke, fumes, residue and sediment that caused Appellant's disease and resulting disability are peculiar to the Plant's manufacturing process.

In deciding Pee, supra, the South Carolina Supreme Court addressed the fifth prong of the Mohasco test in this manner:

> In South Carolina, our statute defines an occupational disease as "a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged." ... Unlike the North Carolina courts, however, we have not construed the definition of occupational disease so rigidly. The statute is satisfied where the Appellant is able to show simply that the employment increased the risk of the disease. Under our more liberal approach, it is not clear that proof of a repetitive trauma injury as an occupational disease would be a more onerous burden than proving it as an injury by accident. (Internal cites omitted) (Emphasis supplied)

Pee, 352 S. C. at 174, 573 S.E.2d at 789.

Sixth: ***The disease must directly result from the Appellant's continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment.***

Appellant began employment with Federal Mogul in 1996 running a rubber mold press for a month, then as a press operator in the gasket department for a year, and then back to the mold department. (R. p. 575, line 9 – p. 580, line 14, Tr. 5/22/08, p. 7, line 9 - p. 12, line 14) She last worked for Employer in July of 2000. (R. p. 236, Manning Internal Medicine notes 10/16/00). Her official termination by Employer was effective March 19, 2002. (Federal Mogul letter dated 3/19/02 addressed to Diane Dingle). Appellant's medical condition deteriorated over time due to continuous exposure to the elements involved in the manufacturing process in the plant. Beginning in 1998 and throughout her period of employment, Appellant saw the physicians and medical care providers named in the APA submissions and whose reports and opinions are referenced in this brief. Dr. Keith wrote Appellant out of work from May 5, 1998, to May 7, 1998, and May 7, 1998, until May 10, 1998, for sinusitis and allergic rhinitis. Her condition deteriorated to the point that she was written out of work six times from April 2000 until she received a note from Dr. Keith dated July 27, 2000, for her Employer, stating that "Ms. Dingle is suffering from recurrent pharyngitis, laryngitis and tonsillitis assoc. with exposure to fumes at work. She cannot be exposed to irritating fumes under any circumstances." (R. pp. 715 – 723, Return to Work Authorizations signed by Dr. Keith for periods 5/5/98 - 5/7/98, 5/7/98 - 5/10/98; 4/17/ - 4/23/00, 5/12/00 - 5/17/00, 6/1/00 - 6/5/00, 6/7/00 - 6/11/00, 7/6/00 - 7/16/00, 7/12/00 - 7/18/00 and the final note dated 7/27/00.)

On September 14, 1998, September 21, 1998, February 11, 2000, February 24, 2000, March 13, 2000, April 25, 2000, and May 1, 2000, Appellant described symptoms of allergies, stopped up nose, and sinuses to Dr. Rocco D. Cassone relating them all to her work at Federal Mogul. (R. pp. 212 – 214, Exh. A, Appell. APA Submis., pp. 87-89)

The record shows substantial evidence that Employer was aware of Appellant's medical problems and attempted to mitigate them by placing Appellant in different work areas during the

early stages of her condition. (R. p. 349, line 23 – p. 351, line 1, Dingle Depo. 3/18/02, p. 43, line 23 - p. 45, line 1; R. p. 582, line 19 – 16, Tr. 5/22/08, p. 14, line 19 – p. 15, line 16). Additionally, medical notes from Dr. David C. Gaines, "who cares for many of the employees"[2] of Federal Mogul communicated to Federal Mogul his diagnosis of "Environmental Allergies" with a treatment date of 10-17-00 and notations of "Allegra twice daily. Avoid irritants. Will refer to allergist for other recommendations." (R. p. 237) He placed a check mark at the space "Cannot Return to Work At this Time" and in the Reason space he wrote, "Pt unable to work due to allergies." The date of injury is written in as "June '98." (R. p. 241, Federal Mogul Summerton Plant Physician's Instructions - Return to Work Statement for Work-Related Injuries)

Appellant asserts that the record clearly proves by substantial evidence that her continuous exposure to the dust, fumes, smoke and chemical compounds in the manufacturing process in the Plant was a direct and proximate cause of her disability arising from injury sustained as a result of occupational disease. "[O]ccupational disease includes "any series of traumatic events or occurrences which requires medical services or results in physical disability of death"." Pee, 352 S.C. at 173, 573 S.E.2d at 788.

3. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO MEDICAL OPINION AS EVIDENCE THAT THE APPELLANT HAD AN UNDERLYING CONDITION OR WAS PARTICULARLY SUSCEPTIBLE TO ANY CONDITIONS THAT EXISTED IN HER WORK.

First, Appellant would assert that the § 42-1-172 "medical opinion as evidence," requirement, which became effective on July 1, 2007, does not apply to her 1998 injury.

Second, Appellant contends that the substantial medical evidence in the record establishes both Appellant's history of underlying sinusitis as well as the existence of aggravating conditions in her work environment.

[2] Report of Dr. Wynne English, McLeod Speech Pathology, report dated May 2, 2001 (/R. p. 243pa. 1, Exh. A, Appell. APA Submis, p. 119)

a) **Medical Opinion of Dr. William Alleyne, II, on Deposition:** Dr. William Alleyne testified on deposition that the Appellant was seen by him on May 3, 2004, at which time he took a complete history and performed a physical exam, pulmonary function test, and reviewed her chest x-ray. In his deposition, Dr. Alleyne acknowledged under questioning by counsel for Federal Mogul that sinus and allergy problems were a part of Appellant's medical history. (R. p. 363, line 23 – p. 364, line 16, Alleyne Depo. 9/24/04, p. 10, line 23 - p. 11, line 16) Dr. Alleyne testified that the pulmonary function test revealed a mild obstructive defect most notable in the small airways. There was a positive bronchodilator response. There was a diffusion impairment, meaning that she does not blow air out as well as she should, ... and she had an impairment in her ability to get oxygen out of the air into her lungs and then into the bloodstream. Dr. Alleyne stated that at that time, he did not diagnose the Appellant with asthma or any other respiratory problem that would have caused this problem. He testified that at that time his impression was that the symptoms were the result of reactive airways dysfunction syndrome. He also felt that, given the fact she had the ongoing pain in her throat and the hoarseness, that she may have also had a component of reactive upper airways dysfunction syndrome. Dr. Alleyne gave his opinion, stated to within a reasonable degree of medical certainty, that Appellant's condition is going to be lifelong. (R. p. 369, line 15 – p. 375. Line 5, Depo. 9/24/04, p. 16, line 15 - p. 22. line 5)

Dr. Alleyne testified concerning the Appellant's susceptibility to chemicals in use at her workplace at the Plant that caused him to be concerned; namely, alcohol or phenol formaldehyde, hexamethylenetetramine methanol, both of which were shown on the Material Safety Data Sheet. He stated that the phenol formaldehye resin raised a red flag for him because it is one of the known causes of RADS. (R. p. 375, line 19 – p. 376, line 10, Depo. 9/24/04, p. 22, line 19 - p. 23. line 10)

b) **Medical notes of Dr. Rocco D. Cassone**

9/14/98 She is seen for evaluation of her nose and sinuses...She has been noted to have headache for a long period of time. She works round a press making oil seals. ... Pollen and dust do seem to aggravate it. He headache is severe at times in the glabella area. Nose shows mild rhinitis. The turbinates are moderately swollen and there is minimal septal deviation. Oropharynx, neck and larynx are unremarkable. ..."

