

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Aisha Taylor and T. Scott Beck, Commissioners

Case No. 2014-000225 (WCC FILE NO. 1023410)

Michael W. Dority, Claimant, Appellant,

v.

CTR of the Carolinas, Inc., et al., Employer, and Twin City Fire Insurance Company, Carrier,
Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- A. Is Appellant's Lung Disease Compensable Under the Act and the Finding of IPF Clearly Erroneous in View of the Reliable, Probative and Substantial Evidence on the Whole Record?
- 1) Does Appellant Have a Compensable Occupational Disease Under the Act, and Is the Commission's Order Affected By an Error of Law in Requiring Appellant to Prove His Disease Was Caused Solely to Employment With CTR?
- 2) Is Appellant's Lung Disease Due to His Occupation and the Finding of IPF Clearly Erroneous in View of the Reliable, Probative and Substantial Evidence on the Whole Record?
- B. Having Established a Compensable Occupational Disease Under the Act, Must Appellant Only Prove the Employment With Respondent Was of a Kind Contributing to the Disease?
- C. Is Appellant's Lung Disease Compensable Under the Accidental Injury Provisions of the Act Based on the Reliable, Probative and Substantial Evidence on the Whole Record?

STATEMENT OF THE CASE

Appellant filed a Form 50 on May 10, 2012 alleging an accidental injury and occupational disease in the form pulmonary fibrosis due to the inhalation of fumes, dust and other airborne contaminants in the work place. Respondents timely filed a Form 51 denying the claim.

A hearing was conducted by Commissioner Avery B. Wilkerson, Jr. beginning on March 26, 2013 in Rock Hill, South Carolina and concluding on April 23, 2013.

Appellant asserted that his lung disease was caused by his exposures to airborne contaminants over a 35 year period of employment beginning in 1975 with Springs Industries, Inc. (Springs) and ending with the respondent, CTR OF THE CAROLINAS, INC. (CTR) in 2010. (R. pp. 130-133, 157 & 1122-1126). Appellant contended the respondents are liable for the payment of compensation because the employment with CTR at the time of disability was of a kind contributing to the disease. (R. pp. 131, 157 & 1125).

Respondents conceded Springs did not need to be enjoined and the claimant had presented the issues correctly but contended the employment with CTR was not injurious. (R. pp. 141-142).¹ Respondents also contended appellant has idiopathic (unknown cause) pulmonary fibrosis. (R. pp. 143-145). The parties stipulated to a compensation rate of \$445.90.

Commissioner Wilkerson issued a Decision and Order on August 19, 2013 finding appellant had failed to prove his lung disease was caused by his employment with CTR and, therefore, failed to prove a compensable occupational disease under S.C. Code Ann. § 42-11-10. (R. pp. 48-49). Appellant filed a Form 30, Request for Commission Review, on August 23, 2013. (R. p. 91).

A hearing was held before an Appellate Panel of the Commission (Appellate Panel) on December 16, 2013. Appellant argued the finding of metal particulate matter in the lung tissue proves the lung disease is due to the occupation and not idiopathic. (R. p. 105). Respondents argued the case turns on the opinions of the medical experts² and conceded that smoking did not cause claimant's lung disease. (R. pp. 109 & 113-114). On January 30, 2014, the Appellate Panel issued an Order (Order) affirming the Decision and Order of the hearing Commissioner. (R. pp. 51-81).

The Notice of Appeal to this Court was served on February 3, 2014, and an Amended Notice of Appeal was served on February 26, 2014. (R. pp. 95-99).

¹ Counsel for the respondents stated: "The issue here is that there's -- there's particulate matter that has been found, apparently by Dr. Abraham, within the lungs but where did all that particular matter come from; where did it come from? We've got a bunch of stuff -- a bunch of work at Springs where the actual things that he found in the lungs were there, okay? And did it all -- did it come from CTR?"

² The hearing Commissioner also stated this is a medically driven case. (R. pp. 164-165).

ARGUMENT

STANDARD OF REVIEW

The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380 (A) (5).

Pursuant to the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or controlled by some error of law. *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006). *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

Various definitions of "substantial evidence" can be found in the interpreting case law: Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow **reasonable** minds to reach the conclusion the agency reached. *Stokes v. First National Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991) (emphasis added). Substantial evidence, however, is something less than the weight of the evidence. *De Groot v. Employment Security Commission*, 285 S.C. 209, 328 S.E.2d 668 (Ct. App. 1985). An appellate court can reverse or modify the Commission's decision if it is clearly erroneous in view of the **reliable**, probative, and substantial evidence in the whole record. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 84, 681 S.E.2d 595, 599-600 (Ct. App. 2009) (emphasis added). The Commission's finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a **reasonable** basis for it. *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 431, 458 S.E.2d 76, 76 (S.C. App. 1995) (emphasis added). Where the evidence is susceptible of but one **reasonable** inference, the question is one of law for the court rather than one of fact for the Commission. *Id* at p. 437, 80 (emphasis added). The court is

limited to a determination of whether or not there is any **competent evidence** to sustain it. *Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 1, 118 S.E.2d 812, 812 (1961) (emphasis added).

