THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2018-001237

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

v.

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

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This Appeal arises out of a workers' compensation claim. Mr. Barr met with his supervisor on March 28th and May 7th, 2015 concerning Mr. Barr's treating neurologist's opinions that his chronic headaches were being caused by exposure on the job to commercial paints. On May 22nd his neurologist issued a written out of work statement that he needed to be out of work as a commercial painter for the Employer on the basis that his fatigue, migraines and memory loss were due to VOCs in the paint at work. (R. pp. 479-481). The Employer having not authorized benefits, Mr. Barr retained counsel and a Form 50 claim for benefits was filed in Darlington County June 17th, 2015 (R. pp. 91-92). Defense Counsel was retained, and Subpoenas were issued on July 7th for medical records. Mr. Barr agreed to a voluntary deposition on July 27th, 2015, held September 9th, 2015. A Request for Hearing (Darlington) was filed September 29th alleging injury by accident, repetitive trauma and/or occupational disease arising out of the employment; alleging and listing as body parts affected, encephalopathy, brain (headaches, memory, fatigue, confusion), neurological/central nervous system and psychological functioning. (R. pp. 94-95). A Form 51 denying Mr. Barr had sustained injury by accident, repetitive trauma or occupational disease and raising all affirmative defenses was filed October 28th. (R. p. 96). Based on a Hearing Notice served November 3rd, 2015, the claim was set for hearing on January 7th, 2016 at 11:45 a.m. Three days later November 6th, a Motion to Compel Mr. Barr

to attend a, "medical evaluation" was filed requesting an Order mandating Mr. Barr attend an evaluation by a psychologist, Dr. Mark Wagener (Ph.D.) in Charleston, S.C. A Reply to the Motion to Compel was filed seven days later on November 13th with supporting case law that the Charleston evaluation should be denied as not being at reasonable times and places nor being with a licensed medical doctor (R. pp. 101-107).

Without hearing, an Administrative Order was issued November 23rd, 2015 granting the Motion to Compel. (R. p. 5). By letter dated November 24th, 2015, a request was filed for the Order to be withdrawn and/or stayed and that the parties be granted at least a telephone conference concerning the Motion before issuance. (R. pp. 1476-1478). No hearing or conference was held and Defendants were placed on notice December 4th of the intent to file Writs of Mandamus and Prohibition in the Circuit Court. Writs of Mandamus and Prohibition with Motion for TRO without notice was filed December 9th (R. pp. 112-114) and served on the Commission December 10th and a Temporary Restraining Order Without Notice was issued on December 16th, 2015 (R. pp. 6-9). Defendants had filed a Motion for Continuance December 5th on the basis Mr. Barr, "intended" to file the Writs of Mandamus and Prohibition which was renewed after the filing of the Writs on December 17th. On December 21st, Counsel for the Commission, A. Camden Lewis, Esquire, notified Mr. Barr's Counsel that the Commission was willing to send Mr. Barr to a, "medical doctor," for the medical examination requested by Defendants if Mr. Barr

would agree to release the Commission from the Temporary Restraining Order and the Commission would then amend its directive requiring Mr. Barr to attend an evaluation by a physician. (R. p. 1480). The following day December 22nd after conference with defense counsel and Commissioner Beck, Mr. Barr notified the Circuit Court he was withdrawing the Writs of Prohibition and Mandamus returning the matter to the jurisdiction of the Commission and immediately filed a Motion for Reconsideration as to the Administrative Order. That Motion was granted by Commissioner Beck by Administrative Order filed December 23, 2015 wherein the Commission's Order of November 23rd was vacated; Respondents were allowed to request an evaluation by a properly qualified examiner, "at reasonable time and place"; and postponed the January 7th hearing until February 24, 2016. Eight (8) weeks after the Order and six (6) weeks after the original hearing. (R. pp. 201; 10-11). (emp. added).

Subsequently on January 27th, Defendants filed a Motion to Compel Mr. Barr to attend an evaluation by a medical doctor but again in Charleston, SC. (R. pp. 208-211). Mr. Barr filed a Reply that day advising, as he had to all Motions; in the Writs of Mandamus and Prohibition; and as set forth in the Commission's Order that the examination had to be at, "reasonable times and places" meaning the Darlington/Florence area. (R. pp. 215-216). After notification by email that the Commissioner was inclined to grant the Motion, to prevent further delay, Counsel for Mr. Barr notified Mr. Barr to be present at the evaluation. (R. pp. 1481-

1482).

Before the reset hearing date of February 24, 2016 at 11:00 a.m. and as required by Regulation, that Defendants as the responsive party must file their Pre-Hearing Brief and APA Submissions at least ten business days prior to the date of the Hearing, on Friday February 12, 2016 Defendants filed their Pre-Hearing Brief and APA Submissions including a new report from Mr. Mark T. Wagner, Ph.D. dated that same day, February 12th. On Saturday, February 13th, an Amended Pre-Hearing Brief was mailed adding yet another report from Dr. L. Randolph Waid, Ph.D. and on Monday, February 15th, a Federal holiday, Defendants added yet another expert, Dr. Eagerton, Ph.D., all of those APA submissions were received by Mr. Barr by mail on February 16th. Numerous objections were made as to the submission of all of these additional written APA submissions reports in writing on February 18th with a Memorandum of Law in support of their exclusion being filed on February 19th. (R. pp. 1483-1483; 244-261; 1485-1487).

A pre-hearing conference was held February 24th after which and over objection, Mr. Barr was notified that the Commissioner would allow the reports of the experts into the Record but would allow him an opportunity to take the depositions at his expense. Defendants had previously asked in their APA Submissions for the Record to be left open for the depositions of Dr. Paul Pritchard, their IME and Dr. Nicholas Lind, but instead of leaving the Record open, the Hearing Commissioner postponed the hearing over Mr. Barr's objection.

The case was then not reset for hearing until April 20th and due to scheduling conflicts had to be rescheduled. Due to the Commissioner not being in the District and a new Motion filed April 13th to, "Compel," Mr. Barr to sign a Medical Release Form, the Form 50 was withdrawn and refiled on April 29th (R. pp. 266-267). The matter was then finally reset for hearing before a new Hearing Commissioner on August 31, 2016.

Before hearing, Mr. Barr filed his Amended Pre-Hearing Brief, APA Submissions and Notice of Witnesses and Defendants filed their Pre-Hearing Brief and APA Submissions. (R. pp. 268; 529). At the August 31st hearing, all objections made in writing or in the prehearing conferences, or Mr. Barr's Pre-Hearing Brief (R. pp. 268-275) were renewed; including the submission of the written reports of Dr. Eagerton, Ph.D., Dr. Waid, Ph.D., and Dr. Wagner, Ph.D. In addition to the hearing testimony and the objections made on the Record, the depositions of Dr. Paul Pritchard, M.D.; Dr. Nicholas Lind, Ph.D.; Dr. Roland Skinner, M.D.; and Dr. Marshall White, M.D. were admitted. The Record was left open for the deposition of Dr. R. Joseph Healy, M.D., which was not conducted until September 29th. (R. pp. 1252; 1071; 1201; 974; 899; 1400).