9/21/98 She is seen for evaluation of difficulty with allergies and stopped up nose. ... She has significant blockage in her OMC and I believe paradoxical turbinates. ... She has significant problems at work and wonders if the problem is related to her press.

2/11/00 ... She is having some problems with the nose. ... She is complaining of drainage. On examination she has significant swelling of her turbinates, there is purulence in the nose. Impression: Significant sinusitis.

2/24/00 Diane is seen for evaluation of hoarseness, sore throat, clogged up throat and lump sensation in her throat. She has been having more difficulty with this. Her sinuses are doing a little bit better at the present time. She is not having the drainage she was having before. The voice is still hoarse and this concerns her greatly.

4/25/00: "Diane is seen for evaluation of difficulty with hoarseness and sinus congestion. IMPRESSION: Laryngitis, sinusitis. RECOMMENDTIONS: ... We will see her in Manning this coming Monday and decide at that time when she can return to work."

5/01/00 Diane is seen for evaluation of sinusitis and hoarseness. She is doing better at the present time. She is doing well at this point. Her voice is markedly improved. She does have some congestion. PHYSICAL EXAMINATION: Nose shows moderate rhinitis. RECOMMENDATIONS: We placed her onEntex for the rhinitis. We will see her pack on a prn basis. She may return to work. (R. pp. 212 – 214, Exh. A, Appell. APA Submis., pp. 87-89)

c) Medical Opinion of Dr. James A. Atkison, Sumter Asthma & Allergy Center, June 13, 2000: "She mainly states that she has complaints with her chest consisting of wheezing, which might be on inspiration, chest tightness, shortness of breath, her chest will hurt or she cannot breathe, and her voice closes down or she get hoarse, mainly at work. She is fine at home, but soon after arriving at work, she begins having problems. She noted that her throat hurts or gets sore, her tongue gets numb, and this progresses to the respiratory problems including the voice changes. This apparently has been gong on for about two years. She has seen an ENT doctor for this, and apparently she been treated some for sinus infection, but that has not helped this problem. She has been put on medical leave because of this. ... She apparently has had pulmonary functions testing done, that might have shown changes consistent with asthma. She complains of sinus headaches, congestion, a yellowish post-nasal drip, itchy nose and eyes, and a yellowish nasal discharge that seems to happen in the spring and the fall, but she seems to be clear in the winter. This started six or seven years ago. ... She has no known drug or food allergies and has not been a smoker. <u>She gets an itchy small bumpy rash, after working in some parts of the plant, that occurs even on unexposed skin</u>. (Emphasis added) Her inspiratory loop, however, showed a slight "cut off" patter, which might be consistent with <u>upper-airway obstruction</u>. Ms. Dingle has a problem with wheezing, shortness of breath and hoarseness, which might sound like asthma or <u>occupational asthma</u>, although I could prove none of that today. She may be having some laryngospasm or laryngeal edema, perhaps <u>secondary to some airborne chemicals or irritants at work</u>.

We cannot do any specific testing for these chemicals, as they are not recognized as allergens, and we are unable to test for them.

I discussed with her the use of the Proventil, and the nature of occupational asthma and how difficult it can be to diagnose. The best treatment for this in the long run may be avoidance, which might mean a change in her job.(Emphasis added)

... After that, we may do allergy skin testing, but that is mainly to evaluate what may be a seasonal allergy problem, which is unrelated to the laryngeal problem." (R. pp. 220 - 221, Exh. A, Appell. APA Submis., pp. 93-94)

Dr. Atkison testified on deposition that when he saw her for evaluation in 2000, he diagnosed the Appellant with seasonal allergies, "flare-ups that would be consistent with spring and fall pollen allergies." (R. p. 474, line 22 – p. 474, line 15, Depo. 9/27/01, p. 6, line 22 - p. 7, line 15.) He explained his statements, intervention and treatment reported in the June 13, 2000, letter:

Q. "The inspiratory loop showed a slight cut off pattern which might be consistent with an upper airway obstruction." Specifically, in that statement, upper airway obstruction, are you referring to a physical obstruction or an irritation, swelling type of obstruction?

A. I really couldn't tell from either what I wrote or from what I saw at that time. We don't normally do an inspiratory loop when we do pulmonary functions to evaluate asthma.

Q. Okay.

A. However, we did that in her situation because, if you notice a paragraph above that on the exam, "Very hoarse and cracking whispery voice," and so I did that to see if there was any blockage in her neck, laryngeal area. And that kind of a cut off pattern would suggest that.

Q. Okay. Some sort of a physical blockage?

A. We would assume some kind of a physical blockage.

Q. And then going on, "She was instructed in the proper use of an asthma inhaler. Following this, however, her voice did not change."

A. Right.

Q. What did that tell you?

A. Occasionally, there are reports of people with asthma who present as hoarseness. She had also complained about wheezing, chest tightness and shortness of breath, which are typical asthma symptoms. So, we had done the breathing test, we tried the inhaler to see what would change, which nothing did. And basically, what that tells me is that I couldn't blame an asthma condition for the hoarseness.

Q. Okay, and then going on in the next paragraph, "Mrs. Dingle has a problem with wheezing, shortness of breath and hoarseness which might sound like asthma or occupational asthma, although I could prove none of that today." You said you could not do any specific testing for chemicals at work, because they were not recognized as allergens.

A. Right.

Q. Did you have any information about what type of products or chemicals she may be exposed to at work?

A. Ms. Dingle had told me, I believe it was on that visit, that where she worked, she was exposed to some type of oil seals, and fosicote (ph) was a name that she, she told me, some kind of metal, rubber, handles metal with rubber applied to it with her bare hands. Did not wear a mask. not being much of an industrial person, I'm not sure exactly what all she meant by that, and I was going to ask her to get me a copy of the M.S.D.S. on that, which we did get a copy.

