THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2021-UP-306
(SC Ct. App. heard February 2, 2021 - filed
April 7, 2021; formerly Opinion No. 5815
Withdrawn, Substituted, and Refiled August 25, 2021)

Kenneth L. Barr, Claimant, ...Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies a Petition for Rehearing to the "Published" Opinion filed April 7, 2021 was made and in an "Unpublished" Opinion filed August 25, 2021 two (2) sections of the "Published" Opinion were deleted and in their place, the Court found these issues had not been preserved for appeal, although originally addressed in the "Published" Opinion.

QUESTIONS PRESENTED

I. Did the Court of Appeals err under SC Constitution Art. V §9 by issuing an Opinion contrary to this Court's decisions on due process and the right of cross-examination and specifically in City of Spartanburg v. Parris, 251 SC 187, 161 SE2d 228 (1968), wherein this Court held that the admission of a written document in an administrative Hearing and consequent denial of a party's right to be confronted by, and to cross-examine his accuser constituted prejudicial error as a denial of due process? Should Respondents' experts written reports paid for to deny the worker's claim be admitted and the injured worker be required to pay to cross-examine the accusing expert; thus, shifting the burden of expense from the party offering the evidence to the party opposing the evidence?

II. As interpreted by the Court of Appeals/current Commission, is SCWCC Regulation 67-612(B) an unconstitutional violation of the due process right of cross-examination, contrary to the provisions of the Workers' Compensation Act and the Commission's Regulations since inception of the Act?

III. Did the Court of Appeals err by addressing and then not addressing whether defense evidence from Dr. Paul Pritchard was obtained/submitted in evidence in violation of (A) SC Code §42-15-95 and/or (B) SC Code §42-15-80?

IV. Did the Court of Appeals err as a matter of law by affirming the Decision of the Commission denying Mr. Barr benefits based on the reliable, probative, and substantial evidence in the Record?

V. Did the Court of Appeals err as a matter of law by affirming the Commission's Decision where it was based on the "medical" opinion of Dr. Eagerton, Ph.D.?

VI. Did the Court of Appeals err as a matter of law by affirming the Commission's Decision where the Hearing Commissioner failed to make detailed Findings of Fact and Conclusions of Law on an essential issue as is required by Statute and Case Law?

STATEMENT OF THE CASE

This Appeal arises out of a workers' compensation claim. Mr. Barr met with his supervisor March 28th and May 7th, 2015 concerning his treating neurologist's opinion that his chronic headaches were caused by his job exposure to commercial paint. May 22nd his neurologist issued a written statement taking him out of work as a commercial painter stating 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 June 17th and filed a Form 50 "claim" for benefits. (R. pp. 91-92). Retained Defense Counsel issued medical record subpoenas July 7th and Mr. Barr consented to a deposition July 27th held September 9th, 2015. A Hearing Request (Darlington) was filed September 29th alleging injury by accident, repetitive trauma and/or occupational disease, listing as body parts affected encephalopathy, brain (headaches, memory, fatigue, confusion), neurological/central nervous system and psychological. (R. pp. 94-95). A Form 51 denying all claims was filed October 28th. (R. p. 96). A Hearing Notice was served November 3rd, setting a Hearing January 7th, 2016. Three days later, and five months after filing a claim, November 6th a Motion to Compel Mr. Barr to attend a, "medical evaluation" with a psychologist, Dr. Mark Wagener (Ph.D.) in Charleston was filed. A Reply was filed November 13th with supporting case law that the Charleston evaluation should be denied as not being at reasonable places nor with a medical doctor

(R. pp. 101-107).

Without Hearing, an Administrative Order of November 23rd granted the Motion. (R. p. 5). November 24th a request was filed for the Order to be withdrawn/stayed and the parties be granted at least a telephone conference. (R. pp. 1476-1478). After no Hearing/conference, December 4th Mr. Barr notified Respondents of the intent to file Writs of Mandamus and Prohibition in the Circuit Court. Writs of Mandamus, Prohibition and Motion for TRO W/O Notice were filed December 9th (R. pp. 112-114); Commission served December 10th. A Temporary Restraining Order W/O Notice was issued December 16th (R. pp. 6-9) and December 17th Respondents filed a Motion to postpone the January 7th Hearing. December 21st, Commission Counsel, A. Camden Lewis, Esquire, notified Mr. Barr's Counsel the Commission was willing to send Mr. Barr to a, "medical doctor," for the medical examination Respondents requested if he would agree to release the Commission from the Temporary Restraining Order. 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/Commissioner Beck, per direction Mr. Barr notified the Court and withdrew the Writs and immediately filed a Motion for Reconsideration which Commissioner Beck granted by Administrative Order filed December 23 wherein his November 23rd Order 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. (emp. add.).

