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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
Aisha Taylor, Commissioner

Appellate Case No. 2018-001237
W.C.C. 1507304
Opinion No. 5815 (filed April 7, 2021)

Kenneth L. Barr, Employee,.....Appellant/Petitioner,

v.

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

**RETURN TO PETITION
FOR REHEARING**

The Respondents, the Darlington County School District and the South Carolina School Boards Insurance Trust, respectfully request that the Court of Appeals deny the Petition for Rehearing, based upon the following:

1. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. *See Toal, et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (2nd Ed. 2002) at p. 309

(citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933)).

However, that is exactly what the Appellant attempts to do with his Petition for Rehearing.

2. In addition, the Appellant continues to raise issues that are not preserved for appeal and to allege “facts” for which no citation to the Record exists.
3. For these reasons, and for the reasons set forth more fully below, the Respondents respectfully request that the Petition for Rehearing be denied pursuant to Rule 221 and Rule 219(b), S.C.A.C.R.

Weight and Sufficiency of the Evidence

4. The Petition for Rehearing contains a litany of complaints regarding the weight and sufficiency of the evidence supporting the Workers’ Compensation Commission’s unanimous conclusion that the Appellant “did not sustain any injury by accident, repetitive trauma, or occupational disease arising out of or in the course of his employment” (R. p.85) and alleges that “the Court misapprehended or overlooked several key facts important to the consideration of this case,” including the Appellant’s exposure to volatile organic compounds outside of his employment with the Darlington County School District; the Appellant’s history of treatment for headaches by Dr. Chapman and Dr. Skinner; the opinions of Dr. White, Dr. Healy, Dr. Lind, Dr. Waid, Dr. Wagner, and Dr. Pritchard; the events of March 16, 2015; the procedural history of the case; the qualifications of Dr. Eagerton; the testimony of Mr. Stegner; and the definition of the term “accident.”
5. The Respondents respectfully contend that the Court did not misapprehend or overlook any fact “important to the consideration of this case” (as alleged by the

Appellant), but instead properly reviewed the evidence actually in the Record in accordance with the Administrative Procedures Act and the substantial evidence standard of review established by S.C. Code Ann. § 1-23-380 and Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981), in affirming the Commission's Decision and Order.

6. It is well-settled that an appellate court's "review of an administrative agency's findings of fact are limited. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996) (citing) S.C. Code Ann. 1-23-380(A)(6) (Supp. 1994). Indeed, "the substantial evidence test need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304, 307 (1981) (internal citations omitted). However, that is precisely what the Appellant advocates in his Petition for Rehearing: inappropriate judicial fact-finding and improper substitution of the appellate court's judgment as to the weight of cherry-picked evidence.
7. The Appellant specifically charges that the "Respondents submitted no testimony or **medical opinion evidence** that his chronic headaches were not caused by his exposure." (Petition p.43) (emphasis original). This is false. The Record includes the following substantial evidence:
 - a. The opinion of the Appellant's personal neurologist, Dr. Roland Skinner, who testified to a reasonable degree of medical certainty that the Appellant's headaches are tension-type headaches complicated by

- analgesic rebound and anxiety, which he did not believe were related in any way to alleged workplace exposures of any kind. (R. pp.1003–1004).
- b. The opinion of Dr. Paul Pritchard who testified, to a reasonable degree of medical certainty, that the Appellant’s complaints of headaches have no causal relationship to his employment at the School District. (R. pp.1175--1176).
- c. The Commission’s unanimous finding that the opinions of Dr. White, upon whom the Appellant primarily relies, are “speculative, based on disproved hypotheticals, uncorroborated, and otherwise without objective basis” and; therefore, entitled to “little weight.” (R. p.52, p.81).
- d. The testimony of Dr. Healy that any alleged VOC exposure was merely “contributory” and that he could not state with any degree of medical certainty what was causing the Appellant’s headaches. (R. p.1429; p.1437, lines 17–25). Dr. Healy admitted that the Appellant’s severe sleep disorders alone (that are unrelated to his employment), especially in combination with his abuse of cigarettes (which is also unrelated to his employment), could be causing the headaches. (R. pp.1407–1408; p.1417; p.1419). Dr. Healy further explained that:
- “...the whole time I’m thinking, you know, this fellow’s breathing is bad. He’s got a lot of reasons to be relatively hypoxic, which leads to stress, fatigue and that might be what causes his headache.” (R. p.1414, lines 20–24).

Additionally, Dr. Healy was asked about the relationship between Barr's non-work-related lung disease and abnormal arterial blood gas and his complaints of headaches:

“Q... so could that be playing a role in his headaches and fatigue as well?

A. Oh, I think it definitely is.” (R. p.1419, lines 11–16).

Dr. Healy further explained that Barr's elevated carbon dioxide levels

“doesn't produce a milieu for the brain to exactly work properly and from a metabolic standpoint, headache is the end result. So that, that's my reason for thinking that his breathing is contributory to his headaches.” ...” (R. p.1437, lines 17–250

8. Therefore, the Respondents respectfully contend that neither the Commission, nor the Court of Appeals, erred or misapprehended the weight of the evidence regarding the cause of the Appellant's headaches. The “medical opinion evidence,” as weighed by the Commission, constitutes substantial evidence supporting the conclusion that the Appellant's headaches are not compensable under the Act, as there are multiple, objectively-documented causes for the headaches unrelated to his employment and only with improper speculation could his employment be considered even a contributing factor.
9. According to the Appellant, the Court of Appeals further misapprehended the requirement that he 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 S.C. Code §42-1-160.” (Petition p.41).

10. While it is true that S.C. Code Ann. § 42-1-160 does not contain the indefinite article “an” before the word “injury,” the statute does define “injury” to “mean only injury by accident arising out of and in the course of employment.” To be entitled to workers’ compensation benefits under S.C. Code Ann. § 42-1-160, the employee must not only prove that he was injured, but also that the injury “arose out of” and “in the course of” his employment. “The injury arises out of employment where there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.” Osteen v. Greenville Co. School Dist., 333 S.C. 43, 50, 508 S.E.2d 21, 25 (1998).
11. Therefore, the Court of Appeals properly affirmed the Commission’s denial of benefits based upon the finding and conclusion that any alleged injury did not “arise out of” the Appellant’s employment. As explained in the Commission’s final Decision and Order, the “overwhelming weight of the evidence” does not support a finding “that his headaches, fatigue, or confusion are causally-related to his employment.” (R. p.86). The Court of Appeals did not misconstrue this finding, the substantial evidence supporting it, or the applicable law, which makes the Appellant’s failure to prove a causal-connection fatal to his claim for benefits. *See* Turner v. SAIIA Constr., 419 S.C. 98, 796 S.E.2d 150 (Ct. App. 2016) (holding that an employee is not entitled to a presumption that his injury was proximately caused by or “arose out of” his employment).
12. Of course, proof of causation alone is not dispositive of his claim for benefits under the Workers’ Compensation Act, despite the fact that the Appellant, and even the

Court of Appeals¹, seem to suggest that if causation is proven, the Appellant is automatically entitled to such benefits. In addition to finding the Appellant's headaches (and other alleged symptoms) are not causally related to his employment with the School District, the Commission made detailed findings and conclusions regarding the Appellant's failure to prove other essential elements of S.C. Code Ann. § 42-1-160, § 42-11-10, and § 42-1-172, which are fatal his claim for medical and compensation benefits under the Workers' Compensation Act. These findings and conclusions are the law of the case and; therefore, even if the Appellant were to prevail on his specious argument that the Commission's findings regarding causation should be reversed, he still would not be entitled to workers' compensation benefits as a matter of law.

a. **S.C. Code Ann. § 42-1-160**

The Commission concluded that the Appellant's claim did not meet the statutory requirements of proving an injury by "accident" under S.C. Code Ann. § 42-1-160(F) because he

"alleges that his condition was gradual in onset and due to repeated alleged exposures over time; therefore, his alleged injuries cannot

¹ The Court's Opinion, Section I, concludes that the Appellant preserved legal arguments under S.C. Code Ann. § 42-1-160 (injury by accident), S.C. Code Ann. § 42-11-20 (occupational disease), and § 42-1-172 (repetitive trauma injury), despite not making any legal argument regarding the Commission's application of these statutes in his Brief to the Court. The Respondents respectfully contend that this was in error, as further evinced by the Appellant's failure to make any argument regarding the Commission's application of these statutes in his Petition for Rehearing.

be considered injuries by ‘accident’ pursuant to the plain terms of S.C. Code Ann. § 42-1-160(F).” (R. p.45; p.86).