Q. Okay. And did you review the M.S.D.S. sheets on that?

A. Yes, I did.

Q. Okay.

A. And I have a copy of that in here somewhere. And what we had on the M.S.D.S. is something called organofunctional silane, S-I-L-A-N-E.

Q. Okay. Is there any indication that's an allergen?

A. No. Although, under the hazards identification paragraph, it does say, "may cause respiratory tract irritation," among other things.

Q. Okay. So, the M.S.D.S. refers to the products she was using as an irritant as opposed to an allergen?

A. That's how they listed it.

(R. p. 475, line 22 – p. 478, line 16, Depo. 9/27/01, p. 7, line 22 - p.10, line 16.)

d) The Clinical Impression of Dr. Wynne English, Speech/Language Pathologist, dated May 2, 2001, referenced the chemicals in Appellant's plant worksite and stated: "Although she has been removed from that environment by being placed on medical leave (reportedly secondary to her response to the chemicals), she continues to experience hoarseness and burning in her throat. Environmental chemicals have been known to have a significant effect on the vocal cords (such as drying of the cords), however, information in the MSDS sheet on Thixon 7500 doesn't specifically mention the vocal cords. This particular chemical does have a variety of potentially severe effects on the body if ingested or put in prolonged contact with the skin." (Emphasis added.) (R. p. 244, Exh. A, Appell. APA Submis. p. 120.)

Appellant testified that although she had been treated for her sinuses, she had no trouble with her respiratory system prior to working in the Plant and related the differences between her

symptoms while she was on the job and when she was at home. (R. p. 324, lines 18 – 21, Depo. of Diane Dingle, 3/18/02, p. 18, lines 18-21; p. 38, line 15; p. 39. line 15.) She testified that from the onset of her medical problems, she was under the care of numerous physicians who either treated and/or referred her to other doctors for her condition, that there was no significant abatement of her symptoms, and that she is still experiencing symptoms. (R. p. 326, line 12 - p. 337, line 14, Depo. 3/18/02, p. 20, line 12 – p. 31, line 14.)

"[I]t is not necessary for an Appellant to identify a specific precipitating event in order for the Appellant to be entitled to benefits." Hargrove, 360 S. C. at 291, 599 S.E.2d at 611. The Appellant suffered traumatic injuries resulting from the fumes, smoke, residue, chemicals and airborne irritants in her workplace, which injuries began gradually, did not respond to medical treatment, and worsened over a period of years. She was re-assigned to different worksites within the Plant, and she was taken out of work intermittently due to her worsening trauma. When her condition improved, she would be released to return to work, and the symptoms would recur. Appellant was placed on a medical leave of absence and eventually terminated from employment effective March 19, 2002. (R. p. 585, line 4 – p. 588, line 15, Tr., 5/22/08, p. 17, line 4 – p. 20, line 15)

Dr. Alleyne reviewed the Report of the Industrial Hygiene Survey conducted by Mr. Richard Bennett and ruled out the cockroach allergens and mold spores as a cause of Appellant's problems. Supporting his opinion on this issue is the fact that the Appellant had lived in the same residence for ten years and experienced no problems until she was exposed to the smoke, fumes, residue, and airborne chemical irritants in the plant. (R. p. 364, lines 20-25, p. 373, line 19 – p. 374, line 20, Depo. 9/24/04, p. 11, lines 20-25; p. 20, line 19 – p. 21, line 20.) Each of the physicians who treated and/or evaluated the Appellant determined that her medical problems were work-related. Dr. David C. Gaines saw Appellant on October 16, 2000. His notes from that visit state: "... She now advises me whenever she goes to work she feels like her throat is closing up and remains sore. She has developed chronic hoarseness as a result. Finally today

she tells me she has been out of work since July secondary to her complaints however this is the first time she has pursued Worker's Comp." Dr. Gaines saw her again on October 17, 2000; his notes from that visit state: (referring to the visit of October 16, 2000) "**S:** ... I started her on some Allegra bid and asked her to return to work. She states she was able to work only for about an hour before she developed severe itching over her entire body with associated throat and chest discomfort. .... **A:** Environmental allegeries. **P:** I have contacted her employer they advise me that they have no light duty in the plant where she would not be exposed to fumes therefore I feel I have no other course but to continue to hold her out of work..." (R. pp. 236-237, Exh. A, Appell. APA Submis., pp. 113-114.) In his deposition Dr. Gaines testified concerning Appellant's symptomatic reaction to her work environment:

Q. Within a degree of medical certainty, could you contribute(sic) Ms. Dingle's symptoms to her job at Federal Mogul?

A. I can't clearly say that it's a definitive cause of her symptoms, however, the way she reported the symptoms occurred, it sounds like that that, the site of her work was where her symptoms were most apparent.

(R. p. 451, lines 17 – 22, Gaines Depo. 11/29/03, p. 5, lines 17 – 22).

Appellant asserts that the substantial evidence in the record supports her claim of injury by aggravation of her pre-existing sinus condition by the work environment at Federal Mogul.

4. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING OF A REPETITIVE TRAUMA.

Appellant directs the Court's attention to the substantial evidence in the record fully supporting a finding of injury by repetitive trauma under the South Carolina statutory and case law as they existed on June 7, 1998, the date of Appellant's injury.[3] With regard to repetitive trauma injury, the South Carolina Supreme Court addressed the issue in Pee, supra:

> Further, under S.C. Code Ann. 42-1-160 (Supp.2001), a disease, which typically has a gradual onset, is compensable as an injury by accident "when it results naturally and unavoidably from the accident." This provision indicates the legislature intended an accident to be compensable under the Act, even where the effects of the accident

[3] 2007 Act. No. 111, Pt. I, § 7, eff. July 1, 2007, codified as § 42-1-172, Definitions, is applicable to injuries that occur on or after that date.

develop gradually. The fact that a repetitive trauma injury is disease-like in its gradual onset does not preclude it from coverage as an injury by accident."

Pee, 352 S.C. at 172, 573 S.E.2d at 788.