A month later January 27th, Respondents again filed a Motion to Compel Mr. Barr to attend an evaluation by a medical doctor in Charleston, SC. (R. pp. 208-211). In Reply, as he had to all Motions; in the Writs of Mandamus/Prohibition; and as set forth in the Commission's Order he argued the examination had to be at, "reasonable times and places" meaning the Darlington/ Florence area. (R. pp. 215-216). After email notification the Commissioner was inclined to grant the Motion, to prevent further delay, Counsel for Mr. Barr notified him to attend the evaluation. (R. pp. 1481-1482).

Reset Hearing date February 24th. As required by Regulation, Respondents as the responsive party must file a Pre-Hearing Brief(PHB)/APA Submissions (APAs) at least ten business days prior to the Hearing. Postmarked: Friday February 12th Respondents filed a PHB/APAs including reports from Dr. Pritchard and an unknown report dated February 12th from Mark T. Wagner, Ph.D.; Saturday, February 13th, an Amended PHB adding another report from Dr. L. Randolph Waid, Ph.D.; and Monday, February 15th, a Federal holiday, added yet another expert report, Dr. Eagerton, Ph.D. All APA submissions were received by mail on February 16th. Numerous objections were made in writing to all of these written APA submissions on February 18th with a Memorandum of Law in support of their exclusion filed on

February 19th; including their submission, without testimony or de bene esse deposition, violated his right to cross-examination. (R. pp. 1483-1483; 244-261; 1485-1487).

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

Due to scheduling conflicts, 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 April 29th, without change, to allow it to be set before the next Commissioner (R. pp. 266-267); however it was not reset until August 31, 2016.

In August Mr. Barr filed his Amended PHB and APAs and Respondents filed their PHB and APAs. (R. pp. 268; 529). At the August 31st Hearing, the Commission File was made a part of the Record including all objections made in writing or in the pre-hearing conferences, or Mr. Barr's Pre-Hearing Brief (R. pp. 268-275) and were renewed. In addition to the Hearing testimony and the objections made on the Record, 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., conducted on September 29th. (R. pp. 1252; 1071; 1201; 974; 899; 1400).

November 17th, 2016 the Commissioner issued his Notes for Decision. (R. pp. 1490-1494). January 19th, 2017, Gerald Malloy filed a detailed Request for Reconsideration Prior to Order in part because the Commissioner had not addressed an essential issue for decision; that being Mr. Barr's request for benefits based on his chronic headaches being caused by the VOCs and finding Mr. Barr was not at maximum medical improvement and entitled to weekly disability benefits and medical care (R. pp. 1495-1499); on which no decision was rendered.

Defense Counsel submitted a First Proposed Order August 17th, 2017. Written objection was filed September 18th and two Revised Proposed Orders were submitted via email September 18th; one at 4:44 pm and a second submitted via email at 6:26 pm which added 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 6:26 pm Revised Proposed Order was filed as the Commissioner's Order on September 20th, 2017. A Form 30 Request for Review with twenty-nine Exceptions was filed October 2, 2017, (R. pp. 789-799). After Briefs, a Full Commission Panel Hearing was held February

20th, 2018. The Panel on the Vote Sheets voted to affirm the decision as written with no amendments. (R. pp. 800-849; 850-898; 1448-1475; 1513-1515). After objection to the proposed Full Commission Order (R. pp. 1516-1518), the Order was filed June 5th, 2018 (R. pp. 61-90); a Notice of Intent to Appeal was filed June 29th, 2018.

