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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2018-001237

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

v.

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

PETITION FOR REHEARING
AND/OR REHEARING EN BANC
AS TO OPINION NO. 5815
FILED APRIL 7, 2021

Pursuant to SCACR 221(a), the Appellant hereby petitions the Court for rehearing on the points/issues that the Appellant would respectfully submit to the Court, the Court overlooked or misapprehended in its decision in this matter as set forth hereinafter. Pursuant to SCACR Rule 219(a and b), the Appellant would request Rehearing en banc after review by the Court for the reasons that: 1) based on the Opinion of the Panel an en

banc review is necessary to secure uniformity of the Court's decisions and 2) a review of the Record and the Petition will clearly indicate to the members of the Court the exceptional importance of a decision on these issues to all workers in the State, present and future, with severe exposure, inhalation /absorption type injuries; and as to all workers fundamental constitutional right to due process of law and the right of confrontation under law, the Workers' Compensation Act, and the Commission's Rules and Regulations. Left unchanged the Opinion coupled with the changes made to SC Code §42-17-20 will require this and all injured workers to spend tens of thousands of dollars to simply cross-examine out-of-area and out-of-State experts who were hired to deny the injured worker's claim.

In reference to the critical importance of the decision and an en banc hearing and under S.C. Constitution Art. V, §9 quoting the Supreme Court from City of Spartanburg v. Parris, 251 S.C. 187, 161 S.E.2d 228 (1968) at S.E.2d page 229:

> "**The right to cross examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance** which, in regard to serious matters, exists even in the absence of express statutory provision, **as a requirement of due process of law** or the right to a hearing, and no one may be deprived of such right, even in an area in which the Constitution would permit it if there is no explicit authorization therefore. 2 Am. Jur. 234, Administrative Law, §424". (Emp. add.)

This Court, in applying Parris in McIntyre v. Securities Comm'r of S.C., 425 S.C. 439, 823 S.E.2d 193 (2018) **after** restating that one of the fundamental requirements of due process is the right to **confront** and to cross examine witnesses, Judge Hill, speaking for the Court:

> **"Although Appellant successfully subpoenaed witnesses, no party to a proceeding carrying such high stakes should be forced to prepare their case amidst the suspense that they may not have the ability to compel the attendance of witnesses."** (Emp. add.)

Judge Hill, speaking for the Court, went on to quote from McNabb v. United States, 318 U.S. 332, 334 63 S. Ct. 608, 87 L. Ed. 819 (1943):

> "The history of Liberty has largely been the history of observance of procedural safeguards."

PREAMBLE

Due to the voluminous Record on Appeal involved in this workers' compensation action, it is very understandable how the Court could have misapprehended or overlooked numerous issues of fact and law in reference to its decision. As a preface to this Petition for Rehearing are set out some fundamental principles in reference to workers' compensation jurisprudence, and statutory and regulatory principles.

First, quoting from the SC Supreme Court in Hudson v. SC State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012):

> "We begin our analysis by repeating two principles which form the lens through which we view this case. First, is the guiding principle undergirding our workers' compensation system that **the Act is to be liberally construed in favor of the claimant**. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.Ed.2d 64, 67 (1973); Hall v. Desert Aire, Inc., 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct. App. 2007). The second is the equally compelling evidentiary principle that an Award may not rest upon surmise, conjecture, or speculation. Tiller v. National Healthcare Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d. 843, 845 (1999). Instead '[an award] must be founded on evidence of sufficient substance to afford a reasonable basis for it.' Wynn v. People's Natural Gas Co. of SC, 238 S.C. 1, 12, 118 S.E.2d. 812, 818 (1961)." (Emp. add.)

The Hudson decision is based upon the first guiding principle undergirding our workers' compensation system that has been repeated by this Court and the Supreme Court ever since the inception of the Act. See: Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d. 825 (1939); Foran v. Murphy USA, 420 S.C. 377, 803 S.E.2d 311 (SC 2017) (J. McDonald for the Court); Thomas v. 5 Star Transportation, 412 S.C. 1, 770 S.E.2d 183 (2015) (J. Konduros for the Court).

Next, the word "shall" in a statute means that the action is mandatory. Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Wilson v. Charleston County School Dist., 419 S.C. 442, 798 S.E.2d 449 (SC App. 2016) (Judge

McDonald for the Court), vacated pursuant to settlement, 442 S.C. 641, 813 S.E.2d 501 (2018).

Next, an Administrative Board and Agency **must** follow its own Rules and Regulations. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 505 S.E.2d. 598 (SC App. 1998). A reviewing Court will reject an Administrative Agency's interpretation of its own Regulation if it is contrary to the Regulation's plain language. Regulations are construed so as to use the same rules of construction as Statutes and accordingly the words of a Regulation must be given a plain and ordinary meaning without resort to subtle or forced construction to limit or expand the Regulation's operation. Be Mi, Inc. v. SC Dept. of Revenue, 408 S.C. 290, 758 S.E.2d 737 (SC App. 2014)(Judge Konduros speaking for the Court); City of Spartanburg v. Parris, 251 S.C. 187, 161 S.E.2d 228 (1968) at S.E.2d page 229 as relied upon by this Court in the McIntyre decision ("The right to cross examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law.); SC Code §1-23-330 guarantees the right of cross-examination.

The US Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 287 (1970):

> "In almost every setting where important decisions turn on questions of fact due process requires an opportunity to confront and cross-examine adverse witnesses."

and in Goldberg quoting Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959):

> "certain principles have remained immutable in our jurisprudence ... we formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment ... this Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases but also in all types of cases where administrative ... actions were under scrutiny." (Emp. add).

While this Court, its Staff Counsel and law clerks are far more learned than the writer of this Petition, this writer knows of no case in S.C. or U.S. Supreme Court jurisprudence where when the right to cross-examine at the Hearing is and has been requested that would require the injured worker to have to pay thousands of dollars to cross-examine an opposing party's experts.

PETITION FOR REHEARING

Because the Court is required under SCACR, Rule 220 to address all issues either distinctly stated or fairly arising out of the Record and because of the issues addressed are so interlocked and because of the sweeping effect this decision will have on procedure and practice, the Petitioner asks for rehearing on all but one issue addressed in the Opinion:

1. Under "**FACTS/PROCEDURAL HISTORY**" the Court misapprehended or overlooked several key facts important to the consideration of this case. First, and very important to this case, is the undisputed fact that **residential house paints do not contain VOCs (volatile organic compounds) and do not require MSDS Sheets**.

