

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-001117

Lisa Gilliard on behalf of
Marvin Gilliard, deceased,

Appellant,

v.

City of Greenville,
Employer, and Self-Insurer,
and Hewitt, Coleman &
Associates, Inc., TPA

Respondent.

BRIEF OF APPELLANT

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Statement of the Issue On Appeal

The Circuit Court erred when it affirmed the Appellate Panel's denial of Lisa Gilliard's occupational disease claim arising from the death of her husband, Greenville City Police Officer Marvin Gilliard, because the Appellate Panel's denial is unsupported by "substantial evidence."

Statement of the Case

Marvin Gilliard timely filed a Form 50, alleging that he had suffered a compensable occupational injury while employed as a police officer for the City of Greenville, having been diagnosed with interstitial pneumonitis, allegedly as a result of exposure to toxic chemicals. Specifically, he alleged that exposures to toxic chemicals during repeated routine foot patrols through an abandoned building within the city had caused his pulmonary disease. The City filed a Form 51, denying that Gilliard had suffered a compensable injury. Subsequently, Gilliard's illness worsened, and he died. His wife, Lisa Gilliard, was substituted and filed a Form 52, alleging that her husband's death had been caused by his chemical exposure and occupational disease. The City filed a responsive Form 53, again denying the claim.

South Carolina Workers' Compensation Commissioner Derrick Williams held a hearing in this matter on April 26, 2011, and a Decision and Order was filed June 20, 2011, finding that Marvin Gilliard had suffered a compensable injury under South Carolina Workers' Compensation law, and awarded survivor's benefits to Lisa Gilliard. Within the statutory period, counsel for the City filed the City's Form 30, a Request for Commission Review. The South Carolina Workers' Compensation Appellate Review Panel heard the City's request for review on November 24, 2011, and entered its Order January 13, 2012, reversing Commissioner Williams and finding in favor of the City. This appeal followed, and on March 4, 2013 the Honorable Edward W. Miller heard Ms. Gilliard's appeal. Judge Miller affirmed the Appellate Review

Panel's findings by Order filed on April 23, 2013, and this appeal followed. Ms. Gilliard served Notice of Appeal on the City on May 22, 2013.

Facts

Marvin Gilliard began working for the City of Greenville as a police officer in 1996. (Gilliard Dep. 17:8-10) As an officer, he mainly worked by himself. (*Id.* at 28:7-17) Around 2002-2003, he was assigned to an area known as Southern Side. (*Id.* at 51:8-10) As part of patrolling the Southern Side area, he was assigned to monitor a building at 104 South Hudson Street. (*Id.* at 50:14-17) He was supposed to keep homeless people from loitering in that building. (*Id.*) While assigned to this area, part of his job was to check this building daily—in fact, Lieutenant Randy Evitt called Gilliard's lieutenant and “told him to make sure that [he] check[ed] that building every day.” (*Id.* at 53:10-12; 54:1-3) When Gilliard inspected the building, it could take an hour, or longer if vagrants were discovered in the building. (*Id.* at 57:23—58:21) When asked to describe the building, Gilliard stated that it was very dirty, that the floors looked oily, and that he noticed a white powder in some areas. (*Id.* at 60:1-11) There were also steel drums that contained oil or “something that looked like oil.” (*Id.* at 60:3-4). A rusted out water tank was also present. (*Id.* at 60:9) Lisa Gilliard, Gilliard's wife, also recalled a strange odor on his police uniforms while she did laundry on the days that he patrolled the abandoned building. (Hr'g Tr. 24:7)

The City of Greenville maintains computer records which capture the movement or activity of officers when they call dispatch. (Appellate Order, January 13, 2012, ¶ 7) Greenville City police officers were typically required to call in to dispatch when leaving a patrol car. (Hr'g Tr. 39:21). The City of Greenville has redundant systems which capture officers' movement or activity when they call dispatch to advise they are outside their patrol vehicle in at least three

separate databases. (Appellate Order, ¶ 8) Either these records or an officer's testimony could be used to locate the officer or determine his activity. (Hr'g Tr. at 42:5-11) Calls were not always required as well—Gilliard testified that because he was assigned to the area that included 104 S. Hudson Street, that he “did not have to get a call. It was part of [his] job to check it every day.” (Gilliard Dep. 53:10-12) He also would not call dispatch if he stopped to assist another patrol car that was already present at the building. (*Id.*, 66:10-15) The police department recognized that a lack of documentary evidence would not be conclusive on the question whether an officer was in a building. (Hr'g Tr. at 43:20-44:1) Further, a report is not necessarily generated by an officer unless official police action was taken. (*Id.* at 44:6-8) Additionally, if an officer was on foot patrol, he could easily walk a couple of blocks without calling in as to his exact location. (*Id.*, at 63:2-12) The police department recognized that its officers did not radio in their exact location at all times. (*Id.*, at 66:17-25)