After Briefing/Oral Argument on April 7, 2021 the Court of Appeals issued a "Published" Opinion affirming the Commission Decision. In it after the Standard Review, which does not include important parts of the Standard of Review applicable to a workers' compensation case, the Decision contained eight sections including: V. Proper Notice of Evidence and VI. Medical Evaluation of Dr. Pritchard. The Injured Workers' Advocates filed Leave to file an Amicus Brief. After extension, May 24th a Petition for Rehearing was filed. A Decision was then entered by the Court of Appeals August 25, 2021 denying the Petition for Rehearing and Rehearing En Banc; granting the Injured Workers' Advocates Amicus Curiae Motion and filing a substituted Opinion, which Opinion was filed as an "Unpublished" Opinion. The "Unpublished" Opinion contained six sections, I-VI, instead of eight and deleted "Published Opinion": "V. Proper Notice of Evidence", which had eviscerated the "mandatory" requirement of SC Code §42-15-95 requiring a defendant to give notice of any intended communication with any of Petitioner's doctors prior to such communication and any Reply is excluded "VI. Medical

Evaluation of Dr. Pritchard" which addressed in the original Published Opinion the requirement that any medical examination "must" be conducted at reasonable times and places as required under SC Code §42-15-80. In their place, the Court under new section V. of its "Unpublished" Opinion held that, "we conclude these issues are not preserved for our review". This Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

An extensive Statement of Facts necessary to a decision on IV. is contained in Appellant's Court of Appeals Brief.

ARGUMENTS

I. THE COURT OF APPEALS ERRED UNDER SC CONSTITUTION ART. V §9 BY ISSUING AN OPINION CONTRARY TO THIS COURT'S DECISIONS ON DUE PROCESS AND THE RIGHT OF CROSS-EXAMINATION AND SPECIFICALLY IN CITY OF SPARTANBURG V. PARRIS, 251 SC 187, 161 SE2D 228 (1968), WHEREIN THIS COURT HELD THAT THE ADMISSION OF A WRITTEN DOCUMENT IN AN ADMINISTRATIVE HEARING, AND CONSEQUENT DENIAL OF A PARTY'S RIGHT TO BE CONFRONTED BY AND TO CROSS-EXAMINE HIS ACCUSER, CONSTITUTED PREJUDICIAL ERROR AS A DENIAL OF DUE PROCESS.

No Court or Administrative tribunal anywhere requires a litigant to pay to cross-examine their accuser. There can be no more chilling effect on an injured worker's right to benefits than to require the injured worker to have to pay to cross-examine defense experts.

Quoting from McNabb v. United States, 318 U.S. 332, 334 63 S.Ct. 608, 87 L. Ed. 819 (1943):

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

Quoting this Court from City of Spartanburg v. Parris, 251 SC 187, 161 SE2d 228 (1968) at SE2d page 229:

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

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

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

Quoting also from Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959):

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

In this case on the 16th, eight days prior to the Hearing on February 24, 2016, Mr. Barr received by mail multiple PHBs and APAs noticing Respondents' intent to submit written documents/ reports as evidence from: 2/12 PHB/APA, Dr. Paul Pritchard, MD, 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 PHBs requested the Record be left open only for the deposition

of Dr. Paul Pritchard. On the 18th in writing with Memorandum of Law 2/19 (R. pp. 1483-1487; 244-261), Mr. Barr objected to the submission of these documents including objections for violations of due process. Mr. Barr in accord with U.S. Supreme Court and this Court's decisions, requested the Commission issue subpoenas, SC Code §42-3-150, to these adverse witnesses to appear so he could exercise his right of cross-examination. No subpoenas were issued.

On the 24th after a pre-hearing conference, the Commissioner instead of holding the Hearing and adjourning it pursuant to WCC Regulation 67-613 to allow Defendants to take depositions within 30 days, to the prejudice of Mr. Barr, cancelled the Hearing. The Commissioner also overruled Barr's objections advising he would admit the reports and that Mr. Barr could exercise his right of cross-examination by scheduling and paying for depositions of Respondents' experts. At the August 31st, 2016 Hearing, all objections made in February and all previous objections were renewed and in addition other objections were made to both the report and deposition of Dr. Paul Pritchard (R. p. 1252). The 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, supra; City of Spartanburg v. Parris, supra.

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 SC 590, 582 SE2d 413 (2003), Brown v. State Board of Education, 301 SC 326, 391 SE2d 866 (1990).

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

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

The U.S. Supreme Court under the Federal APA 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). Majority opinion admitted where Social Security claimant did not request the Administration issue subpoenas to exercise right of cross-examination. Quoting Justice Douglas' dissent (Justices Black, Brennan concurring)

that cross-examination is required regardless of a subpoena request:

> "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**." (Emp. add.).

