THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL COMMISSION

Appellate Case No.: 2018-001526

Monica Murphy, Employee.....Appellant,

v.

Halocarbon Products Corporation, Employer, and Commerce & Industry Insurance Company c/o AIG Claims, Inc., Carrier.....Respondents.

[FINAL] REPLY BRIEF OF APPELLANT

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Argument

1. **The Commission erred in refusing to admit the expert report and opinions of Dr. Philip Edelman, a highly qualified physician and expert in the field of Environmental and Occupational Medicine; the error being his report was timely and properly supplemented and the claimant had a right to rebut the expert report of Dr. MacKinnon, a purported expert in hydrofluoric acid injuries.**

Not only was Dr. Edelman's report properly supplemented, it was timely submitted in view of the fact that the hearing was rescheduled for April 27, 2017. Claimant filed a completely new Prehearing brief and Dr. Edelman's report was included and was a supplement to Claimant's original Prehearing brief of February 20, 2017. Reg. 67-612 (B) (1) provides that "A written expert's report to be admitted as evidence must provide the report at least 15 days before the scheduled hearing." The Claimant did exactly what this regulation requires and served her new Prehearing Brief on April 12, 2017- 15 days prior to the hearing on April 27, 2017. The argument that it was not timely is simply incorrect. Furthermore, while Halocarbon argues in its brief at p. 30 that the Claimant "studiously avoids any mention of Reg. 67-612," this is manifestly incorrect because in her Initial Brief she argues in the heading under Section I, that the **Claimant identified Dr. Edelman in her Pre-hearing Brief 15 days before the scheduled hearing**, which is exactly what Reg. 67-612 requires. Thus, to have excluded Dr. Edelman's report was an abuse of discretion. An abuse of discretion occurs when the trial court's order is controlled by an error of law or where there is no evidentiary support for the trial court's

factual conclusions. *Sundown Operating Co. v. Intedge Industry, Inc.* 383 S.C. 01, 681 S.E. 2d 885 (2009).

Moreover, as previously argued, and reiterated here, "a party is under a duty to supplement a response with respect to any question directly addressed on the form [The Pre-hearing Brief]. Reg. 67-611. The Pre-hearing Brief specifically calls for the party to list witnesses and medical evidence in response to questions 7 and 9 on the Form 58. The Claimant did just that. Reg. 67-611 expressly permits supplementation- without time limitation- at least before the hearing. A "Reset" Hearing Notice was issued by the Commission instructing the parties to file a Form 58 pursuant to Reg. 67-611. (See Ex. A). Thus, Dr. Edelman was listed as a witness by report and as medical evidence by report on the Claimant's required Pre-hearing Brief and the Commissioner's exclusion of this evidence is legal error which should be reversed.

Furthermore, it is simply false to suggest that the Claimant's motion for a continuance or postponement of the March 7, 2017 hearing date on the additional grounds of the need for further discovery was nothing more than just an "afterthought," as argued by Halocarbon at p. 29 of its brief. To have expected an epistle outlining in detail the need for the continuance under emergent conditions is simply unreasonable. Nevertheless, counsel did explain in detail the need for the continuance and confirmed the substance of why it was needed in a follow-up email on March 8, 2017, the very next day, to the Commissioner's administrative assistant setting forth why the continuance was needed and the fact three new experts had been named by the Defendants and that there may be a need **for rebuttal or additional testimony**. (See Exhibit C to Appellant's Brief to the

Full Commission; R. p. 657). The matter of the newly named experts and potential need for rebuttal testimony was vigorously discussed. The very notion that the Claimant could be expected to respond to the allegations and opinions of three newly identified experts in what Halocarbon concedes is a complex case within 10 days of their identification is incredulous, even if they were "timely identified." It is difficult to imagine how Claimant's counsel could have done more. The failure to admit Dr. Edelman's report violates every notion of fundamental fairness. The naming of three new experts in this case, which had been pending for nearly two years, and who had not even examined the Claimant, ten days before the hearing is beyond the pale. Halocarbon does not have clean hands here.[1]

Thankfully, Claimant's counsel has more than one case and the motion to continue the hearing was made **before** the hearing due to circumstances beyond Claimant's control. Because the Single Commissioner committed legal error by not admitting Dr. Edelman's report, her decision should be reversed it its entirety.

