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SC Court of Appeals

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1614297

Kenneth D. Christian,	RESPONDENT CLAIMANT,
vs.	
Sew Eurodrive, Inc.,	EMPLOYER,
AND	
Great American Alliance Insurance Company,	CARRIER, DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina, on October 12, 2020 per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed June 1, 2021

APPEARANCES:

Claimant/Respondent Kenneth D. Christian, Claimant of Easley, South Carolina represented by Thomas S. Phillips, Esquire of Smith Jordan Attorneys at Law, in Easley, South Carolina.

Defendants/Appellants represented by Benjamin M. Renfrow, Esquire of Willson Jones Carter & Baxley, P.A. in Greenville, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill, on January 24, 2020, in Spartanburg, South Carolina. On July 5, 2020, he issued the following Order:

> **IT IS HEREBY ORDERED** that Defendants shall pay unto Claimant temporary total disability benefits from January 1, 2017 until November 19, 2018; and
>
> **IT IS FURTHER ORDERED** that, subsequent to payment of the aforementioned temporary total disability benefits, Defendants shall pay unto Claimant the remaining weeks according to the discount tables designated by the South Carolina Workers' Compensation Commission; and
>
> **IT IS FINALLY ORDERED** that, Defendants shall provide and pay for Claimant's past causally related medical treatment for his bilateral lungs, and, with the exception of a bilateral lung transplant which would require an agreement among the parties or a future order of the Commission, Defendants shall further provide and pay for any additional causally related medical treatment for Claimant's bilateral lungs for his lifetime at the direction of Dr. Leonard James Cochrane, Jr; and
>
> **IT IS SO ORDERED.**

In his Decision and Order, dated July 5, 2020, Commissioner McCaskill made the following specific Findings of Fact and Conclusions of Law:

Findings of Fact

1. When evaluating the evidence in this case, I must consider all the evidence, both lay and medical.

2. Findings of fact "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." *See Burnette v. City of Greenville*, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012).

3. This claim is complex by its very nature. Both parties have presented well-prepared, compelling arguments.

4. Claimant is a covered employee and Defendants are a covered employer who employs four (4) or more employees; thus, Claimant and Defendants are subject to the South Carolina Workers' Compensation Act.

5. An employment relationship existed between Claimant and Defendants on the date of accident, August 26, 2016.

6. The record is replete with medical records which give a detailed history of Claimant's lung condition.

7. Claimant suffers from a debilitating interstitial lung disease known as hypersensitivity pneumonitis.

8. Claimant asserts that while working for Employer, he used chemicals and solder that, over time, caused damage to his lungs. As such, Claimant seeks a finding of compensability and an award for back-owed temporary total disability benefits.

9. Claimant further asserts that as a result of this work-related injury, he is permanently and totally disabled. As such, Claimant seeks an award for permanent and total disability discounted only after the deduction of back-owed TTD benefits and an award for past and lifetime medical treatment.

10. Claimant specially asserts that his lung condition is causally related to exposure to solder at SEW-Eurodrive, Inc.

11. Given that Claimant asserts that he is permanently and totally disabled as a result of this alleged work-related injury, this case is subject to mandatory mediation as set forth in South Carolina Workers' Compensation Regulation 67-1802(A). As such, the parties participated in mediation on April 22, 2019 which resulted in an impasse.

12. Defendants deny that Claimant sustained an injury by accident arising out of and in the course of his employment.

13. Defendants further assert that Claimant's claim is barred by Claimant's failure to give timely and immediate notice to the Employer, and that Claimant cannot meet his burden of proof, which he must, given that this is a denied case.

14. I am persuaded that Claimant had concerns about the origin of his lung condition dating as far back as 2015.

15. In July of 2016, Claimant completed an application for Disability Income. In that application, Claimant indicated that his disability was due to a "sickness" as opposed to an "accident". The application also asked Claimant whether the condition was due to an injury or sickness arising out of his employment. The

options of answering were "Yes," "No" or "Unknown." The Claimant circled "No".

16. That being said, Claimant does not have the information contained in the report from the lung biopsy until August of 2016, which provides a diagnosis of hypersensitivity pneumonitis possibly due to soldering fumes.

17. As such, I cannot conclude with any certainty that Claimant knew or should have known that his lung condition was possibly work-related prior to the biopsy in August of 2016.

18. As such, I find the claim was filed timely. The notice defense fails.

19. Claimant provided proper notice to Defendants, pursuant to the South Carolina Workers' Compensation Act, by advising his boss, Rainer Neufelt, in September of 2016.

20. As to Claimant's position, Claimant cites the following:
    - Claimant is 69 years old.
    - Claimant began working for Employer in September of 1983.
    - Claimant first worked in the maintenance department for eight (8) or nine (9) years before moving to the electronics lab.
    - While working in the electronics lab, Claimant regularly and routinely soldered and de-soldered.