In Green v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, (1959) holding a 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 Court quoted 5 Wigmore on Evidence (3rd Ed.) 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."

Defendants sought and paid for these alleged expert opinions to deny Mr. Barr his entitlement to benefits under the Workers' Compensation Act. It was their evidence, and it was their burden to pay to have it admitted. While not required by this Court's opinions but knowing about Perales, Mr. Barr sought to exercise

his right to cross-examine these witnesses by requesting the Commission issue subpoenas for these adverse witnesses to appear. Defendants who wanted this evidence admitted and knew prior to Hearing Mr. Barr objected and wanted to cross-examine this evidence 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 under Reg. 67-613(C) could have moved for adjournment of the Hearing. Morgan v. JPS Automotives, 321 SC 201, 467 SE2d 457 (SC App. 1996), cert. granted, cert. dismissed as improvidently granted 326 SC 261, 486 SE2d 263.

II. THE INTERPRETATION OF SCWCC REGULATION 67-612(B) AFFIRMED BY THE COURT OF APPEALS IS AN UNCONSTITUTIONAL VIOLATION OF THE FUNDAMENTAL RIGHT OF CROSS-EXAMINATION, CONTRARY TO THE PROVISIONS OF THE WORKERS' COMPENSATION ACT AND THE COMMISSION'S REGULATIONS SINCE THE INCEPTION OF THE ACT.

Unfortunately, this Court is again called upon to apply and remind all of the fundamental principles that the Act is social legislation enacted primarily for the benefit, protection, and welfare of the injured worker and their dependents. Cokeley v. Robert Lee, Inc. 197 SC 157, 14 SE2d 889 (1941); James v. Anne's Inc., 390 SC 188, 7091 SE2d 730 (2010) (Justice Beatty for the Court); Russell v. Walmart Sores, Inc., 426 SC 281, 826 S.E>2d 863 (2019) (Justice Few for the Court). From the inception of the Act in 1936 through 1992 the statutes and case law provided for the submission of all testimony and evidence with cross-examination either at the Hearing or by taking a de bene esse deposition for submission at the Hearing. [1936 (39) 1231; 1937

(40) 613; 1942 Code §70-35-57; 1952 Code §72-64; 1962 Code §72-50.16; 1976 Code §42-3-160]. In accord from 1992 through 1999 SCWCC 67-612 (F), SC Code Ann. 1976 (eff. 4/24/92), provided for submission 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, that Regulation was reworded simply to be in accordance with SC Code §1-23-330. There was nothing created for a record's submission in derogation of the statutory/ constitutional mandate of the right of cross-examination or of prejudicial documentary evidence. In fact, Reg. 67-612(F) still provides that the parties may "consent" to the submission of documents outside of meeting the other requirements of the section. The due process requirements of our Constitutions have never changed, and a Regulation may not alter or amend a statute or the Constitution. Goodman v. City of Columbia, 318 SC 488, 458 SE2d 531 (1995); Sierra Club v. SCDHEC, 426 SC 236, 826 SE2d 595 (2019). (Justice James for the Court.)

III. THE COURT OF APPEALS ERRED BY ADDRESSING AND THEN NOT ADDRESSING WHETHER DEFENSE EVIDENCE FROM DR. PAUL PRITCHARD WAS OBTAINED AND SUBMITTED INTO EVIDENCE IN VIOLATION OF (A) SC CODE §42-15-95 AND/OR (B) SC CODE §42-15-80.

In its, "Published Opinion", substituted by an "Unpublished Opinion", the Court of Appeals held that Respondents did not

procure the expert opinion evidence of Dr. Paul Pritchard in violation of §42-15-95 or §42-15-80. Then in its "Unpublished Opinion" instead found those issues were not preserved for review. Precatory to first addressing preservation Petitioner must impress upon the Court the devastating effect the "Published" Opinion substituted by an "Unpublished" Opinion is having on the rights of injured workers in this State. This situation brings to mind, two maxims: "a card laid is a card played" and "you cannot un-ring the bell". The Published Opinion is being used to excuse/justify non-compliance by defendants with the mandatory protections of §42-15-95 and to excuse compliance with having medical evaluations under §42-15-90 conducted at reasonable times and places.