A review of these cases establishes that the reviewing court, on questions of fact, is not a mere “rubber stamp.” The court must review the whole record to see if the Commission’s findings are reasonably supported by competent, reliable evidence. Where the Commission’s findings are unsupported by substantial, reliable and competent evidence, the court must reverse.

In *Winn, supra*, the Commission awarded total disability benefits based on the testimony of the claimant. *Id* at p. 1, 812. The Supreme Court held the claimant’s testimony could not serve as “substantial evidence” because it “belied” other contrary evidence in the case. The court stated: “In the face of these facts, and of this testimony, respondent’s bare statement that he is unable to work is insufficient, in our opinion, to afford reasonable basis for the conclusion that he is totally disabled.” *Id* at p. 13, 818.

In the case of *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (1995), the Commission found the employee had reached maximum medical improvement and was not entitled to further temporary total disability benefits. The Court of Appeals held the Commission’s finding was not based on substantial evidence. It reviewed the reports of five doctors including a Dr. Graziano who indicated claimant could return to work, but that he should be careful with lifting. The Court held “[v]iewing the record as a whole, we reach the inescapable conclusion that the commission’s decision rested on a clearly erroneous view of the evidence before it.” 312 S.C. 250, 439 S.E.2d 859 (Ct. App 1993). The S.C. Supreme Court affirmed, but modified, the decision of the Court of Appeals and found Dr. Graziano’s report was not competent evidence. *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 310, 454 S.E.2d 320, 322 (1995).

A finding by the Commission that the employee's incontinence was unrelated to the accident (back injury) was not supported by substantial, reliable evidence where it was based on the opinion of a urologist who had not completed his review of the case and the opinion of a nurse who never examined the employee and merely concluded the incontinence was possibly related to a pre-existing condition. *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 458 S.E.2d 76 (1995).

In this case, appellant will show that the Commission's Order is unsupported by substantial, reliable evidence on the whole record.

A. APPELLANT'S LUNG DISEASE IS COMPENSABLE UNDER THE ACT AND THE FINDING OF IPF IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD

1) Appellant Has a Compensable Occupational Disease Under the Act, and the Commission's Order is Affected By an Error of Law in Requiring Appellant to Prove His Disease Was Caused Solely by Employment With CTR.

In its Order denying benefits, the Commission's finding that appellant failed to prove a compensable occupational disease was predicated on its findings that the **CTR employment** did not cause the lung disease or pose a hazard in excess of those ordinarily incident to employment. (R. p. 79, emphasis added). The Commission's conclusion of law that appellant failed to prove a compensable occupational disease resulting from the inhalation of foreign matter was predicated on its conclusion of law appellant failed to prove an occupational disease resulting from the **CTR employment**. (R. p. 80, emphasis added).

The Commission's Order is affected by an error of law in requiring the appellant to prove the disease resulted solely from the employment with CTR.

Claimant's evidence establishes the elements of an occupational disease under S.C. Code Ann. § 42-11-10 et seq: (1) a disease; (2) the disease arises out of and in the course of the claimant's employment; (3) the disease is due to hazards in excess of those hazards that are

ordinarily incident to employment; (4) the disease is peculiar to the occupation in which the claimant was engaged; (5) the hazard causing the disease is recognized as peculiar to a particular trade, process, occupation, or employment; and (6) the disease directly resulted from the claimant's continuous exposure to the normal working conditions of the particular trade, process, occupation or employment. *Mohasco Corp., Dixiana Mill Div. v. Rising*, 289 S.C. 130, 135, 345 S.E.2d 249, 252 (Ct. App. 1986) (Mohasco I), *rev'd on other grounds*, 292 S.C. 489, 357 S.E.2d 456 (1987) (Mohasco II); see also *Fox v. Newberry County Mem. Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995).

The evidence reflects appellant's insidious lung condition, pulmonary fibrosis, is a disease, arose over a period of time and had no definite onset or incident to which the injury can be attributed. *State Workers' Compensation Fund v. Second Injury Fund*, 309 S.C. 365, 423 S.E.2d 158 (Ct. App. 1992).