Next, the Court notes that Mr. Barr was previously employed as a commercial painter for a nuclear plant, but the Court misapprehended from an important factual standpoint that that employment occurred over ten (10) years prior to him going to work for the School District and that during that ten (10) years plus, he worked solely with house paints according to the evidence.

Next, and paramount to a review of the substantial evidence in the Record concerning the essential issues for decision, that is to say Mr. Barr's claim for benefits based on chronic unrelenting headaches, is the factual and medical opinion evidence in 2010. The fact the Court misapprehended and overlooked this entire body of evidence on this essential issue in its decision is established by the fact that the Court does not even reference the diagnosis of and the treatment for chronic headaches in 2010. There is only passing reference to the fact that he was treated continually for chronic unrelenting headaches from 2010 all the way through the date that he left

work in May 2015. While his treatment beginning specifically in the Fall of 2010 by Dr. Chapman is overlooked, more importantly the treatment and diagnosis by a neurologist, Dr. Roland Skinner, is overlooked. Many of the Record references to that evidence are set out on pp. 11 and 12 of Appellant's Brief. Reiterating that undisputed/uncontested evidence, Dr. Raymond M. Chapman, MD diagnosed Mr. Barr on September 13, 2010 with, "persistent headache". (R. p. 450). He referred him to a neurologist for treatment of his persistent, "severe headache for the last five weeks". Dr. Roland Skinner, Board Certified neurologist, treated him after September 23, 2010 through 2012 but most importantly on February 22, 2011 he diagnosed Mr. Barr with, "**IMPRESSION: Chronic Headaches**". (R. p. 464). The Court overlooked that the reliable, probative, and substantial evidence in the Record established that Mr. Barr was diagnosed with and treated for "chronic headaches" beginning in September of 2010 all the way through and continuously through the time of the close of the Record.

Also under paragraph 2 the Court references that there was a CT Scan that did not reveal an abnormality. The Court clearly misread the evidence as referenced in the records of Dr. Chapman, where an MRI was conducted in the Fall of 2010 that was found to be "abnormal". (R. p. 448). His records are quoted at p. 12 of the Appellant's Brief along with a reference to the

problems Mr. Barr had which were headache, dizziness, nausea, and loss of concentration, all of which, as referenced in the MSDS Sheets in the Record, are, "**SIGNS AND SYMPTOMS OF OVEREXPOSURE**". In the fourth paragraph of Facts and Procedural History referencing the treatment by Dr. White, there is no reference in the Opinion of the fact that in 2012 Mr. Barr was taken out of work due to Dr. White's suspicion that the VOCs in the paint were causing his chronic, unrelenting headaches but more importantly, the Court misapprehended the diagnosis of Dr. White on May 21, 2015. Quoting from the Court's Opinion, "Dr. White diagnosed employee with brain damage related to his exposure to VOCs in the paint he used." Incorrect. Dr. White did not diagnose Mr. Barr with brain damage in May of 2015. His Out of Work Excuse, but more importantly, his diagnosis on May 21, 2015 can be found at p. 285 in the Record on Appeal wherein Dr. White at that time simply and only stated that the Claimant was suffering from, "migraines, memory loss and fatigue due to VOCs in paint". He again expressed that same opinion and again that opinion was limited to the following opinion on September 10, 2015 wherein he stated that it was his opinion that Mr. Barr's:

> "fatigue, migraines and memory loss are due to the VOCs (volatile organic compounds) in the paint from work." (R. p. 284).

The Court clearly misapprehended the facts and the diagnosis. Notably there is also absolutely no notation by the Court to

either Mr. Stegner, Mr. Barr's supervisor's, awareness and/or the School District's awareness of this opinion and that that diagnosis of headaches was the reason he was taken out of work back in 2012 for a period of six (6) weeks to see if his condition improved and again in 2015.

Next, in "**FACTS AND PROCEDURAL HISTORY**", the Court misapprehended the testimony and evidence surrounding March 16, 2015 wherein the Court stated that the incident occurred when the employee had not painted yet that day. The assumption that he had not been exposed to the VOCs in the paint that day before the incident occurred while he was driving to pick up supplies, is not accurate. The testimony concerning this can be found on pp. 1357 and 1358 of the Record. What the Record establishes is that Mr. Barr had reported to Carolina Elementary School to begin work, had spoken with the teacher, and had advised her that he was going to set up his area and then go to Lowe's to pick up supplies. Is the Court withdrawing for its decision as a matter of law in Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (SC App. 1987)?

Next, under "**FACTS/PROCEDURAL HISTORY**", the Court misapprehended the opinions of Dr. Pritchard, Dr. Healy, and Dr. White as to the chronic daily headaches. Found at p. 697 of the Record, Dr. Prichard concurred in the opinion that Mr. Barr suffered from chronic daily headaches. He then expressed the

opinion that he could not authoritatively speak on the potential of impairment from the various paints and other compounds to which he reports on the job exposure. He then stated the opinion to Mr. and Mrs. Barr as is recorded in the Record, that he would, "recommend that he be evaluated by an occupational medicine physician who has training and experience in toxicology". Dr. Healy testified that he had a background and experience and had treated patients that had been exposed to commercial paints and who had suffered problems related to that exposure to the VOCs in the paints. He also stated the opinion based on the history of treatment for and diagnosis of chronic headaches since 2010 through the time Mr. Barr was taken out of work in 2015 and based on his continual exposure during that period of time to commercial paints that it was his opinion that Mr. Barr suffered from chronic headaches and fatigue that were causally related to his exposure to the VOCs in the commercial paints which he was using between 2009 and 2015. Those were his opinions stated to a reasonable degree of medical degree of medical certainty. He also stated that Mr. Barr was not at maximum medical improvement and needed further treatment and evaluation for those headaches and fatigue. (R. pp. 501-502). Again, Dr. White's initial opinion was that Mr. Barr suffered from migraine headaches caused by his exposure to VOCs in the commercial paints he used at work. (R. p. 285). There is simply

no conflicting evidence to the medical opinions on the casual relationship to the exposure to VOCs in the commercial paints Mr. Barr used at work. Just like to award benefits there has to be substantial evidence in the Record to support the Award, to deny benefits there has to be substantial evidence in the Record to support the denial.

