

THE STATE OF SOUTH CAROLINA

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In The Court of Appeals

JUL 06 2015

SC Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-002366

Briett Johnson, Employee, ...Appellant,

v.

Pike Electric, Inc., Employer, and Liberty Mutual
Insurance Company, Carrier, ... Respondents.

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STATEMENT OF THE ISSUE

Whether the Workers' Compensation Commission panel erred as a matter of fact or of law in concluding that the Defendants had met the burden of proof to establish the defense of intoxication?

OVERVIEW

This case concerns a fatal automotive crash. It hinges on the WCC panel's reliance on the results of a blood draw that no expert was willing to say is reliable, and whose test results conflict with undisputed testimony from many lay witnesses.

The Employer had the burden of proof to establish the defense of intoxication. The Workers' Compensation Commission panel erred in relying on a blood draw that, if accurate, meant the decedent would be reeking of alcohol, when the testimony was uncontroverted that there was no odor of alcohol whatsoever, and where both experts testified that the blood draw was reliable only under circumstances not present here.

Numerous disinterested witnesses testified that they were in close contact with the decedent, and there was no smell of alcohol about the person. Nor was there the smell of alcohol about his clothes nor in the cab of his overturned pickup truck; nor were there any containers for alcohol nor the like anywhere near the crash site. The Highway Patrol MAIT team went through the decedent's pockets, and also indicated no odor of alcohol by circling "No" in response to a question on the South Carolina Traffic Collision Report Form. Yet the single Commissioner and then the full Commission relied on a supposed test of the decedent's blood indicating a blood alcohol concentration of at least .2088, at

which he would have been reeking of alcohol. They did so despite undisputed expert testimony that the test is reliable only under conditions not present here.

This was error, as a panel may not properly rely on unreliable evidence. It especially may not do so in favor of a party that has the burden of proof. It is especially erroneous to rely on unreliable evidence that is contradicted by reliable, probative, and substantial evidence—and here, there is a great amount of such evidence.

STATEMENT OF THE CASE

This case stems from the untimely death of the Worker, Briett Johnson. A hearing was held before Commissioner Avery B. Wilkerson, Jr. on November 4, 2013, at the Southeastern Institute of Manufacturing and Technology in Florence. By Order filed February 28, 2014, Commissioner Wilkerson found that Shanice Hamilton, the Worker's (illegitimate) daughter, would be the sole beneficiary were the case compensable, but that the case was not compensable. He held that the Defendants had carried the Employer's burden of proof that the Worker was intoxicated at the time of the fatal accident, and that this intoxication was the proximate cause of the accident. An appellate panel affirmed by Order dated September 26, 2014. Appellant timely appealed.

I. FACTS

Events Leading Up to and Including The Crash

On Sundays, after church, Briett ("Barry") Johnson would leave his home in Johnsonville, South Carolina, and drive to the worksite near Columbia, where he worked

as a supervisor for Defendant Pike Electric, Inc. Barry would stay over in a motel until Thursday, when he would drive back home.¹

Barry lived with his daughter, Shanice, and her mother, Margaret Hamilton, his live-in girlfriend. Barry and his daughter were close. (R. p. 147, line 20-p. 148, line 1) (Tr. Hr'g 96:20-97:1) (Testimony of Margaret Hamilton); (R. p. 173, lines 20-22) (Tr. Hr'g 122:20-22) (testimony of Shanice). Shanice was an honors student and was in Beta Club. (R. p. 135, lines 2-4, p. 166 lines 9-16) (Tr. Hr'g 84:2-4, 115:9-16).

He would often tell Shanice, or her mother, that his work obligations would make it impossible for him to attend an event – and then show up.

Q. Ms. Hamilton, Margaret, did Barry Johnson ever tell you he was going to be late from work and not be late from work – coming home from work; did he ever surprise you?

A. Yes.

Q. And how would he do that?

A. He would just say, like, okay, I won't be to the house until a certain, certain, time and then I'd look around then he was there. And then, I'd ask him to come to the games and stuff like that, oh, I won't get home in time. I'd get to the game and then when I looked around in the stands he was sitting up in there.