The requirement that the disease arise out of and in the course of employment requires the employee to show a causal connection between the alleged occupational disease and the conditions of employment in which the employee was engaged. S.C. Code Ann. § 42-11-10; *Mohasco Corp., Dixiana Mill Div. v. Rising*, 289 S.C. 130, 135, 345 S.E.2d 249, 252 (Ct. App. 1986) (Mohasco I). There is no requirement the causative employment be with a singular employer.

For a disease to be due to hazards in excess of those ordinarily incident to employment, the employee need only demonstrate that he was exposed to a greater risk of disease than the general public by reason of his employment. *Fox v. Newberry County Mem. Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995); *Mohasco Corp., Dixiana Mill Div. v. Rising*, 289 S.C. 130, 135, 345 S.E.2d 249, 252 (Ct. App. 1986) (Mohasco I). Here, unlike the general public, appellant was

exposed to a multitude of toxic, inorganic airborne particulates without any respiratory protection.

The requirement the disease be peculiar to the occupation does not mean that the disease must either originate exclusively from or be unique to the particular kind of employment in which the employee is engaged before it can be considered an “occupational disease.” *Mohasco I*. Peculiar to the employment means only that the employment increased the risk of the disease. Ordinary diseases may be occupational diseases if produced or aggravated by distinctive conditions of employment. *Mohasco II and Fox v. Newberry, supra. Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

The evidence on the whole record, as set forth below, clearly establishes appellant’s lung disease resulted from his exposure to inorganic, airborne particulate matter (hazards in excess of those ordinarily incident to employment) over a 35 year period. The Commission, in denying benefits, engaged in an error of law by requiring the appellant to prove the lung disease was caused solely by the employment with CTR. The appellant’s substantial rights were thereby prejudiced.

2) Appellant’s Lung Disease is Due to His Occupation, and the Finding of IPF is Clearly Erroneous in View of the Reliable, Probative and Substantial Evidence on the Whole Record.

Appellant filed this workers’ compensation claim after his pulmonologist, Dr. John Doty³, told him his lung disease was occupationally-related. (R. pp. 84 & 707). An open lung biopsy on September 23, 2010 revealed pulmonary fibrosis, and the hospital pathologist reported findings consistent with both pneumoconiosis (caused by dust/occupation) and idiopathic (unknown cause) pulmonary fibrosis (IPF). (R. pp. 371-372, 380-381 & 817-819).

³ Dr. John D. Doty, II is a board certified pulmonary specialist at the Charlotte Medical Clinic who obtained a fellowship in Pulmonary Medicine at the Medical University of South Carolina (Charleston) from 2001 to 2004. (R. pp. 366-367). He has been practicing pulmonary medicine for several years and has treated patients with occupational lung disease (R. pp. 367 & 435).

Dr. Doty suspected occupational exposure as the cause of appellant's lung disease when he first saw him on July 22, 2010. Because appellant did not experience progression of his disease, Dr. Doty testified there is a 65% likelihood the disease is due to the occupational exposures. (R. pp. 376, 383-388 & 392-394). With pneumoconiosis, you remove the worker from the offending environment and they often stabilize. Since discontinuing employment at CTR, appellant has stabilized including his CT scans, pulmonary function tests, oxygen requirement and subjective complaints. (R. pp. 383-386). IPF is usually seen in patients older than Mr. Dority and is almost always rapidly progressive.⁴ (R. pp. 370, 373-374, 383-387 & 434).

In Dr. Doty's opinion, to a reasonable degree of medical certainty, appellant has a pneumoconiosis that has developed into interstitial lung disease ("ILD"), and the occupational exposure to metal dust and fumes has led to the problem. (R. pp. 407, 412 & 417).

The prolonged inhalation of the fumes and dust from the silver solder Mr. Dority worked with at CTR can cause a benign pneumoconiosis, and in Dr. Doty's opinion, Mr. Dority's clinical course is more consistent with a benign pneumoconiosis as opposed to IPF. (R. p. 389). More likely than not, Mr. Dority's exposures at CTR contributed to his lung condition, and the combined exposures at both Springs and CTR caused the lung condition. (R. pp. 391-392, 418, 441-443 & 450). The three and a half years exposure at CTR contributed to his total particulate burden in his lungs. (R. pp. 443-444).