Finally, there is a procedural misapprehension by the Court in that the Claimant did not file three (3) different claims for benefits. The Claimant filed only one claim for benefits on June 19, 2015. On October 1, 2015 the employee did not file a second claim, but instead simply filed a request for hearing on his claim for benefits. In May of 2016 the Claimant did not file a third claim for benefits but simply having removed his request for a hearing from the roster, he simply re-filed his request for a hearing.

2. That in reference to the Court's decision, section **II. SUBSTANTIAL EVIDENCE**, the Court misapprehended and/or overlooked the substantial evidence in the Record concerning chronic headaches and the cause of those headaches.

While this evidence must be excluded, Dr. Pritchard diagnosed "chronic daily headaches", but expressed no opinion as to the causal relationship of his specifically diagnosed chronic headaches to exposure volatile organic compounds in the commercial paints at work. Quoting from his report,

> "I cannot speak authoritatively on the potential for impairment from the various paint and other compounds to which he reports on the job exposure.... As I explained to Mr. Barr and his wife, I would recommend that he be evaluated by an occupational medicine physician who has training and experience in toxicology." (R. p. 697).

As for Dr. Healy, Dr. Healy is the only doctor that stated he had a background and experience in treating commercial painters who have been exposed to commercial paints containing VOCs and had treated them for conditions related to that exposure. Based on the history of exposure between 2009 and 2015 it was his opinion stated to a reasonable degree of medical certainty that Mr. Barr's chronic headaches were caused by his exposure to volatile organic compounds in the commercial paints he used while working for the School District. (R. pp. 501-502). Dr. Healy found that Mr. Barr was not at maximum medical improvement. He reasserted those opinions and reaffirmed those opinions in his deposition. More importantly in his deposition, in response to a question detailing the 15 month exposure and then the diagnosis of chronic headaches in reference to whether or not that strengthened his opinion or affected his opinion, his answer was, "I think that it suggests that the VOCs are a big component of what is wrong with him." (R. pp. 1428-1429).

In reference to Dr. Wagner who is not a medical doctor but a Ph.D., and reserving the Claimant's position that his report

should not have been admitted into evidence for various reasons including it was late; it consisted of only a records review; and its submission violated the Claimant's right to cross-examine; and the fact that the records upon which he based his opinions and notification of his evaluation was not given to the Claimant pursuant to statute under §42-15-95 (which provides specifically that the Claimant, "shall" be provided notice of any such evaluation), Dr. Wagner's report simply states that the evidence does not, "support a neuro-behavioral syndrome consistent with VOC exposure". He also specifically notes that Mr. Barr suffers from chronic unrelenting headaches.

As for Dr. Lind, the only psychologist that actually evaluated Mr. Barr, his opinions are based on the neuropsychological testing that he performed:

> "Are Mr. Barr's cognitive complaints consistent with brain damage secondary to volatile organic compound exposure? Yes. Mr. Barr presents with disinhibition and impaired dexterity which is consistent with dysfunction secondary to prolonged exposure to volatile organic compound. If VOC exposure is determined to be a cause or factor in Mr. Barr's current symptoms, it is also more likely than not responsible for these cognitive deficits as well. ...
>
> In my opinion, Mr. Barr's emotional symptoms are more likely than not with as much certainty reasonable in the field of psychology, aggravated by his prolonged exposure to volatile organic compounds."

Dr. Lind reiterated these opinions in his deposition. (R. p. 1242).

As for Dr. Waid, in addition to all of the objections as to why his report should not have been admitted into evidence as an expert report put in on behalf of the Defense without requested cross-examination, his review of records is simply to the effect that, as a psychologist, there is no sufficient evidence that any somatic, emotional or cognitive complaints stem from exposure to VOCs. His report also expresses the opinion that there is no evidence of physical brain damage or that Mr. Barr suffers from an encephalopathic condition. However, in reference to substantial evidence on the essential issue for decision he notes and opines that Mr. Kenneth Barr continues to be "disrupted by headaches" that have been, "fairly refractory to treatment". He simply does not address whether or not Mr. Barr's headaches are causally related to the exposure to VOCs either directly or indirectly through medications needed to treat them. Both Dr. Waid's and Dr. Wagner's reports, both of whom are psychologists, went far afield of the opinions that a neuropsychologist can express based on a review of the medical opinions expressed by the doctors, as set out in Fragosa v. Kade Construction, LLC, 407 S.C. 424, 755 S.E.2d 462 (SC App. 2013).

The only medical opinion evidence in the Record concerning the essential issue of Mr. Barr's chronic headaches is that his

chronic headaches were causally related to his exposure to VOCs in the commercial paints he was using as a painter for the School District, between 2009 and 2015. The issue of substantial evidence in the Record is not whether or not he had an encephalopathic condition or chemical encephalopathy, or any neurocognitive behavioral issues but is whether or not he had chronic headaches causally related to his exposure to VOCs, as this Court appropriately noted in the case of Baker v. Hilton Hotels Corp., 406 S.C. 395, 752 S.E.2d 279 (SC App. 2013) (the Commission's decision must be consistent with the medical opinion evidence),(Judge Geathers on the Panel). The Commission simply misapplied or ignored the only substantial evidence on this essential issue for decision.

3. That in reference to "**III. CROSS-EXAMINATION OF WITNESSES**", the Court misapprehended the argument of Appellant and the law in reference to due process, and the right of cross-examination.

In Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (SC App. 2006) cited by the Court, the issue presented in this case was simply not presented to the Court for determination. The issue in Gadson as cited by the Court was:

> "Mikasa contends Hutcheson's report should have been excluded because 'there is no indication that the individual making the report is qualified as an expert or has the expertise to

> express the opinion set forth in her ... report'".

Further and most importantly to the factual procedural history in this case and what Appellant/Petitioner did to assert and preserve the right as compared to Gadson and quoting the Court from Gadson:

> "After the service of the Brief ... Counsel made no ... **attempt to subpoena her to the Hearing** ..." (Emp. add.)

There is absolutely nothing, and the Appellant would reiterate nothing, in Gadson that addresses whether or not it was a denial of due process to submit a written report into evidence over objection especially where pursuant to the United States Supreme Court Opinions of Richardson and Opinions of our Supreme Court, Appellant did everything he could to preserve and request the right of cross-examination. In his Brief to this Court the Appellant properly recited the history of the development of the Regulations simply to establish the Regulations in their current form were changed/reworded to be in compliance with the provisions of the Administrative Procedures Act. SC Code §1-23-330(3) specifically preserves the right to all parties to cross-examine witnesses, and it allows for written evidence to only be submitted where the "**interests** of the parties will not be **prejudiced substantially**".