When Gilliard was employed at the City, when an officer did radio in his location, a police dispatch employee would enter the call information. (*Id.*, at 72:4-19) Information about an officer's location and activity could be logged in both county and city systems. (*Id.*, at 70:17-23) If information was missing from a report, it could be a dispatch error, or that “the computer ate it.” (*Id.*) For these reasons, the City acknowledges that its officers are the best source of information regarding what they are doing on patrol. (*Id.*, at 78:22-24)

After his time patrolling the Southern Side ended, Gilliard was assigned as a resource officer at J.L. Mann High School, which is when he began to have breathing problems. (Gilliard Dep. 28:9-12) Toward the end of 2006, he failed the physical fitness test required by the Greenville City Police Department. (*Id.* 38:21-39:7) He was placed on light duty in May 2007, and continued light duty until his disability retirement on September 5, 2007 due to interstitial

pneumonitis. (*Id.*, 29:7-16)

Gilliard was not a smoker and was in good health until his breathing issues developed. (Hr'g Tr. 12:71-21) Although he had a prior history of a positive PPD (tuberculosis) test in the past, during a later 1996 visit to the Woodward Medical Center his physical examination showed "respirations are normal" and "chest [is] completely clear." (Medical Records, Woodward Medical Center) The first complaint of breathing problems in the record is during a July 21, 2006 visit to Woodward Medical Center, at which Gilliard complained of troubled breathing and a bit of congestion. (*Id.*) The diagnosis was allergies or possibly asthma. (*Id.*) A few months later, on September 11, 2006, Gilliard saw Dr. William Scott of Crossroad Family Practice. (Medical Records Dr. William Scott) He complained of shortness of breath and wheezing when walking steps or with exertion. (*Id.*) He was diagnosed with cough, dyspnea and possibly asthma and was prescribed Avelox. (*Id.*) A pulmonary test on October 24, 2006 showed "moderate restriction." (*Id.*) On November 7, 2006, Gilliard returned to Dr. Scott for a cough with clear mucus with occasional blood in the sputum; further, Gilliard had lost over 20 pounds in the previous months with little to no effort. (*Id.*) Again, pulmonary tests showed moderate restriction, and at this time, Gilliard was referred to Dr. Richard Laurens of Palmetto Pulmonary and Critical Care. (Medical Records, Dr. Richard Laurens). Dr. Laurens ordered a lung biopsy, which was performed December 5, 2006. (*Id.*) The lung biopsy was negative for sarcoidosis, but revealed ground glass opacities in his lungs.

On April 16, 2007, Gilliard began seeing Dr. Huang, a pulmonologist with Duke Medical Center for interstitial lung disease. (Medical Records, Duke University Medical Center) Gilliard was still coughing up blood and whitish sputum at this point. (*Id.*) Gilliard told Dr. Huang that he would go into an abandoned building two or three times a week as part of his patrol. (*Id.*) Dr.

Huang noted a history of environmental exposure and was concerned about chronic hypersensitivity pneumonitis. (*Id.*) Gilliard was diagnosed with nonspecific interstitial pneumonitis during a return visit on May 15, 2007. (*Id.*) On July 30, 2007, Dr. Huang diagnosed Gilliard with hypersensitivity pneumonitis. (*Id.*) By August 20, 2007, Gilliard had a pulmonary function of 52%, which was not likely to increase. (*Id.*) By May 30, 2008, Gilliard was on Duke University Medical Center's waiting list for a lung transplant. (*Id.*) He was still wheezing and oxygen dependent at home. (*Id.*)

Gilliard was hospitalized for tachycardia and followed up with Dr. Bizzell, his primary care physician, on August 28, 2008. (Medical Records, Stacy Bizzell, MD). The tachycardia was most likely caused by Gilliard's severe lung disease. (*Id.*) Gilliard began seeing Dr. Catherine Chang as his local pulmonologist in December of 2008. (Medical Records, Dr. Catherine Chang) His oxygen intake was increased by March 5, 2009. (*Id.*)