The Hearing Commissioner issued his Notes for Decision on November 17th, 2016. (R. pp. 1490-1494). Before any Final Order was filed on January 19th, 2017, a detailed Request for Reconsideration Prior to Formal Order was filed by Gerald Malloy in part because the Hearing Commissioner had not addressed an

essential issue for decision, Mr. Barr's request for benefits based on his chronic headaches being caused by or caused to become symptomatic by the VOCs and a finding Mr. Barr was not at maximum medical improvement and requesting temporary total disability benefits and medical care. (R. pp. 1495-1499).

No decision was rendered on the Request for Reconsideration and a First Proposed Order was not filed until August 17th, 2017. Objection to the Proposed Order was filed on September 18th and a Revised Proposed Order was submitted via email September 18th at 4:44 pm and a Second Revised Proposed Order was submitted on September 18th via email at 6:26 pm which contained additional Findings of Fact and Conclusions of Law. (R. p. 1507). Formal objection to the Second Revised Proposed Order and the additional Findings of Fact and Conclusions of Law was filed September 18th (R. pp. 1508-1509). The Second Revised Proposed Order submitted by defense counsel was filed as the Order of the Commissioner on September 20th, 2017. A Form 30 Request for Review with 29 exceptions was filed on October 2, 2017 (R. pp. 789-799). Briefs were submitted by both parties and a hearing was held before the Full Commission Panel on February 20th, 2018 after which the panel voted to affirm the decision as written with no amendments noted on the Vote Sheets. (R. pp. 800-849; 850-898; 1448-1475; 1513-1515). A form Request for Proposed Full Commission Order was issued and objection to the proposed Full Commission Order was made. (R. pp. 1516-1518). The Full Commission Decision as submitted by defense counsel was filed on June 5th, 2018 (R. pp.

61-90) and a Notice of Intent to Appeal with exceptions was filed with this Court June 29th, 2018 which Notice of Appeal with attachments is on file with the Court. This Appeal follows.

STATEMENT OF FACTS

It is agreed Mr. Barr started work with the School District on May 27, **2009** as a commercial painter using commercial paints (R. p. 489). [Commercial paints (oil/solvent) require MSDS sheets because of the levels of volatile organic compounds - VOCs.] Prior to going to work for the School District in 2009, Mr. Barr operated his own house painting business using, residential (water based) house paints.

For the period 2005 to 2010 only, his family doctor, Dr. Chapman's records were put into evidence. They contain no history or treatment for chronic/repetitive headaches through **May, 2010** (R. pp. 540-547).

ONE YEAR AND ½ MONTH **AFTER MAY 27TH 2009:**

June 15, 2010, Mr. Barr saw Dr. Chapman for:

> "H/A (headaches) (x) (off/on) for 2-3 weeks (2-3 wks.); fatigue; taking Tylenol every day." (R. p. 452);

September 1, 2010 - "persistent" H/A (headaches) c (cause) occ. (occupation) ... work excuse from 8/23/10-9/6/10 RTW 9/7/10 ..." (R. p. 451).

September 13, 2010 -

> "He stated the headache started about 4 weeks ago ... CT scan ...negative ... he was given a prescription ... unfortunately, the headache has persisted. He returned to work on 9/7/10 and worked through Thursday and was released from work ... because of dizziness, fatigue and balance issues ...
> Goody Powders ... now offer no relief. It persists throughout the day." (R. p. 450).(*)

September 16, 2010, Mr. Barr returned, per Dr. Chapman:

> "Follow-up of his headache and fatigue evaluation. Wife states that she took him to the ER a few nights ago and waited several hours and left without being seen. She stated he had a severe dizzy spell with facial pain and pressure and "looked like he was out of it." Denied any drug use or even OTC medications. He recently had an MRI which showed microvascular ischemic changes ..." (R. p. 449).(*)

He was given medications and an out of work statement and then Dr. Chapman recorded,

> *"as young as this patient is with his abnormal brain MRI, I recommend Aspirin 81 mg daily for now in addition to further neurological evaluation ..."* (R. pp. 447-448).

[*)MSDS-Paints- "SIGNS AND SYMPTOMS OF OVEREXPOSURE":

headache, dizziness, nausea and loss of coordination..." (R. pp. 327-337.]

On September 23, **2010**, Mr. Barr was seen by Dr. Roland Skinner, a neurologist who wrote a letter to Dr. Chapman that same day detailing a history of dizziness and headaches with severe headaches that had been continual for the last five weeks. He also noted problems with concentration. Dr. Skinner recorded a very limited social history recording that he had been a chronic smoker but had just quit smoking and that he worked for the school district as a, "handyman and painter." Dr. Skinner, "because of his relative lack of other risk factors except for smoking, and because of the intractable nature of his headaches", ordered additional testing. (R. pp. 453-455).

October 22, **2010**, Dr. Chapman noted Mr. Barr was being followed by a neurologist, Dr. Skinner; opined the headaches were likely, "tension" headaches; but, he also recorded Mr. Barr stated,

> "he was exposed to some lead paint in the Summer and wonders if this is a contributing factor". (R. p. 446).

Dr. Skinner treated Mr. Barr from 2010 through February 21, 2012. On November 15, 2011, he noted Mr. Barr was having, "headaches pretty much every day"; that he had good days and bad days in reference to how severe his headaches were; and Mr. Barr noted to him that, "certain smells will trigger the headaches." His diagnosis was chronic headaches and at that time it was his opinion (15 months later), "a good bit of his problems may be analgesic rebound." (R. pp. 472-473). Dr. Skinner last saw him on February 21, 2012 and continued to diagnose him with tension headaches and as to causation he stated, "and we really had not come up with any other reasons for his headaches at that point." (R. pp. 1002, l. 23 - 1003, l. 15; quote: l. 14-15).

From October of 2010 until the time he lost his health insurance in 2015, Mr. Barr continued to see Dr. Chapman for chronic intractable headaches and from 2010 to 2012, in addition to Dr. Skinner, he saw Dr. Chapman on a constant basis, 11/16/10, 12/13/10, 3/30/11, 4/19/11, 5/2/11, 7/15/11, 8/22/11, 8/24/11, 10/5/11, 9/12/12, 10/10/12, 11/19/12]. (R. pp. 423-445).

October 10, 2012, Dr. Chapman recorded that:

> "I have discussed options as it related to neurological evaluation. He has an appointment to see Dr. White, a neurologist here, rather than traveling to Florence and hopefully this will be a little easier for him to accomplish as it relates to taking off of work." (R. pp. 423-445).

Then his treatment with Dr. Chapman jumped to mid-2013.

October 17, 2012, Mr. Barr for the **first time saw Dr. Marshall White** at his Hartsville office and after taking a detailed history including his work history as a commercial painter for the School District, Dr. White issued a work restriction note:

> "No exposure to volatile organic compounds (including paint fumes). x 6 weeks" (the emphasis/underlining is on original work restriction statement). (R. p. 354).

After six (6) weeks, Mr. Barr returned to work and to chronic headaches. He continued to see Dr. White, before he closed his Hartsville office, then sporadically and mainly saw Dr. Chapman for treatment from 2012 to 2015 with a continuing diagnosis of "chronic headache". (R. pp. 424-480).