These issues were preserved for review. The Court Panel - they were then they weren't? In its Unpublished Opinion (arguendo issued to dodge or not to have to address a "Published" wrong decision) on the issue in its Published Opinion, the Panel struck two sections addressing these issues and hung its decision that these issues were not preserved for appeal on a partial quotation from Counsel's position statement:

> "outside of that, we don't have any objection to the APA Submissions". (R. p. 1258, ll. 24-25.)

Petitioner would first ask the Court to look at Petitioner's Counsel's entire statement in reference to objections and prior objections that had been made and his reference to preserving all prior objections made and his disagreement with but

submission to the prior rulings by Commissioner Beck on admission of that evidence into the Record. Found at p. 1257, l. 25 - p. 1258, l. 21. The Opening Statements of Counsel for both parties were extensive on the Record and repeatedly refer to the extensive off-the-Record conference held prior to the Hearing. Please review pp. 1255-1269, l. 16.

> Next, on preservation on the Record the Commissioner: "Without further objection, the Commission File becomes a part of the Record with the exception of self-serving declarations and unstipulated medical reports ...." (Emp. add.). (R. p. 1261, ll. 3-6).

Part of the Commission File/Record is the Writs of Prohibition and Mandamus Complaint Petitioner filed to prevent Defendants from sending him to Charleston for evaluation by a psychologist, not a medical doctor, in violation of SC Code §42-15-80. Petitioner argued such evaluation was not at "reasonable times and places" which this Court has always interpreted to mean within the vicinity where the worker lives. (R. pp. 112-197). After Temporary Restraining Order restraining such evaluation (R. pp. 6-10); as part of agreement with the Commission to dismiss the Writs and return jurisdiction to the Commission a Motion for Reconsideration was filed/granted and the Order clearly stated the medical evaluation had to be at reasonable times and places. (R. pp. 201-207). Commission Counsel, A. Camden Lewis, Esquire, letter, R. p. 1480.

Next, Preservation in File/Record - letters from Petitioner, R. pp. 1481-1487, noting objections pursuant to SC

Code §42-15-95, §42-15-80, and asking that Commission issue subpoenas to preserve Petitioner's right of cross-examination for records to be admitted requiring Defendants to take de bene esse depositions of their experts. Preservation in File/Record - Memorandum of Objections at p. 244 through p. 261, and specifically at pp. 255-258 wherein Petitioner reiterated his objections based on SC Code §42-15-95 and went over that objection in detail as to the submission of both a letter and a 3-inch stack of records to Dr. Pritchard without those being provided to Petitioner in violation of §42-15-95. Further, in a letter (R. at pp. 215-216) Petitioner again reiterated objection to evaluation by Dr. Pritchard on the basis it was not at reasonable times and places as required by §42-15-80.

Finally, Preservation in File/Record - in Dr. Pritchard's deposition Petitioner noted an extensive objection would be made at end of examination. (R. p. 1077). Then at p. 1167, l. 2 - p. 1168, l. 12; and p. 1169, ll. 16-19; and p. 1170, ll. 4-23, Petitioner went over defense contact with and submission of records to the doctor without notification to Petitioner in violation of §42-15-95; stated an extensive objection to evaluation and testimony of Dr. Pritchard; and noted specific due process objection by denying Petitioner the right of confrontation/cross-examination prior to the hearing which should have gone forward in February.

Petitioner would submit the issues were preserved and

should have been addressed by the Panel in the substituted Unpublished Opinion. Query: these preservations are in the Record and were copiously addressed in Appellant's Brief, so what logical reason can be put forth to explain the Panel not addressing this?

As for SC Code §42-15-95 and failure of compliance with its mandatory prior notice provisions, following the February 2nd evaluation, two days later on February 4th Mr. Barr received a 3" stack of medical records provided to Dr. Paul B. Pritchard on December 8th, 2015.

In his written objections and Memorandum of Law of February 18th the summary of facts concerning the scheduling and first contact with Dr. Pritchard on December 8th, 2015 being made without notice; no notice of any records being provided until January 19th; and no records until February 4th was set out and Dr. Pritchard's report was objected to and sought to be excluded based on violation of SC Code §42-15-95. (R. pp. 1483-1484). The December submission of records and letter to Dr. Pritchard was confirmed at his deposition. (R. p. 1167, ll. 2-23).

