THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

WCC Case No. 1614297
Appellate Case No. 2021-000669

Kenneth D. Christian, Employee, ...Appellant,

v.

SEW Eurodrive, Inc., Employer,
and Great American Alliance
Insurance Company, Carrier, ...Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Mr. Kenneth Christian (the "Appellant") began working with SEW Eurodrive, Inc. ("SEW") in September of 1983 in the maintenance department. (R. p. 157, lines 5 – 11). After approximately eight or nine years, Appellant moved to the assembly molding department within SEW. (R. p. 157, lines 12 – 17). A portion of Appellant's job duties in the molding department included soldering. (R. p. 157, line 18 – p. 158, line 1). Appellant testified that he started experiencing coughing and symptoms with his lungs in the early 2000s. (R. p. 162, lines 3 – 9). Thereafter, Appellant, on his own, began receiving medical treatment for the symptoms in his lungs. Appellant was eventually diagnosed with hypersensitivity pneumonitis ("HP"). Appellant retired from SEW in December of 2016, allegedly due to his lung condition. In Appellant's deposition that took place on December 13, 2016, Appellant testified that he actually planned to retire from SEW in May of 2017, regardless of whether he had a lung condition. (R. p. 189, line 2 – p. 192, line 3). It is undisputed that Appellant's condition significantly worsened after his retirement from SEW.

On September 28, 2016, Appellant, through counsel, filed a Form 50, claim only, alleging that on September 6, 2016 he sustained an illness/occupational disease to both lungs, as well as depression, from working with chemicals over time. Appellant requested medical examination and treatment for his right lung, left lung, and alleged depression. Appellant argued that a determination of permanent disability was premature at this time. (R. p. 65). The parties participated in mediation on April 22, 2019, which resulted in an impasse.

On October 24, 2019, Appellant, through counsel, filed an Amended Form 50 request for hearing, alleging that Appellant sustained an injury/occupational disease to his bilateral lungs and psyche when he "worked with chemicals which over time caused damage to his lungs." (R. p. 66).

The Form 50 further provides an alleged date of injury of August 26, 2016, and that notice of the injury was given to the employer on September 6, 2016. Appellant alleged entitlement to temporary total benefits for "[a]ll time lost at work," as well as permanent total disability. Appellant further alleged that he has reached maximum medical improvement (MMI), "but retains the option for a bilateral lung transplant." (Id).

On November 25, 2019, Respondents, through counsel, filed a Form 51, denying that Appellant sustained an injury by accident arising out of and in the course of employment. In addition, Respondents asserted the affirmative defenses of failure to meet the two-year statute of limitations to file a claim, failure to give immediate and timely notice of a claim, as well as all defenses and affirmative defenses of Chapter 11 of the South Carolina Workers' Compensation Act (the "Act"). (R. pp. 69 – 70).

A hearing was held on January 24, 2020, before the Honorable Gene McCaskill (hereinafter, the "Single Commissioner"), in Spartanburg, South Carolina, to determine the issues outlined in the parties' Forms 50 and 51. At the hearing, it was Appellant's position that Appellant sustained compensable injures under the Act, and he was entitled to back owed temporary total disability ("TTD") benefits from the date that he left work from "involuntary retirement" until his treating doctor wrote him out of work on November 19, 2018. Appellant further sought a finding that back TTD not be discounted as far as the commuted value. In addition, Appellant alleged entitlement to past and lifetime medical treatment, as well as a finding that Appellant is permanently and totally disabled. (R. p. 150, line 24 – p. 151, line 10).

It was Respondents' position that Appellant did not sustain an injury by accident arising out of and in the course of employment, and that Appellant failed to meet his burden of proving that Appellant's condition was causally related to exposure to solder at SEW. In addition,

Respondents' argued that Appellant failed to give immediate and proper notice under the Act, in addition to the other defenses raised in the Form 51, and Respondents' Form 58 and Continuation Sheet. Thus, Respondents denied that Appellant was entitled to any benefits under the Act. (R. p. 152, line 14 – p. 153, line 16).