(R. p. 159, lines 13-24) (Tr. Hr'g 108:13-24). *See also* R. p. 176, lines 15-23, Tr. Hr'g 125:15-23 (testimony of Shanice) (similar).

¹ A. He would leave on Sunday evening –

Q. Okay. And when would he normally –

A. – after church.

Q. – after church?

A. Yes.

Q. And when would he normally come home?

A. On Thursday evening.

(R. p. 139, lines 7-13) (Tr. Hr'g 88:7-13).

The night in question, May 17, 2012, there was to be an athletic banquet at the town's high school. In that small town, "everybody knows when the athletic banquet is." (R. p. 147, lines 1-2) (Tr. Hr'g 96:1-2.) Barry also knew that both Shanice and her mother were very involved in high school athletics. (R. p. 135, lines 10-12; p. 167, lines 1-3) (Tr. Hr'g 84:10-12; 116:1-3). Shanice's mother is a volunteer assistant coach. He knew they both were planning to attend. (R. p. 146, line 19-p. 147, line 4) (Tr. Hr'g 95:19-96:4). (In fact, his daughter was honored that night with the student-athlete award. The honor comes with a with a scholarship to continue her schooling. Barry did not know she was going to receive the award – all he knew is that she was qualified to receive it and that the award would be presented that night. (R. p. 135, lines 1-18; p. 167, lines 1-3) (Tr. Hr'g 84:1-18, 116:1-3.)) Although Barry had told Shanice he would be unable to attend, she didn't really believe him. She figured the odds were 50/50 that he would be there. (R. p. 174, lines 13-17) (Tr. Hr'g 123:13-17).² The athletic banquet was officially supposed to begin at 6 PM. When Barry crashed, at almost exactly 6:00 pm, he was just minutes away. (R. p. 160, lines 19-24) (Tr. Hr'g 109:14-24). Apparently he had just passed a vehicle at a high rate of speed, turned back into his lane as he neared a curve, and lost control of the vehicle as he entered the curve. It was a highly traumatic crash: The vehicle went up and down the embankment, struck a light pole, broke the pole, flipped over and over, and landed upside down. E.g., Coroner Scene Report p. 2 (R. p. 229) (flipped more than once); *id.* (struck a pole); Deposition of Don Reynolds

² (R. p. 174, lines 13-17) (Tr. Hr'g 123:13-17):