Gilliard's condition continued to decline, and he passed away at his home on August 12, 2010. (Death Certificate) Dr. Chang stated that she "was of the opinion, to a reasonable degree of medical certainty, that Marvin Gilliard's death was the result of his interstitial lung disease." (Chang affidavit)

The 104 S. Hudson Street area had been considered by the Greenville County School District as a possible site for a new school. (Gilliard Dep. 61:15-19) A document called the AJ Whittenburg Proposed Site was cited at the hearing before the Commission. Its goal was to "provide a school environment supportive of learning." (Whittenburg Proposed Site Plan) However, the soil there was contaminated, including chemicals such as perchloroethene (PCE) (a cleaning solvent), polycyclic aromatic hydrocarbons (PAHs), elevated hydrocarbon contamination (fuel oil), and contaminated groundwater. (Whittenburg Proposed Site Plan) An

action plan, if a school were to be built at this site, would have to include “removal of above ground fuel oil tanks, removal or containment of contaminated soil, removal of potentially hazardous materials...and a contingency plan for unforeseen sources of contaminated soils.” (Whittenburg Proposed Site Plan) Dr. Huang understood that these chemicals were in the building that Gilliard patrolled. (Huang Dep. 20:18-21) These types of chemicals are volatile solvents and “when [they] are in the soil, [they] are in the air.” (*Id.*, 23:7-9) This was the only document that Gilliard was able to find that listed any sort of chemicals present at the site. Once he became ill, he attempted to investigate but his emails to the City went unanswered. (Gilliard Email to Debra Gammons, City Attorney, dated May 22, 2007)

Argument

I. Lisa Gilliard established that her husband, Marvin Gilliard, suffered an “occupational disease” as that term is defined by S.C. Code, Ann., §42-11-10 (2013, as amended).

S.C. Code, Ann., §42-11-10 (2013, as amended), defines “occupational disease” for purposes of the presentation of a worker’s compensation claim:

"Occupational disease" means a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease is considered an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of continuous exposure to the normal working conditions of that particular trade, process, occupation, or employment. In 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.

The statute specifies that a claimant must establish that the occupational disease arose . . . by a preponderance of the evidence. That standard, of course, requires the claimant, Lisa Gilliard in this case, to establish that it was more likely than not that her husband suffered with an occupational disease that lead to his death. The claimant has the burden of proving facts that

will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) (citation omitted), cited with approval in *Crisp v. SouthCo., Inc.*, 738 S.E.2d 835, 401 S.C. 627 (2013)

A. From 2002 to 2004, Marvin Gilliard entered the condemned building at 104 S. Hudson Street on multiple occasions as an integral requirement of his employment with the City of Greenville's police department.

Marvin Gilliard died on August 12, 2010, from complications of his lung disease. (Death Certificate of Marvin Gilliard). Prior to his death, he was deposed in this matter on February 22, 2008. (APA submission, p. 53-142). In his deposition, he testified that he began working for the City of Greenville as a police officer in 1996 in traffic patrol until moving to community patrol in 1999. (APA p. 73-76). In 2002 or 2003 he was transferred to community patrol in an area of the City of Greenville known as the "Southern Side" and stayed on community patrol in that area for approximately two years. (APA p. 78). He testified that during his community patrol of the Southern Side area, he would have to walk through an old abandoned building located at 104 S. Hudson Street to remove any homeless people in the building. (APA p. 102). Gilliard testified that the abandoned building had been targeted for "extra patrol" because of vagrant issues. (APA p. 105-106). When questioned whether he received a specific call to check on the building, he testified, "Well, I was assigned to it, so I didn't have to get a call. It was part of my job to check it every day." (APA p. 105). He testified that he understood the abandoned building had once been used by a chemical company. (APA p. 104).

During his patrols of the building, Gilliard testified that he would sometimes spend over an hour in the building running out homeless people and that he could be in the building several times a week, which would be days that he was on duty. (APA p. 109, 116). Gilliard also

testified that there would be times that he would “gas up” for duty and to do so he would go by the building. (APA p. 118). If there happened to be a patrol car out front, Gilliard testified that he would stop and assist, but that when he did this he would not always call into dispatch. (APA p. 118). He testified that the floor of the building was dirty, and there were steel barrel drums throughout the building with oil or “something that looked like oil because the dirt looked oily.” (APA p. 112). He also testified there was a rusted out water tank and there was white powder on the floor in areas of the building. (APA p. 112).