Following the hearing, the Single Commissioner issued a Decision and Order, dated July 5, 2020, whereby he found, in relevant part, that: 1) Appellant suffered a compensable work-related occupational disease to his bilateral lungs; 2) The claim was filed timely; and 3) Appellant failed to meet his burden as to a compensable psychological injury. (R. pp. 50 – 64).

On July 17, 2020, Respondents, through counsel, timely filed a Form 30 Request for Commission Review. Decedent passed away on or about October 6, 2020. Oral arguments took place before the South Carolina Workers' Compensation Appellate Panel on October 12, 2020. On June 1, 2021, the South Carolina Workers' Compensation Appellate Panel filed a Decision and Order, reversing the Order of the Single Commissioner, and finding, in pertinent part, that "Appellant failed to prove by a preponderance of the evidence that he sustained an occupational disease, or injury by accident, to his bilateral lungs arising out of and in the course of his employment with Employer on August 26, 2016." (R. pp. 5 – 28).

On or about June 21, 2021, Counsel for Appellant filed a Notice of Appeal, appealing the aforementioned Decision and Order of the Appellate Panel to the South Carolina Court of Appeals.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (2021). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Id. at 135, 276 S.E.2d at 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) (citing Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 590 (1981)). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse or modify if the decision is: "(a) in violation of constitutional or statutory provision; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5) (2021). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). The Full Commission is the ultimate fact finder in workers'

compensation cases. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive." Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). Furthermore, "[t]he weight to be accorded medical opinion testimony is a matter for the Commission." Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 431, 450 S.E.2d 112, 116 (Ct. App. 1994).

ARGUMENT

I. The South Carolina Workers' Compensation Appellate Panel, as the ultimate fact finder, properly reversed the Decision and Order of the Single Commissioner, based on the reliable, probative, and substantial evidence of the whole record.

The Full Commission is the ultimate fact finder in workers' compensation cases. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive." Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). S.C. Code Ann. § 42-1-160(A) provides, in pertinent part: "[i]njury" and "personal injury" mean only injury by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of Chapter 11 of this title. S.C. Code Ann. § 42-1-160 (2021). S.C. Code Ann. § 42-11-10 provides, in pertinent part: "[i]n a claim for an occupational disease, the employee shall establish that the occupational disease arose directly and naturally from exposure in this State to the hazards peculiar to the particular employment by a preponderance of the evidence." S.C. Code Ann. § 42-11-10 (2021).

Here, the reliable, probative, and substantial evidence of the whole record, shows that the Appellate Panel properly reversed the decision of the Single Commissioner. Appellant heavily

relies on the error in the Appellate Panel's order instructions. However, as Counsel for Appellant correctly stated in his brief, the order instructions are not binding on the Appellate Panel. Furthermore, as Counsel for Appellant also stated, the order that was signed by the Appellate Panel did not include the error that was present in the order instructions. Appellant's remaining primary contentions appear to be with the Appellate Panel's decision to give great weight to opinion of Dr. Gordon Early, the only doctor to actually examine Appellant's work environment, and the Industrial Hygiene Sampling Report, which is the only evidence in the record of chemical testing at SEW. However, as indicated above, Appellate Panel is the ultimate fact finder in South Carolina workers' compensation cases. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Furthermore, "[w]hen the evidence is conflicting over a factual issue, the findings of the Appellate Panel are *conclusive*." Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009) (emphasis added). For the reasons provided in this brief, based on the reliable, probative, and substantial evidence of the whole record, the South Carolina Workers' Compensation Appellate Panel, as the ultimate fact finder, properly reversed the Decision and Order of the Single Commissioner, and found that Appellant failed to prove that he sustained an occupational disease, or injury by accident, to his bilateral lungs arising out of and in the course of his employment with SEW.