21. Claimant testified that he originally worked in an enclosed lab with no windows and poor ventilation.

22. After approximately six (6) years in the original lab, Claimant and the lab moved to an old office space which was much smaller.

23. Claimant further testified that throughout his time in both labs, he was never provided any protective or respiratory gear by Employer.

24. Claimant worked in the lab until he retired at the end of 2016.

25. Claimant began experiencing shortness of breath in 2001.

26. Over time, the Claimant undergoes three (3) CT scans, a VATS, and a lung biopsy, which provided Claimant with a diagnosis of hypersensitivity pneumonitis.

27. Claimant has submitted medical records from his treating physician, two pathologists, another pulmonologist and a toxicologist, all of whom state that Claimant suffers from hypersensitivity pneumonitis.

28. Claimant's treating physician, Dr. Leonard James Cochrane, Jr. of GHS Lung Center, links Claimant's lung condition to his work.

29. In a Medical Questionnaire prepared by Claimant's counsel, Dr. Cochrane answers to a reasonable degree of medical certainty that he has diagnosed Claimant with interstitial lung disease. Dr. Cochrane further opines that this diagnosis is causally related to Claimant's history of working around soldering fumes at SEW-Eurodrive, Inc.

30. Claimant has also submitted into evidence the opinions of two pathologists, Dr. Jackson H. McCarter of Greenville Hospital Systems Laboratories and Dr. William D. Travis Memorial Sloan Kettering Cancer Center.

31. Dr. McCarter writes, in part, "Review of the patient's history shows no known exposure to animal dander or other organic antigens, hypersensitivity precipitins have been negative. The patient is an electronics technician who has had frequent exposure to solder fumes, which has been reported as a rare cause of hypersensitivity pneumonitis."

32. Dr. McCarter does not definitively opine as to causation.

33. Dr. McCarter then sent Claimant's slides to Dr. Travis for an outside expert consultation.

34. Dr. Travis writes Dr. McCarter, "This letter confirms our telephone conversation on September 7, 2016. We agree with your consideration of favor chronic hypersensitivity pneumonitis."

35. While Dr. Travis' letter does include the fact that Claimant was exposed to various chemicals in connection to his soldering, Dr. Travis does not opine as to causation.

36. Ultimately, the opinions I give the greatest weight to are those of the pulmonologists in this case. Both parties have provided expert medical opinions from doctors who have the necessary education and professional qualifications to provide the opinions sought.

37. Claimant's expert is Dr. James Lawrence Pearle. Dr. Pearle is the President and Medical Director of the California Research Medical Group, Inc. in Fullerton, California. Dr. Pearle completed a Pulmonary Fellowship at the University of Illinois Medical Center in 1979. He is board certified in both Internal Medicine and Pulmonary Disease.

38. Claimant has provided an extensive Curriculum Vitae for Dr. Pearle.

39. Dr. Pearle opines that Claimant has had prolonged exposure to soldering fumes and possible other substances. He also opines, to a reasonable degree of

medical probability, that Claimant has developed hypersensitivity due to his exposure.

40. Dr. Pearle further opines, to a reasonable degree of medical probability, that occupational exposure to soldering fumes in conjunction with other occupational exposures caused this hypersensitivity pneumonitis.

41. Defendants, on the other hand, offer opinions from Dr. Gregory Feldman, who is Board Certified in Pulmonary Diseases, Critical Care and Internal Medicine, and from Dr. Gordon Early, who is Board Eligible in Occupational Medicine and Toxicology.

42. Defendants have offered depositions of both Dr. Feldman and Dr. Early into evidence. I have read both of those depositions in their entirety.

43. Both Dr. Feldman and Dr. Early have very different opinions than those of Claimant's experts.

44. Dr. Early focuses on Claimant's lack of improvement once he leaves the work environment. He opines that one of the characteristics of hypersensitivity pneumonitis is that it improves once someone is no longer exposed to the trigger. Therefore, Claimant should have seen improvement in his condition after his retirement, but that has not been the case. In fact, his condition has gotten worse.

45. Dr. Early further opines that the listed exposures in the electrical repair workshop are atypical for hypersensitivity pneumonitis triggers and that most are not documented in the medical literature.

46. Dr. Early opines that it is more likely than not that Claimant's work-related exposures did not aggravate or contribute to his hypersensitivity pneumonitis.

47. Dr. Feldman has a very different view of Claimant's condition. He testifies in his deposition that Claimant, "...has interstitial lung disease." (Dep. Tr. p. 10, l. 6). He further testifies that, "It is by all constellations idiopathic..." (Dep. Tr. p. 10, l. 21).