Lisa Gilliard, Marvin Gilliard’s wife, testified at the workers’ compensation hearing held before Commissioner Derrick L. Williams, on April 26, 2011. She testified that she and Gilliard had been married for almost 15 years at the time of his death. (Hearing Tr. p. 11). She testified that prior to 2006 he had never had any breathing or lung issues and that he was not a smoker and had been in good health until the breathing issues developed, with his only health problem being diabetes. (Hearing Tr. p. 20-32; 12). Lisa testified that she handled the laundry for the home and remembers Gilliard’s uniforms having a different and odd smell to them when he was patrolling the “Southern Side” area. (Hearing Tr. p. 23-24). She testified that she remembered having to use a lot of fabric softener to get the smell out and even making the comment that they should invest in a fabric softener company since she used so much to get the smell out of Gilliard’s uniforms. (Hearing Tr. p. 23). Lisa testified that the smell would be on the uniforms several times a week. (Hearing Tr. p. 24).

At the hearing, the City called only one witness—Gary McLaughlin. McLaughlin at that time was a Major with the Police Department of the City of Greenville, and had been employed there since 1979. McLaughlin testified that Gilliard had been a police officer for the City and had been employed on community patrol in the Southern Side area, which included 104 S.

Hudson Street. (Hearing Tr. 35, 37). McLaughlin testified that there were problems with vagrants at 104 S. Hudson Street. (Hearing Tr. 64). He further testified that the purpose of community patrol was for the Greenville City Police Department to have more of a presence in that specific community and to provide “enhanced services”. (Hearing Tr. p. 67).

McLaughlin testified several times one way to “capture” information about an officer’s movements is from the officer himself and that the best source of information about what an officer did on his patrol was the officer. (Hearing Tr. p. 42).

McLaughlin testified that it is department policy for officers to call dispatch when they leave their patrol cars to take police action, which could be responding to a traffic stop, checking a suspicious person, checking a building or pursuing a perpetrator. (Hearing Tr. p. 40).

However, McLaughlin testified that as a community patrol officer, Gilliard could be on foot patrol and out of his car without taking police action. (Hearing Tr. p. 59). He further testified that it is possible for officers, like Gilliard, to take police action while on foot patrol, such as entering an abandoned building, without calling into dispatch. (Hearing Tr. p. 61). McLaughlin stated that Gilliard was a good and honest officer with a personnel record containing no major complaints or disciplinary actions. (Hearing Tr. p. 61-62). McLaughlin testified that Gilliard did his job as a community officer as he should have. (Hearing Tr. p. 62). He also testified that it was certainly possible that Gilliard did not radio in every time he was on foot patrol or checked out a building. (Hearing Tr. p. 66). The City, through McLaughlin, proffered various data entries and logs that purported to show that Gilliard only entered the building in question on one occasion. However, McLaughlin was unable to explain inconsistencies, omissions, and errors in the computer printouts and again acknowledged that the best source of information for the location of a police officer was the officer himself. (Hearing Tr. p. 78).

B. While in the building on Hudson Street, and at the site of the building generally, Gilliard was exposed to various toxic chemicals, which damaged his lungs and led to a diagnosis of hypersensitivity pneumonitis.

In his deposition, Gilliard testified that the floor of the building on Hudson Street was dirty, and there were steel barrel drums throughout the building with oil or “something that looked like oil because the dirt looked oily.” (APA p. 112). He also testified there was a rusted out water tank and there was white powder on the floor in areas of the building. (APA p. 112). And, as noted, his wife testified that his uniforms smelled of chemicals several times a week while he was employed as a community officer on the “Southern Side.”