A. Appellant's condition significantly worsened after he retired from SEW in December of 2016.

The reliable, probative, and substantial evidence of the whole record clearly shows that Appellant's condition significantly worsened after he retired from SEW in December of 2016. At the hearing, Appellant testified that Dr. Justin Gregg, whom Appellant described as a "very smart doctor," advised Appellant that if he went back to work, his lung condition would worsen. (R. p. 191, lines 12 – 16). Allegedly heeding Dr. Gregg's advice, Appellant retired from SEW in

December of 2016. (R. p. 189, line 2 – p. 192, line 3). However, it is worth noting that Appellant previously testified in his deposition that he had already planned on retiring in May of 2017. (Id). Appellant testified that he never returned to SEW after his retirement in December of 2016. (R. p. 226, line 21 – p. 227, line 13). Despite the undisputed fact that Appellant was completely removed from SEW after his retirement, Appellant's lung condition continued to significantly deteriorate. (Id). Dr. Early, in his report from July 26, 2019, addressed this issue and opined as follows:

> The lack of improvement in Mr. Christian's respiratory condition after removal from work argues against a work related causative factor for his HP. One of the characteristics of hypersensitivity pneumonitis (HP) is that it typically gets better when removed from the trigger. If the trigger had been his work related exposures (solder, cleaning materials, and solder removal products) then he should have improved in late 2016 after removal from work. He worsened in late 2016. (R. p. 1112).

Dr. Early reiterated his stance during his deposition. He testified that if Appellant had HP, then he should have gotten better when he moved away from the offending antigen. However, as Dr. Early highlighted, Appellant's condition became significantly worse after he left the workplace, despite steroids. (R. p. 538, lines 11 – 25). Notably, Appellant testified that he was taking BREO and prednisone, because his condition was worsening. (R. p. 179, lines 11 – 19; R. p. 379, lines 16 – 22). Again, this was despite the fact that Appellant had retired from SEW in 2016. At the hearing, Appellant admitted that no doctor told him that he needed to stop working, but that Appellant felt that the doctors felt that his condition might improve if he left the environment. (R. p. 190, line 17 – p. 191, line 22). It is notable that Appellant did not seek to obtain an expert opinion from Dr. Gregg to explain why Appellant's symptoms worsened after he was no longer exposed to solder at SEW. The reliable, probative, and substantial evidence of the whole record shows that, given the fact that Appellant's condition progressively worsened after

his retirement from SEW, exposure to solder at SEW was not the most probable cause of Appellant's current symptoms and complaints regarding his lungs.

B. Appellant's experts failed to investigate and/or address Appellant's significant family history of lung problems.

Appellant's experts failed to investigate and/or address Appellant's significant family history of lung problems. Appellant sought and obtained opinions from Ted W. Simon, Ph.D., and James Lawrence Pearl, M.D. regarding causality, who both opined that Appellant's complaints and symptoms of lung problems are related to exposure to solder at SEW. However, none of Appellant's expert reports mention Appellant's significant family history of lung problems. It is undisputed that Appellant has a long-standing personal and family history of lung problems. Appellant testified that he first began having symptoms with his lungs in the early 2000s. (R. p. 162, lines 3 – 9). Appellant testified that he had a sinus surgery in 2001. (R. p. 173, line 24 – p. 163, line 4). In 2002, Appellant had a heart stent placed. (R. p. 178, lines 2 – 4). Appellant testified that his father passed away from lung cancer. (R. p. 192, lines 4 – 15). Appellant had five (5) brothers. One of Appellant's brothers passed away from lung cancer. Another one of Appellant's brothers passed away from melanoma. Moreover, a third brother died from lung disease. (R. p. 194, line 17 – p. 197, line 3). Notably, Dr. Early testified in his deposition that it is possible that Appellant could have been exposed to whatever caused Appellant's brother's lung disease. (R. p. 535, lines 5 – 15). The failure of Appellant's experts to address this family history is a critical omission.