Appellant testified that she had no trouble with her respiratory system prior to working in the Plant and related the differences between her symptoms while she was on the job and when she was at home. (R. p. 339, line 23 – p. 343, line 13, p. 344, line 13 – p. 345, line 15, Depo. 3/18/02, p. 33, line 23 - p. 37, line 13; p. 38, line 13 - p. 39, line 15.) She testified that from the onset of her medical problems, she was under the care of numerous physicians who either treated and/or referred her to other doctors for her condition, and that she is still experiencing symptoms. (R. p. 326, line 12 – p. 337, line 14, Depo. 3/18/02, p. 20, line 12 – p. 31, line 14.) "... [I]t is not necessary for a claimant to identify a specific precipitating event in order for the claimant to be entitled to benefits." Hargrove, 360 S.C. at 291, 599 S.E. 2d at 611.

Dr. Keith treated Appellant for work-related symptoms in 1998 and wrote her out of work on 7/21/00, because she was "suffering from recurrent pharyngitis, laryngitis, & tonsillitis assoc. with exposure to fumes at work." (R. p. 154, Exh. A, Appell. APA Submis., p.30)

Beginning in 1998, Dr. Rocco Cassone also treated the Appellant, and his notes from 1998 to 2000 in the records before the court include a description of her symptoms, all of which recurred throughout the period and gradually exacerbated. (R. pp. 212 – 214, Exh. A, Appell. APA Submis., pp. 87-89)

After seeing the Appellant for a medical evaluation, Dr. James A. Atkison of Sumter Asthma & Allergy Center submitted a report dated June 13, 2000, to Dr. Keith and stated, in pertinent part:

She mainly states that she has complaints with her chest consisting of wheezing which might be on inspiration, chest tightness, shortness of breath, her chest will hurt or she cannot breathe, and her voice closes down or she gets hoarse, mainly at work. She is fine at home, but soon after arriving at work, she begins having problems. She noted that her throat hurts or gets sore, her tongue gets numb, and this progresses to the respiratory problems including the voice changes. This apparently has been going on for about two years. She has seen an ENT doctor for this, and apparently has been treated some for sinus infection, but that has not helped this problem. She has been put on medical leave because of this.

...

She gets an itchy small bumpy rash, after working in some parts of the plant, that occurs even on unexposed skin.

...

Ms. Dingle has a problem with wheezing, shortness of breath and hoarseness, which might like sound like asthma or occupational asthma, although I could prove none of that today. She may be having some laryngospasm or laryngeal edema, perhaps secondary to some airborne chemicals or irritants at work. We cannot do any specific testing for these chemicals, as they are not recognized as allergens, and we are unable to test for them

...

The best treatment for this in the long run may be avoidance, which might mean a change in her job.

(R. pp. 220-221, Exh A, Appell. APA Submis., pp. 93-94)

Appellant suffered injury as a result of repetitive trauma due to exposure to fumes, smoke, residue, chemicals and airborne irritants in her workplace, which injuries began gradually, did not respond to medical treatment, and worsened over a period of years. From the time Appellant began treatment for her symptoms in 1998, her medical problems exacerbated while she continued to work, was out of work intermittently due to her worsening trauma, was placed on medical leave of absence, and last worked in the Plant in July of 2000. She was terminated from employment effective March 19, 2002. (R. p. 343, lines 8 – 10, Depo. 3/18/02, p. 37, lines 8-10; Federal Mogul Letter dated March 19, 2002) Our Supreme Court has held that a repetitive trauma injury was compensable as an injury by accident. That Court stated in Pee, supra: "We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma." Pee, 352 S.C. at 174, 573 S.E.2d at 789.

The evidence in this record of injury by accident also meets the definition of injury by repetitive trauma. The Appellant has met her burden of proof by substantial, probative and reliable evidence entitling her to compensation for injury by accident and/or by repetitive trauma.

5. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THERE IS NO EVIDENCE THAT THE APPELLANT SUSTAINED AN AGGRAVATION OF AN UNDERLYING CONDITION.

Substantial, reliable and probative evidence in the record describes Appellant's pre-existing sinus problems, the existence of aggravating substances in her workplace, and the

resulting aggravation to Appellant's underlying condition. Appellant gave the following testimony at the SC Workers' Commission Hearing on May 22, 2008, concerning her medical condition when she started work at the Employer's facility.

Q. When did you first begin your employment with Federal Mogul?
A. In November of '96.
Q. Prior to that time had you ever been diagnosed with -- with -- asthma?
A. No.
Q. Did you have any documented sinus problems prior to that time?
A. Just little sinuses.
Q. Okay. Anything that required a prescription medication?
A. No, sir.
Q. Did you have any other kind of respiratory problems prior to your taking employment at Federal Mogul --
A. No.

(R. p. 575, lines 9 – 23, Tr. 5/22/08 P. 7, lines 9-23)

Beginning in 1998, Dr. Rocco Cassone also treated the Appellant, and his notes from 1998 to 2000 are in the records before the court as described hereinabove in Issue #3. (R. pp. 212 – 214, Exh. A, Appell APA Submis., Ex. A, pp. 87-89)

After seeing the Appellant for a medical evaluation, Dr. James A. Atkison submitted the report dated June 13, 2000, as described in foregoing Issue #3. He stated in his report: "The best treatment for this in the long run may be avoidance, which might mean a change in her job." (R. pp. 220-221, Exh. A, Appell. APA Submis., Ex. A, p. 93-94)

The Appellant also testified at the hearing on May 22, 2008, concerning discharges emitted by the machine she operated:

Q. Okay. Now, when that door opens and swings upward what comes from this press?
A. Smoke comes out of it.
Q. Okay, Is it steam or smoke or --
A. -- smoke.
Q. -- okay. Describe for the Commissioner what kind of smoke this is?
A. I guess it's from the -- rubber or whatever because that's what it smells like. The rubber and the solution that they put on the oil seals, that they dip the oil seals in. That's what it smells like when -- when the heat has mended the -- the -- the -- rubber to the --

MR. ROBERTS: Commissioner, I'm going to object to this. I don't thing there's enough foundation about what this stuff smells like.

A. -- well, it smells like that.

. . .

A. That's what it smells like.

. . .

Q. What does -- what does it smell like?

A. It -- it smells like the -- the solution that they put on the metal and the -- and the rubber when it comes up. All the smoke smells just like -- it's real strong. It'll be like all in your clothes and in your underwear and everywhere. When I was working there that's how it was.

(R. p. 577, line 16 – p. 578, line 22, Tr. 5/22/08, p. 9, line 16 - p. 10, line 22)

Appellant gave the following testimony at the May 22, 2008, hearing about the onset of her health problems.