When Gilliard became ill, shortly after his transfer to a position as a resource officer from community patrol, he began to investigate causes for his pulmonary issues. He learned that the Greenville County School District had considered the area including 104 S. Hudson by the Greenville County School District as a possible site for a new school. (APA p. 113). After requesting information from the City about the chemicals stored in the building at 104 S Hudson Street, Gilliard was given a report from the school district, which listed several chemicals that were found when the school district had done its testing of the area. (APA p. 42-43 and 48-49). The report, entitled the “AJ Whittenburg Proposed Site” report, specifically identifies “Perchloroethene, (PCE), (a cleaning solvent), Polycyclic aromatic hydrocarbons (PAHs), Elevated Hydrocarbon Contamination (fuel oil) and contaminated groundwater” as soil contaminants at the site.

Ultimately, Gilliard became a patient of Dr. Yuh-Chin T. Huang, a physician at the Duke Medical University Medical Center, board certified in Internal Medicine, Pulmonary and Critical Care Medicine. (Huang Dep. p. 5-6). Dr. Huang was also the chairman of the Environmental, Occupational and Health Steering Committee on ACCP and also for a committee of the

American Pathology Society. (Huang Dep. p. 38). In Dr. Huang's deposition, submitted into the record at the workers' compensation hearing, he testified that he has done extensive work in the area of occupational and environmental lung diseases because he has a special interest in that area of practice and treats many patients with those conditions. (Huang Dep. p. 38-39).

Dr. Huang testified that he began treating Gilliard in April 2007. He testified that his initial diagnosis was interstitial lung disease. (Huang Dep. p. 7) He testified the pathology tests could not "exclude chronic hypersensitivity pneumonitis" and that "when it mentions HP, we go on to try to find whatever possible exposure, because it has to do with the patient's prognosis." (Huang Dep. p. 23, 30). Dr. Huang testified that upon getting the pathology results, he questioned Gilliard and learned that as a police officer he would patrol a building "a few times a week, and every time he stays he stayed there for an hour or two." (Huang Dep. p. 15-17). He testified that he instructed Gilliard to get the "environmental information" on the building he patrolled. (Huang Dep. p. 21). Dr. Huang identified the A.J. Whittenburg Proposed Site Review (APA # 7) as the document provided in response to his request. (Huang Dep. p. 20). He testified that the document lists contaminants that were found in the soil and what he assumed were chemicals that were in the building Claimant patrolled. (Huang Dep. p. 20).

Dr. Huang testified he understood that the chemicals identified in the AJ Whittenburg Proposed Site Review were the chemicals in the building Gilliard patrolled. (Huang Dep. p. 19). He further testified that the types of chemicals found in the soil were "volatile solvents" and "when it's in the soil, it's in the air." (Huang Dep. p. 23). Dr. Huang testified to a reasonable degree of medical certainty that Gilliard's condition was consistent with exposure to the chemicals listed in the AJ Whittenburg Proposed Site Review. (Huang Dep. p. 31). When questioned about exposure times, Dr. Huang testified that his conclusion would be the same had

Gilliard been in the building less than 15 times in a year and a half and no longer than 30 minutes per visit. (Huang Dep. p. 27). He further testified that “clinically hypersensitivity pneumonitis needs sensitization” and the possibility of the lung disease being caused by chemical exposure increases with exposure time. (Huang Dep. p. 28). Dr. Huang testified that had Gilliard only been in the building 5 times, he still could not exclude the diagnosis that the chemical exposure caused Gilliard’s lung disease. (Huang Dep. p. 28). Huang explained that the probability of the diagnosis increased with each exposure. (Huang Dep. p. 28).

Dr. Huang testified that because he treated Gilliard on a regular basis that he would be in a better position to state medical opinions related to causation than a physician who had not treated him. (Huang Dep. p. 33). Huang also testified that he was familiar the literature on the subject and “...I’ve seen quite a few of those cases, more than you know, any of my colleagues here.” (Huang Dep. 38-39).

C. Complications of the condition acquired during the course of and in the scope of his employment killed Gilliard.

On August 12, 2010, Claimant passed away at his home. (APA p. 145). The cause of death was chronic hypoxic respiratory failure, endstage lung disease and hypersensitivity pneumonitis. (APA p. 145). At the time of his death, Claimant’s local pulmonologist was Dr. Catherine Chang. (APA p. 52). In her affidavit, submitted into evidence by Claimant, Dr. Chang stated, “I am of the opinion, to a reasonable degree of medical certainty, that Marvin Gilliard’s death was the result of his interstitial lung disease.” (APA p. 52). These findings are undisputed by the City of Greenville.