2. **The Full Commission and the Single Commissioner ignored substantial evidence that the Claimant's exposure to 40% HF caused the Claimant's heart block and caused injury or aggravation to her lungs; the error being that the substantial, reliable, and probative evidence on the whole record proves that it is more probable than not that the Claimant's exposure to HF did cause the Claimant's heart and lung injuries.**

The old saying in the law that if everyone is telling the exact same story then someone is lying is pertinent to this case. And yet on the whole, the Claimant

[1] The Commission also buttresses its decision not to admit Dr. Edelman's report in part on the grounds that the Claimant could have withdrawn her Form 50. This position is unreasonable and fails to taken into account that the claim had been filed for going on two years. She should not have been forced to do this to get additional desperately needed medical treatment.

concedes that with respect to an exposure to HF there are certain things one must look for to validate the diagnosis. This is particularly true with respect to HF induced cardiac dysrhythmia or heart block. The Commission ignored evidence in the record which proves what the Respondent claims Ms. Murphy must prove- a cohesive theory of causation. Such evidence is in the record in spades.

While the Commission is free to disregard medical evidence in favor of other competent evidence in the record, it is not free to ignore substantial competent evidence which is favorable to the Claimant in order to reach a conclusion desired by the Commission. *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E. 2d 200 (Ct. App. 2012). Other states have held similarly. ("*We view the evidence in the light most favorable to the decision, but may not view favorable evidence with a total disregard to contravening evidence," Dewitt v. Rent- A- Center, Inc.* 146 N.M. 453, 212 P.2d 341 (2009)). This is what the Commission has done here. See, also, *Geck v. North Dakota Workers Compensation Bureau*, 198 N.D. 158, 583 N.W.2d 621 (1998) ("the Bureau may not simply ignore competent medical...[evidence] without expressly setting forth findings of fact adequate reasons which are supported by the record, for doing so.") In this case, the Commission ignored substantial evidence from a treating doctor on a critical factor, a prolonged QT interval- evidence indicative of significant HF exposure. **Dr. Elgin Hobbes, a treating doctor at University Hospital provided a "Final Diagnosis of Toxic Inhalation injury sequela, Chemical exposure", and noted "Prolonged QT,"** which was eventually interpreted as 3rd degree heart block, requiring a pacemaker. (R. pp. 505-506). The Commission's

Order and Decision is entirely devoid of any analysis of this evidence, and violates its own standard to assign greater weight to the opinion of the treating physician.

According to the case law of this State, it is the custom, practice and wisdom in worker's compensation cases to assign great weight to a treating doctor's findings and diagnoses. *Hope v. Michael's Stores, Inc.* 2015, WL 2328618 (S.C. Work Comp. Comm. 2015) The Commission noted in *Hope*:

> We give more weight to the opinion of the treating physician, Dr. Mark Dean. He was chosen by the Claimant, and she stated that she was happy with his treatment. He also had an opportunity to treat Claimant for several months and actually performed her surgery.
>
> We give greater weight to the opinion of the treating doctor who is intimately familiar with Claimant's injury, treatment, and condition than we give to the one-time IME doctor.
>
> *Debbie Hope, Appellant Claimant Michael's Stores, Inc., Employer & Gallagher Bassett, Carrier, Defendants/respondents,* WCC 1311109, 2015 WL 2328618, at * (S.C. Work. Comp. Comm. Apr. 28, 2015)

Given the fact Halocarbon admits in its own documents that **even a minimal exposure to HF can "cause a wide range of effects that may not show for many hours and days after the initial exposure if not properly treated,"** the reliable and substantial evidence on the whole record supports only one conclusion: Murphy sustained a permanent injury to her heart and lungs from her exposure to HF. (APA No. 20, page no. 204; R. p. 570).