According to S.C. Code Ann. § 42-1-160(F), the

“word ‘accident’ as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time.”²

The Appellant did not raise any argument regarding this finding or conclusion in his Brief to the Court of Appeals, nor does he address it in his Petition for Rehearing.³ Therefore, the Commission’s unanimous conclusion that the Appellant’s claim, specifically including “his complaints of headaches,” does not meet the requirements of S.C. Code Ann. § 42-1-160(F) is the law of the case and cannot be disturbed on appeal, rendering his Petition for Rehearing moot.

Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970).

² Note that S.C. Code Ann. § 42-1-160 was amended in 2007 to add subsection F, at which time the repetitive trauma statute, S.C. Code Ann. § 42-1-172 was also enacted. The cases relied upon by the Petitioner (Petition pp.42-43) were based upon the law prior to 2007; therefore, his reliance is misplaced.

³ Neither the Appellant’s Brief to the Court of Appeals, nor his Petition for Rehearing, makes any reference to S.C. Code Ann. § 42-1-60(F).

b. **S.C. Code Ann. § 42-11-10**

The occupational disease statute, in addition to requiring proof of an actual disease, specifically requires that such disease “result directly and naturally from exposure...to *hazards peculiar to the particular employment.*” (emphasis added). Here, the Commission specifically found and concluded that “the conditions for which [the Appellant] seeks benefits do not ‘result directly and naturally from exposure ... to the hazards peculiar to the employment’ and are not compensable under S.C. Code Ann. § 42-11-10. (R. p.46, p.87). The Appellant did not mention this finding or conclusion in his Brief to the Court of Appeals, nor does he address it in his Petition for Rehearing.⁴ Indeed, at no time has he presented any evidence or argument regarding the peculiarity requirement.⁵ Therefore, the Commission’s findings and conclusions regarding the Appellant’s failure of proof under that statute is the law of the case, rendering his Petition for Rehearing moot. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970).

⁴ In fact, neither the Appellant’s Brief to the Court of Appeals, nor his Petition for Rehearing, makes any mention of S.C. Code Ann. § 42-11-10 or the requirement of a peculiar hazard whatsoever.

⁵ Note that Dr. Eagerton testified that VOCs are found in household products and that any VOC exposure was more likely to have occurred apart from the Appellant’s work at the School District. Dr. Eagerton further opined that any VOC exposure at work would have been limited due to the low vapor pressure of the substances most commonly used by the Appellant and due to his use of a respirator. (R. pp.738—739).

c. **S.C. Code Ann. § 42-1-172**

There are only 3 ways for an alleged injury to be compensable under the South Carolina Workers' Compensation Act: (1) proof of an injury by accident under S.C. Code Ann. § 42-1-160, (2) proof of an occupational disease under S.C. Code Ann. § 42-11-10, or (3) proof of a repetitive trauma injury under S.C. Code Ann. § 42-1-172. Having failed to prove that any of his alleged injuries were caused by an "accident" under S.C. Code Ann. § 42-1-160 or "occupational disease" under S.C. Code Ann. § 42-11-10, the only way the Appellant could conceivably be entitled to benefits under the Workers' Compensation Act is to prove the requirements of the repetitive trauma statute, which include not only proof of "repetitive traumatic events," but also proof of a "direct causal relationship between the conditions under which the work is performed and the injury." Here, the Commission found and concluded that the Appellant failed to meet these statutory requirements -- not only because he had (1) failed to present "credible evidence of a 'direct causal relationship' between [his] work condition and his alleged injuries" -- but also because (2) his "alleged workplace exposures were neither repetitive, nor traumatic." (R. p.58, pp.87-88). On appeal, the Appellant's Brief makes no argument that the Commission erred in its application of S.C. Code Ann. § 42-1-172, nor is any such argument contained in his Petition for Rehearing.⁶ As a result, the Commission's unanimous determination that the Appellant's headaches do not qualify as a compensable

⁶ Neither the Appellant's Brief, nor his Petition for Rehearing, even cite S.C. Code § 42-1-172 or its requirements.

repetitive trauma injury under S.C. Code Ann. § 42-1-172 are the law of the case, rendering his Petition for Rehearing moot. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

13. Not only did the Court of Appeals apply the appropriate standard of review with respect to the Commission's unanimous conclusion that the Appellant "did not sustain any injury by accident, repetitive trauma, or occupational disease arising out of or in the course of his employment" (R. p.85), but the Court's Opinion makes clear that it properly considered the Record as a whole in so doing, despite the Appellant's claims to the contrary.
14. The Appellant alleges that the Court misapprehended "the undisputed fact that residential house paints to no contain VOCs (volatile organic compounds)" in the context of reciting the Appellant's work history. (Petition p.7; p.42) (emphasis original). The Appellant cites no evidence in the Record for this proposition; however, it is clear that is far from "undisputed." In fact, this allegation appears to have been created out of whole cloth. The actual Record reveals that the Appellant's own pharmacologist, Robert Bennett, testified at the hearing,

Q. ...painting of all stripes whether it be residential or commercial has the potential to expose one to volatile organic compounds?

A. Yes.

(R. p.1326, lines 6—10). Additionally, the Appellant's chosen neurologist, Dr. White, testified,

Q. How do you differentiate the exposure to VOCS that he had at Darlington County School District versus the painting he's done in his own private business?

A. I can't.

(R. p.54, lines 19-22). Dr. Eagerton, a former Chief Toxicologist at the S.C. Law Enforcement Division, further opined that

“even if [the Appellant] had an exposure to VOCs, it is more likely that it occurred at his previous job or while he was moonlighting as a self-employed painter (because he did not wear proper protection during those times.)”

(R. p.739). Therefore, the Respondents respectfully contend that the Court did not misapprehend any fact by noting that Appellant “worked as a commercial painter for a nuclear plant and as a house painter on a self-employed basis.”

15. The Appellant next alleges that “misapprehended and overlooked” the fact that he was diagnosed with chronic headaches in 2010, some five years before his claimed date of injury (“5/21/15”). (R. p.268). However, this allegation is also without merit, as the Court’s Order plainly notes that the Appellant was evaluated by Dr. Chapman for headaches in 2010 and that Dr. Skinner had diagnosed him with headaches “tension headaches” in 2010. (R. p.454). In fact, the Court’s Opinion even quotes Dr. Skinner’s November 15, 2011 opinion that

“a good bit of his problems may be analgesic rebound. He needs to completely stop intermittent Tylenol, Ibuprofen, and Goody Powders.” (R. p.473).

Therefore, the Respondents respectfully contend that the Appellant's allegation that "the Court does not even reference the diagnosis of and the treatment for chronic headaches in 2010" is without merit, as is plain to anyone who reads the second and eighth paragraphs of the Court's Opinion No. 5815.