Q. Okay. Now, when did you start having problems from this process?

A. I started having problems July of '98, June, July of '98. I started having real bad headaches and my stomach hurt and like -- it was like bad sinuses or whatever. Whatever it was affected my sinuses, I don't know --

Q. Okay. Now, who --
A. -- during that time I didn't know.
Q. -- and what doctor did you see?
A. Dr. Keith.

(R. p. 580, lines 15 – 25, Tr. 5/22/08, p. 12, lines 15 - 25)

Q. Okay. And did Dr. Keith, during 1998, take you out of work for any period of time?
A. Yes.
Q. Okay. Do you recall how many times you were taken out of work?
A. Several times, I can't recall how many times.
Q. Okay. Would that have been during the year of 1998?
A. Yes.
Q. Now did you continue to see Dr. Keith through 1999?
A. I was -- Dr. Keith had sent me to Dr. Cassone --
Q. Okay.
A. -- because I was having these bad headaches. He gave me --he sent me for an MRI, a CAT scan because I was having these bad headaches and stuff. So, he sent me to Dr. Cassone, the ENT, because my ears and throat and everything was hurting so bad.

(R. p. 581, lines 6-21, Tr. 5/22/08, p. 13, lines 6 - 21)

Q. When -- when did it come to your knowledge that -- that this was a job related problem as far as you were concerned?
A. It was January -- well, December of '99 and January of 2000.
Q. Okay. And was that from your conversation with a doctor?
A. No I knew that for myself.
Q. Okay. When-- did the doctor tell you that?
A. The doctor told me that after, you know, going in --

(R. p. 582, lines 6 – 18, Tr. 5/22/08, p. 14, lines 6 - 18)

Q. Okay. Now you -- describe how your condition changed, if it did at all, from 2000 until the time you actually left the plant?

A. It had got worser because I was -- when they was --while they was moving me around I started doing the inspections in molding. And then -- and they had moved me to the Wabash area. It's like different little areas in Federal Mogul and they moved me to the Wabash area where -- on the end where the -- where they hook up a trimmer. And these trimmers -- and these oil seals -- the girls do the top, they runs the press then, and they send the oil seals down the trimmer -- well, they put them in the little slot there where the little trimmer -- where the thing comes through. And they-- the little trimmer trims the -- the rubber off of the top of your oil seals and all -- and as it's doing this it's like knocking the dust off of the oil seals unto my table. It's like it's coming from up here, coming down to my table. This is my table with a bunch of oil seals on them, like, a couple of hundreds you know, whatever on the side right there. And that's like coming down and all the dust and stuff like that is falling on my table and I'm like inhaling it from that.

Q. Okay. Now --

COMMISSIONER HUFFSTETLER: Which job -- I'm just trying to understand your claim --

A. Inspection. I was in molding -- I was in molding working inspection.

COMMISSIONER HUFFSTETLER: --if you'll let me finish my question. Which job do you contend caused your problem?

A. It's the oil seals. It's not a specific job. It's the oil seals themselves.
Q. -- okay. Now, and the Commissioner needs to understand what you're referring to when you say oil seals. Describe the job that you did that -- which would require you to come in contact with the oil seals, themselves.
A. The mold press.
Q. Okay. So -- so, these oil seals are put into this mold press and then --
A. Yes.
Q. -- and the taken out?
A. Right.
Q. Now, would you tell the Commissioner how many times this press would open and close during a ten (10) minute period of time?
A. It depends on how fast I am or how fast a person is that's running the press. But it can -- it can open and close -- in ten (10) minutes you say?
Q. Yes.
A. I guess about five (5) times in ten (10) minutes. It all depends on how fast you load the board, get it in there; about five (5) times.
Q. Okay.

COMMISSIONER HUFFSTETLER: But you're -- if I understand your claim, you're saying you believe your exposure while running the mold press has caused your problem?

A. I --

COMMISSIONER HUFFSTETLER: That's a question. I'm not trying to tell you what it is. That's a question.

A. -- I -- I feel like this, I -- I -- it's the stuff that's on those oil seals. All that stuff that was on the oil -- oil seals. Those are the things that I know that did it and that's without a doubt.

COMMISSIONER HUFFSTETLER: And you worked with oil seals at the mold press?

A. Yes.

COMMISSIONER HUFFSTETLER: Okay.

Q. Now, you testified earlier about when this -- this -- this press opened and when it closed. Was it -- again, was there -- was there smoke or steam or heat that came from this press?
A. It -- it was smoke.
Q. Okay. Was it -- was it hot smoke or cold smoke or just normal temperature smoke?
A. Hot smoke.
Q. Okay. Any idea how -- how hot this -- this press was in terms of what came from it?
A. Four hundred (400) and something degrees.
Q. And how long did you work in this area?
A. For -- ever since '98 -- '99, I'm sorry.
Q. And up until the time you left?
A. Uh-huh.

COMMISSIONER HUFFSTETLER: Is that a yes.

A. Yes.

(R. p. 585, line 4 – p. 20, line 23, Tr. 5/22/08, p. 17, line 4 -p. 20, line 23.

Q. Describe the symptoms that you got -- well, how did feel on a daily basis starting from, if you can, from January of 2000 up until the time you left in August?
A. You mean what kind of symptoms was I having?
Q. Yes. After every day you left work if you had symptoms what would those symptoms be like?
A. I had itching around the mouth, headaches, my throat was burning, my lungs felt like they was burning, stomachache, my eyes was burning, my throat feel like a knife cutting it.
Q. Did you have problems breathing?
A. Yes.
Q. You did? You have (sic) answer that if you can.
A. Can I be excused, please.

. . .

Q. We were talking about what you -- what your symptoms were on a daily basis and you were telling me about the throat, issues with your mouth and your lungs. Was there anything else that -- that -- any symptoms you experienced on a daily basis from 2000, January, until the time you left, anything else?

A. Yes, severe pains in my throat. My nose feel like it's swollen up. I felt like I'm -- I'm going to throw up because I feel faint and nausea.

(R. p. 589, line 19 – p. 590, line 21, Tr. 5/22/08, p. 21, line 19 - p, 22, line 21)

Judge Cothran found that "Dr. Alleyne made a diagnosis and offered his opinion ruling out exposures at the Claimant's home, but he never gave an opinion that the work environment cause[d] the Appellant's/Claimant's condition. Also as the Commission found and affirmed by this Court, Dr. Alleyne testified in his deposition that he never visited the plant and that the industrial hygiene studies do not indicate dangerous levels of chemical exposure." (R. pp. 23-24, Cothran Order 8/3/11, p. 14-15)

Appellant would respectfully point out that the Report of Industrial Hygiene Survey Conducted at Federal Mogul, Summerton, South Carolina, by Risk Tech, LLC, was prepared by Shawn Stewart and reviewed by Richard Bennett. The Survey was conducted February 23, 2004, and the Report is dated March 4, 2004 - approximately six (6) years after the Appellant began treatment for her injuries and almost four (4) years after the Appellant left the plant environment. Therefore, remoteness in time renders the survey unreliable. Furthermore, the Appellant was not among the personnel used in the survey as described in the Methods section and the record does not show that the personnel involved in the test had underlying medical conditions similar to Appellant's underlying sinus condition. Appellant's claim of unreliability is further buttressed by the following disclaimer set forth in the Introduction.