48. When pressed in his deposition, Dr. Feldman does not rule out the possibility that Claimant has hypersensitivity pneumonitis, but if he does, Dr. Feldman testified that it is the "organic type" (Dep. Tr. p. 16, l. 20). Dr. Feldman goes on to testify, "...you've got to distinguish two types of hypersensitivity pneumonitis, which I have for you, organic and non-organic. It's consistent with organic. It's inconsistent with non-organic." (Dep. Tr. p. 17, ll. 8-11).

49. Dr. Feldman further testified, "But would we know – or more than 50 percent. We'll never know what caused it." (Dep. Tr. p. 17, ll. 17-19).

50. Both Dr. Early and Dr. Feldman do agree that Claimant's lung condition was not caused by his work. They both so opined.

51. Defendants also submitted the report of Dr. Albert Mitsos who is Board Certified in Forensic Traumatology by the American Board of Forensic Medicine.

52. Dr. Mitsos' report concludes, "Therefore, the medical records failed to demonstrate any evidence to any degree of medical certainty to causally relate Mr. Christian's condition to soldering fumes in the work environment."

53. On March 17, 2017, Palmetto EHS, LLC completed a report on the sampling of various chemicals at SEW-Eurodrive, Inc., which they conducted. All of those chemicals were below the Permissible Exposure Limits ("PELs") established by OSHA.

54. Claimant is 69 years old and worked for Employer from 1983 – 2016.

55. Claimant first worked in the maintenance department for the first eight (8) or nine (9) years of his employment. He then moved to the lab where he soldered and de-soldered as part of his job.

56. Claimant testified in his deposition that on average, at most, he would solder two (2) to three (3) times a week, and sometimes even less. However, he testified at the hearing that how much he soldered would depend on what drives came into the lab. He further testified that, "If you sat down with a drive that's blown up, you're going to have to spend two to three hours de-soldering and soldering everything back." (Dep. Tr. p. 72, ll 23-25).

57. Claimant's testimony as to how much he soldered and the testimony of Wade Blackwell differ.

58. As background, Mr. Blackwell first worked for SEW-Eurodrive, Inc. in the same lab as Claimant from 2003 until about 2007, when he was promoted to his current position.

59. Mr. Blackwell testified that he is the purchasing manager, but that he wears many hats and would also be considered the safety manager.

60. In total, Mr. Blackwell has worked for the Employer for twenty (20) years.

61. Mr. Blackwell testified that as to time spent soldering, "...you wouldn't waste three hours soldering on a tiny little board. You would just grab a board and say it's too costly to fix that board. You would replace it, and it would be much more profitable that way."[Hearing Transcript/Depo Page...]

62. Mr. Blackwell is also asked about a document that is in the record. It is a document that was based on information provided by Claimant which shows workflow. The document provided was from August of 2006. Mr. Blackwell testified that he could provide – if requested – Claimant's entire workflow history. Claimant didn't ask for that to be provided. However, to be fair, Defendants could have provided it themselves, but they did not. It is but a snapshot in time when the entire record could have been provided. Additionally, it is from 2006, some ten (10) years before the alleged date of injury. It would have had greater value if there had been additional records or the entire record. I give it little weight.

63. Mr. Blackwell and Rickey Jones, who also testified at the hearing and whose discovery deposition was handed up as an exhibit, both testified that they do not know of anyone in the employ of SEW-Eurodrive, Inc. who has had respiratory issues during their time there. Please note I have read Mr. Jones' deposition in its entirety.

64. Mr. Jones is the Environmental Health and Safety Coordinator for Employer. He began working for Employer part-time while he was in high school. After college, he began his full-time employment. He has worked for the Employer for thirteen (13) years.

65. Both Mr. Blackwell and Mr. Jones are questioned about the exposure to chemicals at the facility. Both cite the study done by Palmetto EHS, LLC. *See* Finding of Fact No. 53.

66. Mr. Jones was designated by Employer as the person most knowledgeable as to Employer's safety policies and procedures.

67. Mr. Jones was specifically questioned about Rosin, which was not tested. Mr. Jones testified, "Rosin is listed as a component. It makes up roughly 2.2 to 3 percent of the soldering as a whole, but if you look at the SDS (safety data sheets) of the solder used, it specifically – it calls out rosin below the list of chemicals as not considered hazardous." (Dep. Tr. p. 134, ll. 10 – 15).

68. There is in the record a number of "what ifs;" that is, possible exposure to other potential causes of Claimant's lung condition. While all of those are interesting possibilities, I cannot make any findings as to any of those possibilities without speculating, which the Court has said I cannot do. *See* Finding of Fact No. 2.