In addition to the other cases cited from the United States Supreme Court guaranteeing the right of cross-examination as a fundamental right under due process, the Appellant both in his letter to Commissioner Beck of February 18, 2016 and in the Memorandum submitted to Commissioner Beck the following day prior to the Hearing set in February, cited the United States Supreme Court decision in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971) which specifically held that where a written medical doctor's report is sought to be admitted into evidence in an Administrative Hearing and where the Claimant, the Appellant/Petitioner in this case, requests that a Subpoena be issued by the Administrative Agency so that he may exercise his right of cross-examination **or** require, as the Regulations have always required since the inception of the Act and Regulations in workers' compensation, that the Defendants take the de bene esse deposition of their doctor/expert **if** they want it submitted into evidence. Quoting from Petitioner's letter to Commissioner Beck of February 19, 2016 (R. p. 1484) after citing Richardson and the requirement that in Administrative Hearings the Claimant must affirmatively request the right to cross-examine experts:

> **"I am hereby requesting pursuant to S.C. Code §42-1-140 that the Commission subpoena these alleged medical or other experts and that the Commission pursuant to §42-3-130, have those Subpoenas served by the County Sheriffs of the**

respective counties wherein the witnesses live." (Emp. add.)

That is exactly what the Appellant did in this case, and repeated at every Hearing, and every conference on and off the Record, and in every written document including every Prehearing Brief filed in this matter after that. This Court, as set forth in the Brief, has specifically affirmed the right of cross-examination; see: McIntyre, supra.

As cited in the basis for review based on exceptional importance of the Decision, our SC Supreme Court has specifically stated that in an Administrative Proceeding in a quasi-judicial or adjudicatory proceeding the right of cross-examination is of fundamental importance which even in the absence of express statutory provision is a requirement of due process of law and that no one, no one may be deprived of such right; a principle in which the members of this Panel and this Court have concurred. Also as set forth in the Preamble, Regulations have the authority and force of law, but Regulations may not alter or add to the terms of the Statute. Not only can they not add to or alter the terms of a Statute, they cannot add to or alter the terms of the Constitution of the United States or of this State.

In no other Court or any other quasi-judicial or administrative proceeding does a party have to pay to cross-examine an opposing party's expert.

Further in reference to due process and the Statute, the Statute specifically provides for the right of the Commission in the, "discharge of its duties" to compel the attendance of witnesses, "deemed necessary in connection with any proceeding under this Title". SC Code §42-3-150.

A reading of the entire Act and reading all of the Statutes in conjunction with each other, and looking at the history of the Act and looking at the very essence and beginning of the Act and how our Supreme Court and this Court have always interpreted the Act giving a liberal interpretation to every nuance, presumption, and interpretation in favor of benefits to the injured worker, it is crystal clear that the Act was meant to be and is a no-fault system designed to deliver swift, sure benefits to the injured worker, but it is also clear that as far as the injured worker is concerned in having his case heard it was designed to be a no cost system.

One cannot read or should not read the Regulations without consideration of the history of the Act, its Statutory scheme, the history of the Regulations and the caselaw in reference to those Regulations.

How can one look at the history of the Act and the Regulations that have controlled workers' compensation claims since 1936 under the overall guiding principle that the law, including all of the Statutes and Regulations are to be resolved

in favor of the claimants and its provisions reconciled, if possible, its purposes effectuated, and its presumptions and penalties directed towards the end of providing coverage, and then opine that it is a liberal interpretation of the law in favor of the injured worker to allow the insurance carrier or any party defendant to go out and hire experts, some of which may be out of area and/or out of State and/or to fan out across the entire State of South Carolina to find experts and then to submit their reports to deny an injured worker's claim and then require that injured worker who has been hurt on the job and is out of work without any way of supporting that workers' family to have to pay to cross-examine the very experts that had been paid for and selected with the specific purpose of denying the worker benefits under the Workers' Compensation Act.

Finally, the Appellant would point out that the Court misapprehended or misapplied the law in reference to the Regulations in that under this section of the Opinion, the Court makes paradoxical rulings and opines that because the Defendants complied with the Regulation, which allows for its submission (regardless of the issue of due process which has never been presented to the Court), the documents should come in. In the Preamble, the Appellant recites the general opinion of the Courts and principles that Regulations have the force of law and that the Commission shall follow its Regulations and cannot

deviate from its Regulations. So, under this argument and this part of the Opinion because of compliance with the Regulation the report comes in, but yet in another part of the Opinion, the Court does not require the Commission to comply with its own Regulations and the Court sanctions non-compliance by not requiring timely filing of APAs and also postponing the Hearing.

In that regard in the Opinion, section III notes that the APA Submissions were not received until February 16th for a scheduled Hearing on the 24th of February, thus in violation of the Regulation as to the time of filing of such reports but then just casually notes that the Hearing was, "rescheduled and did not take place until August 31, 2016, seven months later". Under Rule 67-613 the Hearing can only be postponed for good cause and certain specific bases are listed. Under that same Regulation, a party must move for a Hearing to be postponed at least ten (10) days before the Hearing. There was no Motion for Postponement filed; there was no Order setting out good cause.

Further, that same Regulation provides that a party may move for adjournment. There is no evidence of either a Motion for Postponement or for Adjournment in the Record. The parties are required to have their evidence available and ready to go whenever the Hearing is called. So, the Appellant would ask the Court to consider that on the one side the Court is saying that because they complied with the Regulation the report should go

in but on the other side, the Court is sanctioning the Commission's violations of its Regulations in this and other parts of the Opinion. So, is the Court willing to allow these reports into evidence when they were not timely submitted and forgive or overlook non-compliance, or to allow the Commission to simply avoid a Regulation and non-compliance by simply continuing the case? Is compliance required or not required?

Again, due process of law and the Decisions of the SC Supreme Court and this Court mandate that the right of cross-examination must be preserved in this and all administrative hearings according to the Decisions of the United States Supreme Court and our Supreme Court and the Appellant did everything he was supposed to do to assert and to preserve his right of cross-examination.