Respondent's own purported HF expert and its toxicologist affirm what is, in fact, in the Claimant's medical records. That is, if one is experiencing HF induced heart bock or rhythm disturbance, you would expect to see a prolonged QT interval. Dr.

Elgin Hobbs notes in the University Hospital records that Ms. Murphy had a "prolonged QT" interval reading from initial Electrocardiogram. (Cl. APA page no. 45; R. p. 505). Dr. MacKinnon acknowledged on cross - examination in his deposition, which is quoted at length in Appellant's Brief, that a prolonged QT interval is a significant finding subsequent to an HF exposure and that it would take a significant exposure to precipitate a prolonged QT interval. (MacKinnon Dep. p. 41: 22-25- p. 43: 1-21; R. pp. 356-357). Dr. Early, the Defendants' toxicologist, notes the effects of HF on the heart include "prolongation of the QT interval, arrhythmias (ventricular tachycardia, fibrillation, and electromechanical dissociation). (Defendant's APA at page 400; R. p. 612).

Dr. Setaro, Claimant's expert cardiologist, and an Associate Professor of Medicine at Yale, notes that with HF exposures there "can be prolongation of the QT interval on ECG or other electrical disturbances. (Cl. APA page 240; R. p.575).

The substantial, reliable evidence, therefore, shows that no fewer than 4 doctors note the significance of a prolonged QT interval following an exposure to HF, which Murphy had. The failure of the Commission to weigh this evidence, analyze it and come to the only reasonable conclusion that can be reached (which is that HF caused the claimant heart and lung injuries) should be reversed.

Ms. Murphy has already shown that the absence of abnormal electrolyte findings is not uncommon following HF exposures, as noted by Dr. Early, the defense toxicologist. (Def. APA page 400; R. p.612). Even so, the Claimant had an abnormal electrolyte finding noted in her medical record which was revealed as low

phosphorus. (Cl. APA page no. 51; R. p. 511). Dr. Chetan A. Patel, a treating physician, notes "**The patient has a low phosphorus**, I will supplement with potassium phosphorus." (Id.) Both Dr. Early and Dr. MacKinnon missed this fact. Dr. Early states:

> The issue of electrolyte abnormality developing 10 days after the exposure is one that I would like to discuss. I reviewed the electrolyte reports from MCG. They were all done in the first 2 weeks after the exposure... **I did not see a low phosphate or local (sic) calcium in the reports.**

(Dr. Gordon Early Report, Def. APA page no. 399; R. p. 611)

These are glaring and substantial errors by Halocarbon's experts on critical factors relating to the effects of an HF exposure. The Commission ignored these errors and facts which cannot be excused, which renders the Commission's factual findings unreliable. Indeed, the Commission's finding at p. 46, No. 65 (R. p. 116) that there were no abnormal electrolytes noted is without evidentiary support because Murphy had a documented low phosphorous level. The combination of absolutely false factual findings indicates that the Commission's decision is not based on sufficient substance to withstand scrutiny. Instead, the Commission engages in surmise, conjecture and speculation about the degree of Murphy's exposure as not of sufficient quantity or duration to cause permanent injury, when in fact Halocarbon's own documents admit otherwise. In fact, there was no scientific measurement of the quantity of fumes taken but Halocarbon's own expert admits the existence of a prolonged QT interval on EKG is evidence of a significant exposure, not a minimal one. And Dr. Mackinnon admits that visible fumes, which Halocarbon concedes were present, is evidence of a high

degree of HF concentration. (Appendix pp. 3-5; Tr. pp. 191-195; Mackinnon Dep. p. 27: 1-2; R. p. 349). And Halocarbon's own witness, George Campbell, states that he knew it was HF that he was overcome by and not Sevoflurane or any other chemical. (Appendix p. 2, lines 2-5; Tr. p. 181).