C. There are multiple other potential causes for Appellant's lung condition.

The evidence shows multiple potential causes for the condition to Appellant's lungs other than exposure to solder at SEW. In his report, dated July 26, 2019, Dr. Early provided the following: "Allergy Partners of the Upstate was concerned enough about fungal exposure to do an

Aspergillus pinprick test. This test came back positive. Aspergillus is a well-known trigger for fungal HP. It is thought to be related to HP in compost exposed workers, hay exposed workers, moldy barley exposed workers, and moldy tobacco exposed workers. This fungus is one of the most commonly known substances mediating HP. In the over 1000 pages of medical records that I reviewed, no one documents the moisture conditions in Mr. Christian's home." (R. p. 1112; emphasis added). Dr. Early further provided in this report as follows: "[t]he medical opinions that I reviewed who opined that he had a work related HP did not discuss his home exposures, his woodworking or his positive Aspergillus pinprick test. I think that it is more likely than not Mr. Christian's work related exposures did not aggravate or contribute to his HP." (R. p. 1113; emphasis added).

Dr. Albert Mitsos also submitted an expert report wherein he opined that medical records failed to demonstrate any evidence to any degree of medical certainty to causally relate Appellant's condition to soldering fumes in the work environment. Dr. Mitsos also addressed Appellant's positive Aspergillus test, and provided the following:

> Eosinophilic reaction is consistent with hypersensitivity or allergic response to an antigen. However, the only positive antigen found was Aspergillus without antibodies. This antigen/antibody profile implies that Mr. Christian had been prior exposed to Aspergillus but no longer was mounting a reaction via antibody response. This is also consistent with hypersensitivity interstitial pneumonitis secondary to Aspergillus. Mr. Christian has demonstrated a positive skin test to mold… (R. p. 1125). Mr. Christian, while he suffers hypersensitivity interstitial pneumonitis which can be secondary to many antigens has not demonstrated an antigenic reaction to the soldering mold and thus, has never demonstrated any evidence which would relate his condition to the soldering mold. (R. p. 1126).

Dr. Early highlighted that soldering is not in the top 100 causes for HP, and, further, that HP can be an idiopathic disease. (R. p. 533, line 7 – p. 534, line 1). Moreover, Dr. Feldman

testified in his deposition that Appellant's condition could have stemmed from something that he was exposed to 20 or 30 years ago, and is just now manifesting itself. (R. p. 469, lines 4 – 17).

Other factors to consider regarding Appellant's condition are: 1) Appellant's previously listed hobbies of woodworking and landscaping; 2) Appellant's use of pest control spray in his home without inquiring about the chemicals that were used; 3) the dog that Appellant had living with him; 4) the fact that Appellant previously used gas logs, and has since gotten rid of them because they aggravated his condition and bothered his wife; 5) the fact that Appellant testified that he lived in his current house for over nine years, which was built in the 1940s; and 6) the fact that Appellant testified that he never had any mold testing done at his prior home at 109 Briar Park Drive. (R. p. 156, lines 16 – 19; R. p. 199, line 8 – p. 210, line 20). Appellant also admitted that cutting the grass aggravated his condition. (R. p. 201, line – p. 202, line 14). Appellant admitted that he worked in the electrical field for a number of years prior to working for SEW. However, he testified that he never inquired as to whether or not he could have been exposed to dangerous or toxic materials at any of his previous jobs, which included employment at Charleston Air Force Base, Pet Dairy Company, Platt Saco-Lowell, Marquette Metal Products, and National Water Lift in Beaufort (where he worked on a missile guidance system). (R. p. 182, line 4 – p. 184, line 10). Moreover, it is notable that Appellant testified at the hearing that his symptoms were worse in the mornings and evenings, even though he previously worked the day shift at SEW. (R. p. 216, lines 16 – 24). It is notable that Appellant admitted that his symptoms were worse during times when he was not exposed to solder at SEW.