69. There is also in the record testimony about Claimant's family history as to lung disease. Given that medical history, Claimant may have a genetic disposition to develop lung disease, but that has not been established. Even if it had been established, we take Claimants in the workers' compensation system as we find them.

70. The central question as to causation remains: Can Claimant meet his burden as to compensability?

71. The answer to immediate foregoing question rests primarily in the medical evidence.

72. The record is voluminous, and the experts are not in agreement as to causation.

73. While I give great weight to the opinions of the other pulmonologists who have opined in this case, I must give the greatest weight to the opinion of Claimant's treating pulmonologist, Dr. Leonard James Cochrane, Jr.

74. Claimant is first seen at the Greenville Hospital System Lung Center on June 28, 2016. He ultimately treats with Dr. Justin Wayne Gregg and then, beginning on April 4, 2017, with Dr. Cochrane. Dr. Cochrane opines in November of 2018 that Claimant's interstitial lung disease is causally related to his work for Employer. *See* Finding of Fact Nos. 28 & 29.

75. When the evidence is viewed as a whole, and based on a preponderance of the medical evidence, Claimant has suffered a compensable work-related occupational disease to his bilateral lungs.

76. There is no evidence that Claimant was exposed to soldering fumes outside of his work with Employer. Furthermore, there is no proof that the myriad of potential antigens set forth by Defendants during cross-examination caused or contributed to Claimant's work-related occupational disease. *See* Finding of Fact Nos. 2 & 68.

77. While the Claimant clearly suffers from emotional distress, based on a review of the evidence, I cannot find that he has met his burden as to a compensable psychological injury.

78. A vocational report from Rock Weldon, MA, ABVE, who is a Board-Certified Vocational Expert, is in evidence. In his report of December 21, 2019, Mr. Weldon reports that he met with Claimant for a 90-minute evaluation. Mr. Weldon concludes his report, "...it is my vocational opinion that he should be considered permanently and totally vocationally disabled. I do not believe that he is capable of any type if work for eight hours a per day 40 hours per week."

79. This is the only vocational evidence in the record. Although they had the opportunity, Defendants chose not to send Claimant for a vocational evaluation by an expert of their choosing.

80. Likewise, Defendants had the opportunity to take the depositions of Dr. Cochrane and Claimant's medical experts, but they chose not to do so.

81. Based on the vocational report in evidence, I find that Claimant is permanently and totally disabled and is, therefore, entitled to an award consistent with the directives set forth in the South Carolina Workers' Compensation Act.

82. Claimant is entitled to ongoing lifetime medical care and treatment for the occupational disease to his bilateral lungs.

83. Dr. Leonard James Cochrane, Jr. is to be the authorized treating physician.

84. Claimant is entitled to any and all usual and customary treatment modalities Dr. Cochrane provides or directs, to including imaging.

85. There cannot be a transfer of care to another physician, except by agreement of the parties or an order of the Commission.

86. A future lung transplant(s) is not authorized by this Order. Such a procedure would require an agreement of the parties or a future order of the Commission.

87. Claimant is entitled to past medical treatment.

88. Claimant is entitled to back-owed temporary total disability benefits from his forced retirement until the first Medical Questionnaire of Dr. Cochrane (January 1, 2019 until November 19, 2018).

89. Claimant's back-owed temporary total disability benefits are not to be discounted as part of the commuted value.

Conclusions of Law

1. Claimant was an employee of Employer and Employer operated a business employing four (4) or more employees. Therefore, Claimant and Employer are subject to the South Carolina Workers' Compensation Act. *See* S.C. Code Ann. §§ 42-1-130 through 42-1-150.

2. The South Carolina Workers' Compensation Commission has jurisdiction over this claim because Claimant and Employer were in an employment relationship at the time of Claimant's injuries. *See Crim v. Decorator's Supply,* 291 S.C. 193, 194, 352 S.E.2d 520, 520 (Ct. App. 1987) ("An award will not be made under our Workers' Compensation Act unless an employment relationship existed at the time of the alleged injury for which the claim is made.").

3. Claimant sustained an occupational disease to his bilateral lungs arising out of and in the course of his employment with Employer on August 26, 2016. *See* S.C. Code Ann. § 42-11-10 (defining "occupational disease" to mean "a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged."); *see also* S.C. Code Ann. § 42-11-40 ("...the

disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident and the employee, or in case of death his dependents, shall be entitled to compensation as for an injury under this title.").

4. Claimant provided proper notice to Employer pursuant to the South Carolina Workers' Compensation Act. See S.C. Code Ann. § 42-15-20 ("...no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby."); *see also Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985) ("In the case of occupational diseases, the "accident" occurs when the employee becomes disabled and could, through reasonable diligence, discover that his condition is a compensable one.").