4. That under "**IV. FINDINGS OF FACT**" the Court overlooked or misapprehended or misapplied the law in this area. SC Code §42-9-5 was specifically added in 2007 to require the Commission to make detailed Findings of Fact and Conclusions of Law to support any Award. That Section in reality simply codified the decision in the Drake case which is cited in the Opinion by the Court. The Court appropriately cites the seminal case of Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d. 288 (1962) which was cited by Appellant in support of his argument. Quoting briefly from that decision and as emphasized:

> "**The duty to determine** the factual issues is placed **solely on the Commission . . .**"

The duty is placed on the Commission, not the defense lawyer. It was Commissioner Campbell's duty to make factual findings on all of the essential factual issues presented to him for decision. He did not do that in his Notes which are found in the Record at pp. 1492-1494. The Commissioner failed to make essential findings on that issue which was brought to his attention by the Claimant. The Court will find nothing, and Appellant would reiterate nothing, to establish the Commissioner made additional Findings but what the Court will find in the Record is the email from defense counsel responding at 6:25 p.m. to the 3:27 p.m. original objection letter from Appellant wherein in the email defense counsel states, in pertinent part:

> "In light of Mr. McDaniel's arguments that the Claimant may be entitled to benefits for headaches unrelated to his allegations of brain damage, **I have modified the Findings of Fact and Conclusions of Law** to further clarify that the headaches were not caused by injury by accident, repetitive trauma, or occupational disease . . ."

So it is clear, who made those Findings of Fact and Conclusions of Law, not the Commissioner or the defense lawyer. It is the Commissioner's duty to make those Findings of Fact and Conclusions of Law -- not the defense lawyer. The Appellant had asked for reconsideration and to point out objections to the Order as written. It would have been appropriate for the

Commissioner to have responded and/or to have made additional Findings of Facts and Conclusions of Law that were his; but that is not what happened. Appellant's Counsel knows of no Judge that when an essential issue has not been addressed in an Order that is brought to his or her attention that would not make a decision on those issues themselves. Drake and the Statute, and all the Decisions of this Court and the Supreme Court require that the Commission make the Findings of Fact and Conclusions of Law on all of the, "essential, factual issues". That was not done.

5. That in reference to "**V. PROPER NOTICE OF EVIDENCE**", the Court misapprehended or overlooked the wordings and mandatory requirements of SC Code §42-15-95 which wording and requirements serve as one of the **primary** bases for the objection of the Appellant to the submission of Dr. Pritchard's report into evidence. The Court cites in part subsection (B) of §42-15-95 but the specific reference under subsection (B) is as follows, "a healthcare provider who provides examination or treatment for any injury, disease, or condition for which compensation is sought ... may discuss or communicate an employee's ... without the employee's consent." However under that section, as the Court appropriately cites, the employee must be notified of the communication prior to the actual

discussion or communication by defendants with the healthcare provider.

In this case after the late December Commission Order allowing for an IME with a medical doctor at reasonable times and places, under the guise of requesting that Independent Medical Evaluation in January by Dr. Pritchard in Charleston pursuant to SC Code §42-15-80 over Claimant's objection and after a Motion to Compel, the Commission advised it would allow the examination. That request and the Commission's direction for Petitioner to undergo that examination occurred in January. Up to and after that examination **and only** just prior to the deposition that occurred after the original Hearing had been set in February did the Claimant become aware that defense counsel had communication back in December with Dr. Pritchard without notifying the Claimant of that communication and also in December had submitted to him a large group of medical records. The communication by defense counsel and the provision of those medical records including the records from Dr. Lind and Dr. White were clearly communications made in contravention of SC Code §42-15-95 and the requirements of that section.

The purpose of that section is clear. The section allows defendants in a workers' compensation case to communicate with a doctor that is examining a patient without that patient's permission, but to protect the patient, the Statute provides

that the defendants, "**must**" which has the same meaning as "**shall**" and which is mandatory, notify the Claimant of that communication and when it is in writing, provide a copy of the written communication to the claimant before the communication takes place. The mandatory nature of that Statute and the reason for that Statute is clear.

However, there is no question that the Defendants did not, did not, comply with the Statute and did not notify Mr. Barr and his representatives of either the communications with Dr. Pritchard or of the records that they were sending to Dr. Pritchard. They hid those in clear violation of the Statute. The Statute provides a remedy and this Court's decision **eviscerates** the protections that the Legislature put into place to ensure the integrity of examinations and treatment and the sanctity of the personal liberties and the right of privacy of a claimant, the patient in a workers' compensation case. That remedy and that sanction is as follows quoting from subsection B of the Statute:

> "**Any** discussions, communications, **medical reports**, or **opinions** obtained in violation of this section **must be excluded** from any proceedings under the provisions of this Title."

The intent of the Legislature is clear, and it is clear what it is meant to prevent, and the Appellant would submit that it is meant to prevent exactly what occurred here.

In the Opinion, the Court does not reference the extensive litigation that went on in the Circuit Court to prevent a violation of the limited right that the Defendants have in a workers' compensation case to have an Independent Medical Evaluation and to insure that that evaluation is just that, an "Independent" Medical Evaluation. The safeguards put in SC Code §42-15-95 were put there to insure that. When Mr. Barr went to that evaluation it was like a lamb going to the slaughter; the die was cast, and the well was poisoned. The Appellant would respectfully request reconsideration and rehearing and an opportunity to address this specific issue before the Court.

6. That in reference to **"VI. MEDICAL EVALUATION OF DR. PRITCHARD"**, the Court misapprehended and overlooked facts in reference to the second argument being made by the Petitioner/Appellant in reference to the evaluation by Dr. Pritchard. The argument which directly follows the argument in reference to the multiple violations of SC Code §42-15-95 was meant to be an extension and to further aggrandize those but focus on the violations of SC Code §42-15-80, and specifically in reference to the timeline in conjunction with violations of SC Code §42-15-80. On December 22, 2015 when the Commissioner ordered that they could only have an evaluation with a medical doctor and specifically ruled that it had to be at reasonable times and places which the Appellant had argued successfully,

both to the Circuit Court and to the attorney that was hired to represent the Commission, had to be in the Florence/Hartsville area. **At the time of that Order the Respondents knew that they had already sent a letter without a copy to the Appellant and had sent a three-inch (3") stack of records to Dr. Pritchard for review on December 5th**. This can be found at multiple places in the Record, but the December communication and records is confirmed by Dr. Pritchard under oath in the Record at p. 1167, ll. 2-23. Then as the Court will find under both of these arguments in the Brief, which was obviously overlooked, the Defendants did not even notify the Claimant of an evaluation with Dr. Pritchard until January 19th.