> ...The purpose of this survey was to determine the potential formaldehyde exposure to mold press operators using the Mold Release Thixon 759 product.
>
> ...The results presented in this report are indicative of conditions only during the time of the sampling period. This study does not purport to include every potential health hazard at this location and only those areas and exposures specifically mentioned were evaluated.

R. p. 668, Report of Industrial Hygiene Survey, INTRODUCTION, METHODS, p. 2

First, there is no evidence that the Federal Mogul employees used in the survey had an underlying condition similar to Appellant's pre-existing condition. Second, the purpose of the

survey was to determine the potential formaldehyde exposure to press operators using the Thixon 759 product and "does not purport to include every potential health hazard at this location." The evidence in the record shows that formaldehyde was only one of many chemicals, compounds and residue to which Appellant was exposed.

Q. Now, did you diagnose her at that time with asthma?
A. No, sir.
Q. So, that did not have an impact on her condition?
A. No, sir.
Q Did you diagnose her with any other respiratory problem that would have caused this problem?

A. No, sir. At that time my impression was that her symptoms were the result of reactive airways dysfunction syndrome. I also felt that, given the fact she had the ongoing pain in her throat and the hoarseness, that she may have also had a component of reactive upper airways dysfunction syndrome.

Q. So, you actually diagnosed her with two problems?

A. Yes, sir.

Q. In her history, did you have the opportunity to review records of doctors who have seen her in the past, particularly that of a Dr. Edward Keith?

A. Yes, sir.

Q. Okay. Did you see in her records during the period of time that she was seen and working at Federal Mogul that had he taken her out of work for these very same problems?

A. Yes, sir.

Q. Now, what is important about the fact that she's a nonsmoker?

A. I think that as a nonsmoker your respiratory symptoms are clearly not attributable to smoking, but must be due to some other factor. Whether that factor would be asthma, which she clearly does not have, it's inconceivable that she was been seen by I would say, Dr. Keith her family doctor, she also was seen by at least two ear, nose and throat doctors, she was seen by an allergist, she was seen by myself. In reviewing her medical records, no one talks about asthma, or at least no one establishes that diagnosis, and the least of which myself, frankly, who would not miss asthma. In addition, her respiratory exposures at the plant were certainly suspect as the cause of these symptoms.

Q. Okay. Now, you reviewed from the plant, since you brought that up, the MSDS sheets?
A. That's correct.

Q. Is it your understanding Federal-Mogul is an open-air type of plant with very little walls in the manufacturing portion of that plant?

A. That is correct.

Q. How does that affect a person who is employed there working there in a particular area or zone when they're exposed to many, many chemicals at the same time?

A. Well, certainly, if one is in that type of situation, although the individual patient may not be working with a certain chemical or group of chemicals, does not mean that they have not been exposed to them. Perhaps someone working at another area was working with them, and they got exposed.

Q. The MSDS sheets detail several chemicals that had chemicals in them that caused the kind of problems that Ms. Dingle has; is that correct?

A. That's correct.

Q. What do you call the portion of the MSDS sheets that tell the adverse symptoms that a person could have as a result of exposure?

A. I presume you're talking about the health and safety risks.

Q. Right. now, each one of these data sheets has that health and safety risk component on each of the documents; is that correct?

A. That is correct.

(R. p. 370, line 11 – p. 373, line 14, Alleyne Depo., 9/24/2004, p. 17, line 11 - p. 20, line 14)

Q. Are there any particular chemicals noted on the MSDS sheet that cause you any immediate concern? You list several in your report, alcohol -- is that phenol formaldehyde?

A. Yes.

Q. And methanol, the long word about 20 letters long. Can you pronounce that for me?

A. The hexamethylenetetramine methanol.

Q. Can you tell me why you mention those in your report?

A. Well, these were the ones that were mentioned in the material safety and data sheets, and specifically formaldehyde resin raised a red flag for me.

Q. Why?

A. Because that is one of the known causes of RADS.

Q. And this was used in this plant?

A. That is correct.

(R. p. 375, line 19 – p. 376, line 12, Alleyne Depo. 9/24/2004, p. 22, line 11 - p. 23, line 12)

6. WHETHER OR NOT THE CIRCUIT COURT ERRED IN FINDING THAT THE APPELLANT HAS PROVIDED NO MEDICAL EVIDENCE TO SHOW THAT EXPOSURE IN THE WORK EITHER CAUSED, AGGRAVATED OR EXACERBATED THE APPELLANT'S CONDITION.

Appellant asserts that substantial, probative and reliable evidence in the record shows that exposure to chemicals in the plant either caused, aggravated or exacerbated the Appellant's condition.

Q. Now in your report you listed several chemicals that she was exposed to. Isopropyl alcohol, butyl alcohol, and phenol formaldehyde?

A. That is correct.

Q. Are you aware of a substance called Thixon 7505?

A. I believe it was referred to in one of these material safety and data sheets.

Q. So, you don't know the particular section that this chemical was used within the plant?

A. No, sir.

Q. Now, Ms. Dingle expressed to you that she ran a press in the plant. That was her or, and that's how she got exposed to these chemicals?

A. That is correct.

Q. Did she ever express to you any problem while working in gaskets, in the gasket area of the plant?

A. She did not describe working with the gaskets, no, sir.

Q. All right. Now, you were provided material data safety sheets, correct?

A. Yes, sir.

Q. And would you agree that most of these sheets show acute problems, short-term problems being exposed but not long-term problems

A. The MSDS sheets refer to primary acute, but they also refer to chronic problems.

Q. And the MSDS sheets, the chemicals listed on those sheets are in their pure forms, correct?

A. That is correct.

Q. All right. So, if a chemical is diluted with water, it would diminish the effect of that chemical, correct?

A. Not necessarily.

Q. It's possible, though? I mean, why would you dilute it with water if it doesn't change it?

A. But if that is then aerosolized, it may, in fact, magnify the effect.

Q. And you are not aware that Federal-Mogul dilutes most of its chemicals with water before it's used in the plant?

A. No, sir.

Q. You said earlier Ms. Dingle was diagnosed with RADS?

A. I have diagnosed her, yes.

Q. Now one criteria of RADS would be a documented absence of any preceding respiratory complaints. Wouldn't you agree?

A. Usually patients do not have a preceding history of respiratory complaints with RADS, that is correct.

Q. Now are you aware that Ms. Dingle was seen by her physician in 1995 for light-headedness and a sinus infection?

A. I have reviewed Ms. Dingle's records. I don't know that I have them dating back to 1985.

Q. 1995.

A. 1995.

Q Yes, sir.