In a memo drafted on May 12, 2015, Mr. Larry Stagner, Mr. Barr's supervisor with the School District, noted that he had met with Mr. Barr both on March 28th and again on May 7th, 2015, because Mr. Barr was having trouble performing his work due to his headaches which on March 28th, his doctors had, "speculated" were related to his painting with the School District. Mr. Stagner recorded:

> "While no doctor's excuses have been provided to date to substantiate these issues and other than a doctor's excuse provided Oct. 17, 2012 by Dr. Marshall White

> stating, "no exposure to volatile organic compounds (including paint fumes) for six weeks", we have nothing definitive on which to substantiate this assumption." (R. p. 481).

He noted that Mr. Barr was going to meet again with his doctors on May 22nd and noted that since the doctors had told him to stay out of the VOCs, Mr. Barr inquired about alternative employment and he and Mr. Stagner set up an appointment with vocational rehabilitation and discussed the idea of applying for Social Security Disability. Mr. Stagner then advised that,

> "our meeting closed with the fact that you need to find a way to be able to perform your job or to find a career that you are able to work without making you sick. ... on 5/22 ... I expect the release to return to work as a painter without restriction or to remove you from work permanently. I need for you to be able to perform your job at 100% or I need a resignation." (R. p. 481).

In a May 26th note, Mr. Stagner noted Mr. Barr and his wife had presented a doctor's note taking him out of work until further notice and another note stating, "fatigue, migraines, and memory loss due to VOCs in paint from work". (R. p. 285). On May 29th, Mr. Stagner instructed a fellow employee to go to Sherwin Williams to get the MSDS sheets. (R. pp. 479-480).

On June 4th and 5th, after his initial statement on May 21, 2015, Dr. White again recorded Mr. Barr's headaches and memory loss were due to exposure to VOCs and that he had slow mental processing speed, headaches, memory loss due to his exposure to the VOCs in the paint at work. (R. pp. 288-290; 294).

June 15th, a claim was filed and June 30th Mr. Barr was notified of representation by defense counsel.

Dr. White renewed out of work statements on July 18th and again on September 10th, 2015 taking Mr. Barr out of work until further notice. (R. pp. 286-287). Also, on September 10, 2015, Dr. White reaffirmed his opinion stated to a reasonable degree of medical certainty, that Mr. Barr's fatigue, headaches and memory loss were caused by volatile organic compounds in the paint at work. (R. p. 284).

HISTORY AFTER HEARING REQUEST

On September 29th having heard nothing and the Defendants having not accepted the claim, a hearing request was filed.

Between Dr. White's May 21st and September confirmational opinions, and November 4th, aside from taking Mr. Barr's deposition in September, Defendants did nothing in reference to medical evaluation or medical opinion by any physician local or otherwise.

Dr. White confirmed at his November 23rd, 2015 deposition that he had issued a referral on November 3, 2015 to a local clinical psychologist, Dr. Avie Rainwater, Ph.D. in Florence, South Carolina to perform neuropsychological testing; provided Nov. 3 to Defendants. (R. pp. 935-936).

On November 4, Mr. Barr received a telephone call that an appointment had been set up for an evaluation at MUSC to which Mr. Barr initially objected on the basis that it was not at reasonable times and places and after being informed, it was for an evaluation by a psychologist, Dr. Mark Wagner, Ph.D., on November 4th, Mr. Barr further objected it was for an evaluation

not allowed for under the Act and there was no reason that the testing could not be performed as prescribed by Dr. White locally by Dr. Rainwater. (R. pp. 101-111).

On November 6th, 2015, Defendants filed a Motion to Compel the attendance at what they referred to as a, "medical evaluation" but which was for evaluation by Dr. Wagner, Ph.D. in Charleston, South Carolina. A Reply was filed and the Motion to Compel was initially granted without hearing. Based on Writs of Mandamus and Prohibition, a temporary restraining order was issued by the Circuit Court restraining any evaluation and then based on a conference with the hearing Commissioner, he granted Reconsideration and the Motion to Compel was denied by December 23nd Order on the basis that it was not with a medical doctor but finding Defendants had a right to an evaluation by a licensed physician but noting specifically only at, "a reasonable time and place". (R. pp. 118-133; pp. 10-11).

A month later by letter dated January 19, 2016, Defendants noticed an evaluation by Dr. Paul Pritchard, MD not in the Florence-Darlington area but again in Charleston, South Carolina for February 2, 2016. Mr. Barr objected as not being at, "reasonable times and places," and a Motion to Compel was filed on January 27, 2016. In his Reply on January 28th, Mr. Barr reiterated his two (2) prior objections made in November: first not being with a medical doctor second not being at, "reasonable times and places". He again noted he would attend any evaluation scheduled pursuant to the Act under §42-15-80 as the Circuit

Court had agreed at reasonable times and places. Mr. Barr also noted to the hearing Commissioner his December 22nd Order stating any evaluation was to be at, "reasonable times and places" and as to time it had been over a month since his Order and was scheduled February 2nd; 22 days before hearing. (R. p. 215-216). After emailing Commissioner, would grant, Mr. Barr noting his objection, advised he would attend the evaluation to prevent further delay. (R. pp. 1481-1482).

February 12, 2016, by regular mail Defendants filed their first Pre-Hearing Brief noting a deposition of Dr. Pritchard had been set for March 3rd but also submitting a report issued by Dr. Pritchard on February 2, 2016, [the Notice of Deposition of Dr. Pritchard was not served on Mr. Barr until February 17]; noticing a Deposition of Dr. Nicholas Lind, Ph.D.; and including a report from Dr. Mark Wagner Ph.D. dated February 12, 2016. (R. pp. 227-238).

Saturday, February 13th, Defendants by mail (received 2/16) filed a first Amended Pre-Hearing Brief and added yet another report from Dr. L. Randolph Waid, Ph.D. dated February 12, 2016. (R. pp. 227-238).

Monday, February 15th, (federal holiday), Defendants by mail (received 2/16) added yet another report from Dr. David H. Eagerton, Ph.D. as an exhibit. (R. pp. 239-244).

No request was made to leave the Record open for either the deposition of Dr. Wagner Ph.D. or Dr. Waid Ph.D. or Dr. David Eagerton, Ph.D.

On February 18th, Mr. Barr noting that February 13th was a Saturday and Monday, the 15th was a federal holiday and that none of these reports were received until February 16th, filed his objection to the submission of any of these records as being late and inappropriately filed/served. (R. p. 1483). In addition, he notified the Commission that he would be filing a formal notice of objection to the admission of any of this as evidence at the hearing and would be filing a Memorandum of Law in Support thereof which was filed with the Commission on February 19th. He also objected to the Record being left open for the submission of any of this late filed documentary evidence. (R. pp. 1485-1487).

A pre-hearing conference was held on February 24th at which the Commissioner "continued" the hearing to allow for the deposition of Dr. Pritchard; allowed for the admission of these late filed reports; notified Mr. Barr that the Commissioner would not subpoena these doctors to any hearing; and that if he wanted to exercise his right to cross-examination of any of this documentary evidence that he would have to schedule, at his own expense, the depositions of these doctors.