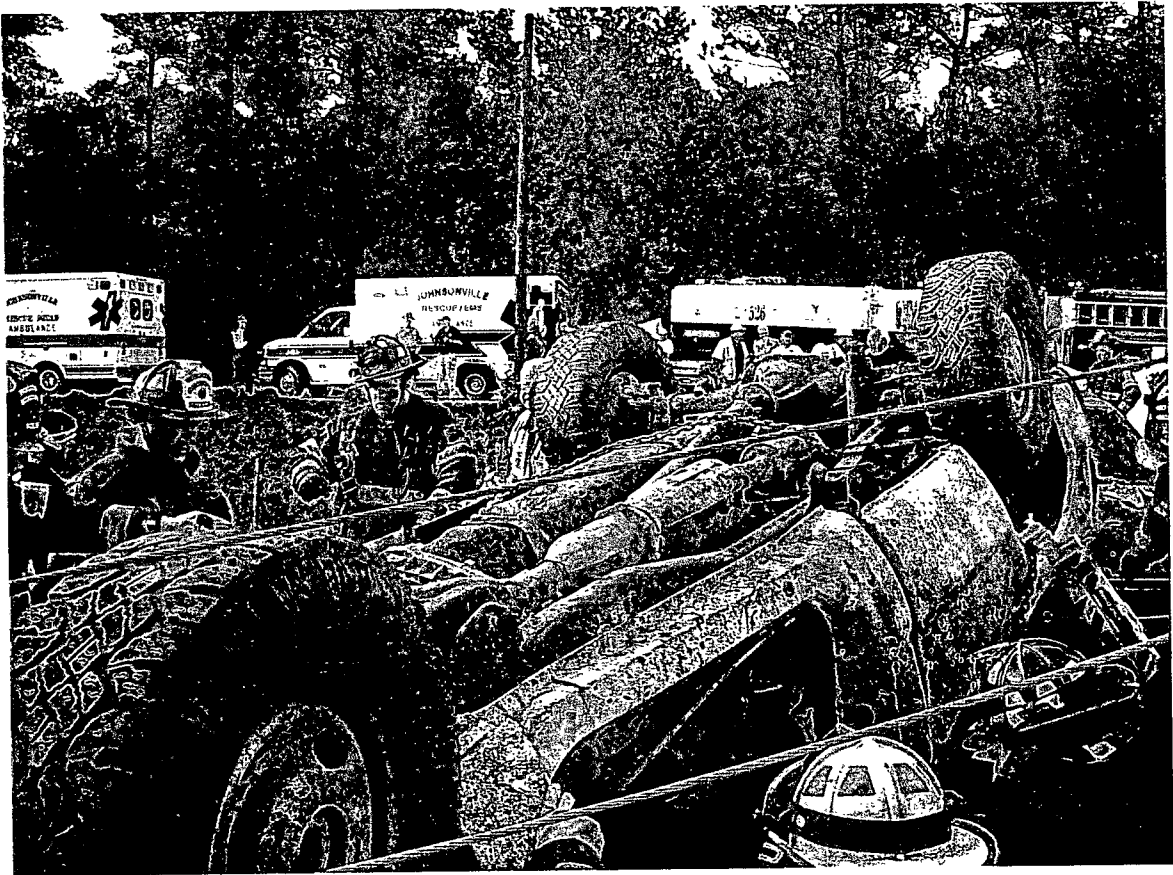
Q. Okay. Did – you indicated your father said he would not be at the banquet?

A. Correct.

Q. All right. Did you expect him to be there anyway?

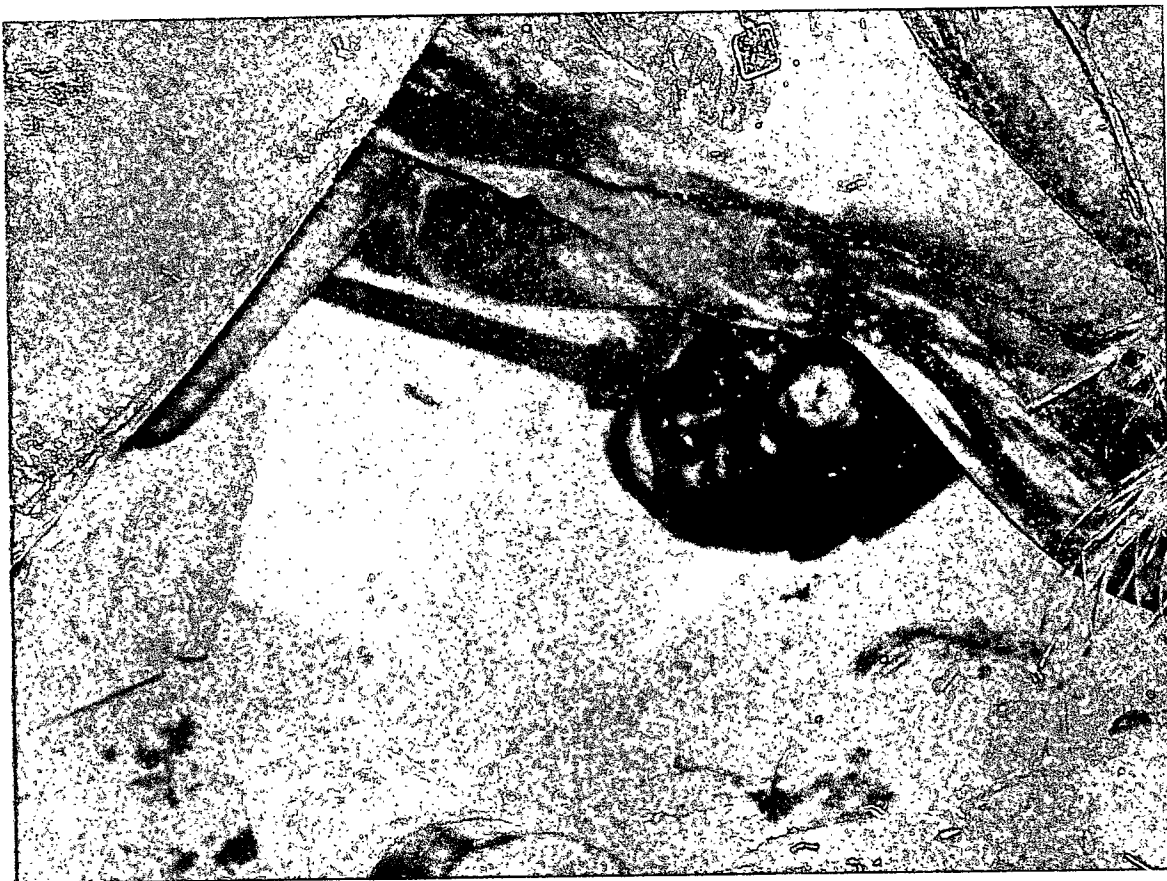
A. Fifty-fifty (50/50).