5. Claimant is entitled to back-owed temporary total disability benefits from his forced retirement on January 1, 2017 until the first Medical Questionnaire of Dr. Leonard James Cochrane, Jr. on November 19, 2018. *See* S.C. Code Ann. § 42-9-10 ("When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages.").

6. Claimant is permanently and totally disabled. Therefore, Claimant is entitled to an award consistent with the directives set forth in the South Carolina Workers' Compensation Act, commuted only after the deduction of the aforementioned back-owed temporary total disability benefits. *See* S.C. Code Ann. § 42-9-10 ("When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages...In no case may the period covered by the compensation exceed five hundred weeks."); *see also* South Carolina Workers' Compensation Regulation 16-1605(E)(5) ("The present worth of the remaining weeks is determined according to the discount tables designated by the Commission.").

7. Claimant is entitled to past and lifetime medical treatment, including modalities and imaging at the direction of Dr. Leonard James Cochrane, Jr. *See* S.C. Code Ann. § 42-15-60(A) ("The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required...to effect a cure or give relief."); *see also* S.C. Code Ann. § 42-15-60(C) ("In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital, and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit."); *see also* South Carolina Workers' Compensation

Regulation 16-1601, which provides for covered and reimbursable expenses incurred for travel to receive medical attention. Although Claimant is at maximum medical improvement, Claimant has the option to undergo a bilateral lung transplant. The same would require agreement among the parties or a future order of the Commission.

Statement of Case / Appeal

On July 17, 2020, within the statutory period, counsel for Defendants filed an application for review in the case setting forth Defendants grounds for review, copies of which were furnished to all interested parties prior to oral argument presented to the Appellate Panel on October 12, 2020. Claimant is deceased, and his date of death is October 6, 2020. By appeal, counsel for Defendants alleged that the Single Commissioner's Findings of Fact, Conclusions of Law, and Orders were not supported by the preponderance of the evidence, and they were also errors of law. In Defendants' Appellate Panel Brief, counsel for Defendants submitted the following issues for review, among others:

1. The Single Commissioner erred in finding that Claimant met his burden of proving that he sustained an injury/occupational disease by accident arising out of and in the course of his employment with SEW Eurodrive, Inc.; and
2. The Single Commissioner erred in finding that Claimant gave immediate and timely notice of a claim.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration. After considering all of the evidence in the record, the Appellate

Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, has fully reversed the decision and order of the Single Commissioner, and issues the following Findings of Fact and Conclusions of Law, which shall become, and hereby are, the law of the case.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. When evaluating the evidence in this case, we must consider all the evidence, both lay and medical.

2. Findings of fact "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." See Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012).

3. This claim is complex by its very nature. Both parties have presented well-prepared, compelling arguments.

4. An employment relationship existed between Claimant and Defendants on the date of accident, August 26, 2016.

5. The record is replete with medical records which give a detailed history of Claimant's lung condition.

6. Claimant suffers from a debilitating lung condition.

7. Claimant asserts that as a result of this alleged work-related injury, he is permanently and totally disabled. As such, Claimant seeks an award for permanent and total disability discounted only after the deduction of back-owed TTD benefits and an award for past and lifetime medical treatment.

8. Claimant specially asserts that his lung condition is causally related to exposure to solder at SEW-Eurodrive, Inc.

9. Given that Claimant asserts that he is permanently and totally disabled as a result of this alleged work-related injury, this case is subject to mandatory mediation as set forth in South Carolina Workers' Compensation Regulation 67-1802(A). As such, the parties participated in mediation on April 22, 2019 which resulted in an impasse.

10. Defendants deny that Claimant sustained an injury/occupational disease to his bilateral lungs by accident arising out of and in the course of his employment.

11. Defendants further assert that Claimant's claim is barred by Claimant's failure to give timely and immediate notice to the Employer, and that Claimant cannot meet his burden of proof, which he must, given that this is a denied case.

12. As to Claimant's position, Claimant asserts the following:

a. Claimant is 69 years old.

b. Claimant began working for Employer in September of 1983.

c. Claimant first worked in the maintenance department for eight (8) or nine (9) years before moving to the electronics lab.

13. Claimant worked in the lab until he retired at the end of 2016.

14. Claimant began experiencing shortness of breath in 2001.

15. Over time, Claimant underwent three (3) CT scans, a VATS, and a lung biopsy.

16. Claimant's treating physician, Dr. Leonard James Cochrane, Jr. of GHS Lung Center, links Claimant's lung condition to his work.

17. Dr. McCarter does not definitively opine as to causation.

18. Dr. McCarter then sent Claimant's slides to Dr. Travis for an outside expert consultation. While Dr. Travis' letter does include the fact that Claimant was exposed to various chemicals in connection to his soldering, Dr. Travis does not opine as to causation.