The hearing was later reset without agreement for April 20, 2016 in Columbia, South Carolina. Note, after notice of the rescheduled hearing, counsel again objected to the late filed documentary evidence and that Defendants could not bootstrap that evidence into being timely filed because the Commissioner had rescheduled the hearing.

Mr. Barr, because of a conflict on April 20th and because the matter was not being reset in Hartsville, had to withdraw the Form 50 by letter dated April 19th. Mr. Barr also requested that a hearing be held on motions before a hearing, which hearing was not set and this entire matter was then transferred to the next jurisdictional Commissioner.

Although the Regulations do not require refiling where there is no change in the request for hearing, another Form 50 per the direction of the Commission, was filed and a responsive Form 51 was filed. (R. p. 266-267).

Subsequently, this matter was reset before Commissioner Campbell and APAs and Pre-Hearing Briefs were refiled, all objections to evidence were renewed and this matter was then heard. At the August 31st hearing the Record was again left open, this time for the deposition of Dr. R. Joseph Healy, MD.

The evidence submitted shows that Dr. White, Mr. Barr's treating neurologist gave Mr. Barr an out of work statement on May 21st, 2015 and stated at that time to the employer that it was his opinion Mr. Barr's migraine headaches, memory problems and fatigue were due to exposure to VOCs (volatile organic compounds) in the paint at work which opinion he reaffirmed as his opinion stated to a reasonable degree of medical certainty on September 10th, 2015. (R. pp. 284-285). He restated that opinion and that Mr. Barr was suffering from an encephalopathic condition that had resulted in severe permanent brain damage on October 21st, 2015 and then after review of the

neuropsychological testing of Dr. Lind on December 23rd, 2015, stated those neuropsychological tests confirmed his opinion. After review of the MSDS sheets that repeated and prolonged over-exposure to solvents was associated with permanent brain and nervous system damage, he stated it was his opinion the encephalopathic condition was caused by exposure to the VOCs and that knowing the nature of Mr. Barr's job it was more probable than not that his exposure to VOCs in the workplace came from a dermal, or in other words skin exposure as much as it did from inhalational exposure. (R. pp. 279-280).

Dr. Nicholas Lind, Ph.D. submitted his report that the neuropsychological testing confirmed Mr. Barr's cognitive complaints were consistent with brain damage secondary to volatile organic compound exposure.

Dr. R. Joseph Healy, Jr. who became Mr. Barr's treating neurologist on or about March 31st of 2016 stated the opinion that Mr. Barr's severe chronic headaches and fatigue were caused by his exposure to commercial paints and the VOCs in those paints and that Mr. Barr required medical treatment including medications and follow-up medical care for his problems stemming from that work-related exposure. However, Dr. Healy stated the opinion that Mr. Barr was not at maximum medical improvement due to his chronic headaches and fatigue and was in need of additional evaluation and treatment for those problems. He also stated that as a neurologist, he had treated several other patients with problems related to exposure to commercial paints

and that again all of this was due to his exposure to VOCs in the commercial paints in his job as a commercial painter for the Darlington County School District. Dr. White, Dr. Healy and Dr. Lind all reaffirmed their opinions in their depositions. (R. pp. 968, l. 24-p. 969, l.4; 1438, ll. 8-15; p. 1247, ll. 7-18).

The only other, "medical" opinion evidence in the Record came from Dr. Pritchard. Dr. Paul Pritchard, M.D. in his February 2nd, 2016 report confirmed as his assessment:

1. That Mr. Barr was having headaches and cognitive impairment which by history were consistent with chronic daily headaches. Based on his examination he stated Mr. Barr did not have findings that would support a diagnosis of encephalopathy but then he specifically noted:

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

In his deposition, Dr. Paul Pritchard, the only other medical doctor to actually physically examine Mr. Barr, confirmed that based on his evaluation and his review of the medial records from 2010 through 2016 that Mr. Barr suffered from severe headaches. Question: "In your opinion does he have a chronic headache problem?" Answer: "He does". (R. p. 82, ll. 17-19).

He also reaffirmed his recommendation that Mr. Barr be seen by an occupational medicine specialist with a specialty in toxicology because he,

> "thought they could shed more light on the toxicologic components than I could".

He also stated that he did not have enough information about Mr. Barr's exposures and that he was,

> "not knowledgeable about how much he had when and I'm not a toxicologist. I don't want to overstate my qualifications."

(R. pp. 1176, ll. 19-22; 1168, ll. 21-p.1169, l. 1). In addition, Dr. Paul B. Pritchard in his evaluation report based on his independent medical evaluation referred to the fact that he had,

> "reviewed the list of documents which Ms. Barr furnished to me in advance of the appointment today." (R. pp. 693-694).

Those medical and other records referred to in his report were not provided to Mr. Barr in advance of and only after the evaluation; and included in addition to medical records the depositions of Mr. Kenneth Barr and Mr. Larry Steigner and a transcript of Mr. Barr's school records. (R. pp. 694-695).

Commissioner Campbell issued his written findings on November 17th, 2016. January 19th, 2017, Gerald Malloy filed for reconsideration in part because Commissioner Campbell had not addressed Mr. Barr's request for benefits based on his chronic headaches being caused by or caused to become symptomatic by the VOCs and under which he was requesting only temporary total

disability, medical care and a finding he was not at maximum medical improvement. The first proposed Order was not filed until August 17, 2017, nine (9) months after his directives and one year (≤ 2 weeks) after the hearing.

ARGUMENTS

I. MR. BARR WAS DENIED DUE PROCESS BY THE ADMISSION OF DOCUMENTARY EVIDENCE OVER OBJECTION DENYING HIM THE RIGHT OF CROSS-EXAMINATION AND BY SHIFTING THE BURDEN OF EXPENSE TO THE INJURED WORKER TO EXERCISE THAT CONSTITUTUIONAL RIGHT.

Prior to the hearing set for February 24, 2016, on February 16th, Mr. Barr received in the mail multiple Pre-Hearing Briefs (PHB) and Administrative Procedures Act admissions (APA's) containing notice of the intent of Respondents to submit written documents at the hearing as evidence which purported to be reports from: 2/12 PHB/APA, Dr. Paul Pritchard, MD and Dr. Mark Wagner, Ph.D.; 2/13 PHB/APA, Dr. L. Randolph Waid, Ph.D.; 2/15 APA, Dr. David Eagerton, Ph.D. The 2/12 and 2/13 PHB's requested the Record be left open only for the deposition of Dr. Paul Pritchard. On 2/18 in writing and with written supporting Memorandum of Law on 2/19, Mr. Barr objected to the submission of these documents including objections of violations of due process. Mr. Barr very importantly under U.S. and S.C. Supreme Court and this Court's decisions requested the Commission issue subpoenas under S.C. Code §42-3-150, for these alleged experts and adverse witnesses to appear at the hearing so Mr. Barr could exercise his due process right of cross-examination.