The claimant in a workers' compensation case has the burden of proof to prove his entitlement to benefits by a preponderance of the evidence. The employer and/or its insurance carrier have very limited rights under the Act as the Court knows. One of those rights is the entitlement to an "independent" medical evaluation. Of course the Act is to be liberally construed in favor of benefits and in favor of swift and sure benefits to the injured worker. The argument made by the Petitioner is basically that of the fruit of the poisonous tree. If the evidence sought to be admitted is the fruit of improper process, then it must be excluded.

Petitioner never questioned and does not question the credentials of Dr. Pritchard. He is an outstanding neurologist, not any more so than the other Board-Certified neurologists involved in this matter, but that is not the point and actually that should have nothing to do with whether any evidence from him should be admitted. There is nothing, and the **Petitioner would reiterate nothing, in the entire process whereby his report and deposition evidence was placed into the Record that is in accordance with any of the Rules and Regulations of the Workers' Compensation Commission or the workers' compensation statute, or the Rules of Procedure under the Administrative Procedures Act and/or in general;** or that it was an independent medical examination.

First, the Respondents tried to send Mr. Barr, the injured worker, married father of three, out of work, no income for eight months (swift and sure benefits?) not to a medical doctor, but to a psychologist in Charleston. The injured worker had to go to the time and expense and the protracted litigation, which should not occur in a workers' compensation case, of filing a Writ of Mandamus and a Writ of Prohibition. Then upon advice of Counsel once Counsel was obtained by the Commission, Counsel advised the Commission that Claimant's Counsel was correct on the law in reference to the evaluation by a medical doctor and on the meaning of at reasonable times and places.

On December 22nd after months of Defendants trying to avoid that, the Commissioner entered an Order, after lifting and dismissing the Circuit Court injunction and action, allowing them to have an evaluation performed by a medical doctor at reasonable times and places. That phrase which comes from the Act is specifically in the Commissioner's Order. The Petitioner hopes that it was not and is not lost on the Court that the very same Commissioner that originally entered the Order allowing the Respondents to have an evaluation conducted outside of the Florence and Hartsville area where this man lives and who had been corrected by the Circuit Court and the Commission's own employed Counsel, Mr. Cam Lewis, is the same Commissioner that issued his opinion by email on the January 22, 2016 Motion to Compel that he would grant it.

Next, and most importantly, all this occurred in December (Pritchard letter/records December 5th and Order December 22nd) and the Claimant's Hearing in January had to be continued (swift and sure benefits?) until February. The Record establishes that Respondents then did not notify the Claimant of any appointment until the end of January when the Respondents had known for over a month that the Hearing was set at the end of February. Again, they had known throughout January that the Hearing was set for February 24th.

Then although the evaluation was performed on February 2nd **and his report is dated February 2nd** the Respondents did not mail it until, dated February 12th, notice of which was not received until February 16th (late) for the February 24th Hearing. Reg. 67-612 provides they must provide any report at least ten (10) days before the scheduled Hearing.

The Supreme Court has specifically ruled and it has not been overturned in the case of Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960) that it is unreasonable and it is not at reasonable times and places to require an injured worker to even go from Georgetown to Charleston for an independent medical evaluation. As the Court knows, Hartsville and Florence are a lot further away from Charleston than Georgetown. The Singleton decision to this day is considered Black Letter Law in reference to what constitutes reasonable times and places.

As the Court knows and as the Record sets out, Respondents wrote Dr. Pritchard and sent him massive amounts of records without the knowledge of Counsel for the Appellant on December 5th. So, the Respondents knew about wanting to have an evaluation by Dr. Pritchard on December 5th, wait until the end of January to notify the Appellant, wait until the last minute to file the report, do not provide the Appellant with a copy of what Dr. Pritchard said until February 16th, do not let the

Appellant know that they have been communicating with Dr. Pritchard, do not let the Appellant know what questions they have asked him, do not tell the Appellant that they are taking copies of the depositions of his doctors and submitting all that to Dr. Pritchard, and then the Commissioner continues the case again in February and Mr. Barr does not get a Hearing until August and then the Respondents again submit Dr. Pritchard's report.

A review will establish that the Respondents violated SC Code §42-15-95. They violated initially the provisions of SC Code §42-15-80 (medical doctor/reasonable times and places) and then failed to comply with the directions of the Hearing Commissioner in his Order allowing the Respondents to have an independent medical evaluation performed, but at reasonable times and places. They then violate Rule 67-613 in reference to the introduction of the report, and then while the Regulation for a postponement only allows for the case to be continued for a period of thirty (30) days, six (6) months later Mr. Barr finally gets a Hearing. The Petitioner's argument was and is that due to these numerous violations violating numerous Regulations and numerous provisions of the Workers' Compensation Act, that neither the report nor Dr. Pritchard's deposition should have been allowed into evidence. See as example: Holcombe v. Dan River Mill/Woodside Division, 286 S.C. 223, 333 S.E.2d

338 (SC App. 1985). There, as here, where the Respondents knew about Dr. Pritchard; knew they were going to send him to Dr. Pritchard; they knew about his report way in advance of the Hearing; the Commission and the Supreme Court both in Holcombe under those circumstances, did not allow for the Record to be left open.

The Petitioner would implore the Court to consider the effect if all you have to do to get around the Regulations and the statutory requirements is to wait until the last minute and then count on the Commissioner to continue the case so documents can be timely filed and you can comply with the Regulations, and get into evidence the evidence of an expensive expert to deny an injured worker benefits under the Workers' Compensation Act, for whose benefit the entire Act was created. Have we forgotten bloody Thursday, September 6, 1934 Chiquola Mills and the entire purpose of the 1936 Workers' Compensation Act? The Petitioner would ask the Court to review the six (6) basic, "**Objectives**" published by the Workers' Compensation Commission, reprinted by permission of the Commission since at least 1988, first by Lawyers Coop Publishing and then by West Publishing Co., in the South Carolina Workers' Compensation Law Annotated published annually. To rule otherwise is to eviscerate the statutory protections for the worker.