19. Both parties have provided expert medical opinions from doctors who have the necessary education and professional qualifications to provide the opinions sought.

20. Claimant's expert is Dr. James Lawrence Pearle. Dr. Pearle is the President and Medical Director of the California Research Medical Group, Inc. in Fullerton, California.

21. Claimant has provided an extensive Curriculum Vitae for Dr. Pearle.

22. Dr. Pearle opines that Claimant has had prolonged exposure to soldering fumes and possible other substances. He also opines, to a reasonable degree of medical probability, that Claimant has developed hypersensitivity pneumonitis (HP) due to his exposure.

23. Claimant had expert reports from several out of State providers, and Dr. Cochrane only signed a Questionnaire causally relating Claimant's condition. He never went to the job site or obtained information on how much soldering Claimant performed. There is no evidence that he even evaluated the Industrial Hygiene Report or had any real knowledge about Claimant's potential exposure other than the facts given to him by Claimant and his attorney.

24. Defendants, on the other hand, offer opinions from Dr. Gregory Feldman, who is Board Certified in Pulmonary Diseases, Critical Care and Internal Medicine, and from Dr. Gordon Early, who is Board Eligible in Occupational Medicine and Toxicology, and Dr. Albert Mitsos, who is Board Certified in Forensic Traumatology by the American Board of Forensic Medicine.

25. Defendants have offered depositions of both Dr. Feldman and Dr. Early, who are both licensed physicians in South Carolina, into evidence. We have read both of those depositions in their entirety.

26. Dr. Feldman, Dr. Early, and Dr. Mitsos have very different opinions than those of Claimant's experts.

27. Both doctors Feldman and Early thoroughly reviewed all of the medical records, the Industrial Hygiene Reports and one of them went to the actual job site where Claimant worked, and saw what and how he did his job.

28. Dr. Early was the only doctor that actually went to SEW Eurodrive, Inc. and reviewed the job site and the type of work Claimant performed before giving his final opinion. Dr. Early focuses on Claimant's lack of improvement once he left the work environment. He opines that one of the characteristics of HP is that it improves once someone is no longer exposed to the trigger. Therefore, Claimant should have seen improvement in his condition after his retirement, but that has not been the case. In fact, his condition has gotten worse.

29. Dr. Early further opines that the listed exposures in the electrical repair workshop are atypical for HP triggers and that most are not documented in the medical literature.

30. Dr. Early opines that there are multiple potential causes of Claimant's lung condition, and that Allergy Partners of the Upstate was concerned enough about fungal exposure to do an Aspergillus pinprick test, which came back positive. Dr. Early notes that aspergillus is a well-known trigger for fungal HP.

31. Dr. Early opines, to a reasonable degree of medical certainty, that it is more likely than not that Claimant's work-related exposures did not aggravate or contribute to his HP.

32. Dr. Early testifies in his deposition that the electronics lab is not a typical place to get HP, and that soldering is not in the top 100 causes for HP. (APA pp. 1125; 1127). He further testified that HP can be an idiopathic disease. (APA p. 1127). Moreover, reinforced the fact that Claimant's condition significantly worsened after he was no longer working at SEW Eurodrive, Inc., and he testified as follows:

> "...[I]f [Claimant] had HP, he should get better when you move him away from the offending antigen. And we're dealing with an obscure, potentially offensive antigen, if we're alleging solder. And [Claimant] got a whole lot worse when you took him away from the...potential offensive antigen, and he got worse quick, despite steroids. So, it makes you wonder, "Hey, do we have the wrong potentially offensive antigen?" (APA p. 1128).

33. Dr. Feldman is a South Carolina based pulmonologist. He opines that soldering is not in the top one hundred potential causes of Interstitial Lung Disease and HP. He further opined that even if Claimant had HP, he had a "non-organic type" not an organic type as would be caused by soldering/ chemicals.

34. Dr. Feldman testifies in his deposition that Claimant, "...has interstitial lung disease." (Dep. Tr. p. 10, l. 6). He further testifies that, "It is by all constellations idiopathic..." (Dep. Tr. p. 10, l. 21).

35. When pressed in his deposition, Dr. Feldman does not rule out the possibility that Claimant has HP, but if he does, Dr. Feldman testified that it is the "organic type" (Dep. Tr. p. 16, l. 20). Dr. Feldman goes on to testify, "...you've got to distinguish two types of [HP], which I have for you, organic and non-organic. It's consistent with organic. It's inconsistent with non-organic." (Dep. Tr. p. 17, lines 8-11).

36. Dr. Feldman further testified, "But would we know – or more than 50 percent. We'll never know what caused it." (Dep. Tr. p. 17, lines 17-19).