SC Code §42-15-95(B) provides that a health care provider who provides, "examination" or treatment under the Act, may communicate with defendants on certain specified issues without the employee's consent.

However, statute mandates that the employee **must** be (B):

(1) "**notified** that the ... communication **is going to take place** and this notification **"must occur prior to the ... communication"**; or

(2) advised of the nature of the discussion or communication, "**prior to the discussion or communication**"; or

(3) "provided with a copy of the written questions **at the same time the questions are submitted to the healthcare provider**."

The employee must be provided a copy of the provider's response. Dr. Pritchard's February 2nd report was not received by Mr. Barr until February 16th when submitted as Defendants' APAs.

The statute then mandates that:

"(C) 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."

Defendants without telling Mr. Barr communicated with Dr. Pritchard on December 8th by writing and sending Dr. Pritchard 3" of records for review. Mr. Barr had no knowledge of Dr. Pritchard being contacted until January 19th and no records until February 4th. Commissioner Beck ruled the report was coming in and the Commission and Defendants cannot "un-ring the bell" and bootstrap compliance by allowing and taking a deposition after Defendants had violated the statute. State-Record Co., Inc. v. State, 332 SC 346, 504 SE2d 592 (1998).

The issue was preserved, and Defendants having violated this section, the evidence from Dr. Pritchard should have been excluded by the Commission. The decisions by the Court of Appeals in both its Published and Unpublished Opinions are wrong requiring Certiorari to be granted and these errors reversed by this Court.

As to the violation of SC Code §42-15-80, the evaluation must be at "reasonable times and places" which this Court has interpreted to mean the area in which the claimant lives barring a showing of just cause. Singleton v. Young Lumber Co., 236 SC 454, 114 SE2d 837 (1960).

Mr. Barr's fight from November through February to simply require Defendants to have the evaluation performed by any local physician and Defendants' delay in having an evaluation only performed in February is detailed in the Record, Briefs and Petition for Rehearing. 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. Subsequently the Commissioner based its decision almost entirely on Dr. Pritchard/Dr. Eagerton opinions.

Mr. Barr has never questioned Defendants' right to an examination under SC Code §42-15-80 as long as it is in accordance with that Code section which 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".

In Singleton v. Young Lumber Co., supra, where the claimant lived in Georgetown and the defendants sought an examination in Charleston, and where the Commission found there were qualified physicians or surgeons in Georgetown area to perform the evaluation, this Court held the Commission should not order and the claimant was justified in not attending the examination set

for Charleston. In this case, Mr. Barr lives in the Florence area and Defendants made no showing and the Commission made no findings there were no qualified physicians in the area. The Commission erred as a matter of law by ordering Mr. Barr to attend the evaluation in Charleston and then basing its decision on that evaluation. The Court of Appeals erred in affirming that decision based on the Act and this Court's prior decisions, requiring certiorari to be granted.

IV. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY AFFIRMING THE DECISION OF THE COMMISSION DENYING MR. BARR THE 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 caused to become symptomatic by his exposure to the workplace commercial paints. Where there is no substantial evidence on an essential issue for decision by the Commission, the decision of whether the Petitioner is entitled to benefits constitutes a matter of law for decision by the Courts. Clemmons v. Lowes Home Centers, Inc., 420 SC 282, 803 SE2d 258 (2017). The substantial evidence in the Record on the essential issue is copiously set out with specific Record citations in the Petitioner's Brief to the Court of Appeals in the Statement of Fact (pp. 11-16; pp. 21-24) and under Argument VI. (pp. 40-46). However for purposes of this request for a grant of certiorari two points of uncontradicted evidence call for certiorari to be granted.

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 he has been under continual treatment ever since for severe headaches.

On May 21st, 2015, Dr. White issued the opinion that his headaches, fatigue and memory problems were being caused by his exposure to VOCs in the commercial paints. (R. pp. 285, 354, 481). All treating neurologists, Dr. White, Dr. Healy and Dr. Skinner concur Mr. Barr suffers from severe chronic headaches. Dr. Pritchard agreed Mr. Barr's history is consistent with the diagnosis of, "chronic daily headache" but expressed no opinion on a causal relationship. Dr. Healy and Dr. White both stated the opinion that Mr. Barr's headaches were caused by his exposure to the VOCs in the commercial paints at work. There is not one medical opinion contained in the Record as to the cause of his chronic headache condition other than the opinions of Dr. White and Dr. Healy. The Court of Appeals and Commission cannot ignore the unanimous opinion of medical experts on the cause of his chronic headaches. Herndon v. Morgan Mills, Inc., 246 SC 201, 143 SE2d 376 (1965).