Dr. Doty testified appellant's breathing problems and oxygen requirement are due primarily to his pneumoconiosis and ILD. (R. pp. 396 & 445). The fibrosis has caused a severe reduction in his diffusing capacity. (R. p. 396). Cigarette smoking does not cause

⁴ Dr. Feldman, the defense IME, agrees IPF "relentlessly" progresses to death. (R. p. 476).

pneumoconiosis, pulmonary fibrosis or ILD. (R. pp. 394, 413 & 437). It causes COPD or emphysema which is diagnosed by airflow (reduced FEV1 on spirometry). (R. pp. 437-439).⁵

Claimant had the biopsy reviewed by Dr. Richard Kradin,⁶ a board certified pulmonologist and pathologist who teaches at Harvard University. Dr. Kradin reported that the biopsies exhibit several unusual pathological features seen in relation to the inhalation of smoke and fume inhalation. Based on his review of the lung tissue, it is his opinion, to a reasonable degree of medical probability, that claimant's occupational exposures to metals, including the components of silver brazing alloy, caused his chronic lung disease. (R. pp. 767-784).

Respondents had appellant undergo an independent medical examination by Dr. Gregory Feldman. In his deposition of October 4, 2012, Dr. Feldman testified claimant has IPF and his lung disease cannot be definitively attributed to his occupational exposures without a pathological finding of particulate matter in the lung tissue. (R. pp. 471-472, 474-475 & 481-482). According to Dr. Feldman, there are many metals that can cause pneumoconiosis, and if a pathologist found particulate matter in the lung tissue, it would be his opinion appellant's lung condition is due to his inhalation of dust and fumes. "You have to have a particulate matter to suggest that metal/welding plays some role. . . . Then we would not be sitting here and arguing what he has." (R. pp. 471 & 515-516).

Therefore, after Dr. Feldman's deposition, the lung tissue from the biopsy was analyzed using state-of-the-art scanning electron microscopy (SEM) and Energy Dispersive X-ray

⁵ Mr. Dority's airflow/spirometry was normal in 2011 and 2012. (R. p. 395). His oxygen requirement is not related to emphysema/COPD. (R. p. 439). COPD does not result in an oxygen requirement until the FEV1 is reduced to 1 liter. His FEV1 is 2.8 liters. (R. p. 439).

⁶ The Commission found Dr. Kradin conducted only a records review and then afforded his opinion no weight because his report indicated the welding exposure was at Springs rather than CTR. (R. p. 60-61). However, Dr. Kradin reviewed the lung tissue and opined the biopsies exhibit several unusual pathological features seen in relation to the inhalation of smoke and fume inhalation. Accordingly, this inaccuracy in his report logically cannot detract from his opinion the lung disease was caused by the occupational exposures as a whole.

Spectroscopy (EDS) by Dr. Jerrold L. Abraham.⁷ (R. pp. 742-743). He found large numbers of particulates and a high number of metal particles including aluminum, iron, tin, chromium, nickel, titanium, manganese and zinc. (R. p. 742). These are all very unusual particulates not seen in the general population and consistent with exposure to various metals. (R. pp. 742-743).

The evidence is uncontroverted that all of these metals were sawed, cut, grinded, sanded, welded or soldered at CTR and that appellant was exposed to airborne dust from these metals without benefit of respiratory protection. (See Section C, *infra*; emphasis added).

Based on these findings, Dr. Abraham concludes, to a reasonable degree of medical certainty, that appellant's pulmonary fibrosis was due to his exposures to a multitude of different toxic dust particulates over his working career including his exposures at CTR and cannot be IPF because that diagnosis requires exclusion of exposures to toxic particulates. (R. p. 742).

In light of Dr. Abraham's findings, Dr. Feldman's opinions support the appellant's claim of occupational lung disease and cannot be viewed as competent evidence supporting the Commission's findings of IPF.

After receiving Dr. Abraham's report, respondents hired Dr. Victor Roggli.⁸ In his first report, Dr. Roggli concluded appellant does not have asbestosis,⁹ and he supported respondents' contention appellant has IPF. He cited the *2011 American Thoracic Society (ATS) Official*

⁷ Dr. Jerrold Abraham is an expert pathologist in the diagnosis of pneumoconiosis using SEM/EDS. A graduate of MIT, Dr. Abraham is the Director of the Department of Particle Analysis in Environmental and Biomedical Samples at SUNY Upstate Medical University in Syracuse, NY. (R. pp. 744-766). His Curriculum Vitae reflects he has authored hundreds of medical articles and abstracts including dozens of articles regarding his research in the area of inorganic particulate matter in the lungs of individuals with pneumoconiosis. (Id) These articles include (1) *Lung Pathology and Mineralogy Associated with High Pulmonary Burden of Metal Particles*, (2) *Development and Use of a Pneumoconiosis Database of Human Pulmonary Inorganic Particulate Burden in Over 400 Lungs*, (3) *Documentation of Environmental Particulate Exposures in Humans Using SEM and EDXA* and (4) *Proposed Criteria for Mixed-Dust Pneumoconiosis; Definition, Descriptions, and Guidelines for Pathologic Diagnosis and Clinical Correlation*. (Id)

⁸ On 1/25/13, Respondents filed a motion to postpone the hearing scheduled for 2/5/13 in order to get a report from Dr. Roggli resulting in his first report of 2/1/13. (R. pp. 87-90).