At the time for the hearing on February 24th the Hearing Commissioner, after a pre-hearing conference, instead of holding the hearing and adjourning the hearing pursuant to Regulation, WCC Reg. 67-613, to allow defendants depositions, to the prejudice of Mr. Barr cancelled the hearing. Prior to and at the time of the hearing, the hearing Commissioner refused to issue Commission subpoenas, overruled the objections advising that he would admit those reports and held that Mr. Barr could exercise his right of cross-examination by scheduling and paying for depositions of the Respondents' adverse and alleged experts. At the August 31st, 2016 hearing, all the objections placed in writing back in February and all objections were renewed and in addition thereto, other objections were made to both the report and deposition of Dr. Paul Pritchard (R. p. 1252). The Hearing Commissioner's decision was based on the opinions of Dr. Eagerton, Ph.D.; Dr. Wagner, Ph.D.; Dr. Waid, Ph.D.; and Dr. Pritchard, M.D. (R. pp. 13-60).

In an administrative proceeding, due process requires the opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 US 254, 90 S.Ct. 1011 (1970). Where important rights turn on questions of fact in an administrative setting, one whose word would deprive a person of his or her livelihood or property rights must be subject to cross-examination. In Re: Vora, 354 S.C. 590, 582 S.E.2d 413 (2003), Brown v. State Board of Education, 301 S.C. 326, 391 S.E.2d 866 (1990). The mandatory right to cross-examination of adverse

witnesses has specifically been affirmed by this Court in the case of Smith v. S.C. Dept. of Mental Health, 394 S.E.2d 630, 329 S.C. 485, Rehearing denied, Cert. granted, affirmed, 335 S.C. 396, 517 S.E.2d 694 (1997).

South Carolina Constitution, Article I, §22 confirms that in administrative procedures the constitutional right to due process of law applies and S.C. Code §1-23-330(3) specifically provides that in all administrative proceedings, the right to cross examination is preserved and under section (4) that documentary evidence may only be admitted,

> "where the hearing will be expedited and the interest of the parties, "will not be prejudiced substantially",

by such admission. The U.S. Supreme Court in conformity with the Federal Administrative Procedures Act in a Social Security hearing, held the right of cross-examination extends to medical reports and such documentary evidence may not be admitted where the claimant has specifically preserved his right to cross-examination by requesting that subpoenas be issued to exercise that right at the hearing. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, (1971), (written medical doctors' reports based on personal examination of claimant admitted where Social Security claimant did not request administration issue subpoenas requiring doctors to appear to exercise right of cross-examination). Quoting Justice Douglas' dissent (Justices Black and Brennan concurring) only that cross-examination is required regardless of a subpoena request in an administrative hearing:

> "This case is miniscule in relation to the staggering problems of the Nation. But when a grave injustice is wrecked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone, for these days the average man can say, "there but for the grace of God go I ...
>
> Review of the evidence is of no value to us. The vice is in the procedure which allows it in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts. The problem of the law is to give advantage to neither but to let trial by ordeal of cross-examination distill the truth."

In Green v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, (1959) wherein the Supreme Court held that the government contractor could not be deprived of his position based on documentary evidence submitted at a hearing wherein he was not allowed to exercise his right of cross-examination, The Supreme Court quoted from 5 Wigmore on Evidence (3rd ed) s 136>:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

The Defendants sought and paid for this alleged expert evidence to deny Mr. Barr his entitlement to benefits under the Workers' Compensation Act. They were the ones that sought to place these documents into evidence and it was their burden to pay for their submission. Mr. Barr sought to exercise his right to cross-examine these documents and these opinions by requesting

that the Commission issue subpoenas for these adverse witnesses to appear so he exercise that right. That was not granted. The Respondents who wanted to submit this evidence, when objection was made by Mr. Barr and he sought to cross-examine this evidence which he noticed prior to the hearing could have either brought these witnesses to the hearing or requested a continuance to allow for their appearance under Reg. 67-613 (A-B) or in the alternative, the Respondents who wanted this evidence into the Record under Reg. 67-613(C) could have moved for adjournment of the hearing as this Court sanctioned as specifically affirmed in Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (SC App. 1996), cert. granted, cert. dismissed as improvidently granted 326 S.C. 261, 486 S.E.2d 263.

The Respondents did not seek any of these in reference to the documentary evidence sought to be admitted and it should have been excluded. The Respondents wanted these documents into evidence, Mr. Barr sought to preserve his right to cross-examination and the evidence should have been either excluded or the Respondents directed to submit it in such a fashion as would preserve Mr. Barr's right to cross-examination under due process of law. The Commission erred as a matter of law by failing to issue Commission subpoenas or by excluding this documentary evidence; and by not complying with its own Regulations by either excluding the evidence or granting an adjournment for depositions and not by improperly simply continuing the hearing indefinitely and shifting the burden of expense to the injured worker.

On a final note, and in substantiation of this argument, the Court will find that from the inception of the Act in 1936 through 1999 the statutes, case law and Regulations of the Commission all provided for the submission of all testimony and evidence with cross-examination at the hearing but with the right to take a de bene esse deposition of a witness for submission at the hearing. [S.C. Code Ann. 1962, and S.C. Code Ann. 1976, Re. 67-12, S.C. Code Ann. 1976 Reg. 67-612 (eff. 4/24/92)]. From 1992 through 1999, Reg. 67-612(F) provided as to submissions of reports under the APA:

> "F: The report may be admitted if:
>
> 1. The opposing party consents ...
> 2. The expert attends the hearing. The expert may testify and **shall** be subject to **cross-examination**;
> 3. The **de bene esse** deposition is taken **before the hearing**. (emp. added).

In 1999, the Regulation was changed simply to be in accordance with the Administrative Procedures Act, §1-23-330. There was no new allowance created by Regulation for the submission of a report in derogation of that statutory mandate which includes the right of cross-examination or for the submission of prejudicial documentary evidence over objection. See specifically Reg. 67-612(F) which still provides that the parties may consent to the submission of documents outside of meeting the requirements of the remainder of the section concerning documentary evidence. The requirements of due process and our U.S. and S.C. Constitutions have never changed. The

decision of the Commission should be reversed due to this error of law and/or at a minimum reversed and remanded for a de novo hearing.

II. THE COMMISSION ERRED AS A MATTER OF LAW BY AFIRMING THE DECISION OF THE HEARING COMMISSIONER WHEREIN THE HEARING COMMISSIONER FAILED TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON AN ESSENTIAL ISSUE PRESENTED TO HIM FOR DECISION AS IS REQUIRED BY BOTH STATUTE AND CASE LAW.

Commissioner Campbell issued his Notes for Decision including his findings of fact based on a review of the evidence on November 17, 2016. (R. pp. 1490-1494). Subsequently before an Order on January 19th, 2017, Mr. Barr asked for reconsideration specifically on the basis Commissioner Campbell had not addressed nor had he made findings or a decision on one of the essential issues and bases upon which Mr. Barr was requesting benefits; i.e. he specifically requested benefits based on the opinion of Dr. Healy that Mr. Barr suffered from chronic headaches caused by or aggravated by his exposure to VOCs in the commercial paints used as a painter for the District and that Mr. Barr was not at maximum medical improvement (R. p. 1496, #2). The essential issue the request for temporary total disability benefits and the provision of medical care until Mr. Barr reached maximum medical improvement based on Mr. Barr's "disabling" condition: chronic headaches is nowhere addressed in Commissioner Campbell's Notes for Decision.