A. That, I would have to refer to her medical records.

Q. And are you aware that she told her physician of a family history of sinus and allergy problems?

A. Again, I would have to review her records.

Q. Okay. Now, if these things are in her records, that will show a prior history of respiratory complaints; wouldn't you agree to that?

A. That is correct.

Q. Also another criteria of RADS is exposure to gas, smoke, or vapor in high concentrations?

A. That's correct.

Q. Now, did you receive an industrial hygiene survey done by Mr. Richard Bennett of the Federal-Mogul plant.

A. Yes.

Q. Okay. Did you review that?

A. Yes I did.

Q. Now, wouldn't you agree his results show far below OSHA standards?

A. Yes.

Q. So, any exposure to any chemicals would be far less than what OSHA considers harmful to humans, wouldn't you think?

A. I would say the levels indicated are below the OSHA standards. I don't know that you could then extrapolate and say they are not harmful to humans.

Q. That's why OSHA makes these standards, to make sure the levels of chemicals would not be harmful to people working there.

A. But when you say that, that doesn't mean that there's no -- there are no health consequences of these standards. OSHA standards are what's generally, quote, unquote, safe; however, if one were exposed to them, it doesn't guarantee that they will not develop something like RADS or RUDS, for that matter.

Q. Okay. All right. Now, you expressed earlier that you've never been in the Federal-Mogul Plant.

A. That is correct.

Q. So, you don't really know the amount of exposure Ms Dingle had at the Federal-Mogul

plant?

A. My information is based on examining her, her history, as well as, of course, reviewing the MSDS sheets provided by Federal-Mogul.

Q. She never told you any particular incident of exposure that initiated these problems?

A. That is correct.

Q. Okay. Are you familiar with cockroach allergens the affect they can have on the body?
A. Yes.

Q. What kind of affect can cockroach allergens have?

A. We know that cockroach allergens can cause or worsen asthma.

Q. Can they cause problems breathing and hoarseness?

A. When you say problems breathing, we know that they can certainly causek again, cause or exacerbate asthma. I'm not aware that they cause hoarseness.

Q. Okay. Can they cause the problems Ms. Dingle is complaining of?

A. In my opinion, no.

(R. p. 361, line 21 – p. 367, line 5, Alleyne Depo. 9/24/04, p. 8, line 21 - p. 14, line 5.)

Q Now, as far as your workup on Ms. Dingle, can you tell us exactly what you did?

A. Ms. Dingle was seen in the office on May 3, 2004. At that time I took a complete history as well as performed a physical exam. We also did a pulmonary function test, and we reviewed her chest x-ray.

Q. Okay. What did this testing show as far as Ms. Dingle's status?

A. The pulmonary function test revealed a mild obstructive defect most notable in the small airways. There was a positive bronchodilator response. There was a diffusion impairment.

Q. What does that mean to the layperson?

A. To the layperson, that means she doesn't blow air out as well as she should, and that this problem doesn't prove -- although it does not normalize in her case with the addition of what we call bronchodilator medicines that help open up the airways. In addition, she had an inability -- or I should say, an impairment in her ability to get oxygen out of the air into her lungs and then into the bloodstream.

Q. Now, did you diagnose her at that time with asthma?

A. No, sir.

Q. So that did not have an impact on her condition?

A. No, sir.

Q. Did you diagnose her with any other respiratory problem that would have caused this problem?

A. No, sir. At that time my impression was that her symptoms were the result of reactive airways dysfunction syndrome. I also felt that, given the fact she had the ongoing pain in her throat and the hoarseness, that she may have also had a component of reactive upper airways dysfunction syndrome.

Q. So, you actually diagnosed her with two problems.

A. Yes, sir.

(R. p. 369, line 13 – p. 371, line 3, Alleyne depo. 9/24/04, p. 16, line 13 - p. 18, line 3.)

Q. The question was asked about those household spores. Cockroach allergens?

A. That is correct.

Q. Did you find that any possible or potential exposure to that caused here problem?

A. I did not feel that was the case no.

Q. Did you feel like mold spores caused any of her problems?

A. No, sir.

(R. p. 373, line 19 – p. 374, line 2, Alleyne depo. 9/24/04, p. 20, line 19 - p. 21, line 2.)

Dr. Alleyne reviewed the Report of the Industrial Hygiene Survey and ruled out the presence of cockroach allergens and mold spores in Appellant's home as a cause of Appellant's problems. Supporting his opinion on this issue is the fact that the Appellant had lived in the same residence for ten years and experienced no problems until she was exposed to the smoke, fumes, residue, and airborne chemical irritants in the plant. (Dingle Depo. 4/17/08, p. 6, line 13 - p. 7, line 17)

Each of the physicians who treated and/or evaluated the Appellant determined that her medical problems were work-related. Dr. David C. Gaines, who saw Appellant on October 16, 2000, stated: "I can't say clearly that it's a definitive cause of her symptoms, however, the way she reported the symptoms occurred, it sounds like that that, the site of her work was where the symptoms were most apparent." (R. p. 451, lines 19-22, Gaines Depo. 11-29-03, p. 5, lines 17 – 24. Dr. Alleyne diagnosed her with the specific conditions of RADS and RUDS arising from her work environment at the plant. (R. p. 357, lines 12 – 15, p, 370, line 20 – p. 371, line 3, Alleyne Depo).

"When a pre-existing condition or disease is accelerated or aggravated by injury or accident "arising out of and in the course of the employment," the resulting disability is a compensable injury." Hargrove, 360 S.C. at 295, 599 S.E.2d at 614.

7. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO ESTABLISH THAT THE DECISION AND ORDER OF THE WORKERS' COMPENSATION COMMISSION DATED DECEMBER 17, 2008, IS UNSUPPORTED BY THE SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE IN THE RECORD.

