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**Oct 08 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Appellate Panel of the South Carolina Workers' Compensation Commission

R. Michael Campbell, II; Avery B. Wilkerson, Jr.; Aisha Taylor  
South Carolina Workers' Compensation Commissioners

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Case No. 1614297  
Appellate Case No. 2021-000669

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Kenneth D. Christian,

Appellant,

v.

SEW-EURODRIVE, Inc. and  
Great American Alliance Insurance Company,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## ARGUMENTS

**I. Respondents' argument that the Appellate Panel's Order did not contain the error present in its Order Instructions is evasive to the gross mischaracterization of evidence.**

In response to the gross mischaracterization of the evidence in the Appellate Panel's Order Instructions as discussed in Appellant's Initial Brief, Respondents' respond as follows: "The order that was signed by the Appellate Panel did not include the error that was present in the order instructions."

First, Respondents' attempt to downplay the significant error in the Appellate Panel's Order Instructions by stating that the same error was not included in the order signed by the Appellate Panel. This is dismissive of the essential reasoning of the Appellate Panel's reversal of the Single Commissioner due to "the two South Carolina physicians who had an opportunity to evaluate the [Appellant] in person as well as [Appellant's] workplace." The same demonstrates a complete misunderstanding of the evidence by the Appellate Panel, as not only was the evidence not in the record, the evidence simply did not exist

Finally, the order signed by the Appellate Panel did not contain the aforementioned error, which was the linchpin of the Appellate Panel's reasoning, because counsel for Respondents had to meticulously draft the order to avoid the reason given by the Appellate Panel for its reversal and conceal the true reasoning for the overturning of the Order of the Single Commissioner by the Appellate Panel. Instead, counsel for Respondents had to draft the order by rejecting the opinions of pulmonologists and by giving great weight to a non-board certified family doctor in a medically-complex lung case.

## **II. Respondents' arguments are based purely on surmise, conjecture, and speculation.<sup>1</sup>**

As part of their Initial Brief, Respondents assert that the Decision & Order of the Appellate Panel should be affirmed because (1) Appellant's condition worsened; (2) Appellant has a significant family history of lung problems and there are multiple other causes to Respondent's lung condition; and (3) Appellant was only exposed to a minimal amount of solder at work. As such, Respondent's arguments are based on casting doubt unto the finder of fact and seem to confuse the Commission's standard of proof with that of a criminal court.

### **A. Appellant's condition worsened.**

Respondents contend that Appellant's work is not the most probable cause of his lung condition because his disease worsened after leaving the work environment. As support, Respondents rely on the opinion of one of their experts, Dr. Early. In addition to the weaknesses of Dr. Early's opinions as discussed in Appellant's Initial Brief, together with the contention that Appellant's condition should have improved following removal from the work environment, below are excerpts from an article submitted by Respondents at the hearing before the Single Commissioner:

- Pneumonitis can cause permanent lung damage if you don't catch it early enough
- Symptoms include tightness in chest; dry cough; unintentional weight loss
- Chemicals are a cause
- Your genes play an important role in triggering your reaction
- Lung biopsy is a test to diagnose
- Although you should avoid triggering substances, once you have lung scarring, it is not reversible

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<sup>1</sup> See *Burnette v. City of Greenville*, 401 S.C. 417 (Ct. App. 2012) ("...a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.").

See Pneumonitis Article.