⁹ Dr. Roggli's primary expertise is in the area of asbestos-related disease. (R. pp. 959-982).

Statement of Guidelines for the Diagnosis of IPF in support of this opinion. (R. pp. 953-954 & 823-833).

However, the *ATS Statement* provides:

Diagnostic Criteria:

The **diagnosis of IPF requires** the following:

1. Exclusion of other known causes of ILD (e.g., domestic and occupational environmental exposures, connective tissue disease, and drug toxicity).

(R. p. 830; emphasis added)

Despite the fact that exclusion of occupational exposures is the first criteria that must be met in diagnosing IPF, Dr. Roggli makes the diagnosis while admittedly having absolutely no clinical or occupational exposure history. (R. pp. 953-956).

After learning this case does not involve allegations of asbestos-related disease and after receiving a copy of Dr. Abraham's report, Dr. Roggli authored a second report and makes the bare assertion Dr. Abraham's opinion is "sheer speculation not supported by scientific evidence." (R. p. 957).

However, prior to his involvement in this case, Dr. Roggli authored an article entitled, *Electron Microprobe Analysis in Metal-Induced Lung Disease*, which sets forth on Table 1 a list of metals which can cause pneumoconiosis including iron, aluminum, silicon, tin, chromium, copper, nickel, titanium and zinc (all types of particulates found by Dr. Abraham in appellant's lung tissue). (R. p. 896). In this article, Dr. Roggli discusses the importance of SEM/EDS (methods used by Dr. Abraham) in the diagnosis of metal-induced lung disease. He states that these metals can cause mixed-dust pneumoconiosis and cites the article by Dr. Abraham setting forth the criteria for the diagnosis of mixed-dust pneumoconiosis. (R. pp. 889, 891, 893 & 896).

Also prior to his involvement in this case, Dr. Roggli authored a chapter in a pathology textbook in which he states the clinical investigation of a patient with suspected pneumoconiosis

and the diagnosis of mixed-dust pneumoconiosis begins with and requires a careful and detailed occupational exposure history. (R. pp. 898-899). If lung tissue is available, it should be analyzed for inorganic particulate content using SEM/EDS and the results correlated with the exposure history for a correct diagnosis. (R. pp. 898 & 902-903). He states the analysis of the lung tissue for injurious agents provides important evidence in medicolegal cases. (R. p. 900). He cites various articles written by Dr. Jerrold L. Abraham in support of these statements.¹⁰ (R. pp. 904-909).

Dr. Roggli's opinion cannot be considered competent evidence because: (1) his diagnosis of IPF completely lacks the foundation (exclusion of other causes) required in the ATS Guidelines that he cites in support of his opinion, (2) his conclusion that Dr. Abraham's causation opinion is "sheer speculation" clearly contradicts the opinions he previously expressed in his medical article and textbook and (3) his opinion is unreliable, not only because of these glaring defects and his initial opinion appellant does not have asbestosis, but because the respondents moved to continue the hearing for the purpose of submitting a report from Dr. Roggli before he had even reviewed the case and formulated an opinion.¹¹

The findings of the Commission and any medical opinion that the cause of appellant's lung disease is unknown (IPF) "belies" the pathological finding of an unusual number and type of metal particles in the lung tissue and the accepted medical literature (ATS Guidelines) requiring the exclusion of occupational exposures. (see *Wynn, supra*) In view of the reliable, probative and substantial medical evidence on the whole record, the Commission's conclusion

¹⁰ Six different articles written by Dr. Abraham were cited by Dr. Roggli including "*Recent advances in pneumoconiosis: The pathologists' role in etiologic diagnosis*" and "*Proposed Criteria for Mixed Dust Pneumoconiosis: . . . diagnosis and clinical correlation.*"

¹¹ The clear implication being that respondents knew Dr. Roggli invariably would support the defendants' position.

that the cause of appellant's lung disease is unknown and not due to the occupational exposures is clearly erroneous and not founded on substantial evidence ("evidence of sufficient substance to afford a reasonable basis for it"). S.C. Code Ann. § 1-23-380(5) (d), (e) (Supp. 2011); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010); *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 309-10, 454 S.E.2d 320, 322 (1995) (affirming reversal of Commission's decision, which was supported by no competent evidence in the record).

B. HAVING ESTABLISHED A COMPENSABLE OCCUPATIONAL DISEASE UNDER THE ACT, APPELLANT MUST ONLY PROVE THE CTR EMPLOYMENT WAS OF A KIND CONTRIBUTING TO THE DISEASE.