16. The Appellant further baselessly alleges that "the Court clearly misread the evidence" when it noted that a "CT scan did not reveal any abnormality." The Respondents respectfully contend that it is the Appellant, not the Court, who "misread" the report of the March 16, 2015 "Head CT," which is contained in the Record at page 378 and clearly states:

"FINDINGS: NO evidence of acute intracranial hemorrhage or extra-axial collection. Ventricles and CSF spaces are symmetric and appropriate. No evidence of midline shift or mass effect. No evidence of acute infarct. Osseous structures are without acute abnormality. IMPRESSION: NO EVIDENCE OF ACUTE INTRACRANIAL ABNORMALITY." (emphasis original).

17. The Appellant next charges that "the Court misapprehended the diagnosis of Dr. White on May 21, 2015," arguing that "Dr. White did not diagnose the Appellant with brain damage" on that date. However, Dr. White's May 21, 2015 office note states "Impression: VOC related Neurologic Sx" (R. p.297) and Dr. White subsequently characterized these "Sx" (symptoms) as "brain damage" (R. p.282). Therefore, the Respondents respectfully contend that the Appellant's argument in this regard is specious and does not merit rehearing by the Court. This is especially true considering the fact that the Commission, within its sole discretion, determined

“[b]ecause Dr. White’s opinions are speculative, based upon disproven hypotheticals, uncorroborated, and are otherwise without objective basis, the statements and opinions of Dr. White are given little weight.” (R. p.81).

Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (holding that the final determination of witness credibility is reserved to the Commission).

18. According to the Appellant, “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 that day.” The Respondent respectfully contends that this statement is correct, as the Appellant testified as follows:

“Q. ...do you deny that you went to the hospital on March the 16th of 2015 complaining of dizziness, confusion, of headaches that occurred at home?

A. I don’t even know what day it was.

Q. Okay. And you described this incident when you got confused on your way to Lowe’s. Is that right?

A. Yes, ma’am.

Q. Okay. And **even though you hadn’t done any painting that day, you say you were confused?**

A. **I mean, yeah**, it was like it hit me, yeah.” (R. p.1393, l.8—p.1394, l. 17) (emphasis added).

Contrary to the Appellant’s allegations, by referring to this undisputed fact the Court did not contravene the holding of Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d

479 (Ct. App. 1987) (applying pre-2007 statutes to conclude where a sudden illness is precipitated by the inhalation of harmful elements at a definite time, which brings to a climax the cumulative deleterious effects of the inhalation over a period of time, it is generally considered an accidental injury rather than to occupational disease). Here, the Appellant's sudden confusion on March 16, 2015 was not "precipitated by the inhalation of harmful elements at a definite time" and nothing more than innuendo supports the claim that he had been "exposed to the VOCs in the paint that day before the incident" as he now alleges. More importantly, the holding in Grayson was superseded by the 2007 amendments to S.C. Code Ann. § 42-1-160 and the statute now mandates that the "word 'accident' ... must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time."⁷

19. The Petition for Rehearing also casts aspersions regarding the Court's comprehension of "the opinions of Dr. Pritchard, Dr. Healy, and Dr. White as to the chronic daily headaches." The Respondents respectfully contend that the Court did not misapprehend these opinions, but carefully viewed them in accordance with the substantial evidence standard of review.

- a. The Court's Opinion correctly notes that "Dr. Pritchard did not find evidence of encephalopathy in Employee and stated Employee's neurological exam was normal..." This is in addition to the Dr. Pritchard's

⁷ The Commission specifically concluded that, because the Appellant alleges his headaches were caused by alleged exposures over a period of several years, his claim is not compensable under S.C. Code Ann. § 42-1-160(F) as a matter of law. (R. p.45; p.86).

testimony that, to “a reasonable degree of medical certainty” the Appellant’s headaches no not have any causal relationship to his employment at the Darlington County School District. (R. p.1175, l.24 – p.1176, l.9).

- b. The Court’s Opinion also correctly notes that “Dr. Joseph Healy, another physician who examined Employee, opined Employee’s exposure to VOCs in paint did impact his health, but as one of a number of other factors” including being a heavy smoker, abnormal blood gas, metabolic problems, pulmonary problems, and severe obstructive sleep apnea syndrome.” This is, in part, why the Commission concluded that the Appellant failed to prove a “direct causal relationship” as required by S.C. Code Ann. § 42-1-172.
- c. In addition, the Court’s Opinion correctly notes that “[t]he Appellate Panel gave little weight to the opinions of Dr. White ‘as they have no objective basis and they are otherwise contradicted by the overwhelming weight of the credible evidence in the record.’” Therefore, the substance of Dr. White’s opinions matters not because the final determination of witness credibility is reserved to the Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969).

20. Though it is wholly unclear why any allegation regarding the precise nature of the claim’s procedural history would merit rehearing or reconsideration by the Court, the Appellant nevertheless claims that “there is a procedural misapprehension by the Court that the Claimant did not file three (3) different claims for benefits.” The

Respondent respectfully contends that the Court correctly stated that the Appellant initially filed a Form 50 “Employee’s Notice of Claim and/or Request for Hearing” on June 19, 2015 (R. p.91), that he filed a second Form 50 “Employee’s Notice of Claim and/or Request for Hearing” on October 1, 2015 (R. p.94), and that he filed a third Form 50 “Employee’s Notice of Claim and/or Request for Hearing” on May 3, 2016 (R. p266).

21. The Appellant further assails the Court’s comprehension of Mr. Stegner’s opinions, claiming.

“[n]otably, there is also absolutely no notation by the Court to either Mr. Stegner, Mr. Barr’s supervisor’s, awareness [sic] and/or the School District’s awareness of this opinion and that the diagnosis of headaches was the reason he was taken out of work...” (Petition pp.9–10) (emphasis original).

Respectfully, not only is this issue not relevant to the issues *sub judice* (as the Respondents raised no notice defense under S.C. Code Ann. § 42-15-20), but Mr. Stegner’s deposition testimony was not submitted into evidence before the Commission (R. pp.14–16) and is not part of the Record on Appeal.

22. The Appellant claims that the Court “overlooked or misapprehended” his arguments regarding the weight accorded to by the Commission to the opinions of Dr. Eagerton because “Dr. Eagerton is not a licensed medical physician.” As correctly noted by the Court of Appeals, there was “no error in the Commission’s consideration of the opinions of Dr. Eagerton.”

- a. The Record reveals that the Commission correctly assessed Dr. Eagerton’s qualifications as “Assistant Professor of Pharmacology at Presbyterian

College and former Chief Toxicologist for the South Carolina Law Enforcement Division.” (R. p.43, p. 742). The Commission did not labor under any mistaken belief that Dr. Eagerton was a physician, but properly weighed and considered his opinions as to the Appellant’s alleged VOC exposure, including his opinions regarding to the science of pharmacology, a branch of *medicine*.

- b. Of course, the South Carolina Supreme Court has previously recognized Dr. Eagerton as a medical expert. State v. Green, 423 S.C. 263, 814 S.E.2d 496 (2018) (finding Dr. Eagerton’s opinions regarding the effects of MS Contin on breast milk, which were stated “to a reasonable degree of scientific and medical certainty,” competent and persuasive in a homicide conviction).
- c. In addition, the Record reveals that the Commission also considered the opinions of Dr. Robert Bennett, a former pharmacist with no professional licenses who testified on behalf of the Appellant regarding his alleged exposure to VOCs over the Respondents’ objection. (R. p.41). If the Appellant sincerely believed that only physicians could offer expert opinions in a workers’ compensation claim, then it certainly begs the question why Dr. Bennett was hired to attend the hearing and testify regarding the Appellants’ alleged exposures and alleged injuries.
- d. Importantly, though the Appellant now argues that Dr. Eagerton’s opinions should have been excluded from evidence based upon his qualifications, the Appellant made no such objection at the evidentiary hearing on August 31, 2016. (R. p.1258). Because no specific,

contemporaneous objection was raised to, or ruled upon by, the Commission, this issue is not preserved for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that to preserve an issue for appeal, specific grounds in support of the objection must be clearly stated).