D. <u>The evidence shows that Appellant was exposed to only a minimal amount of solder at SEW.</u>

Appellant testified that he would sometimes solder about two or three hours per day. However, the evidence shows that Appellant was only exposed to a minimal amount of solder.

Wade Blackwell is production manager/safety manager at SEW, who has worked at SEW for nearly 20 years. (R. p. 242, lines 13 – 15). Mr. Blackwell testified that SEW has five (5) plants in the United States of America, and Mr. Blackwell was not aware of anyone ever complaining of lung problems related to exposure at work. (R. p. 243, line 22 – p. 244, line 24). Mr. Blackwell even spent at least two or three years working in the same lab as Appellant, and performing the same job as Appellant. (R. p. 242, line 16 – p. 243, line 3). When describing the amount of time that was spent soldering in the lab, Mr. Blackwell testified "[y]ou wouldn't use hours. You would use minutes." (R. p. 245, lines 6 – 13). He went on to explain that the electronic lab was never a for-profit business entity within the company, and it is not economical for someone to be soldering for three hours per day. He further testified that an employee would be admonished for soldering for three hours per day, because this would be wasting company money. (R. p. 245, line 15 – p. 247, line 8).

To further illustrate the amount of time that is actually spent soldering at SEW, Mr. Blackwell obtained the log showing the amount of work Appellant performed in a week in 2006. Mr. Blackwell made it clear that this was just one sample "snapshot" that was pulled from his computer, and if asked by Appellant, his counsel, or his experts, Mr. Blackwell could have provided his entire work history. However, Mr. Blackwell was never asked to do so. The log shows that there were twenty-one repairs done over a 6 day work week, and only four of the twenty-one repairs required soldering. To further illustrate amount of soldering, or lack thereof, that was done at SEW, Mr. Blackwell testified that only fifteen rolls of solder were ordered from 2000 throughout the time that Appellant continued to work with SEW. Moreover, he testified that "[p]robably more of that solder walked off or it wound up in the trash can than what we used…" (R. p. 247 – p. 254, line 21).

Mr. Blackwell further testified that as soon as Appellant claimed that he was having the lung problems at issue, SEW hired Palmetto EHS, LLC, an industrial hygiene company to conduct a study. (R. p. 254, line 22 – p. 257, line 15). On March 17, 2017, Palmetto EHS, LLC conducted industrial hygiene sampling for various chemicals at SEW. (R. pp. 1134 – 1253). The following materials were sampled: acetone, antimony, copper, ethanol, hexane isomers, isopropyl alcohol, methanol, 1 methoxy-2 propanol (PGME), n-Hexane, n-Propyl Acetate, pentane, silver, and tin. "The results of the chemical sampling indicated that all of the chemical samples were below the respective Permissible Exposure Limits (PELs) established by the Occupational Safety and Health Administration (OSHA), as well as below the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLVs) and Short Term Exposure Limits (STELs)." (R. p. 1137). Mr. Blackwell testified that nothing revealed in the industrial hygiene study gave him cause for concern. (R. p. 257, lines 6 – 15). Mr. Blackwell described the lab that Appellant was working in as being a very generous size room, with high ceilings, and proper ventilation. (R. p. 257, line 16 – p. 259, line 18).

Appellant's experts did not come to SEW to observe the work environment. Furthermore, Appellant testified that he never took the hygiene study to Dr. Gregg, Dr. Bolton, or Dr. Payne. (R. p. 223, line 25 – p. 224, line 23). Dr. Early testified in his deposition that he was unaware of any names or statistics about any other employee in the employer's history that suffered from HP related to solder exposure. (R. p. 535, line 25 – p. 536, line 11). Unlike Appellant's experts, as well as Dr. Leonard Cochrane (whom the Single Commissioner gave the greatest weight), Dr. Early actually visited SEW to examine the work environment. (R. p. 1107). Dr. Early's report from July 26, 2019 provides the following:

> The products Mr. Christian was exposed to in soldering were primarily inorganic products. The soldering flux was inorganic.