After this was brought to the Commissioner's attention first **in January 2017** and again after the first proposed Order was

submitted to the Commissioner **in August 2017**, which proposed Order did not address this essential issue, the Defendants then submitted a second proposed Order without any further findings by the Commissioner and in that second proposed Order made additional findings of fact and conclusions of law on that essential issue. Again, those findings and conclusions were never made by Commissioner Campbell. There is absolutely nothing in the Record to indicate that these are the findings of fact of Commissioner Campbell in reference to that specific issue and that specific request for benefits. These findings of fact in the Order are simply nothing more and nothing less than findings of fact that were made by defense counsel addressing these issues after Mr. Barr asked for reconsideration because they had not been addressed by Commissioner Campbell.

Under statutory law, SC Code §42-9-5 and under the prior decisions of the South Carolina Supreme Court and specifically in such decisions as Drake v. Raybestos-Manhattan, Inc., 241 SC 116, 127 SE2nd 288 (1962) **the Commission** is required to make detailed findings of fact and conclusions of law. It is the,

> *"duty of the Commission to make specific findings of fact upon which a Claimant's entitlement to compensation may rest and upon which the amount of compensation due to him may be calculated by one of the statutory formulas"*. (emp. added).

The findings of fact and conclusions of law on the essential factual issues before the Commission for decision must be,

> ***"sufficiently definite and detailed to enable the appellate court to properly determine whether the***

findings of fact are supported by evidence and whether the law has been properly applied to those findings." (emp. added). Drake, supra, 127 S.E.2d at 292.

Where the Commission itself, not defense counsel, does not make detailed findings of fact and conclusions of law on an essential issue for decision by the Commission, it is reversible error and the case must be remanded for a hearing on those issues. Hill v. Jones, 255 SC 219, 178 SE2d 142 (1970); Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E.2d 21 (1977).

Commissioner Campbell simply did not make detailed findings of fact and conclusions of law on an "essential issue" for decision; i.e., the specific request for benefits based on Mr. Barr's chronic headaches caused by VOCS for temporary total disability benefits and medical care until he reached maximum medical improvement from his chronic disabling headaches and having not done so, the Defendants cannot be allowed to simply fill in the blanks. (R. pp. 1507; 1508-1510).

III. THE COMMISSION ERRED AS A MATTER OF LAW BY ADMITTING THE EVALUATION REPORT AND THE DEPOSITION OF DR. PAUL B. PRITCHARD, III, M.D.

After a hearing was noticed on December 22nd, 2015 for February 24th, 2016, on January 19th, 2016, Mr. Barr received a letter, without any records setting an IME evaluation with Dr. Paul B. Pritchard for February 2nd, pursuant to S.C. Code §42-15-80. Following the evaluation of February 2nd on February 4th, two (2) days after the evaluation as is set forth in the Record, Mr.

Barr received a 3" stack of medical records that had been provided to Dr. Paul B. Pritchard on December 8th, 2015.

In his Memorandum of Law in support of his written objections on February 18th, this summary of facts about the scheduling and first contact with Dr. Pritchard on December 8th, 2015 being without notice to Mr. Barr, no notice to Mr. Barr of any records being provided until January 19th and no records until February 2nd was noted and the report from Dr. Pritchard was objected to and sought to be excluded based on the violation of S.C. Code §42-15-95. (R. pp. 1483-1484). The submission of records to Dr. Pritchard and the scheduling of his deposition were confirmed at his deposition. (R. p. 1167, ll. 2-23).

S.C. Code §42-15-80 specifically gives Defendants the right to have an independent medical evaluation conducted by a qualified physician as designated and paid for by the employer or the Commission. S.C. Code §42-15-95(B) provides that a health care provider who provides, "examination" or treatment for any injury, disease or condition for which compensation is sought under the provision of the title, may communicate on various items/issues such as medical history, diagnosis and causation with the insurance carrier without the employee's consent.

However, when a physician performs any, "evaluation", that statute mandates that the, "employee **must** be (B)(1):" **notified** that the discussion or communication **is going to take place** and this notification **"must occur prior** to the actual discussion or

communication" or (B)(2) advised of the nature of the discussion or communication, "**prior to the discussion or communication**" and the employee must be "provided with a copy of the written questions **at the same time the questions are submitted to the healthcare provider**." An employee must also be provided with the response of the healthcare provider. The report of Dr. Pritchard dated February 2, 2016 was not received by Mr. Barr until February 16th when it was submitted as part of Defendant's APA Submissions. More importantly, the statute further mandates that any discussion or communication, medical reports or opinions obtained,

> "in accordance with this section will not constitute a breach of the physician's duty of confidentiality **but** any discussions, communications, **medical reports, or opinions** obtained in violation of this section **must be excluded from any proceeding** under the provisions of this Title."

The Respondents cannot "unring the bell" and bootstrap compliance by taking a deposition after they had violated the statute. State-Record Co., Inc. v. State, 332 S.C. 346, 504 S.E.2d 592 (1998). In this case, there is no question that the Respondents without telling Mr. Barr communicated with Dr. Pritchard on December 8th and actually wrote him at his home address and sent him 3" of records for review in anticipation of the evaluation. Mr. Barr had no knowledge of Dr. Pritchard even being contacted until January 19th and then was not provided any records until two (2) days after his examination. The statute specifically mandates that where any evaluation is performed by any health

care provider that the Claimant is to be given notification: 1) that such evaluation is going to take place or 2) at the same time as the communication and the substance of the communication is given to the provider. There is no exception for a medical evaluation under §42-15-80.

The Respondents having violated this section, the evidence from Dr. Pritchard should have been excluded by the Commission.

IV. THE COMMISSION ERRED BY AFFIRMING THE DECISION OF THE ORIGINAL HEARING COMMISSIONER ASSIGNED TO HEAR THE CASE WHO ALLOWED THE RESPONDENTS TO SEND MR. BARR FOR AN EVALUATION BY DR. PAUL B. PRITCHARD IN CHARLESTON, SOUTH CAROLINA IN VIOLATION OF S.C. CODE §42-15-80 AND HIS ORDER.

In November of 2015, the Defendants scheduled an evaluation with Dr. Mark Wagener, Ph.D. to which Mr. Barr objected as being not with a, "medical" doctor and also not being at, "reasonable times and places" to where he lived in Hartsville, South Carolina. The Defendants filed a Motion to Compel attendance which was initially granted (although there is no right under the statutory authority of the Commission to compel anything). Mr. Barr filed for Writs of Mandamus and Prohibition in the Circuit Court which resulted in a temporary restraining order restraining the Defendants from sending him to any evaluation on the preliminary basis that such evaluation was in violation of the Commission's statutory authority. A telephone conference was then held with Commissioner Beck after which Commissioner Beck granted a Motion for Reconsideration; denied the Defendants the right to send Mr. Barr directly to a psychologist; but found that the Defendants had the right to schedule an evaluation with a

licensed, "medical" doctor or surgeon, and Commissioner Beck put in his Order, that, "such evaluation was to be at reasonable times and places". (R. pp. 10-11).

Although the Order was issued on December 22nd, the Defendants did not schedule or notify Mr. Barr of any evaluation until January 19th and then notified him of an evaluation to be performed by Dr. Pritchard in Charleston, South Carolina on February 2nd just twenty-two days (22) prior to the rescheduled Hearing on February 24, 2016. Mr. Barr again objected on the basis that the evaluation was in violation of SC Code §42-15-80 and specifically in violation of the provision of the Order that the evaluation must be at "reasonable times and places;" which has been interpreted by the Supreme Court to mean the county or the area in which the Claimant lives unless there is a showing of just cause. Young v. Singleton Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960).