- e. Additionally, S.C. Code Reg. 67-612 does not in any way limit the introduction of documentary evidence to “medical physicians,” but instead speaks only to “expert’s reports” generally. The Respondents respectfully contend that Dr. Eagerton is such an expert whose reports are admissible under Regulation 67-612 because “[a]n expert is not limited to any class of persons acting professionally.” Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006) (finding report of a vocational consultant admissible under Regulation 67-612, applying an “abuse of discretion standard” and the South Carolina Rules of Evidence) (internal citations omitted).
- f. Lastly, because the “final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel,” the Court lacks authority to review the weight and credibility accorded Dr. Eagerton’s opinions by the Commission on any basis. Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007)

23. Therefore, the Respondents respectfully contend that the Court did not (as the Appellant alleges) misapprehend or overlook any fact “important to the consideration of this case,” but instead properly reviewed all of the evidence in the record in accordance with the Administrative Procedures Act and the substantial evidence standard of review established in S.C. Code Ann. § 1-23-380 and Lark v. Bi-

Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Accordingly, the Petition for Rehearing should be denied.

Dr. Pritchard's Opinions and S.C. Code Ann. § 42-15-95

24. The Respondents respectfully contend that the Appellant's arguments regarding the admissibility of Dr. Pritchard's opinions and the applicability of S.C. Code Ann. § 42-15-95 were waived at the evidentiary hearing on August 31, 2016, were not preserved for appeal, and the merits of these arguments should not have been addressed by the Court of Appeals in its April 7, 2021 Opinion (although the Court's ultimate conclusion was correct), and are; therefore, not properly before the Court by way of a Petition for Rehearing under Rule 221, S.C.A.C.R.
25. In his Petition, the Appellant claims that his
- “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.” (Petition for Rehearing p.33).
26. In reality, **the Appellant did not object to the admission of Dr. Pritchard's opinions** at the August 31, 2016 hearing.⁸ (R. pp.1255-1258).

⁸ The Respondents' Brief to the Court of Appeals makes this point clear by stating that the Appellant “made no objection to the submission of Dr. Pritchard's report or Dr. Pritchard's deposition becoming part of the Record when submitted to the Hearing Commissioner...It was not until *after* the Hearing Commissioner denied Barr's claim, based in part on Dr. Pritchard's opinions, that he argued for their exclusion. Therefore, any error now alleged is not preserved for review, as it was neither raised before nor

27. The Appellant further and baselessly claims that

“[t]here is nothing, and the Petition would reiterate nothing, in the entire process whereby [Dr. Pritchard’s] 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.” (Petition for Rehearing p.30).

28. However, the Record is clear that the Respondents and the Workers’ Compensation Commission complied with the governing law, including S.C. Code Reg. 67-612 and S.C. Code Ann. § 1-23-330, in admitting this evidence. Regardless, because there was **no contemporaneous objection**, the Appellant cannot be heard to challenge the admission of Dr. Prichard’s opinion on appeal under any legal theory.⁹

29. Prior to the evidentiary hearing before Hearing Commissioner Campbell on August 31, 2016, the Respondents notified the Appellant of their intention to submit both the written report and deposition testimony of Dr. Pritchard into evidence in accordance with S.C. Code Reg. 67-612 (providing that a non-moving party must

ruled upon by the Hearing Commissioner.” (Respondents’ Brief pp.46–46) (citations omitted).

⁹ The Appellant now argues that the admission of Dr. Pritchard’s opinions violates S.C. Code Ann. § 42-15-95, S.C. Code Ann. § 42-15-80, and S.C. Code Reg. 67-613. Again, the Appellant did not raise any contemporaneous objection, the Commission did not rule on any of these statutes, and none of the Appellant’s arguments regarding the admissibility of Dr. Pritchard’s opinions are preserved for appeal.

provide the moving party any experts' reports at least then days before the hearing) (R. pp.534–535).

30. At the call of the hearing on August 31, 2016, Commissioner Campbell specifically asked,

“[a]re there any objections to A.P.A.s ... or any other items?

...
Mr. McDaniel, any objections?” (R. p.1255, l.16 – p.1257, l.24).

In response, counsel for the Appellant raised no objection whatsoever to the admission of Dr. Pritchard's written report or deposition testimony. Instead, according to the Appellant's attorney's own statement to the Hearing Commissioner, he

“objected to the submission of the reports from Dr. Wade [sic] ... and Dr. Wagner ... and also Dr. Eagerton ... they have never seen or evaluated nor are they here personally to testify **outside of that, we don't have any objection to the A.P.A. submissions.**” (R. p.1258) (emphasis added).

Therefore, the opinions of Dr. Pritchard were properly admitted into evidence -- without objection -- by Hearing Commissioner Campbell. *See* S.C. Code Reg. 67-612(D) (providing that any experts' reports provided by the non-moving party at least ten days prior to the hearing “shall be submitted” into evidence and that if the parties consent to the admission of an expert's report the Hearing Commissioner “shall receive such report”) and S.C. Code Ann. § 1-23-330 (codifying that “any part of the evidence may be received in written form” at an administrative hearing).

31. Our courts have consistently held since time immemorial that evidence admitted without objection becomes competent and must be considered by the finder of fact. *See* Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) (refusing to address arguments concerning evidence admitted without objection); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967) (holding that testimony received without objection “becomes competent and cannot be disregarded” by the court); Wessinger v. Duncan, 113 S.C. 205, 102 S.E. 6 (1920) (explaining that where testimony was not objected to, it “must be considered by the jury”); Minton v. Pickens, 24 S.C. 592 (1886) (holding that “[t]estimony not objected to at the time is competent.”). This is true even where there may have been a statutory basis upon which to object to said evidence. *See* Geddings v. Geddings, 319 S.C. 213, 460 S.E.2d. 367 (1995) (involving appellants who failed to contemporaneously object to testimony presented in violation of the Dead Man’s Statute).
32. It is equally well-settled that the failure to object to evidence at the time it is offered constitutes a waiver of the right to have the issue considered on appeal. Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992). Here, the Appellant did not object to Dr. Pritchard’s opinions at the time they were admitted into evidence by Hearing Commissioner Campbell, despite “ample opportunity to object.” (R. p.1255, l.16 – p.1257, l.24; p.1258). *See also* 75 AM. JUR.2d Trial § 426 at 613 (1991) (“an objection to evidence based on a specific ground constitutes a waiver of objections on all grounds not so specified”); *id.* § 429 at 615 (“[o]n appeal, the party will be limited, ordinarily, to the specific objections to evidence made at the trial”). Therefore, the Appellant clearly waived his right to have any question regarding the

admissibility of Dr. Pritchard's opinions considered on appeal because the Appellant made no contemporaneous objection to Dr. Pritchard's opinions when they were admitted into evidence at the hearing before Commissioner Campbell.¹⁰ See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (explaining that a "contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

33. Not only did the Appellant consent to the admission of Dr. Pritchard's opinions, but the Appellant also made no reference to S.C. Code Ann. § 42-15-95 (with respect to Dr. Pritchard's opinions or otherwise) at the evidentiary hearing before Commissioner Campbell. On August 31, 2016, the Appellant presented no