Not only is the Court of Appeals' 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 SC 65, 731 SE2d 303 (2012).

Certiorari should be granted and this Court as a matter of law should review the evidence and award benefits.

V. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY AFFIRMING THE DECISION OF THE COMMISSION WHERE THAT DECISION WAS BASED ON THE OPINION OF DR. EAGERTON, PH.D.

Dr. Eagerton's report served as the pivotal basis for the Commissioner's decision quoting 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 is a Ph.D., not a medical doctor. It is the unauthorized practice of medicine and beyond his "alleged" credentials as an expert for him 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 SC 447, 593 SE2d 603 (2004). The Court of Appeals erred as a matter of law and certiorari should be issued on this issue.

VI. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY AFFIRMING THE COMMISSION'S DECISION DENYING BENEFITS TO MR. BARR WHERE THE COMMISSION FAILED TO MAKE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON AN ESSENTIAL ISSUE AS IS REQUIRED BY THE STATUTE AND CASE LAW.

Mr. Barr 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 he

was not at maximum medical improvement (R. p. 1496, #2). This essential issue is nowhere addressed in Commissioner Campbell's Notes for Decision. This was brought to his attention in Mr. Malloy's January Request for Reconsideration and after in the first proposed Order. Defendants quickly submitted a second proposed Order, without any further findings by the Commissioner, making findings and conclusions on that essential issue. There is absolutely nothing in the Record to indicate those findings were those of the Commissioner and in fact are simply nothing more and nothing less than findings made by defense counsel.

Under statutory law, SC Code §42-9-5 and under the decisions of this Court such as Drake v. Raybestos-Manhattan, Inc., 241 SC 116, 127 SE2nd 288 (1962) it is the "**duty of the Commission**" to make detailed findings of fact and conclusions of law. Where the Commission, not defense counsel, does not make detailed findings of fact and conclusions of law on an essential issue for decision, 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 SC 366, 234 SE2d 21 (1977).

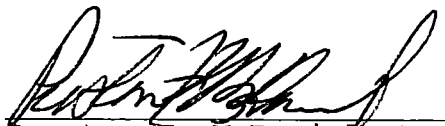
Commissioner Campbell simply did not make detailed findings of fact and conclusions of law on an "essential issue" for decision; and having not done so, Respondents cannot be allowed

to simply fill in the blanks. (R. pp. 1507; 1508-1510). Certiorari should be granted to review this issue.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari on all issues and specifically the denial of due process and the statutory and regulatory violations that occurred. The right of cross-examination is of fundamental importance to all workers in our State, present and future, who have sustained severe injuries and all workers in reference to their constitutional right to confront and cross-examine their accusers. Requiring an injured worker to pay thousands of dollars to exercise his right of cross-examination of a defense expert will have devastating effects on them and their families and more will become charges on society. Cokeley v. Robert Lee, Inc., supra.

Respectfully submitted,



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Attorneys for Petitioner

September 24, 2021

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2021-UP-306
(SC Ct. App. heard February 2, 2021 - filed
April 7, 2021; formerly Opinion No. 5815
Withdrawn, Substituted, and Refiled August 25, 2021)

Kenneth L. Barr, Claimant, ...Petitioner,

v.

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

PROOF OF SERVICE

I hereby certify that I have served the **PETITION FOR WRIT OF CERTIORARI** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to its Attorney of Record: Kirsten Leslie Barr, Attorney at Law, Trask & Howell, LLC, Post Office Box 2167, Mt. Pleasant, SC 29465.

Dated: September 24, 2021

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Proudly representing injured workers for over 35 years.

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September 24, 2021

HAND DELIVERED
The Honorable Patricia A. Howard
Clerk of Court
SC Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Kenneth L. Barr v. Darlington County School Dist.
SC Court of Appeals Case No. 2018-001237

Dear Ms. Howard:

Please find attached the original and two (2) copies of my Petition for a Writ of Certiorari for filing with the Court in regard to the above referenced matter, along with the required $250.00 filing fee. I would appreciate your returning the clocked-in copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving the Court of Appeals and Counsel for Defense with a copy of same.