> The soldering pen was inorganic. Additionally, Mr. Christian was repairing 3-4 units per day for 220 workdays per year. Of these 660-880 units per year, it was estimated about half required soldering. Even if he never used his ventilation suction fan, the amount of solder fume exposure would have been rather minimal in my opinion. (R. p. 1112).

The substantive evidence clearly shows that Appellant was only exposed to a minimal amount of solder while working at SEW.

E. There is no evidence that any employees of SEW have ever sustained a work-related lung injury due to exposure to solder fumes and/or other chemicals at SEW.

During the hearing, Appellant testified that he was not aware of anyone that worked in the lab at SEW who ever complained of having lung problems from exposure to solder or other chemicals at SEW. (R. p. 185, line 15 – p. 189, line 1). This testimony is consistent with the hearing testimony of Wade Blackwell and Rickey Jones. Mr. Blackwell, who is currently employed as a purchasing manager and safety manager, actually worked two or three years alongside Appellant in the lab. As indicated above, Mr. Blackwell testified that he knew of people who worked at SEW for thirty (30) years or more, and he was unaware of anyone ever complaining of lung or respiratory issues, in or outside of the lab, across SEW's five (5) plants across the country. (R. p. 243, line 22 – p. 244, line 24). Rickey Jones is employed with SEW as an environmental health and safety coordinator, and he has worked with SEW for approximately thirteen (13) years. (R. p. 273, lines 7 – 20). Consistent with the testimony of Appellant and Mr. Blackwell, Mr. Jones testified at the hearing that he was not aware of anyone that has worked at SEW that has complained of lung problems. (R. p. 283, line 20 – p. 284, line 21). Mr. Jones further testified that either he or Mr. Blackwell is to be notified in the event of an accident. (R. p. 284, lines 2 – 14). Furthermore, Appellant did not produce any evidence that any other SEW employees, current or former, ever complained of any problems with their lungs or respiratory

system. Therefore, no evidence was submitted at the hearing showing that any employee of SEW, other than Appellant, ever complained of lung or respiratory problems due to solder fumes and/or other chemicals at SEW.

F. The Appellate Panel of the South Carolina Workers' Compensation Commission did not err by giving great weight to Dr. Gordon Early, an expert toxicologist with over 20 years of experience.

Counsel for Appellant erroneously describes Dr. Early as simply a "family doctor." Counsel for Appellant's characterization of Dr. Early is self-serving at best, and it is a gross mischaracterization of Dr. Early's qualifications. Appellant's Counsel dwells on Dr. Early not being board-certified. However, even a cursory review of Dr. Early's curriculum vitae (CV) shows that he has extensive experience in toxicology, and he is qualified to provide expert opinions in this field. (R. pp. 1116 – 1122). Dr. Early's CV indicates he has experience in toxicology and occupational medicine that dates back to the mid-1990s. (Id). The CV further indicates that he was South Carolina's first Board Eligible Medical Toxicologist. (R. p. 1119). At the time of his deposition, he was board-eligible in occupational medicine, preventive medicine and toxicology. (R. p. 504, lines 10 – 12). Dr. Early's qualifications speak for themselves, and he was certainly qualified to provide an expert opinion regarding occupational medicine and medical toxicology in this matter.

Counsel for Appellant also failed to reference that Dr. Early, as opposed to Appellant's experts, actually visited the lab at SEW where Appellant worked. Dr. Early analyzed the lab, and reviewed the amount of solder that had been ordered over the previous fifteen (15) years. (R. p. 1107; R. p. 507, lines 8 – 13). He also reviewed the safety data sheets ("SDSs") for the products that had been used for the previous fifteen (15 years). (R. p. 507, lines 10 – 13). After reviewing Appellant's voluminous medical records, solder roll orders from SEW from 2000 to 2019, as well