37. Both Dr. Early and Dr. Feldman do agree that Claimant's lung condition was not caused by his work. They both so opined.

38. Defendants also submitted the report of Dr. Albert Mitsos who is Board Certified in Forensic Traumatology by the American Board of Forensic Medicine.

39. Dr. Mitsos' report concludes, "Therefore, the medical records failed to demonstrate any evidence to any degree of medical certainty to causally relate Mr. Christian's condition to soldering fumes in the work environment."

40. On March 17, 2017, Palmetto EHS, LLC completed a report on the sampling of various chemicals at SEW-Eurodrive, Inc., which they conducted. All of those chemicals were below the Permissible Exposure Limits ("PELs") established by OSHA. We give this report great weight.

41. Claimant first worked in the maintenance department for the first eight (8) or nine (9) years of his employment. He then moved to the lab where he soldered and de-soldered as part of his job.

42. Claimant testified in his deposition that on average, at most, he would solder two (2) to three (3) times a week, and sometimes even less. However, he testified at the hearing that how much he soldered would depend on what drives came into the lab. He further testified that, "If you sat down with a drive that's blown up, you're going to have to spend two to three hours de-soldering and soldering everything back." (Dep. Tr. p. 72, lines 23-25).

43. Claimant's testimony as to how much he soldered and the testimony of Wade Blackwell differ.

44. As background, Mr. Blackwell first worked for SEW-Eurodrive, Inc. in the same lab as Claimant from 2003 until about 2007, when he was promoted to his current position.

45. Mr. Blackwell testified that he is the purchasing manager, but that he wears many hats and would also be considered the safety manager.

46. In total, Mr. Blackwell has worked for the Employer for twenty (20) years.

47. Mr. Blackwell testified that as to time spent soldering, "...you wouldn't waste three hours soldering on a tiny little board. We would just grab a board and say it's too costly to fix that

board. You would replace it, and it would be much more profitable that way." (Hr. Tr. p. 102, lines 4 – 8).

48. Mr. Blackwell is also asked about a document that is in the record. It is a document that was based on information provided by Claimant which shows workflow, which Mr. Blackwell described as a "snapshot" that was pulled from his computer showing the amount of work Claimant performed in a week in August of 2006. Mr. Blackwell testified that he could provide – if requested – Claimant's entire workflow history. (Hr. Tr. p. 102, line 9 – p. 109, line 21; APA#24; APA#34). Claimant, who has the burden of proof in this matter, did not ask for it to be provided.

49. Mr. Blackwell and Rickey Jones, who also testified at the hearing, and whose discovery deposition was handed up as an exhibit, both testified that they do not know of anyone in the employ of SEW-Eurodrive, Inc. who has had respiratory issues during their time there. We have read Mr. Jones' deposition in its entirety.

50. Mr. Jones is the Environmental Health and Safety Coordinator for Employer. He began working for Employer part-time while he was in high school. After college, he began his full-time employment. He has worked for the Employer for thirteen (13) years.

51. Both Mr. Blackwell and Mr. Jones are questioned about the exposure to chemicals at the facility. Both cite the study done by Palmetto EHS, LLC. See Finding of Fact No. 40.

52. Mr. Jones was designated by Employer as the person most knowledgeable as to Employer's safety policies and procedures.

53. Mr. Jones was specifically questioned about Rosin, which was not tested. Mr. Jones testified, "Rosin is listed as a component. It makes up roughly 2.2 to 3 percent of the soldering as a whole, but if you look at the SDS (safety data sheets) of the solder used, it specifically – it calls out rosin below the list of chemicals as not considered hazardous." (Dep. Tr. p. 134, lines 10 – 15).

54. There is in the record a number of "what ifs;" that is, possible exposure to other potential causes of Claimant's lung condition.

55. There is also in the record testimony about Claimant's family history as to lung disease. Claimant has a long-standing personal and family history of lung problems. Claimant testified that he first began having symptoms with his lungs in the early 2000s. (Hr. Tr. p. 17, lines 3 – 9). Claimant testified that he had a sinus surgery in 2001. (Hr. Tr. p. 28, line 24 – p. 29, line 4). In 2002, Claimant had a heart stent placed. (Hr. Tr. p. 33, lines 2 – 4). Claimant testified that his father passed away from lung cancer. (Hr. Tr. p. 47, lines 4 – 15). Claimant had five brothers. One of Claimant's brothers passed away from lung cancer. Another one of Claimant's brothers passed away from melanoma. Moreover, a third brother died from lung disease. (Hr. Tr. p. 49, line 17 – p. 52, line 3).