(hereinafter, “Reynolds Dep.”) 9:5 (R. p. 249, line 5) (pole was broken). He died, strapped into his seatbelt.



Photograph 1: The vehicle after the accident (APA 8-1).³

³ Photograph 1 accurately shows the position the truck was in when EMS reached the accident site. (R. p. 85, lines 8-24) (Tr. Hr'g 34:8-24) (testimony of EMS Redmond).



Photograph 2. Decedent in vehicle. (APA 8-2).⁴

He was suspended in the vehicle, strapped in, for more than an hour and a half.

(R. p. 93, lines 9-15) (Tr. Hr'g 42:9-15).⁵ When they him loose, the body dropped. (R. p. 94, lines 4-8) (Tr. Hr'g 43:4-8).⁶

⁴ Photograph 2 accurately displays Barry's position just after the accident. (R. p. 89, lines 9-22) (Tr. Hr'g 38:9-22) (testimony of EMS Redmond).

⁵ (R. p. 93, lines 9-15) (Tr. Hr'g 42:9-15):

Q. Now, Mr. Redmond, how long was this body suspended in this vehicle?

....

A. that would be better than an hour an [*sic*] a half.

⁶ (R. p. 94, lines 4-8) (Tr. Hr'g at 43:4-8):

We had to cut the seat – seatbelt and it dropped him down some and his foot – I believe it was his foot – was pinned in under the – under the dash. And we had to cut the door off to get in and lift the dash up off of him a little bit

The Immediate Aftermath

The highly experienced MAIT team scoured the area. *See* MAIT report (R. pp. 191-226). At least five MAIT members participated in the on-scene investigation. *See* R. p. 200 (Document entitled, “SCENE CASE NOTES”) (stating that Officer Flowers was the primary investigating officer; Officers Alban, Epps, and Luther were also working at the scene, assisted/notified by Officer Castles). *See also* R. p. 221 (Officer Jason took additional photographs; Officer Jones assisted). The MAIT team are not rookie highway patrol. They checked out the vehicle. They checked out the body. Numerous photographs they provided document that they searched the entire scene. (CD from MAIT) (provided separately from the bound Record on Appeal); *see also* paper copies of APA photographs 8-1 through 8-5, Supp. R. pp. 2-6. They obviously went through Barry’s pockets, because they put in their Report a picture of a speeding ticket he had in his pocket. (R. p. 227) (Photograph DSCN0106.JPG). What were they looking for? A beer cap, a bottle opener, a receipt showing a purchase of alcohol. Drugs. Anything else that would show drug or alcohol use. They found nothing.