D. Based on the evidence presented at the initial hearing, the hearing Commissioner found that Marvin Gilliard had suffered a compensable occupational disease resulting in his death, and that Lisa Gilliard was entitled to a dependency award consistent with that finding.

After the hearing, and after having observed the witnesses' testimony and demeanor, and after having reviewed the APA submissions of the parties, the hearing commissioner, in his Order of June 20, 2011, found that Gilliard had suffered an occupational disease, arising in the scope of and in the course of his employment. "An injury arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances." *McCuen v. BMW Mfg. Corp.*, 383 S.C. 19, 25 (Ct. App. 2009). Occupational disease is defined as "a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged." *S.C. Code Ann.* § 42-11-10(A). In summary, the hearing commissioner found that the testimony offered by the Gilliards was credible, and that Dr. Huang, as his treating physician, was likewise credible. Further, he found that given the contradictory nature of the police department's records and McLaughlin's testimony that the best way to locate a police officer is to ask the officer his location was also credible on the question of Gilliard's exposure history in the building on Hudson Street. Finally, he found that the AJ Whittenburg report supported Gilliard's contention that he had been exposed to specific chemicals in the environment and that Dr. Huang's medical opinion on causation was probative on the cause of Gilliard's illness and ultimate demise. (Commissioner Williams' Order, June 20, 2011).

II. Findings by the Appellate Panel of the Workers' Compensation Commission were clearly erroneous and unsupported by the reliable, probative, and substantial evidence in the whole record before it.

Despite the record Gilliard presented, the Appellate Panel reversed the Hearing Commissioner and denied Gilliard's claim in its entirety. The denial rested on the computer records submitted by the City through McLaughlin, although he was unable to explain them, and

although they were both inconsistent and incomplete, and on the medical report of Stephen Sahn, M.D., who had not examined Marvin Gilliard, but who was retained by the City to examine his medical records specifically for the purpose of refuting the testimony of Gilliard's treating physician, and who labeled Gilliard's fatal illness as "idiopathic."

A. The Appellate Panel erred when it found that Gilliard only entered the building in question on one occasion.

McLaughlin identified and discussed several documents that the City alleged showed all police activity for 104 S. Hudson Street including, but not limited to Gilliard's police activity.

(Hearing Tr. p. 41, 44-55). The documents were dispatch calls to the location and incident reports for calls to 104 S. Hudson Street and nearby areas. (Hearing Tr. p. 41, 44-55)

McLaughlin testified that many of the documents produced showed "redundant" information.

(Hearing Tr. p. 41, 44-55). Some of the records were incomplete. McLaughlin testified that APA #18 listed incident reports, but that no report existed for the last incident listed. (Hearing Tr. p.

78). He also stated that APA #19 referenced incident reports for S. Hudson Street for the time

period April 1, 2004 to September 15, 2007. (Hearing Tr. 46). McLaughlin further testified that

incident entries listed on APA #20 were incomplete. These entries did not fully describe

incidents, and the missing information may not have been provided to dispatch. (Hearing Tr. p.

71, 73-74).

The Appellate Panel therefore erred as a matter of law in its Findings 11 and 12, that

Marvin Gilliard only entered the abandoned building at 104 S. Hudson Street on one occasion,

and remained there less than thirty minutes, because that finding can be made only if the Panel

ignored the testimonial evidence of all the witnesses who testified, including the City's own

witness, McLaughlin, and relied solely on one bit of evidence, the computer printouts that

McLaughlin acknowledged were incomplete and inconsistent. Such reliance would be erroneous

as a matter of law and grounds for reversal, even pursuant to the “substantial evidence” standard applicable in this case.

B. The Appellate Panel erred when it ignored the probative medical evidence.

The City hired Dr. Steven Sahn to review Gilliard’s medical records and the City’s records, and based on those records to formulate an expert opinion about Gilliard’s condition and its cause. (APA p. 335-336). Dr. Sahn’s report is incorrect and incomplete in many respects. For example, he indicated that Gilliard became employed by the City in February of 1999, when he in fact was employed in 1996. (APA p. 73-76).

Much more importantly, Dr. Sahn did not review the AJ Whittenburg Proposed Site document (APA p. 48-49), which clearly documents the existence of environmental hazards and toxic ground contaminants at the 104 S. Hudson Street site. (APA p. 42-43, 62, 113).