56. The central question as to causation remains: Can Claimant meet his burden as to compensability?

57. The record is voluminous, and the experts are not in agreement as to causation.

58. Ultimately, we give the greatest weight to the opinion of Dr. Early, who evaluated Claimant's specific workplace, and to the fact that Defendants submitted evidence from at least two in-State medical providers regarding the causation issues in this claim. We also give great weight to the Industrial Hygiene Sampling Report.

59. We reverse the rulings of the Single Commissioner, and find that Claimant failed to prove by a preponderance of the evidence that he sustained an occupational disease, or an injury by accident, to his bilateral lungs arising out of and in the course of his employment with SEW Eurodrive, Inc. on August 26, 2016. This finding is based on the evidence in the record as a whole, including but not limited to the APA submissions and exhibits by Claimant and Defendants, the

testimony of all witnesses at the hearing, the hearing and deposition testimony of Claimant, and the evidence set forth in the Findings of Fact herein.

60. When the evidence is viewed as a whole, and based on a preponderance of the medical evidence, Claimant has failed to prove that he suffered a compensable work-related occupational disease, or injury by accident, to his bilateral lungs.

61. Defendants provided a myriad of potential antigens that could have caused or significantly contributed to Claimant's work-related occupational disease.

62. While Claimant clearly suffers from emotional distress, based on a preponderance evidence, we cannot find that he has met his burden as to a compensable psychological injury. This finding is based on the evidence in the record as a whole, including but not limited to the APA submissions and exhibits by Claimant and Defendants, the testimony of all witnesses at the hearing, the hearing and deposition testimony of Claimant, and the evidence set forth in the Findings of Fact herein.

63. We are persuaded that Claimant had concerns about the origin of his lung condition dating as far back as 2015.

64. In July of 2016, Claimant completed an application for Disability Income. In that application, Claimant indicated that his disability was due to a "sickness" as opposed to an "accident." The application also asked Claimant whether the condition was due to an injury or sickness arising out of his employment. The options of answering were "Yes," "No" or "Unknown." Claimant circled "No".

65. Given that we find that Claimant failed to prove by a preponderance of the evidence that he sustained an occupational disease to his bilateral lungs arising out of and in the course of his employment with Employer on August 26, 2016, we decline to address the issue of whether Claimant's claim was timely filed.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to S.C. Code Ann. § 42-17-50, the Appellate Panel has the power to affirm, amend, or reverse the decision of a single Commissioner.

2. Claimant was an employee of Employer and Employer operated a business employing four (4) or more employees. Therefore, Claimant and Employer are subject to the South Carolina Workers' Compensation Act. See S.C. Code Ann. §§ 42-1-130 through 42-1-150.

3. The South Carolina Workers' Compensation Commission has jurisdiction over this claim because Claimant and Employer were in an employment relationship at the time of Claimant's injuries. See Crim v. Decorator's Supply, 291 S.C. 193, 194, 352 S.E.2d 520, 520 (Ct. App. 1987) ("An award will not be made under our Workers' Compensation Act unless an employment relationship existed at the time of the alleged injury for which the claim is made.").

4. Claimant failed to prove by a preponderance of the evidence that he sustained an occupational disease, or injury by accident, to his bilateral lungs arising out of and in the course of his employment with Employer on August 26, 2016. See S.C. Code Ann. §§ 42-11-10, and 42-1-160.

5. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable mental injury arising out of and in the course of his employment on June 15, 2017. See S.C. Code Ann. § 42-1-160.

ORDER

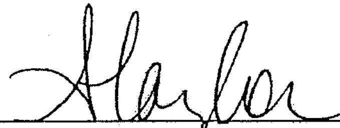
Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner filed in the above-captioned matter on July 5, 2020, is hereby reversed.

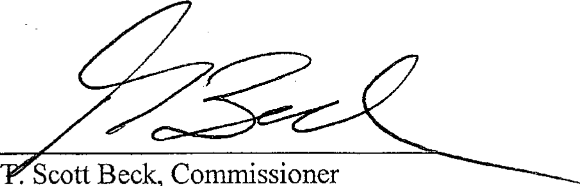
AND IT IS SO ORDERED.

REVERSED

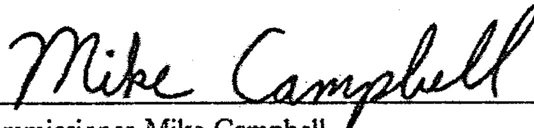
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Commissioner Aisha Taylor



P. Scott Beck, Commissioner



Commissioner Mike Campbell

Order Served via E-Mail:

Thomas Phillips Smith, Jordan, PA phillips@smithjordan.com	Benjamin M. Renfrow Wilson, Jones, Carter, & Baxley, PA bmrenfrow@wjlaw.net

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on June 1, 2021