**B. Appellant’s family history and other potential causes.**

In response to Respondents’ laundry list of speculative and baseless “what ifs,” Appellant sets forth the following:

<b>Theory of Respondents</b>	<b>Evidence</b>
Landscaping (Hr. Tr. p. 30, ll. 12-17)	There is no evidence in the record that Appellant’s injuries are linked to landscaping.
Various medications (Hr. Tr. p. 34, ll. 5-7)	There is no evidence in the record that any medication Appellant has taken during his lifetime caused his injuries.
Appellant’s job delivering mail for the Air Force (Hr. Tr. p. 34, ll. 20-23)	There is no evidence in the record that Appellant’s delivering of mail in the Air Force caused his injuries.
Prior work in electronic world (Hr. Tr. p. 37, ll. 4-6)	There is no evidence in the record that Appellant’s past work caused his injuries. In fact, Appellant testified he never had any lung issues while working these jobs (Hr. Tr. p. 92, ll. 3-6)
Appellant’s father & brother died of lung cancer (Hr. Tr. p. 47, ll. 10-15; p. 51, ll. 21-25).	Appellant’s father & brother were smokers. (Hr. Tr. p. 47, l. 25-p. 48, l. 1; p. 51, ll. 21-25). Appellant has never smoked and his diagnoses/injuries do not include lung cancer.
Appellant’s other brother dies from occupational lung disease (Hr. Tr. p. 52, ll. 1-3).	Appellant’s brother was a welder and also worked around chemicals (Hr. Tr. p. 25, ll. 10-13).
Asbestos and other toxic materials in Appellant’s homes (Hr. Tr. p. 54, ll. 15-18; p. 65, ll. 17-19).	There is no evidence in the record that Appellant’s homes are/were infected with asbestos or other toxic materials.
Woodworking (Hr. Tr. p. 58, ll. 23-25).	Appellant would help his wife with craft projects. (Hr. Tr. p. 59l, ll. 10-14). There is no evidence that Appellant’s injuries are linked to woodworking.
Pesticides (Hr. Tr. p. 60, ll. 3-4).	There is no evidence in the record Appellant’s injuries were caused from routine treatment of his house by pesticides.
Appellant’s dog (Hr. Tr. p. 60, ll. 19-24).	There is no evidence Appellant’s injuries were caused by his dog.
Gas logs (Hr. Tr. p. 21, l. 13).	There is no evidence in the record that Appellant’s injuries were caused by gas logs.
Appellant’s wife’s quilting & sewing (Hr. Tr. p. 63, ll. 9-10; p. 63, ll. 18-19).	There is no evidence Appellant’s injuries were caused by his wife’s quilting and sewing hobbies

Appellant's sinus surgery (Hr. Tr. p. 91, l. 25-p. 92, ll. 1-2).	Appellant was working for Employer at the time of his sinus surgery (Hr. Tr. p. 91, l. 25-p. 92, ll. 1-2).
Home renovations (Hr. Tr. p. 92, ll. 7-13).	There is no evidence in the record that Appellant's injuries were caused by renovations to his home. In fact, Respondent moved into his home only after renovations were complete (Hr. Tr. p. 92, ll. 7-13).

It should be noted that although Respondents seek to raise the foregoing issues, they failed to provide or otherwise offer any evidence or proof that any of these caused or even contributed to Appellant's bilateral lung disease. These numerous items that Respondents list to desperately try to find another cause of Appellant's lung condition becomes beyond any reason or rationale. It truly does come to the point where one wonders why Respondents did not blame the lung disease on the work Appellant did **not** do in the coalmines during his youth; or perhaps, it was the **nonexistent** trip through West Virginia when he inhaled coal dust that breached the windows of the family station wagon.

In addition to the foregoing, Respondents further rely upon the opinions of another one of their experts, Dr. Mitsos and, again, the opinions of Dr. Early. Having said that, Respondents' illustration of these opinions is not complete:

First, Dr. Mitsos agrees with the HP diagnosis, but does not link it to solder. His opinions are clearly wrong.

Second, Dr. Mitsos also concurs in the HP diagnosis, which provides even more support of Appellant's treating physician, pathologists and expert witnesses, as well as Respondents' expert witness.

Third, Dr. Mitsos opines that Appellant's first reported symptoms of shortness of breath were related to his heart attack. While that may be true, *see* Internal Medicine Journal Article, wherein a study has shown that risk for heart attack is 17 times higher in the first seven days after

a respiratory infection. Appellant's first report of shortness of breath occurred on May 18, 2001. Appellant had a heart attack on May 26, 2001.