The Defendants again filed a Motion to Compel and that Motion to Compel set forth no reason or justification as to why there was not a licensed medical physician or surgeon within the Florence-Darlington-Hartsville area that could perform the independent medical evaluation sought to be performed by the Defendants. Commissioner Beck by email then advised the parties he would order that the evaluation take place and Mr. Barr, over and noting his objection, attended the evaluation with Dr. Pritchard. (R. p. 1481-1482).

The problem with allowing this examination was further compounded by the fact that Mr. Barr's requested hearing for benefits in February was then continued to allow the Defendants the opportunity to take the deposition of Dr. Pritchard. Although the evaluation was performed on February 2nd and his report is dated February 2nd, the report was not given to Mr. Barr for review until February 16th as part of the Defendants' APA Submissions mailed February 12th. Further, although the defendants had known about the treating neurologist, Dr. White's opinion since May 21st, 2015; Defense counsel had been involved since June 30th, 2015; and a Hearing had been set for January 7th which was continued once to February 24th, they did not schedule an evaluation until February 2nd and the February 24th hearing was continued. Because of the continuance over objection in violation of Rule 67-613 and in spite of Mr. Barr's right to speedy benefits, no hearing was held until August 2016. Subsequent thereto, Commissioner Campbell based his decision almost entirely on the opinions of Dr. Pritchard/Dr. Eagerton.

Mr. Barr does not question the right of the Defendants to obtain an examination under SC Code §42-15-80 as long as that examination is in accordance with the provisions of that Code section and is requested in a timely manner. That Code section specifically provides that the Claimant shall submit himself to, "examination, at **reasonable times and places**, by a qualified physician or surgeon designated and paid for by the employer or

the Commission". The Supreme Court has specifically held that generally reasonable times and places means the county or the area wherein the Claimant resides. In Singleton v. Young Lumber Co., 236 SC 454, 114 SE2d 837 (1960), where the Claimant lived in Georgetown and the Defendants sought an examination by an orthopedic surgeon in Charleston, South Carolina and where the Commission found that there were qualified physicians or surgeons in the Georgetown area to perform the evaluation, the Court held the Commission should not order and the Claimant was justified in not attending such examination. In this case in addition to the over eight-month delay in requesting an independent medical evaluation in reply to both the original Motion to Compel and the subsequent Motion to Compel, Mr. Barr took the position that there were qualified physicians and surgeons in the Florence-Darlington-Hartsville area that could perform the evaluation requested by the Defendants. The Defendants made no showing that there were no qualified physicians or surgeons or even that there were no qualified physicians or surgeons in the specific specialty from which the Defendants wanted Mr. Barr to be examined. Thus there was no just cause as is required by Rule 67-613 for postponement much less cancellation. The Commission erred by ordering Mr. Barr to attend the evaluation by Dr. Pritchard and then basing its decision on that evaluation especially where there was no showing by the Defendants that there were no qualified physicians or surgeons to conduct the evaluation in the

Florence-Darlington-Hartsville area or just cause for the delay in requesting it or for postponement of the Hearing.

The Claimant has the burden of proof to prove his entitlement to benefits under the Act and the Defendants have a very limited right, and Mr. Barr would reiterate a very limited right, to have an evaluation performed. That right is limited in two regards; 1) it is limited to an examination by a qualified physician or surgeon; and 2) it must be at reasonable times and places which has been interpreted to mean in the area in which the Claimant lives unless there is a showing of just cause.

V. THE COMMISSION ERRED AS A MATTER OF LAW BY AFFIRMING THE HEARING COMMISSIONER'S DECISION WHICH WAS IN PART BASED ON THE REPORT AND OPINION OF DR. EAGERTON, PH.D.

In addition to the other reasons that the reports and documentary evidence submitted from Dr. David H. Eagerton, Ph.D. should have been excluded by the Hearing Commissioner, Dr. Eagerton's report served as the pivotal basis for the Commissioner's decision wherein he quotes under his Findings for Decision No. 12:

> "On 02/14/2016 Dr. David H. Eagerton of Presbyterian College opined to a reasonable degree of scientific **and medical certainty** that Claimant's symptoms are not likely due to exposure to VOCs while he was employed by the Darlington County School District."

Dr. Eagerton, Ph.D. is the only "alleged expert" that states an opinion from either a scientific or medical standpoint. The only other evidence in the Record about there not being a relationship

between the VOCs and the employment is set out in Findings for Decision No. 14 that Dr. Paul Pritchard could not,

> "be sure to a reasonable degree of medical certainty whether the headaches Claimant reports were caused by his alleged exposure to VOCs at the Darlington County School District." (R. p. 1493).

In his report, Dr. Eagerton states his opinion is stated to a reasonable degree of, "medical" and professional certainty. Dr. Eagerton is a Ph.D. not a medical doctor and not in the state of South Carolina. It is the unauthorized practice of medicine, totally improper and beyond his "alleged" credentials as an expert (assuming as true the hearsay in the documentary evidence concerning his credentials) for Dr. Eagerton not a medical doctor to state a medical opinion. There is no substantial evidence in the Record that he is qualified by background, experience or training to express a medical opinion. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). Since the decision of the hearing Commissioner, is based upon the "medical" opinion of Dr. Eagerton, the decision must be reversed; or at a minimum remanded for review without it.

VI. THE COMMISSION ERRED AS A MATTER OF LAW BY DENYING MR. BARR BENEFITS BASED ON THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD.

There is simply no substantial evidence in the Record other than that Mr. Barr's severe headaches were either caused by or were aggravated and caused to become symptomatic by the his exposure to the commercial paints which he used in the workplace. Where there is no substantial evidence on an essential issue for

decision by the Commission, the decision of whether or not the Claimant is entitled to benefits constitutes a matter of law for decision by the Courts.

It is axiomatic that the Act shall be liberally construed in favor of benefits to the injured worker and any reasonable doubts shall be resolved in his favor. The Claimant need only prove his entitlement to benefits by the simple burden of proof of proving by a preponderance of the evidence his entitlement to those benefits. As a matter of law the burden of proof by a preponderance of the evidence simply means that if the scales of justice tip ever so slightly in favor of the Claimant, then the Commission must award benefits. Our Courts have held under that burden of proof that if there is any, "reasonable inference" from the evidence whether that be direct or circumstantial or otherwise, the Commission should award benefits.

There is a gross misunderstanding and confusion confusing the Claimant's burden of proof by a preponderance of the evidence with the substantial evidence rule. To meet his burden to be entitled to benefits, the Claimant must only prove or put forth evidence of sufficient substance, "to afford a reasonable basis for ..." an award of benefits under the Workers' Compensation Act. Hudson v. South Carolina State Ports Authority, 399 SC 381, 732 SE2d 500 (2012). The Commission must apply that preponderance of the evidence standard as to whether or not there is a reasonable basis for making an award and once the Commission has applied that standard, the legal standard on appeal

completely flips and the reviewing courts must apply the substantial evidence rule to see if there is any substantial evidence in the Record to support the decision. Lake v. Reader Construction Co., 332 SC 242, 498 SE2d 650 (SC App. 1998). It is beyond question that Mr. Barr put forward sufficient evidence to tip the scales ever so slightly in his favor and there being a reasonable basis for an award, the Commission did not as a matter of law apply the standard which the Commission must apply and award benefits to Mr. Barr.