¹⁰ The Appellant's Form 58 dated August 16, 2016 does state that "Claimant *may* object to any report from Dr. Pritchard," however, he did not actually make any such objection at the hearing on August 31, 2016 and he never even threatened to object to Dr. Pritchard's testimony taken by deposition on March 3, 2016. (R. pp.268–275, p.1258) (emphasis added). Cf. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), *cert. denied*, 117 S.Ct. 2460, 138 L.Ed. 2d 217 (1997) (explaining that even when a motion *in limine* is made and ruled upon, a contemporaneous objection must be made again when the evidence is presented at trial to preserve the issue for appeal); State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) (holding that a motion *in limine*, even if granted, does not remove the need for a contemporaneous objection at trial); White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989), *rev'd on other grounds*, 301 S.C. 560, 393 S.E.2d 182 (1990) (holding that if a motion *in limine* to exclude evidence is denied, a party must renew its objection when the evidence is presented during trial).

arguments and no evidence regarding the application of § 42-15-95. Therefore, no issue regarding § 42-15-95 (or the admissibility of Dr. Pritchard's opinions generally) was properly raised to, or ruled upon by, the Hearing Commissioner and no such issues are preserved for appellate review. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (holding that "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); Southern Region Industrial Realty, Inc. v. Timmerman, 285 S.C. 142, 328 S.E.2d 128 (Ct. App. 1985) (holding that where appellant failed to raise the applicability of a statute at the trial level, the statute's applicability may not be considered on appeal).

34. In addition, when Dr. Pritchard's opinions were admitted into evidence at the August 31, 2016 hearing, the Appellant made no claim of prejudice under S.C. Code Ann. § 1-23-330 with respect to the admission of Dr. Pritchard's reports; made no complaint pursuant to S.C. Code § 42-15-80 about the timing or location of Dr. Pritchard's evaluation; made no claim that Dr. Pritchard's opinions were not timely submitted under S.C. Code Reg. 67-212 ; and raised no argument about the conduct of the hearing under S.C. Code Reg. 67-613. (R. p.1258).
35. Following the admission of Dr. Pritchard's opinions into evidence, the Appellant made no motion to strike Dr. Pritchard's report or testimony from the record. (R. pp.1252—1398). Of course, "in absence of a contemporaneous objection, a motion to strike may be denied" and the Appellant "could not cure [his] failure to object contemporaneously by moving to exclude the evidence at the end of [his] case." Parr, 309 S.C. 477, 424 S.E.2d 515 (citing Lindsey v. City of Greenville, 247 S.C.

232, 146 S.E.2d 863 (1966)). Nevertheless, the Appellant did not even attempt to cure his failure to contemporaneously object by asking Hearing Commissioner Campbell to strike Dr. Pritchard's opinions.

36. Indeed, the Appellant never raised any issue with respect to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 at any time during the August 31, 2016 evidentiary hearing. Of course,

“[t]he first step in preserving an issue for appellate review is to actually raise it to the lower court ... The idea is to give the lower court a chance to resolve the issue before it is presented to the appellate court. Thus, the lower court must also rule upon the issue for it to be preserved for review.”
Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (2nd Ed. 2002) at p.66 (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995)).

Because the Appellant failed to object to Dr. Pritchard's opinions when they were admitted into evidence and failed to raise any argument with respect to S.C. Code Ann. § 42-15-95 at the hearing, Commissioner Campbell had no reason to address these (non)issues in his September 20, 2017 Decision and Order. (R. pp.13–60). *See* S.C. Code Ann. § 42-17-40 (requiring the Commission to make findings of fact and conclusions of law “pertinent to the questions at issue”). As a result, the Hearing Commissioner's Decision and Order does not contain any findings of fact or rulings of law with respect to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 and; therefore, these issues are not preserved for appellate review. *See* Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA, *supra*.

37. Not only did the Appellant fail to make any contemporaneous objection, not only did the Appellant fail to make any motion to strike during the evidentiary hearing, not only did the Hearing Commissioner not rule upon these issues in his Decision and Order, but the Appellant did not ask the Hearing Commissioner to address the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 after the hearing. Prior to the issuance of Hearing Commissioner Campbell's Decision and Order, the Appellant did file a "Request for Reconsideration" by letter dated January 19, 2017 (R. pp.1495–1499; p.1511), in which he (improperly) attempted to relitigate the merits of his claim. However, the Appellant's January 19, 2017 letter does not raise any argument regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95, though it does complain about the weight accorded Dr. Pritchard's opinions. (R. p.1497). Therefore, no argument with regard to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 was preserved for appellate review.
38. In addition, the Appellant's six-page letter to the Hearing Commissioner dated September 18, 2017 (sent two-days prior to the issuance of the Decision and Order), the Appellant raised no objection to the admissibility of Dr. Pritchard's opinions pursuant to S.C. Code Ann. § 42-15-95 or on any other basis. (R. pp.1500–1505). However, the law clearly requires that objections to the admissibility of evidence be specific, in addition to being contemporaneously raised and actually ruled upon by the Hearing Commissioner. See Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 301 (Ct. App. 1986) (holding that the objection should be sufficiently specific to bring into focus the precise nature of the alleged error). While the Appellant's September 18, 2017 letter outlines a litany of complaints,

including a critique about which passages of Dr. Prichard's testimony should be quoted in the Decision and Order (R. pp.1502—1503), such complaints do not constitute evidentiary objections and certainly lack the requisite specificity to preserve any argument regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 for review by the appellate courts. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that to preserve an issue for appeal, specific grounds in support of the objection must be clearly stated).

39. Even after the Workers' Compensation Commission's Appellate Panel issued its final Order on June 5, 2018 -- without making any findings of fact or conclusions of law regarding the admission of Dr. Pritchard's opinions or the application of S.C. Code Ann. § 42-15-95 -- the Appellant did not file a Motion for Reconsideration in an attempt to preserve these issues for appellate review, as was his right pursuant to S.C. Code Reg. 67-215(B). The Appellant did "strongly object" to the Order ultimately endorsed by the Appellate Panel but made no request that the Panel make findings or conclusions regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 in its Order. (R. pp.1516—1517). Therefore, the Appellant failed to preserve these issues for appellate review. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating that "[p]ost-trial motions are ... used to preserve those [issues] that have been raised to the trial court but not yet ruled upon by it") (internal citations omitted); *Cf. Nettles v. Spartanburg School Dist. #7*, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000) (holding that a trial court's failure to rule on an issue is a "fatal" error preservation problem where the right to file a motion to reconsider exists); S.C.S.R. 42-2 Doc. No. 4735, effective February 23, 2018 (promulgating the right to file a motion to reconsider an

order of the Workers' Compensation Commission by amending S.C. Code Reg. 67-215(B)).