as several SDSs, Dr. Early ultimately opined, to a reasonable degree of medical certainty, that it was more likely than not that Appellant's work-related exposures did not aggravate or contribute to his HP. (R. pp. 1106 – 1115). Dr. Early noted that "[o]ne of the characteristics of HP is that it typically gets better when removed from the trigger… [and] [i]f the trigger had been his work related exposures (solder, cleaning materials, and solder removal products) then he should have improved in late 2016 after his removal from work. He worsened in late 2016." (R. p. 1112). Dr. Early further opined that the amount of Appellant's solder fume exposure would have been minimal, even if Appellant never used his ventilation suction fan. (Id). Dr. Early noted that Appellant tested positive for an Aspergillus pinprick test, and that "Aspergillus is a well-known trigger for fungal HP." (Id). He also noted that the medical records from Appellant's primary care physicians lists a family history of Appellant's brother having died of "occupational lung disease," and that this was not mentioned by the other providers. (R. p. 1108).

When reviewing Dr. Early's opinions, deposition testimony, CV, and the fact that he was the only expert to actually visit and analyze the lab at SEW, it is clear that the Appellate Panel of the South Carolina Workers' Compensation Commission did not err by giving him great weight in this case.

G. The Appellate Panel of the South Carolina Workers' Compensation Commission did not err by giving great weight to the Industrial Hygiene Sampling Report.

On March 17, 2017, Palmetto EHS, LLC conducted industrial hygiene sampling for various chemicals at SEW. As the aforementioned date indicates, the chemical sampling was conducted approximately three (3) months after Appellant retired in December of 2016; not "years after Appellant left the workplace," as Counsel for Appellant argues. "The results of the chemical sampling indicated that all of the chemical samples were below the respective Permissible Exposure Limits (PELs) established by the Occupational Safety and Health Administration

(OSHA), as well as below the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLVs) and Short Term Exposure Limits (STELs)." (R. p. 1137). The Industrial Hygiene Sampling Report is the only evidence in the record of chemical testing at SEW, and the Report shows that all of the chemical samples were below the required limits.

Appellant argues that the Report "cannot be an accurate reflection of the working conditions of Appellant and cannot possibly have any probative value in this case," because the report was conducted after Appellant retired. This is a baseless argument that has absolutely no merit. Appellant has provided no evidence that the Report, which again was conducted only three (3) months after Appellant's retirement, is not an accurate reflection of Appellant's work conditions. Appellant elected not to have a separate industrial hygiene sampling performed. Moreover, Appellant elected not to depose anyone from Palmetto EHS, LLC, despite having ample time to do so.

Appellant also argues that the Appellate Panel erred in giving great weight to the Report because it did not test for rosin/colophony. However, this argument also lacks merit. Ricky Jones is the environmental health and safety coordinator at SEW, and at the time of the hearing, he had been working at SEW for nearly thirteen (13) years. (R. p. 274, lines 8 – 18). Mr. Jones testified that there was nothing in the Industrial Hygiene Sampling Report that led him to believe that the employees at SEW were being exposed to dangerous levels of solder. (R. p. 278, lines 6 – 12). Mr. Jones pointed out that the SDS indicates that rosin is listed as a component that makes up roughly 2.2 to 3 percent of the soldering as a whole, and the SDS sheet for solder indicates that rosin is a chemical that is not considered hazardous. (R. p. 278, line 18 – p. 280, line 7). Mr. Jones

further indicated that the SDS does not even have an established occupational exposure limit. (R. p. 279, lines 15 – 18).

For the above-referenced reasons, the Appellate Panel of the South Carolina Workers' Compensation Commission did not err by giving great weight to the Industrial Hygiene Sampling Report.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel be affirmed in full.

Respectfully submitted,

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Date: December 2, 2021

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

Case No. 1614297
Appellate Case No. 2021-000669

Kenneth D. Christian, Employee, ...Appellant,

v.

SEW Eurodrive, Inc., Employer,
and Great American Alliance
Insurance Company, Carrier, ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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