7. That in reference to "**VII. RELIANCE ON THE OPINION OF DR. EDGERTON**", before addressing specifically what the Petitioner will assert that the Court overlooked or misapprehended in reference to the admission, consideration and basing the decision on Dr. Edgerton's, "medical" opinion, there has creeped into the law an ever increasing, intermingling and application of jurisprudence applicable in the Circuit Court into the jurisprudence of the Workers' Compensation Act. From 1936, the inception of the Act until 2007, appeals from the SC Workers' Compensation Commission were first sent to the Circuit Court, who of course had jurisdiction over both, all Jury and Non-Jury civil cases in the Circuit Court in addition to the appeals from the Commission. There was a distinct understanding and appreciation by all Judges of the difference of the role of, and in the law applicable to, a Judge as the giver of the law and the jury as the finder of fact in a jury trial versus the merging of law and fact in a Commissioner as a lay or attorney member of a quasi-judicial body. Quoting Chief Justice Toal from Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E>2d 169 (2016):

> "The jury and the Trial Court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as its fact-finder and is charged with the duty of weighing the evidence admitted at trial in reaching a verdict. The Trial Court, on the other hand, is charged with the duty of determining issues of law. As part of its duty, the Trial Court serves as a gatekeeper and must

> decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the Trial Court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves. Importantly, the Trial Court is never permitted to second-guess the Jury in their fact-finding responsibilities unless compelling reason justify invading the Jury's province. ...."

Chief Justice Toal on behalf of the Court went on to address the Rules for admission of expert testimony:

> "For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the Trial Court must make preliminary findings that are fundamental to Rule 702 before the Jury may consider expert testimony.
>
> First, the Trial Court must find that the subject matter is beyond the ordinary knowledge of the Jury, thus requiring an expert to explain the matter to the Jury. ....
>
> Next, while the expert need not be a specialist in the particular branch of the field, the Trial Court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. ...
>
> Finally, the Trial Court must evaluate the substance of the testimony and determine whether it is reliable. ..."

The Supreme Court and this Court have always kept a keen eye and imposed a strict interpretation and application in reference to the Judge's responsibility in a jury trial and applied a strict application of that role in the submission of expert evidence

into evidence by the Commission. Without citation, it is a primary and cardinal Rule of workers' compensation that the Act is to be liberally construed in favor of benefits to the injured worker and strictly construed against denying benefits to the injured worker. In fact, the overall scheme of the Act which is discussed throughout this Petition for Rehearing is designed towards a liberality in the worker's presentation in attempt to obtain benefits because the Act was created for their benefit, to help prevent them from becoming public charges and to provide, "swift and sure" benefits to the worker; and on the other side imposes a strict interpretation in reference to the employer and its insurance carrier trying to avoid paying benefits. The Court is well aware that this has been the application of the law by it and the Supreme Court ever since the inception of the Act. In reference to our Appellate Courts guarding against interpretations that would result in the denial of benefits, the Petitioner would specifically point the Court to the 1941 case of Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, pp. 716-718 (1940) wherein the Supreme Court struck down a decision by the Commission because the Commission had applied a "literal" interpretation of the Act instead of a "liberal" interpretation of the Act. The Court in no uncertain terms in 1940 and ever since then has instructed that the Commission is to apply a "liberal" interpretation toward

awarding benefits and a strict interpretation in reference to the denial of benefits.

Specifically in reference to what the Court overlooked or misapprehended, first is that the Commission relied on Dr. Eagerton, Ph.D.'s "medical" opinion. In reference to strictly applying the provisions of the Act when the evidence is submitted to deny benefits, the Petitioner would point the Court to the Supreme Court decision in Michau v. Georgetown County ex. rel. SC Counties Workers' Compensation Trust, 392 S.C. 589, 723 S.E.2d 805 (2012), wherein the Court excluded a medical opinion by an agreed upon licensed physician or surgeon where the report did not contain the language that was required by the Statute. In Crisp v. South Co. Inc., 401 S.C. 627, 738 S.E.2d 835 (2013) because the "medical" opinions and the decisions by the Commission and the Court's used brain "injury" and brain "damage" whereas the Statute refers to brain "damage". The case was remanded.

In addition to the generally accepted principles that only a licensed physician or surgeon is allowed to give, "**medical**" opinion, the Act in at least two separate places sets out that specific qualification to express "**medical**" opinion in a workers' compensation case. Under SC Code § 42-15-80 which allows the Defendants to obtain an "independent" medical evaluation it is required that that "independent" medical

evaluation must be conducted by a licensed physician or surgeon. Under §42-1-172(C), medical evidence is defined, and it means expert testimony or evidence, "offered by a licensed and qualified medical physician".

Further in Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906, the Supreme Court held that under SCRCP Rule 35, which allows for a physical or mental examination by a physician that the Circuit Court Judge could not order an examination by a clinical psychologist because the clinical psychologist was not a physician. Also in this regard, and most importantly, the Court overlooked its decision in Nelson v. Taylor, 347 S.C. 210, 353 S.E.2d 488 (SC App. 2001) wherein this Court held that even a trained physical therapist was not qualified to give a medical opinion. Thus, Dr. Eagerton is not a licensed medical physician and an expression of a "medical" opinion is outside of his area of expertise, in addition to the fact that he is not a physician, i.e. medical doctor.

Therefore, applying the decisions of the Supreme Court and this Court in reference to medical opinion evidence and under a liberal interpretation in favor of benefits to injured worker and its strict interpretation in reference to evidence submitted for the purpose of denying benefits to the injured worker and since it is beyond cavil that the Commissioner relied on the, "medical" opinion of Dr. Eagerton in reaching the Commission's

decision, this constitutes reversable error requiring the reversal of the Commission's decision in and of itself.

8. That in reference to **"VIII. Findings of Fact Pursuant to Regulation 67-709(E)"**, upon review the Petitioner agrees with the decision of the Court in reference to this issue and does not request rehearing or reconsideration on that. The Petitioner's objection was as to the variance between the original Hearing Commissioner's Notes and the Order that was submitted within an hour of that objection being lodged by the Respondents which then included Findings of Fact that had not been, and were not made by the Hearing Commissioner.

9. That in reference to the **CONCLUSION**, the Petitioner hopes upon rehearing that the Court will find that there is no substantial evidence in the Record other than that the Petitioner's chronic headaches were caused by his exposure to volatile organic compounds in the commercial paints with which he worked for the School District. The Petitioner also hopes that the Court, upon rehearing, will find that there were numerous errors committed in the introduction of evidence and the handling of procedural matters that were raised on appeal for review by the Court, particularly in reference to allowing the financially well-healed, self-insured employers and/or their insurance carriers to spend untold amounts to hire experts all over the State, and all over the country and to submit by

written report those reports into evidence to deny an injured worker benefits under the Act.