All of the competent evidence of record in this case establishes appellant has a compensable occupational disease under S.C. Code Ann. § 42-11-10, et seq. (Supp. 2011) As noted above, appellant has consistently asserted throughout the prosecution of this claim that he has a compensable occupational lung disease as a result of employment beginning with Springs in 1975 and ending with CTR in 2010.

Unfortunately, however, the record reveals the Commission's Order is affected by an error of law as it clearly focused on whether the CTR employment caused the appellant's lung disease. The Commission found as fact that "there is insufficient evidence to establish that Claimant's lung disease was caused or aggravated by the **work environment at CTR**" and "[c]laimant failed to prove by a preponderance of the credible, reliable, and probative evidence that his alleged lung disease was directly caused by, aggravated by, or arose out of his **employment with CTR.**" (R. p. 63; emphasis added)

As a result of addressing this irrelevant issue, the Commission's Order places great importance on the credibility¹² of the lay witnesses and concludes the respondents' witnesses were more credible. (R. pp. 55-57). While the appellant disagrees with these findings and vigorously stands by the veracity of his testimony and that of Charles Glenn, the only real difference in the testimony of the lay witnesses goes to the intensity of exposure (atmospheric conditions) in the CTR facility. They all agree on the types of metals that were cut, sawed, grinded, sanded, soldered, welded and became airborne at CTR.

Therefore, the evidence is undisputed that the CTR employment was of a kind contributing to the disease. Since appellant does not have to prove the CTR employment, standing alone, caused his disease, the intensity of the exposures at CTR versus Springs is irrelevant notwithstanding all the competent evidence on the whole record showing the CTR employment clearly contributed to cause appellant's lung disease.

Appellant's occupational disease resulted in disability during his employment with the respondents. (R. pp. 398-399). In *Glenn v. Columbia Silica Sand*, 112 S.E.2d 711 (1960), the S.C. Supreme, in addressing the question of liability as between successive carriers, held liability is assigned "to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease We note, in passing, that where the employment at the time of disability was not of a kind contributing to the disease, the general rule is that liability for the entire compensation is that of the employer, and consequently of the carrier, at the time of the employee's last exposure causally related to the disease."

¹² The testimony of appellant and Charles Glenn regarding the intensity of exposures at CTR is more credible than the testimony of the respondents' witnesses. For example, appellant and Mr. Glenn testified the soldering/brazing work done in the plant created smoke and fumes. The respondents' witnesses testified no smoke was emitted by this work. The MSDS for the solder used at CTR and common sense draw the credibility of the respondents' witnesses into question.

In *Hanks v. Blair Mills*, 286, S.C. 378, 335 S.E.2d 91 (Ct. App. 1985), the employee had a long history of exposure to cotton dust having worked for Abney Mills from 1946 to 1955 and then Blair Mills from 1964 to 1979. *Id* at p. 380, 93. His breathing problems which began in the mid-1970's resulted in permanent and total disability in 1979, and he retired on June 28, 1979. *Id*. The Commission ordered the carrier, Commerce Industry, to pay total disability benefits, and the circuit court affirmed.

Commerce Insurance appealed and argued Hanks did not suffer his last injurious exposure to cotton dust during its coverage. Commerce pointed out it provided coverage beginning on May 31, 1979 when Hanks was out of work due to illness. He returned on June 4, 1979 and remained until June 28, 1979 when he retired on total disability. Commerce argued any cotton dust exposure during the 24 days of coverage could not have been injurious as the medical evidence indicated any exposure during this period would have caused no measurable damage. The Court was not persuaded:

In the case of occupational diseases, liability is . . . assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of the disability was of a kind contributing to the disease. . .

Consequently, under the rule of *Glenn v. Columbia Silica Sand Company*, *supra*, Commerce Insurance is the liable carrier. Appellants filed a petition to argue against application of the *Glenn* rule because it is harsh and unfair to employers and carriers under whose employment or coverage the employee may have received only minor exposure to the disease-producing hazard. They urge instead that South Carolina adopt the apportionment rule under which liability is apportioned among all the employee's employers, and their carriers, whose conditions of employment were of the type contributing to the disease. We decline to adopt the apportionment rule because in summary, it would place an unduly harsh burden on an employee to notify, file a claim and prove a compensable injury against the many employers whose conditions of employment may have contributed to his injury.

Id at p 385-386, 95-96.