While the burden of proof may be met by either circumstantial or direct evidence, where the circumstances lead, "an unprejudiced mind to reasonably infer the injury was caused by the accident", the Commission should award benefits. Tiller v. National Health Care Center of Sumter, 334 SC 333, 513 SE2d 843 (1999). The hearing Commissioner in this case simply took his eye inadvertently off of Mr. Barr's actual burden of proof and that under the undisputed facts Mr. Barr met that standard. The following facts both circumstantial and direct are uncontradicted in the Record.

1. There is no evidence in the Record for at least 10 years prior to 2009 of any treatment ever for chronic headaches and no more than one or two times that Mr. Barr was treated for a headache even as a symptom related to a common cold or a sinus infection.

2. There is no evidence of any exposure to commercial paints for a period of at least 10 years prior to 2009 when Mr.

Barr went to work for the School District. Prior to 2009, he was using residential paints (latex) which under federal law do not require MSDS/OSHA sheets as do commercial paints.

3. In 2010, one year after becoming a commercial painter and being exposed consistently to the commercial paints requiring OSHA/MSDS sheets (acute exposure causes headaches), Mr. Barr sought treatment specifically for chronic recurring headaches and after August, 2010 was under and has remained under treatment ever since for severe headaches.

4. There is no dispute and the Commission and this Court may and should take judicial notice of the uncontradicted fact pursuant to the MSDS sheets, that the Commercial paints Mr. Barr was using as a painter for the District (supervisor obtained MDSD sheets) cause on an acute basis and the symptoms from acute exposure to these paints are as set out in MSDS sheets:

> "SIGNS AND SYMPTOMS OF OVER-EXPOSURE
>
> **headache**, dizziness, nausea, and loss of coordination are indications of excessive exposure to vapors or spray mist." (R. pp. 324, 327, 329-330, 337, 341, 344-345).

5. **June 15, 2010**, Dr. Chapman recorded headaches, fatigue and occasional indigestion. (R. p. 452); **September 13th** - dizziness, fatigue, balance issues and headaches; **September 16th**- headache and fatigue. (R. p. 449). Dr. Skinner, **September 23rd** - dizziness, headache, difficulty concentrating, some nausea. (R. p. 453).

6. September, 2010 - to present, constant and continual exposure to commercial MDSD requiring paints and treatment for diagnosis: severe chronic headaches.

7. 2012 Dr. Marshall White first visit with Mr. Barr and records history commercial painter and that same day removes Mr. Barr from exposure to the VOCs and his employer removes him for a period of six weeks. (R. pp. 354, 479-481).

8. March 28th, 2015, Dr. White expresses to Mr. Barr and Mr. Barr tells supervisor, Mr. Stagner, his headaches were speculated to being related to his painting environment. (R. p. 481).

9. While Mr. Barr was unrepresented and at the request of his employer, on May 21st, 2015, Dr. White issues the opinion that his headaches, fatigue and memory problems were being caused by his exposure to VOCs from the commercial paints he was using and took him out of work. (R. pp. 285, 354, 481).

10. All treating neurologists, Dr. White, Dr. Healy and Dr. Skinner concur Mr. Barr suffers from severe chronic headaches. Dr. Pritchard agreed that Mr. Barr's history is consistent with the diagnosis of, "chronic daily headache" and recommended an evaluation by an, "occupational medicine physician". Dr. Healy and Dr. White both state the opinion that Mr. Barr's headaches were caused by his exposure to the VOCs in the commercial paints at work.

11. Mr. Barr's testimony is uncontested.

12. There is not one medical opinion contained in the Record as to the cause of his chronic headache condition in 2015 and 2016 which developed in and after 2010 other than the opinions of Dr. White and Dr. Healy that his chronic headaches that started in 2010 were caused or were caused to become symptomatic by his exposure to the commercial paints he used at work. The Commission cannot ignore the unanimous opinion of the medical experts on the cause of the chronic headaches. Herndon v. Morgan Mills, Inc., 246 SC 201, 143 SE2d 376 (1965).

This undisputed evidence is there was no exposure to VOCs or commercial paints before 2009; one year after consistent exposure in 2010 Mr. Barr reports with all of the listed symptoms of acute over-exposure and ever since 2010 he has been treated for chronic headaches. Two doctors specifically opined those headaches stem from his exposure to the commercial paints he was using as a painter for the District. Clearly, Mr. Barr met his burden of proof that there is a reasonable inference both circumstantially and directly from his exposure to volatile organic compounds in the commercial paints he was using as a painter for the District. More importantly under the substantial evidence rule, there is no medical opinion after Mr. Barr filed his request for benefits that his chronic headaches were not caused by his exposure. Not only is the Commission's decision based on a "mistaken view of the evidence,' there was, "in reality no evidence" that his chronic headaches were not caused by his exposure to commercial

paints in his job. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (2012).

Mr. Barr's request for temporary total weekly benefits and medical care for his chronic headaches due to over-exposure; based on the reliable, probative and substantial evidence in the Record, should have been awarded and having failed to do so, this Court as a matter of law should review the evidence and award benefits.

VII. THE FULL COMMISSION ERRED AS A MATTER OF LAW BY ISSUING AN ORDER CONTRARY TO ITS DECISION.

As is reflected in the Record, the Full Commission simply voted to affirm the decision of the Hearing Commissioner (vote sheets). The Commission's own Regulations require that if there are any amendments or changes to the Hearing Commissioner's decision and if they do anything other than simply affirm that decision, the Commissioners are to set out those Findings of Fact and Conclusions of Law or amendments or corrections or additions to the Hearing Commissioner's decision on the vote sheets. S.C. Commission Reg. 67-709(E)(2):

> "The Commissioners, together, **shall** agree on a modification if any and **record** their findings of fact and conclusions of law on a **vote sheet**." (emp. added).

The Commissioners asked for a proposed Order to that effect, Defendants sent in an Order which was signed containing both factual and legal arguments and positions outside of the Commission's Decision which was simply to affirm. The Commission must make the decision and the law and its Regulations require

that the Commission if they modify the Order must tell us in writing what that consensus decision is. The Full Commission Order in this case that does not do that is an error of law prejudicial to the substantial rights of Mr. Barr. S.C. Code §1-23-380.

CONCLUSION

For all the foregoing reasons, the Court should reverse the Decision and Award benefits to Mr. Barr. At a minimum, the Court should rule as a matter of law and exclude the evidence presented from Dr. Pritchard, Dr. Eagerton, Dr. Waid and Dr. Wagner and either as a matter of law determine that the substantial evidence in the Record establishes an entitlement to benefits or should remand to the Commission for review of the evidence in the Record and a decision based on that evidence.

Respectfully submitted,

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March 22, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2018-001237

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

v.

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

CERTIFICATE OF COUNSEL

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

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