Fourth, Dr. Mitsos further uses the fact that Appellant was exposed to the solder for 30 years before any symptoms arose to support his opinions. However, there is no evidence that Appellant had to develop symptoms from the first moment of first contact with solder. There is no evidence that Appellant could not have been affected by the solder after years of exposure. There is also no evidence that one cannot become more sensitive to allergens as they age.

Fifth, Dr. Mitsos tried to link Appellant's HP to Aspergillus and mold. However, Respondents' expert, Dr. Early, testified Appellant could have tested positive for Aspergillus but the same not be active. (Early Dep. Tr. p. 27, ll 5-6) and that Appellant's Aspergillus test could have been a false positive. (Early Dep. Tr. p. 27, ll 8-9).

Finally, to the extent the Appellate Panel based any of its decision on Appellant living with mold, the record is clear that Appellant's home does not have elevated levels of mold (*see* Mold Inspection Report) and there is no evidence that Appellant's home was exposed to mold prior to the date of the mold test.

**C. Appellant was only exposed to a minimal amount of solder.**

In alleging that Appellant was only exposed to a minimal amount of solder at work, Respondents rely on the testimony of Wade Blackwell and Rickey Jones. Respondents' illustration of that testimony is incomplete, as more fully discussed in Appellant's Initial Brief. In addition, and as the Single Commissioner pointed out, Respondents could have provided Appellant's entire workflow history; however, they only put forth a "snapshot in time" from 2006, some ten (10) years before the alleged date of injury. *See* Order of Single Commissioner.

**III. Respondents' argue that Appellant's experts do not take into account Appellant's family history of lung problems.**

Respondents contend that Appellant's experts failed to investigate and/or address Appellant's family history of lung problems because the reports do not mention the same. There is no evidence that Appellant's experts did not consider Appellant's family history. Respondent's had ample opportunity to depose Appellant's experts to address these concerns. In fact, Respondents scheduled depositions and then canceled them. Respondents cannot now "put words in the mouths" of Appellant's experts of whom they chose not to depose.

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that the Decision & Order of the Appellate Panel of the South Carolina Workers' Compensation Commission be reversed.

RESPECTFULLY SUBMITTED,



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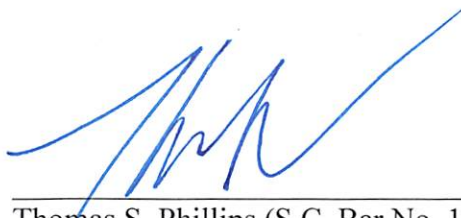
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**PROOF OF SERVICE**

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I certify that I served the Reply Brief of Appellant on Respondents on October 8, 2021, by electronic mail and addressed to Respondents' attorney of record, Benjamin M. Renfrow, Willson Jones Carter & Baxley, P.A., [bmrenfrow@wjcblaw.com](mailto:bmrenfrow@wjcblaw.com).

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**VIA ELECTRONIC MAIL**

Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: Kenneth D. Christian v. SEW-EURODRIVE, Inc., et al.  
Case No. 1614297  
Appellate Case No. 2021-000669

Dear Ms. Kitchings:

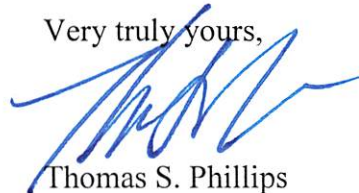
Enclosed are the following documents:

1. Reply Brief of Appellant;
2. Amended Designation of Matter to be Included in the Record on Appeal;
3. Certificate of Counsel; and
4. Certificate of Service.

Should you have any questions or concerns, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,



Thomas S. Phillips

TSP/pmh  
Enclosures

cc: Ms. Carol A. Christian  
Benjamin M. Renfrow, Esq.