Finally, it is noteworthy that the absence of hypocalcemia findings on lab report are very likely due to the fact that Ms. Murphy had been administered calcium gluconate on August 21, 2015 at the plant, which was continued in route to the hospital. (R. p. 266; Tr. p. 67). This very likely masked a low level of calcium.

Insofar as the injury to her lungs, Dr. Early, the defense toxicologist, admits that "**Ms. Murphy's lung condition is worse now that it was prior to the exposure.**" (Def. APA page no. 402; R. p. 614). And so the Respondent's claim that Dr. Early said she was no worse is patently false.

Dr. Mitchell, the defense pulmonologist, admitted that in fact there was evidence in the record of airflow obstruction with Ms. Murphy's lungs after bronchodilator testing. (Dr. Mitchell Dep. p. 27; Appendix p. 8, lines 2-13). And so, although RADS can present as either obstructive or restrictive disease, there is nonetheless substantial evidence of airflow obstruction on bronchodilator testing of Ms. Murphy's lungs. (Dr. Alleyne Dep. p. 12: 4-8; R. p. 407). Dr. Mitchell further admitted, confirming Dr. Alleyne's testimony, that the diagnosis of reactive airways syndrome- RADS- is based on history and clinical findings, and that there is no objective test to confirm a diagnosis of RADS. (Mitchell Dep. p. 32:12-15; R. p. 442).

The Commission's finding that the Claimant did not prove her exposure to HF caused her heart block or lung injury should be reversed because it is not supported by substantial, reliable evidence of sufficient substance. In the face of the evidence detailed above, which was ignored by the Commission, the only reasonable conclusion that can be drawn from the evidence is that Murphy suffered both heart and lung injuries due to her exposure to HF.

3. Respondent's parenthetical, misplaced arguments as to the lethality of HF and the standard of review afford no basis to affirm the Full Commission.

Halocarbon argues that Murphy has violated Rule 208 (b)(1)(C),SCACR by including allegedly argumentative and "hyperbolic" language in her Statement of the case by stating that HF "is one of the most dangerous chemicals used in all industry." This argument is false. Halocarbon's own HF expert, Dr. Mackinnon, concedes that the chemical is lethal if you are exposed. (Mackinnon Dep. p. 11: 7-9; R. p. 11, lines 7-8). And HF is highly hazardous as a matter of law, as it is on the Occupational Safety and Health Administration's *List of Highly Hazardous Chemicals* listed in 29 C.F.R. 1910.119. Murphy's inclusion of this admitted fact in her Statement of the case is hardly a violation of Rule 208.

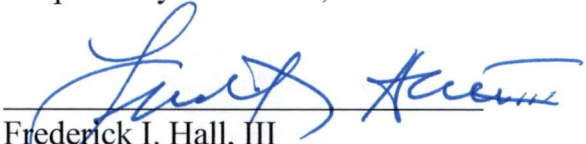
As to the standard of review applicable to the issues on appeal, Murphy's counsel concedes that no separate section has been set forth as apparently required by the Rules, as amended in May, 2018. However, the standard as to both arguments is readily apparent because in her argument as to the issue of the timeliness of Dr. Edelman's report, Murphy argues the abuse of discretion standard and the statutory requirement that

a properly supplemented witness must be allowed. As to her second argument, Murphy clearly sets forth the substantial evidence rule as the standard of review. Appellants Brief at p. 18. Murphy would point out, however, that the Thompson Reuters publication for the *South Carolina Rules of Court* for the year 2018 (used by many practitioners) does not contain the requirement of a specific section setting out the standard of review. Regardless, this technical issue affords no basis to affirm where there is clear legal error.

Conclusion

Because the Commission committed legal error in not admitting Dr. Edelman's timely submitted report and ignored substantial evidence which proved an injury to the Claimant's heart and lungs and its factual and legal findings pertaining thereto are on the whole without evidentiary support or are clearly erroneous, its Decision and Order should be reversed.

Respectfully Submitted,

BY: 

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that this Final Reply Brief complies with Rule 211(b) S. C. A. C. R.

February 13, 2019

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