Dr. Sahn’s report reflects that he reviewed records that showed Gilliard in the abandoned building at 104 Hudson Street approximately thirteen times in 2001 and another four times in 2002 and that each time Gilliard spent approximately 30 minutes in the building. (APA p. 335-336). This information is inconsistent with the evidence presented at the hearing, but is admissible as the sort of information that experts rely on routinely, and further, is in evidence without objection. It is unclear how Dr. Sahn developed this information but as he was hired by the City it is certainly reasonable to believe that he received the information from that source. Therefore, the “history” developed by Dr. Sahn is actually independently supportive of Gilliard’s recollection of the events, and further, is supportive of Dr. Huang’s causation opinion.

Dr. Sahn noted Claimant’s physicians diagnosed him with non-specific interstitial pneumonitis (NSIP) from hypersensitivity pneumonitis also referred to as environmental exposures. (APA p. 335-337). In his report, Dr. Sahn addresses several causes of idiopathic

interstitial pneumonitis including connective tissue disease as the most common, and environmental exposures as the second most common cause. (APA p. 335-337). Dr. Sahn acknowledges that the second most likely cause of NSIP is environmental exposures, but discounts chemical exposures as the cause of Gilliard's condition. However, there is no evidence of any sort in the record that Gilliard suffered connective tissue disease, even though the City submitted many pages of his medical records, both prior to and subsequent to his environmental exposure. Further, despite a positive TB titer in 1996, nowhere in those same records is there any evidence that would support a diagnosis of tuberculosis, an infectious disease which would have been obvious by both its symptoms and through diagnostic testing, and more importantly, curable with antibiotics. Certainly, the City's bought and paid for expert would have made such a diagnosis, but he indicated that Gilliard's disease was "idiopathic"—that is, that its cause could not be identified.

The Appellate Panel erred as a matter of law in its Finding 28, in that the Appellate Panel misstated the opinion of Dr. Huang, and suggested that multiple exposures of several times per week, with more than an hour's duration, would have been necessary to cause Gilliard's occupational disease. In fact, Dr. Huang testified that his causation opinion would have been the same had Gilliard been in the building less than 15 times in a year and a half for no longer than 30 minutes per visit. (Huang Dep. p. 27) and that had Gilliard only been in the building 5 times, he still could not exclude the diagnosis that the chemical exposure caused Gilliard's lung disease. (*Id.*)

The Appellate Panel further erred as a matter of law in its Finding 31, in that the Appellate Panel ignored the records, affidavit and deposition of Dr. Huang, and instead substituted for that evidence the report of the City's paid expert, who had never seen or treated

Marvin Gilliard, and whose report was filled with inaccuracies and with information which in fact supported Dr. Huang's conclusions, and further, who was unable to arrive at a diagnosis for Gilliard, despite his acknowledgement that the second most likely cause of interstitial pneumonitis is chemical exposure, and the first most likely cause was eliminated by the absence of a diagnosis of connective tissue disease in the submitted medical records.

The Appellate Panel further erred as a matter of law in its Finding 13, in that the Appellate Panel erroneously cites medical records submitted by the City in support of its findings, when in fact the records cited indicate that Gilliard's chest was "completely clear", that his respirations were "normal" in 1996, and that although he had had a positive TB test in the past, he had also had a negative test, and that he had been treated with an antibiotic, Rifampin, to cure his tuberculosis, if any, and that a cure must have effected as a result of his more recent negative test. Further, the City erroneously references a resolved viral infection as evidence of chronic lung problems in 1999.

C. The Appellate Panel erred when it found that there were no contaminants at 104 S. Hudson Street.

The Appellate Panel erred in its finding that Gilliard presented insufficient and/or no evidence to support his contention that there were contaminants at the 104 S. Hudson site sufficient to cause his injury. Findings 18-25 address the question of the nature and location of the contaminants in question. However, the AJ Whittenburg report specifically indicates that there are soil contaminants and that there is ground water contamination, which would indicate that contaminants are in both solid form (the white powder that Gilliard observed) and liquid form suspended in ground water. (Whittenburg report, p. 1). As Dr. Huang indicated in his deposition, the contaminants identified in the report are volatile, and if they were in the soil then they were in the air. Further, while the Appellate Panel found that there was no evidence in the

record of the nature or extent of the contamination, the Whittenburg report suggests an estimated budget of \$1.7 million for remediation, which would include the removal of substantial amounts of soil from the site. (Whittenburg report, p. 1). While the report does not specify a scientifically calculated level of contamination, the magnitude of the estimated remediation costs certainly suggest extensive and dangerous levels of toxic chemicals.