The Appellant would respectfully show that the Decision and Order of the South Carolina Worker's Compensation Commission Appellant Panel Decision filed December 17, 2008, is not supported by the substantial, reliable and probative evidence in the record and, furthermore, the Findings of Fact is infected with errors of fact and law

The Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. The Order of the Single Commissioner dated July 15, 2008, reflects that the following records were submitted into evidence under the APA by the Appellant:

APA #1: Medical records of Dr. Edward Keith dated August 31, 1998 to March 14, 2003;

APA #2: Medical records of Dr. Rocco Cassone dated September 14, 1998 to May 1, 2000;
APA #3: Medical records of Dr. James A. Atkinson (Atkison) dated September 1, 2000 to June 12, 2002;
APA #4: Medical records of Dr. Dan Hopla dated September 18, 2000 to April 27, 2001;
APA #5: Medical records of Dr. David C. Gaines dated October 16, 2000 to October 17, 2000;
APA #6: Medical records of Ms. Wynne English, CCC-SLP, dated May 2, 2001 to September 20, 2001;
APA #7: Medical records of Dr. Lucinda Halstead dated September 20, 2001 to December 13, 2001;
APA #8: Medical records of Dr. Bonnie Harris dated March 26, 2002;
APA #9: Medical records of Dr. Don Castell dated November 27, 2001 to January 29, 2002;
APA #10: Medical records of Dr. William Simpson dated July 31, 2002 to November 27, 2002
(R. pp. 125 – 275)

> Appellant incorporates in this Issue #7 each and every argument on the foregoing issues to show that the Decision and Order of the Commission dated December 17, 2008, was rendered in violation of § 1-23-380(5)(a)(b)(c)(d)(e) and (f) and that the substantial rights of the Appellant have been prejudiced by the said Order as it was based upon errors of fact and law.

8. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO PROVE SHE SUSTAINED A COMPENSABLE CLAIM UNDER EITHER § 42-1-160 OR § 42-11-10, *ET SEQ.*

Appellant would respectfully show that her injury by accident is compensable under § 42-1-160.

> In determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself. . . . Further, an injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing. . . . Therefore, if an

> injury is unexpected from the worker's point of view, it qualifies as an injury by accident. . . . Pee v. AVM, INC., 352 S.C. 167, 171, 573 S.E.2d 785, 787 (2002).

In construing the definition of an occupational disease under S.C. Code Ann. § 42-11-10, the South Carolina Supreme Court held as follows:

> In South Carolina, our statute defines an occupational disease as "a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged." ... Unlike the North Carolina courts, however, we have not construed the definition of occupational disease so rigidly. The statute is satisfied where the Appellant is able to show simply that the employment increased the risk of the disease. (Internal cites omitted) (Emphasis supplied)

Pee, 352 S. C. at 174, 573 S.E.2d at 789..

9. WHETHER OR NOT THE CIRCUIT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APPELLANT FAILED TO ESTABLISH THAT SHE IS ENTITLED TO BENEFITS UNDER §§ 42-15-60, 42-9-10, 42-9-20 OR 42-9-30 FOR MEDICAL CARE/TREATMENT, TEMPORARY TOTAL/PARTIAL DISABILITY BENEFITS AND/OR PERMANENT PARTIAL DISABILITY BENEFITS.

The record in this case unambiguously establishes by substantial, probative and reliable evidence Appellant's entitlement to medical care/treatment under § 42-15-60, compensation for temporary partial disability benefits under § 42-9-20, and compensation for specific permanent partial disability under § 42-9-30.

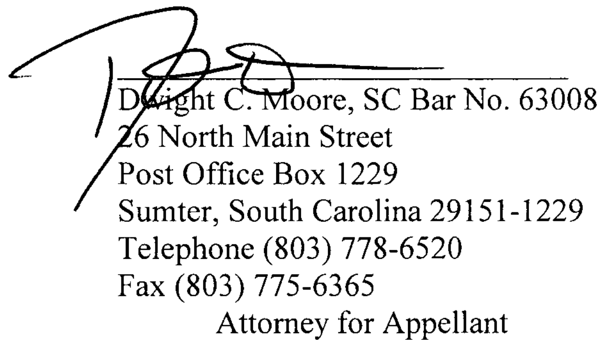
The substantial evidence in the records requires that the Orders of the Single Commissioner and of the Panel denying benefits to the Appellant should be reversed based upon errors of law and fact.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the substantial, probative and reliable evidence in the record, the law of the case, and the statutory and case law of this State require that the orders denying her benefits be vacated and the initial order of Commissioner Childs awarding her benefits and the subsequent affirmance of the Single Commissioner's order by the Panel and the Full Commission be reinstated.

Respectfully submitted,

MOORE LAW FIRM, L.L.C.



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Attorney for Appellant

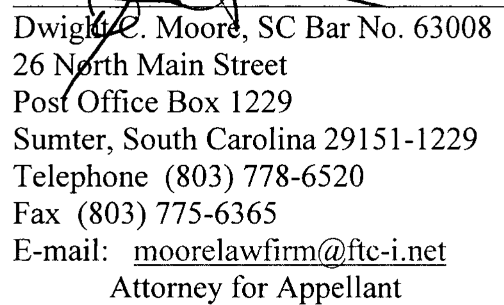
April 4, 2013

CERTIFICATE OF COUNSEL

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

MOORE LAW FIRM, L.L.C.

April 4, 2013



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2007-CP-14-00150

Diane C. Dingle, Claimant, ... Appellant,

v.

Federal Mogul Corporation, Employer, and
Travelers Property Casualty Company of America, Carrier, ... Respondents.

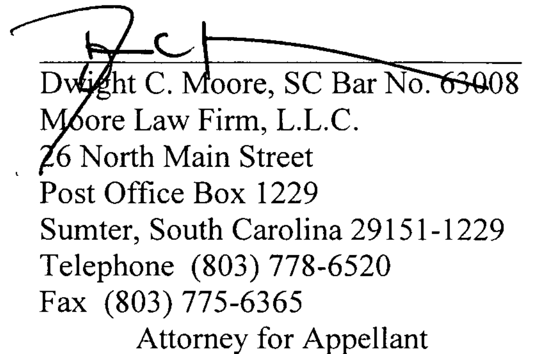
PROOF OF SERVICE

I certify that I have served the documents named below upon the Respondents by depositing a copy of the same in the United States mail, postage prepaid, on April 8, 2013, addressed to their attorney of record as follows:

DOCUMENTS SERVED: Final Brief of Appellant
Final Reply Brief of Appellant

SERVED UPON: Candace G. Hindersman, Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209

April 8, 2013



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