40. Furthermore, there is no evidence to support the Appellant's allegations regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95, as the record contains no evidence or documentation of any allegedly improper communications with any health care provider, nor any evidence that any medical reports or opinions were the result of any allegedly improper communication, and the Respondents deny any improper communication. Of course, the trier of fact – the Workers' Compensation Commission – made no finding or conclusion regarding the elements or application of S.C. Code § 42-15-95 and certainly made no finding that Dr. Pritchard's opinions are "fruit of the poisonous tree" as the Appellant now suggests (Petition for Rehearing p.29). Because the Appellant did not actually object to Dr. Pritchard's opinions when they were admitted into evidence and because the Commission never made any findings of fact or conclusions of law regarding the admissibility of Dr. Pritchard's opinion or applicability of S.C. Code Ann. § 42-15-95, the Appellant relies on nothing more than his own self-serving declarations in this regard.¹¹ However, the substantial

¹¹In this Court's April 7, 2021 Order, reference is made to a number of unfounded "assertions" made by the Appellant regarding alleged communications with Dr. Pritchard, which are not evinced by actual evidence in the Record. The Respondents have denied these assertions (characterizing them as allegations); therefore, it is presumed the Court's opinion contains a typographical error to when it states, "Employer [sic] asserts Employer communicated with Dr. Pritchard..." Since the issue was first raised on appeal, the Respondents have consistently maintained that there was no violation of S.C. Code Ann. § 42-15-95 -- even if the Appellant's allegations were

evidence rule governs appeals from the Workers' Compensation Commission, which prohibits reliance on a "mere scintilla of evidence" or "evidence viewed blindly from one side of the case." Lark v. Bi-Lo, Inc., 375 S.C. 130, 276 S.E.2d 304 (1981). A factual claim simply cannot be based on surmise, conjecture or speculation as the Appellant argues. See Kennedy v. Williamsburg Co., 242 S.C. 477, 131 S.E.2d 512 (citing numerous cases for the proposition that findings of the Workers' Compensation Commission "must not be based on surmise, conjecture, or speculation).

41. Not only did the Workers' Compensation Commission not make any findings of fact or conclusions of law regarding the elements of S.C. Code Ann. § 42-15-95, but the Respondents respectfully contend that a reviewing court lacks the authority to do so on appeal. S.C. Code Ann. § 42-15-95 governs the "communication of medical history by health care providers" and requires that "opinions obtained in violation of this section must be excluded from any proceedings." The authority to resolve the factual questions under § 42-15-95 (*i.e.*, whether a health care provider communicated improperly and, if so, whether proffered opinions resulted from such improper communication) is expressly reserved to the Workers' Compensation Commission. Fox v. Newberry County Memorial Hospital, 319 S.C. 278, 461 S.E.2d 392 (1995) (holding that a reviewing court has no authority to determine factual

accepted as true -- and, more importantly, that "this objection was not raised before or ruled upon by the Hearing Commissioner and is not preserved for review." (Respondents' Brief p.47, ¶2; R. p.894). No evidence to the contrary was presented to the Workers' Compensation Commission, which made no findings of fact regarding the nature or implication of any alleged communications.

issues on appeal); *see also* S.C. Code Ann. § 42-3-180 (requiring that “[a]ll questions arising under [Title 42] ... shall be determined by the commission”).

Here, the Workers’ Compensation Commission made no findings of fact or rulings of law applying S.C. Code Ann. § 42-15-95 because the Appellant did not properly raise any objection to any evidence under this statute. (R. p.1258). Therefore, the Respondents respectfully contend that the Court of Appeals misapprehended its authority to make a finding that “Employer failed to communicate with Employee pursuant to section 42-15-95(B)” for the first time on appeal, although the Court’s ultimate legal conclusion was correct.

42. Additionally, because the Appellant did not actually introduce any evidence of improper communications, much less evidence that any “discussions, communications, medical reports, or opinions” were obtained in violation of S.C. Code Ann. § 42-15-95, there is no substantial evidence in the record that could support the Court’s finding on appeal regarding the application of S.C. Code Ann. § 42-15-95. The Appellant’s Brief to the Court of Appeals and his Petition for Rehearing point to no such evidence, only self-serving allegations and unsubstantiated innuendo for which no citation to the Record exists.¹² Ordinarily,

¹² In the Appellant’s Brief to the Court of Appeals at page 34, the Appellant makes numerous, specific allegations without a single citation to evidence in the actual Record on Appeal. Likewise, in his Petition for Rehearing, the Appellant makes numerous, specific allegations regarding at pages 31–34 without citation to the record. The Appellant claims (at page 29 of the Petition) support for his allegations “can be found at multiple places in the record,” but cites only page 1167, lines 2-23, wherein he asked Dr. Pritchard about when the IME was scheduled, but no correspondence or documents were marked as an exhibit or otherwise admitted into evidence. The Appellant’s Brief

“the appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), S.C.A.C.R.

43. The Respondents respectfully contend that the Court of Appeals erred in addressing the merits of the Appellant’s claims regarding the admissibility of Dr. Pritchard’s opinions and the applicability of S.C. Code Ann. § 42-15-95 in Section V of the Court’s Order and respectfully request that this portion be modified. Specifically, if the Court were to apply long-established principles of issue preservation and refuse to make findings of fact on appeal, the Court should reject the entirety of the Appellant’s § 42-15-95 argument without addressing its theoretical application in the case *sub judice*. See, e.g., Hendrix v. Eastern Distrib., Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (vacating Court of Appeals opinion to the extent it addressed issue that was not preserved). [Note that even the Injured Workers’ Advocates agree that “if the issue is not preserved, the Court should remove the entire analysis from the opinion.” (Reply to Respondents’ Return to Motion of Amicus Curiae p.3)].
44. Furthermore, because the Appellant did not object to the admission of Dr. Pritchard’s opinions at the evidentiary hearing on August 31, 2016, the Court’s analysis of S.C. Code Ann. § 42-15-95 (with its allegedly far-reaching affects) is unnecessary and irrelevant. Indeed, because no objection was raised to their admission, Dr. Pritchard’s opinions are competent evidence that must be

and Petition similarly fails to make any references “to where relevant objections and rulings occurred in the transcript,” in contravention of the mandates of the appellate court rules. See Rule 208(b)(4), S.C.A.C.R. (stating “[r]eferences shall also be made to where relevant objections and rulings occurred in the transcript”).

considered in accordance with more than 100-years of sound jurisprudence in South Carolina, regardless of any argument advanced for the first time on appeal. Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) (refusing to address arguments concerning evidence admitted without objection); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967) (holding that testimony received without objection “becomes competent and cannot be disregarded” by the court); Wessinger v. Duncan, 113 S.C. 205, 102 S.E. 6 (1920) (explaining that where testimony was not objected to, it “must be considered by the jury”); Minton v. Pickens, 24 S.C. 592 (1886) (holding that “[t]estimony not objected to at the time is competent.”).

45. Our appellate courts have consistently held that “the admission of evidence is a matter addressed to the sound discretion of the trial judge and absent clear abuse of discretion amounting to an error of law, the lower court’s ruling will not be disturbed on appeal.” Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989). Can it reasonably be argued that Hearing Commissioner Campbell committed a “clear abuse of discretion” by admitting evidence when no objection was raised to its admission? The Respondents respectfully contend that no reasonable person could accept such an argument, as to conclude otherwise would require Workers’ Compensation Commissioners to exclude evidence *sua sponte*, in violation of S.C. Code Reg. 67-612(D) (providing that any experts’ reports provided by the non-moving party at least ten days prior to the hearing “shall be submitted” into evidence and that if the parties consent to the admission of an expert’s report the Hearing Commissioner “shall receive such report”) and Cannon 3 of the Code of Judicial Conduct, which forbids such clearly biased conduct.