The Appellate Panel therefore erred in its implicit finding that Gilliard was not exposed to toxic chemicals at 104 S. Hudson Street. While not expressly stated, that finding should be reversed as unsupported by any evidence.

III. The Circuit Court erred when it affirmed the Appellate Panel which in turn had reversed the Hearing Commissioner, because the Appellate Panel's Findings of Fact and Conclusions of Law were erroneous as a matter of law and unsupported by "substantial evidence."

The South Carolina Administrative Procedures Act, *S.C. Code, Ann.*, §§1-23-10, *et. seq.*, (2013, as amended) governs the presentation, litigation and review of claims before the administrative agencies of the state. The South Carolina Workers' Compensation Commission is, of course, one of those agencies, and claims procedure before the Commission is therefore governed by the Act. *Foggie v. General Electric Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008). *S.C. Code, Ann.*, §1-23-380 sets forth the logistics and standard for judicial review of decisions by the Commission.

§1-23-380(5) specifies the standard of review:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (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.

Since 1981, the appellate courts of South Carolina, including circuit courts reviewing the decisions of administrative agencies, have applied the “substantial evidence” standard of review to those decisions. *Lark v. BI-LO, Inc.*, 276 S.C. 130 (1981).

While the “substantial evidence” standard requires deference to the Appellate Panel, as already set forth, the Panel erred in its reversal of the Hearing Commissioner. Moreover, the Appellate Panel entirely substituted its own view of the credibility of the witnesses for the Hearing Commissioner’s view. That substitution flies in the face of logic. See *Fishburne v. ATI Sys. Int’l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct.App.2009) (internal citation omitted) "It is logical for the [Appellate Panel], which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." Cited with approval in *Brunson v. American Koyo Bearings*, 718 S.E.2d 755, 395 S.C. 450 (Ct. App. 2011)

As set forth more fully above, the Appellate Panel’s findings lack evidentiary support entirely. “Substantial evidence” is defined as “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 the administrative agency reached in order to justify its action.” *Etheredge v. Monstanto Co.*, 349 S.C. 451, 456 (Ct. App. 2002).

The circuit court should have reversed the Commission’s decision because its findings appear to be based on a view of the evidence solely from one side of the case—that of the City.

By definition, such a one-sided view is not substantial evidence.

Further, a finding of fact of the Commission should “not be based on surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” *Frame v. Resort Services Inc.*, 357 S.C. 520, 527 (Ct. App. 2004). A number of the Appellate Panel’s findings are notoriously unsupported by any evidence, as noted above, and therefore warrant reversal.

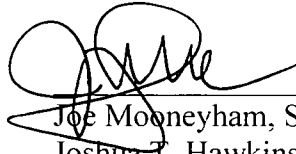
Of course, it is also axiomatic that in its analysis, the court must first liberally construe the Administrative Procedures Act in favor of the claimant. *Hutson v. South Carolina State Ports Authority*, 732 S.E.2d 500, 399 S.C. 381 (S.C. 2012). The Appellate Panel’s view of the evidence appears to take the opposite tack, and all inferences appear to be made in favor of the City.

The Court of Appeals has, for example, reversed the Workers’ Compensation Appellate Panel when the Panel relied solely on the testimony of a physician who did not treat the claimant, when the employer failed to present any expert testimony from a physician who actually evaluated the claimant, when the claimant had presented “overwhelming medical testimony and evidence” at the hearing. *Carolinas Recycling Group v. S.C. Second Injury Fund*, 398 S.C. 480, 485 (Ct. App. 2012). The Panel’s decision in this case likewise justifies reversal, as the medical evidence from all Gilliard’s treating physicians is exclusively favorable to him, and the only unfavorable evidence comes from a physician paid to review his records who never saw him during his lifetime.

Conclusion

Commissioner Williams' decision is fully supported by the credible and probative evidence presented on behalf of Marvin Gilliard. The Appellate Panel's decision, on the other hand, is unsupported by "substantial evidence" and the Circuit Court's affirmation of the Panel's specific Findings of Fact and Conclusions of Law must be reversed.

Respectfully submitted,



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