In *Reese v. CCI Construction Co.*, 334 S.C. 600, 514 S.E.2d 144 (Ct. App. 1999), the claimant alleged an injury by accident/occupational disease while working for CCI. He had worked with “powered vibratory tools” as a carpenter and construction worker for over twenty years prior to his employment with CCI. On his third day of work for CCI, claimant twisted his right wrist while working with a power drill. The medical evidence indicated he suffered from necrosis of the carpal lunate and that this condition sometimes occurs among people who work with “very high powered vibratory tools.” The Commission found claimant’s disease qualified as an occupational disease but that the evidence did not establish that it was caused, aggravated or contributed to by his work at CCI and that, therefore he did not suffer a compensable injury by accident arising out of or in the course of employment. The S.C. Court of Appeals reversed and held the claim compensable because the employment with CCI was of a kind contributing to the disease. The Court cited *Glenn* and *Hanks* in reaching its decision.

Appellant’s disease resulted in disability while employed by CTR, and the employment with CTR was of a kind contributing to the disease.

C. APPELLANT’S LUNG DISEASE IS COMPENSABLE UNDER THE ACCIDENTAL INJURY PROVISIONS OF THE ACT BASED ON THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

Appellant worked for CTR from July 9, 2007 through September 17, 2010. (R. p. 174). Charlie Glenn and the respondents’ witness, Michael Hornback testified CTR manufactures cryogenics equipment and refurbishes vessels, bulk tanks and tanker trucks used in the delivery of industrial gases in a large facility involving extensive fabrication of various metals including stainless steel, aluminum, copper, nickel, tin, zinc, titanium and iron. (R. pp. 295, 296, 301-304, 554-557, 563-564 & 575-577). They testified one open space comprises various departments including final line side, fabrication shop, bulk tank area and the tanker section. (R. pp. 290-291,

293-295, 557-559, 572 & 575-576). The Electrical Department and Oxygen Cleaning Section are separated from the open areas. (R. 559-560).

Charlie E. Glenn worked for CTR from February, 2007 to November, 2011 as IT Director and Safety Director. (R. pp. 549-551). He testified the work done in the CTR facility involved welding, brazing, grinding and sand-blasting of the various metals with torches and pneumatic grinders and sanders. (R. pp. 558, 561-567, 569-570, 572-573, 575, 577, 584-586 & 627). This testimony was corroborated by the testimony of the respondents' witness, Michael Hornback. (R. pp. 311-313).

Glenn testified this work created metal dust, shavings, fumes and smoke which traveled throughout the facility. (R. pp. 566-567, 570 & 573-578). In the winter, there a constant, visible cloud most of the day. (R. pp. 584-585). In the summer, it was not as bad, but the wind would blow the dust from the grinding. (R. pp. 584-585). Metal shavings and grindings were not cleaned up until the evening. (R. p. 585). The dust affected the electronic equipment he used. (R. pp. 565-566 & 568-569). In his opinion, claimant worked in deplorable conditions without respiratory protection and was exposed to the metal dust, shavings, fumes and smoke. (R. pp. 580-581, 586-588, 591 & 612-613).

On the final line, appellant cut and brazed tubing made of copper, brass and stainless steel. (R. pp. 187 & 349-352). The brazing work created smoke and fumes that he inhaled daily. (R. pp. 192-193, 198-199 & 203). He used a solder containing silver, zinc, copper, tin and cadmium to braze together the tubing. (R. pp. 834-844).

The Material Safety Data Sheet ("MSDS") for the solder used by appellant and his co-workers at CTR states prolonged or repeated inhalation may cause "damage to the lungs" and "pneumoconiosis" and "may adversely affect existing medical conditions such as respiratory ailments." (R. pp. 837-838). The MSDS also states the product may cause "dust, powder or

fume” and to “avoid breathing any dusts, mist or fumes resulting from the use of this product.” (R. pp. 838-840). The MSDS states use of a respirator may be necessary. (R. p. 840).

He also was required to cut, grind and sand sheets of aluminum in constructing panels which created shavings and dust he inhaled on a regular basis. (R. pp. 197-199 & 247-248). This testimony was corroborated by the respondents’ witness, Jason Threatt. (R. pp. 352-353).

Co-workers within close proximity of claimant used power band saws to cut Monel tubing used to build high pressure gas panels. (R. pp. 199, 306-309 & 354-355). Claimant inhaled the airborne dust created when the Monel tubing was cut. (R. pp. 200 & 354-355). Monel was comprised of various metals including aluminum, copper, iron, manganese, nickel, silicon and titanium. (R. pp. 872-873).

Claimant next worked for CTR in the Electrical Department building panels. (R. p. 206). He mounted and tested the panels in the main plant and continued to be exposed to the dust, fumes and smoke including welding from the fabrication shop. (R. pp. 206-209). He was also exposed to silica from the sandblasting work he was regularly required to do and also from major sandblasting work done on tanker trucks behind the plant. (R. pp. 188, 195-197, 201-203, 241-243 & 314-315).