Further, while the Petitioner appreciates the expression on, "genuine empathy" and the recognition by the Court that this is a, "distressing case in which employee is obviously in pain almost every day of his life" in its **Conclusion**, the Petitioner would submit that the Court overlooked that it failed to include one phrase in its decision wherein the Court stated that the employee had failed to, "prove an injury by accident, repetitive trauma, or occupational disease." The Petitioner believes the phrase that the Court failed to add was that, "in the opinion of the Commission", the employee did not meet his burden of proof. There is more than ample evidence in the Record to sustain that the employee sustained injury by accident and/or repetitive trauma and/or an occupational disease. If the Court does not grant rehearing, the Petitioner would request this revision. Of course, if the Court grants Rehearing or rehearing en banc which the Petitioner is hopeful that the Court will grant because of the critical importance of procedural issues in this matter, such an addendum will not be necessary.

As a point of edification in the **Conclusion**, the Court refers to the employee having to prove an injury by accident, whereas an employee's burden is to prove injury by accident. There is no "an" in the definition of injury by accident in SC

Code §42-1-160 which the Supreme Court has specifically held differentiates our statute and definition of injury by accident from North Carolina's. See Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939); Stokes v. First National Bank, 306 S.C. 46, 410 S.E.2d 248 (1991). This misapprehension and adding of the word "an" particularly in reference to the undisputed facts that during 2010 approximately one year after the employee began using commercial paints, which are the only paints that contain volatile organic compounds (house paints do not contain those) and with which the painter had not worked previously for over a period of ten years is extremely important in reference to whether or not he sustained injury by accident referencing all the decisions over the years under that injury by accident (I.A.) standard. See: Strawhorn v. J.A. Chapman Construction Co., 202 S.C. 43, 24 S.E.2d 116 (1943) (I.A. - painter who died from several months exposure to lead based paints); Hiers v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211 (1952) (I.A. - employee became ill due to atmospheric work exposure); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977) (I.A. - cement truck driver exposed to months of high humidity, high temperatures; cement dust, short rain showers, developed emphysema); Grayson v. Gulf Oil, 292 S.C. 528, 357 S.E.2d 479 (SC App. 1987) (I.A. - claimant developed dysfunctional immune system caused by chemical sensitivity to

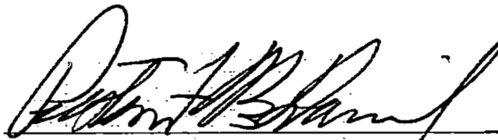
gasoline products to which she was exposed for months then very minor exposure - man walked by with gasoline odor on overalls). This Court and the Supreme Court have repeatedly in recent years reversed the current Commission for having denied benefits to an injured worker where there was no substantial evidence in the Record to sustain that denial and have repeatedly rebuked the Commission for culling through the Record to try to find evidence to deny benefits and by narrowly applying the law to exceptions to deny benefits. See for example: Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E.2d 651 (2015); Clark v. Phillips Electronics/Shakespeare, Op. No. 5809, filed March 10, 2021, 2021 W.L. 908493 (SC App. 2021). The Appellant submitted evidence that in 2010 due to his repetitive exposures he developed chronic headaches and he submitted specific medical opinion evidence to support that his chronic headaches came from his exposure to VOCs in the paint. The Respondents submitted no testimony or **medical** opinion evidence that his chronic headaches were not caused by his exposure, and in fact all of the medical experts agree that the Appellant is suffering from chronic, disabling headaches. There is no substantial evidence in the Record under the definition of injury by accident to the contrary to establish anything other than that the Claimant's chronic headaches were caused by his exposure to VOCs in the commercial paints which he was using and which developed and

which were diagnosed also exactly one year to the day in 2010 after he began work with those commercial paints.

CONCLUSION

For the foregoing reasons, the Petitioner would respectfully pray for and request rehearing and reconsideration based on the points overlooked or misapprehended by the Court and would pray for a rehearing *en banc* due to the critical importance of those procedural issues on this worker and all injured workers whose cases are pending before or will come before the Workers' Compensation Commission. The SC Workers' Compensation Commission has published an overview to workers' compensation in South Carolina, which was published years ago, and which has been reprinted annually by permission of the Commission by First Lawyer Coop Publishing and then West Publishing in its preface to the annual publication, SC WORKERS' COMPENSATION LAW ANNOTATED 2021, THOMSON RUETERS, JANUARY 2021. The Petitioner prays that the Court review the section on, **"Objectives"** wherein the six basic "**Objectives**" that underly the workers' compensation laws are repeated by the Commission. Applying those and the law of this State and the decisions of this Honorable Court and the Supreme Court, rehearing should be granted, and the decision of the Workers' Compensation Commission should be reversed.

Respectfully submitted,



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Attorneys for Appellant

May 24, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2018-001237

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

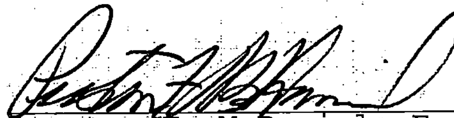
v.

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

PROOF OF SERVICE

I certify that I have served the **PETITION FOR REHEARING AND/OR REHEARING EN BANC AS TO OPINION NO. 5815 FILED APRIL 7, 2021** on May 24, 2021 addressed as follows:

Kirsten L. Barr, Attorney
Trask & Howell
Post Office Box 2167
Mt. Pleasant, South Carolina 29463



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Proudly representing injured workers for over 35 years.

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May 24, 2021

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MAY 24 2021
SC Court of Appeals

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

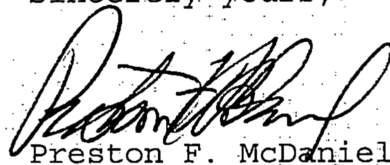
RE: Kenneth L. Barr v. Darlington County School District
Appellate Case No.: 2018-001237

Dear Ms. Kitchings:

Please find attached the original and seven (7) copies of our **PETITION FOR REHEARING AND/OR REHEARING EN BANC AS TO OPINION NO. 5815 FILED APRIL 7, 2021** in the above-referenced matter, along with the required $50.00 filing fee. I would appreciate your returning a clocked-in copy to me via the enclosed self-addressed stamped envelope.

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

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Gerald Malloy, Esquire
Kirsten L. Barr, Esquire

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RECEIVED
MAY 24 [illegible]
SC Court of Appeals

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