46. Therefore, to the extent that the Appellant requests rehearing regarding the admissibility of Dr. Pritchard's opinions and the applicability of S.C. Code Ann. § 42-15-95, the Respondents respectfully contend that the Petition should be denied. Instead, Section V of the Court's Order should be withdrawn and modified to reflect the Appellant's failure to preserve this issue for appeal.
47. In the alternative, Section V of the Court's Order should be amended so as to acknowledge the Appellant's consent to the admission of Dr. Pritchard's opinions into evidence on August 31, 2016, such that the Court's analysis of S.C. Code Ann. § 42-15-95 (with its allegedly far-reaching affects) becomes unnecessary and irrelevant. Indeed, because no objection was raised to their admission, Dr. Pritchard's opinions are competent evidence that must be considered in accordance with more than 100-years of sound jurisprudence in South Carolina, regardless of any argument advanced for the first time on appeal. Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) (refusing to address arguments concerning evidence admitted without objection); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967) (holding that testimony received without objection "becomes competent and cannot be disregarded" by the court); Wessinger v. Duncan, 113 S.C. 205, 102 S.E. 6 (1920) (explaining that where testimony was not objected to, it "must be considered by the jury"); Minton v. Pickens, 24 S.C. 592 (1886) (holding that "[t]estimony not objected to at the time is competent"); *see also* Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989) (holding that "the admission of evidence is a matter addressed to the sound discretion of the trial judge and absent clear abuse of discretion amounting to an error of law, the lower court's ruling will not be disturbed on appeal').

Failure to Cross-Examine Witnesses & Due Process

48. The Appellant's Petition for Rehearing charges that the Court of Appeals "misapprehended the argument of Appellant and the law in reference to due process, [sic] and the right of cross-examination." The Court did not misapprehend these issues, but instead rejected the Appellant's arguments, with particularity and in accordance with the law. According to the Court's Opinion, this argument was rejected because the Appellant had notice of the Respondents' evidence "seven months" prior to the hearing in this case and; therefore, had ample opportunity to cross-examine witnesses, either by subpoena or by deposition, but "failed to take advantage of his right." See S.C. Code Ann. 42-3-150; S.C. Code Reg. 67-214; and Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006) (upholding the admissibility of documentary evidence under S.C. Code Reg. 67-611 and 67-612 where the party failed to exercise his right of cross-examination).
49. At the outset, it should be made clear that the Appellant's attorney had inherent authority to issue such subpoenas on his own accord pursuant to S.C. Code Ann. § 42-3-140, S.C. Code Ann. § 42-3-160, and S.C. Code Reg. 67-214. He required no affirmative action by or order from the Workers' Compensation Commission to exercise his right to cross-examine Dr. Wagner, Dr. Waid, or Dr. Eagerton. In fact, the Appellant exercised this right when he subpoenaed Larry Stegner to a deposition on July 27, 2015. (R. p.93). Similarly, the Respondents required no action or order from the Commission to cross-examine Dr. White, or Dr. Lind, or

Dr. Skinner, or Dr. Healy – subpoenas were simply issued by counsel.¹³ Therefore, the Appellant’s allegation that he “did everything he could to preserve and request the right of cross-examination” (Petition p.17) is without merit because the Appellant never even bothered to issue a subpoena to Dr. Wagner, or Dr. Waid, or Dr. Eagerton, as he was entitled to do pursuant to S.C. Code Ann. § 42-3-140, S.C. Code Ann. § 42-3-160, and S.C. Code Reg. 67-214.

50. Moreover, having taken no action over the course of more than seven months and declining the opportunity to cross-examine the Respondents’ experts at either a deposition or at the hearing, the Appellant simply failed to exercise his due process rights cannot now be heard to complain of some constitutional deprivation as a matter of law.
51. For example, in Gadson v. Mikasa Corp., this Court upheld the admissibility of documentary evidence under S.C. Code Reg. 67-611 and 67-612 where the party failed to exercise his right of cross-examination, which is exactly what the Appellant failed to do in the case *sub judice*, and the Court of Appeals properly applied this precedent.
52. Furthermore, in Richardson v. Perales, the United States Supreme Court held that “a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be

¹³ Note that the Respondents deposed Dr. White in Mount Pleasant and Dr. Lind was deposed in Columbia. Therefore, to the extent that the Appellant alleges that potential travel costs associated with deposing the Respondents’ witnesses was somehow prejudicial, this allegation is without merit because such costs are commensurate with those incurred by the Respondents.

received as evidence in a disability hearing.” The Supreme Court explained that even despite its hearsay character and an absence of cross-examination,

“and despite the presence of opposing direct medical testimony and testimony by the claimant himself, such documentary evidence may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.”

Again, the Appellant *sub judice* failed to avail himself of the opportunity for cross-examination and; therefore, cannot be heard to claim a violation of his right to due process, rendering the Opinion of the Court of Appeals entirely consistent with this precedent.

53. The Appellant’s new argument that “the Regulations have always required since the inception of the Act and Regulations in workers’ compensation, that the Defendants take the de benne esse deposition of their doctor/expert **if** they want it submitted into evidence” (emphasis original) is also wholly without merit and Appellant does not cite any authority for this argument. *Contra* S.C. Code Reg. 67-612 (governing the admissibility of written experts’ reports).
54. Additionally, the Appellant’s own conduct belies his argument that parties to a workers’ compensation claim must provide depositions of every expert if they desire to submit their written opinions. The Record makes clear that the Appellant, himself, submitted into evidence 246 pages of written reports from seven different medical providers and a doctor in Aberdeen, Scotland, yet noticed not a single *de benne esse* deposition of any expert. Certainly, the Appellant cannot be heard to

suggest that his new deposition rule applies only to defendants¹⁴, or that he is prejudiced by the Respondents' submission of a mere 19 pages of written reports from three experts in South Carolina (Dr. Wagner, Dr. Waid, and Dr. Eagerton). Indeed, instead of cross-examining the Defendant's neuropsychologists and toxicologist, he hired his own – a deliberate and voluntary choice of how to allocate a litigation budget for which he cannot now claim prejudice.

55. The Appellant further suggests that the Court's Opinion "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." (Petition p.2). The Respondents respectfully contend that the corollary is actually true: requiring cross-examination of all experts in all administrative claims will increase costs in terms of both time and treasure for all parties, thus nullifying the benefits of the streamlined administrative process. As this Court explained in Gadson v. Mikasa Corp., 628 S.E.2d 262 (Ct. App. 2006), "[t]he utilitarian efficacy of admissibility under Workers' Compensation regulations is salutary and salubrious," and the Respondents respectfully contend that to accept the Appellant's arguments would eviscerate this lauded "utilitarian efficacy."
56. In addition, the Respondents' experts are not "out-of-State," as both Dr. Wagner and Dr. Waid are located in Charleston and Dr. Eagerton is in Lexington.

¹⁴ The Appellant strangely refers to the Darlington County School District as a "financially well-healed" [sic] employer with the ability to spend "untold amounts to hire experts." The Respondents respectfully contend that, in reality, the School District is a judicious steward of scarce tax-payer dollars for the benefit of the children of Darlington County.

Moreover, the Workers' Compensation Fee Schedule strictly limits the charge for an expert witness deposition to \$400 for the first hour and \$100 for each additional 15 minutes. Therefore, the Appellant's cost allegations for this case are exaggerated and would seem to pale in comparison to the costs he voluntarily incurred for Robert Bennett's travel from Charleston to testify in person at the hearing in Florence, or for the neuropsychological testing by Dr. Lind necessitated by his refusal to submit to the exact same testing the Respondents' attempted to provide with Dr. Wagner.

Workers' Compensation Commission's Orders

57. The Appellant claims that the Court misapprehended his argument that the Appellate Panel "erred as a matter of law by issuing an order contrary to its decision." The Respondents contend that the Court's did not misapprehend this argument, it simply found "no merit" in it.
58. Respectfully, the Hearing Commissioner's 48-page Decision and Order and the 29-page Final Decision and Order issued by the Appellate Panel are sufficiently detailed with respect the issues properly raised by the parties, including specific findings of fact regarding the weight of the evidence and legal rulings applying the law to those findings. (R. pp.51-55; pp.57-58; pp.79-85; pp.86-87).
59. Furthermore, there is no evidence that the Orders bearing the signatures of Commissioners Campbell, Taylor, Barden, and McCaskill do not represent the actual decisions of these Commissioners. The Appellant cites no authority for his argument that the appellate courts should look beyond the four corners of the Commission's Orders to determine their meaning or intent. Therefore, his

arguments with regard to the sufficiency of the Commission's Orders are without merit and do not warrant reconsideration.