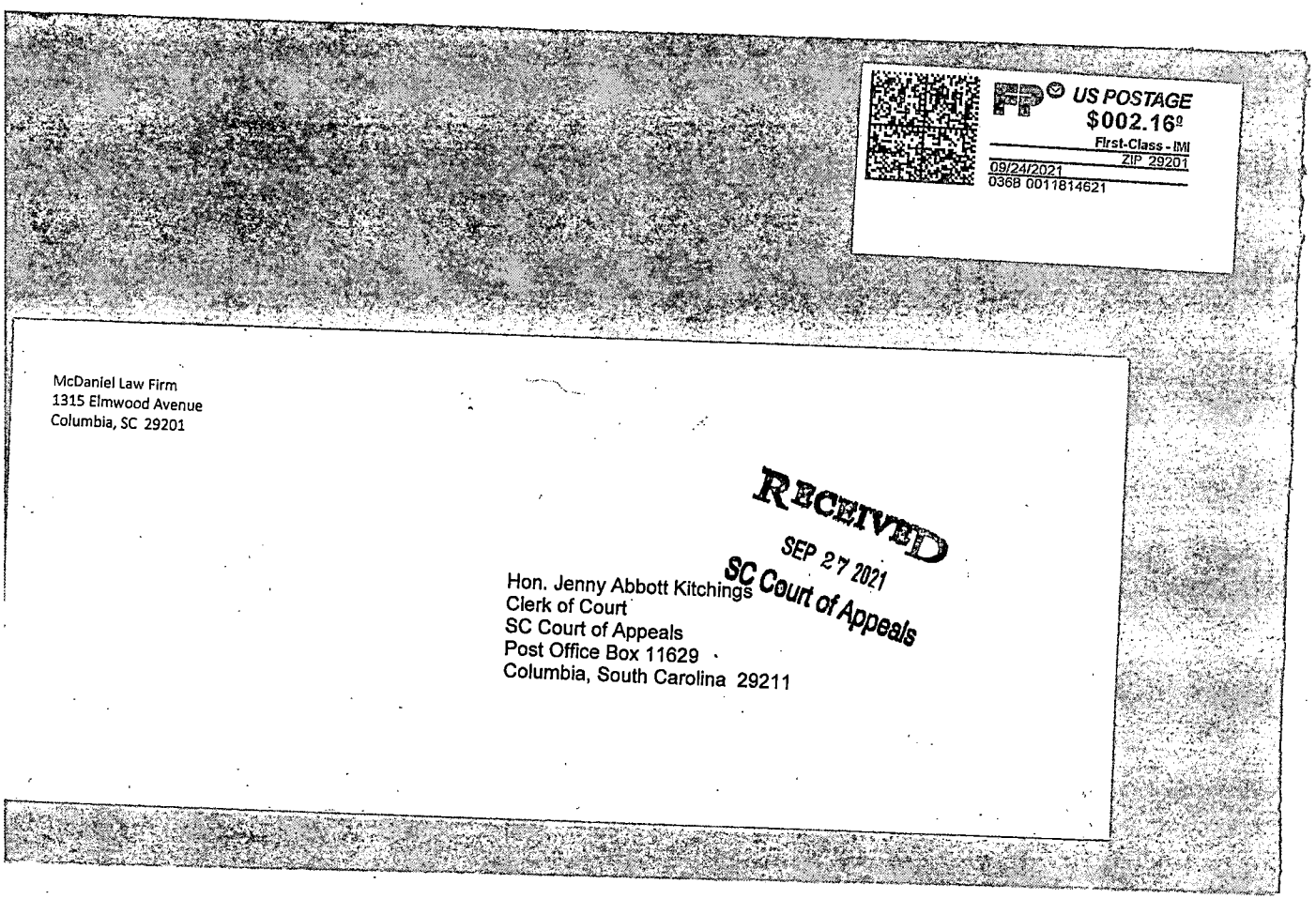
I hope this is sufficient for filing with the Court; however, if you require anything further, please do not hesitate to contact me.

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: Gerald Malloy, Esquire
Kirsten L. Barr, Attorney at Law
Jenny Abbott Kitchings, SC Court of Appeals ✓



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SEP 27 2021
SC Court of Appeals

Hon. Jenny Abbott Kitchings
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