Claimant and the other employees did not wear, nor were they required to wear, respiratory protection (R. pp. 324-325), and he experienced frequent choking and coughing due to the dust and smoke. (R. pp. 192, 194, 205 & 206).

This claim was brought under both the occupational disease and accidental injury provisions of the Act as appellant is entitled to compensation under either theory of recovery and is not required to elect between the two. (R. pp. 84, 107 & 1122). *Marquard v. Pacific Columbia Mills*, 278 S.C. 323, 295 S.E.2d 870 (1982). The Commission’s Order failed to address the claim brought pursuant to the accidental injury provisions of the Act.

S.C. Code Ann. § 42-11-40 (Supp. 2011) provides the disablement of an employee resulting from an occupational disease shall be treated as an injury by accident and the employee shall be entitled to compensation as for an injury.

A claimant may recover workers' compensation benefits if he sustains an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2009). "Arising out of" refers to the origin and cause of the accident. An accident arises out of the employment when the accident happens because of the employment, as when the employment is a contributing proximate cause. *Pierre*, at 386 S.C. 534, 541, 689 S.E.2d 615, 619 (2010) citing *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 349, 656 S.E.2d 753, 758-759 (Ct. App. 2007). *Sola v. Sunny Slope Farms*, 244 S.C. 6, 135 S.E.2d 321 (1964).

"In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances." *Hall*, 376 S.C. at 349, 656 S.E.2d at 759. "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." *Id.*

"Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion. These words are construed broadly and should continue to be so construed. Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." *Id.* (citation omitted). *Id.* citing *Pelfrey v. Oconee County*, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945).

Claimant's evidence establishes a compensable accidental injury similar to the cases of *Hiers v. Brunson Construction Co.*, 221 S.C. 212, 70 S.E.2d 211 (1952), and *Sturkie v. Ballenger Corp.*, 268 S.C. 536, 235 S.E.2d 120 (1977). In *Hiers*, an employee with a preexisting cold was required to repair a roof on a cold, wet day in February. He experienced a "chill" while working on the roof which subsequently developed into influenza, pleurisy, and pneumonia. In affirming a death benefit award, the court defined "injury by accident" as follows:

The adjective "accidental" qualifies and describes the injuries contemplated by the statute as having the quality or condition of happening or coming by chance or without design, taking place unexpectedly or unintentionally. If one becomes ill while at work from natural causes, the state or condition is not accidental since it is a natural result of consequence and might be termed normal and to be expected. If, however, there is a subsisting condition of illness or incapacity or physical disability which is caused, increased, or accelerated by some act or event coming by chance or happening fortuitously, then the requisite quality or condition of the injury will exist so as to make it accidental. Neither is it necessary that the accidental quality or condition be created by wound or external violence . . . In the majority of jurisdictions, no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident.

Hiers at 230-231.

In *Sturkie v. Ballenger*, the court addressed the question of whether injuries resulting from a routine, continuous exposure to the elements were compensable. The claimant, a cement truck driver working on a job site in Puerto Rico, was routinely exposed to high humidity and temperatures, fog, cement dust, and short rain showers. He worked without incident from August 1, 1972, to October 25, 1972, when he blacked out on the job. He was later diagnosed as having emphysema, which he contended resulted from his environmental and work conditions. In upholding the award of benefits, the SC Supreme Court stated that "a composite of these cases clearly establishes a recognition in South Carolina case law of disease resulting from exposure

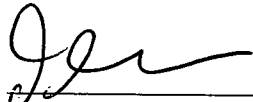
constituting an injury by accident where the result is unexpected.” 268 S.C. at 541, 235 S.E.2d at 122.

CONCLUSION

All of the competent, probative, reliable and substantial evidence establishes that appellant has sustained an accidental injury and occupational disease and that the respondents are liable for the payment of workers’ compensation benefits under the Act.

The Order of the South Carolina Workers’ Compensation Commission should be reversed and the case remanded to the Commission for a determination of applicable benefits.

Respectfully submitted,



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June 3, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Susan S. Barden, Aisha Taylor and T. Scott Beck, Commissioners

Appellant Case No. 2014-000225 (WCC File No. 1023410)

Michael W. Dority, Claimant, Appellant,

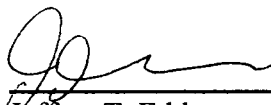
v.

CTR of the Carolinas, Inc., et al., Employer, and Twin City Fire Insurance
Company, Carrier, Respondents.

CERTIFICATE OF COUNSEL

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

June 10, 2014



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SC Court of Appeals