60. Indeed, the official commentary to the Code of Judicial Conduct, Canon 3, specifically recognizes that a

“judge may request a party to submit proposed findings of fact and conclusions of law so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.”

61. Here, the Record makes clear that when Hearing Commissioner Beck requested that the Respondents submit a proposed order (R. p.1491), he simultaneously apprised the Appellant of the request (R. p.1490). Of course, the Appellant was also given an opportunity to respond to the proposed findings and conclusions and did so by correspondence dated January 19, 2017 (R. pp.1495--1499), September 18, 2017 (R. pp. 1500—1506), and September 19, 2017 (R. pp.1508—1510). Likewise, the Appellate Panel apprised the Appellant of its request for a proposed order and the Appellant also responded to that proposed order. (R. pp.1516—1518).
62. Therefore, the Respondents respectfully contend that the Appellant's argument with regard to the propriety of the Commission's Orders is without merit.

“Liberal Construction”

63. The Appellant argues that the unanimous Decision and Order of the Workers' Compensation Commission should be reversed based on his belief in “a liberal interpretation of the law in favor of the injured worker” and because he believes there is there “is more than ample evidence in the Record to sustain that the

employee sustained injury [sic] by accident and/or repetitive trauma and/or occupational disease.” (Petition for Rehearing p.41).¹⁵ By proffering such a spurious argument, the Appellant reveals his own misunderstanding of the substantial evidence standard of review, as it is well-settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s findings from being supported by substantial evidence” and “a judgment upon which reasonable men might differ will not be set aside.”

Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm’n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304, 307 (1981).

Of course, the final determination of the weight to be accorded the evidence and the credibility of the witnesses are reserved to the Commission. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005).

64. Moreover, a policy of liberal construction does not excuse the Appellant’s burden of proof and; therefore, the Court of Appeals properly affirmed the Commission’s denial of benefits. See Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998) (holding that the “burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture or speculation”); see also Cross v. Concrete

¹⁵ The Appellant does not actually raise any argument regarding the application of the governing statutes (S.C. Code Ann. § 42-1-160(F), S.C. Code Ann. § 42-11-10, and § 42-1-172) or their legal requirements in his Petition for Rehearing, nor did he raise any such argument in his Brief, rendering the Commission’s rulings on these statutes the law of the case. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Materials, 236 S.C. 440, 446-7, 114 S.E.2d 828, 832 (1960) (holding that a “liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other”) (quoting 100 C.J.S. WORKMENS’ COMPENSATION § 54(7), pp.602, 603); Rudd v. Fairforest Finishing Co., 189 S.C. 188, 200, S.E.2d 727 (1939) (holding it “is settled by the decisions of the Supreme Court of this State that a Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation and there is no presumption in favor of compensability”).

65. In Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965), the South Carolina Supreme Court explained,

“[w]e have held in numerous cases that the claimants who assert their right to compensation must establish by the preponderance of the evidence the facts which will entitle them to an award under the Workmen's Compensation Act and such award must not be based on surmise, conjecture or speculation ... The difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party.” (internal citations omitted).

66. Our Supreme Court has further explained that

“[w]e are further bound by precedent to strictly construe statutes in derogation of the common law. Workers’ compensation statutes provide an exclusive compensatory system in derogation of common law rights. As

such, when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities.

Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003)

67. Therefore, the Respondents respectfully contend that the Commission properly applied the law to the carefully weighed and considered facts of this case in denying the Appellant benefits under the Workers' Compensation Act and that the Court of Appeals committed no legal error in affirming the Commission.

Abandonment of Claims

68. The Court's Opinion states that "[a]s a threshold issue, Employer contends Employee abandoned ... his claims for injuries other than headaches – encephalopathy, memory loss, fatigue, confusion, and injuries to the brain and nervous system ... We disagree."
69. The Respondents respectfully contends that this conclusion, especially as it pertains to the abandoned claims for encephalopathy (*i.e.*, brain injury), should be reversed based on the Appellant's own admissions in his Petition for Rehearing.
70. Specifically, the Appellant argues that the "essential issue for decision" is "Barr's claim for benefits based on chronic unrelenting headaches." (Petition p.7). He further argues that the

"essential issue of Mr. Barr's chronic headaches is that his chronic headaches were causally related to his exposures to VOCs ... 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...” (Petition pp.15-16).

71. The Appellant goes on to argue that the Court “clearly misapprehended the facts and the diagnosis,” claiming

“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 ... The Court clearly misapprehended the facts and the diagnosis.” (Petition p.9)

(emphasis original).

72. The Appellant’s Petition for Rehearing, like his Brief to the Court of Appeals, makes no argument that he is entitled to benefits for any alleged injury other than “headaches” and entirely abandons his prior “brain damage” claim.

THEREFORE, the Respondents, the Darlington County School District and the South Carolina School Boards Insurance Trust, respectfully request that the Petition for Rehearing be denied pursuant to Rule 221 and Rule 219(b), S.C.A.C.R. The Petition elucidates no issue actually misapprehended or overlooked by the Court of Appeals, but instead merely regurgitates arguments previously raised and properly rejected by Opinion No. 5815. Furthermore, the majority of the arguments raised in the Petition were previously waived, or abandoned on appeal, or are otherwise moot. Indeed, even if the Court were to accept the Appellant’s specious argument that all of the evidence presented by the Respondents should be stricken from the Record and the balance of the

evidence re-weighed on appeal, the fact remains that his claim is not compensable under S.C. Code Ann. § 42-1-160(F), § 42-11-10, or § 42-1-172 as a matter of law.

Respectfully submitted,



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Attorneys for Respondents

June 25, 2021
Mount Pleasant, South Carolina

RECEIVED

Jun 25 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION APPELLATE PANEL
Aisha Taylor, Commissioner

Appellate Case No. 2018-001237
W.C.C. 1507304

Kenneth L. Barr, Employee,.....Appellant,

v.

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

PROOF OF SERVICE


The undersigned hereby certifies that the above-named Appellant, Kenneth L. Barr, was served with the attached Return to Appellant's Petition for Rehearing of the Respondents this 25th day of June 2021 by emailing and mailing (first class postage) the same to addressed to each of the parties of record, as follows:

Preston F. McDaniel, Esq.
1315 Elmwood Avenue
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June 25, 2021


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TRASK
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WORKERS' COMPENSATION DEFENSE

RECEIVED

Jun 25 2021

SC Court of Appeals

Reply to

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June 25, 2021

Via Email: ctappfilings@sccourts.org /Regular Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Kenneth L. Barr v. Darlington County School District
W.C.C. File No.: 1507304
Appellate Case No.: 2018-001237
Carrier File No.: WC016314
Date of Accident: May 21, 2015

Dear Ms. Kitchings:

Enclosed herewith for filing, please find original and six copies Return to Appellant's Petition for Rehearing of the Respondents in the above-referenced case. Also enclosed is our Proof of Service showing that we have served all counsel of record.

Thank you for your time and attention to this matter. Should you have any questions, please do not hesitate to contact me.

Yours very truly,



Kirsten L. Barr

KLB/lld/les

Enc.

cc: Eric Mayer, SC School Boards Insurance Trust (w/enc.)
Christy Sandifer, Darlington County School District (w/enc.)
Preston F. McDaniel, Esq. (w/enc.) (email/mail)
Gerald Malloy, Esq. (w/enc.) (email/mail)
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