They stated in writing that they found no evidence of alcohol use. (R. p. 194) (MAIT Report, p. 4) (document entitled, “ORIGINAL-AMENDED,” with “FINDING #1” stamped on top.) They so stated again. (R. p. 225) (document entitled, “Collisions,” stating “Alcohol Related . . . (*check box for yes*)” (emphasis in original), with box not checked). They did not report any odor of alcohol about the decedent. They did not report any odor of alcohol in the vehicle.

The highly qualified EMS Paramedic Thomas E. Redmond testified similarly. His impressive credentials are summarized in the note at the end of this sentence.⁷ Most particularly, he is highly experienced with wreck cases and with cases involving alcohol. He has been to some fifteen hundred to two thousand (1,500 to 2,000) wreck sites, approximately half of those involving alcohol.⁸ He was up close and personal with the body, and he detected not a trace of an odor of alcohol.

And when we got to him I was able to crawl through the back window and ascertained there was no life. The first thing you check is the carotid pulse, that's our protocol, and there was not – you could not feel a carotid pulse and I could tell he wasn't moving or breathing and hadn't moved or breathed in a few minutes.

(R. p. 84, line 21-p. 85, line 2) (Tr. Hr'g 33:21-33:2) (emphasis added).

Q. Did – did – and you testified earlier that you went up in the cab, as I recall; is that correct?

A. Yes, sir.

Q. And checked his carotid artery –

A. Yes, sir.

Q. – and to see if there were any signs of life?

A. That's correct.

Q. All right. Did you ascertain any odor of alcohol at that point?

⁷ Mr. Redmond was one of the first EMTs in the State. (R. p. 83, lines 24-25) (Tr. Hr'g 32:24-25). He has 52 years' experience as an EMS, *id.* line 23, and 24 years as a paramedic. (R. p. 83, line 23-p. 84, line 3) (Tr. Hr'g 32:23-33:3). He had about 18 months' formal training as a paramedic. (R. p. 107, lines 18-19) (Tr. Hr'g 56:18-19). He has attended numerous seminars and workshops over the years, was a Certified Instructor for Red Cross and for the American Heart Association, and is ALS, BTLS and PALS certified. (R. p. 84, lines 5-8) (Tr. Hr'g 33:5-8).

⁸ (R. p. 91, lines 8-14) (Tr. Hr'g 40:8-14):

Q. . . . All right. Now, about how many wreck cases have you been to, Mr. Redmond?

A. In my career probably fifteen hundred (1,500) to two thousand (2,000).

Q. Okay. Have you ever been to any that involved someone who had been using alcohol?

A. Yes, sir; probably fifty percent (50%).

A. None, whatsoever.

(R. p. 92, lines 16-25) (emphasis added).

He was also “up close” with the body while cleaning the Decedent’s face, and again, there was no odor of alcohol. (R. p. 97, line 21-p. 98, line 3).

Q. Now, when you said you were cleaning his face with two-by-two (2x2) and sterile water did you get up close to that body at that point?

A. Yes, sir.

Q. Did you detect any odor of alcohol at that point?

A. None whatsoever.

Q. All right.

A. And my report designates that also.

(R. p. 97, line 21-p. 98, line 3) (emphasis added).

Thus, the highly experienced EMT-Paramedic was up close and personal with the decedent, in the cab, hand on the carotid, cleaned his face with sterile water and cotton swabs, and smelled not a wisp of alcohol. And alcohol is something he affirmatively looked for. (R. p. 102, lines 23-25). (In fact, he scoured the scene leading up to the accident, looking for containers and the like: he found none. (R. p. 103, lines 12-17)). He simply found no evidence of any alcohol consumption. (R. p. 92, lines 12-15).

Funeral Director John Caughman Pinckney was also in close contact with the body, and he too smelled no alcohol. For his proximity, *see, e.g.*, R. p. 116, lines 17-22, Tr. Hr’g 65:17-22 (close proximity to body; helped move it from gurney to gurney); *id.*, lines 3-6 (noting the “limberness in the neck” when he “picked it up,” and also “the movement”). He found no indication that alcohol had been used by this decedent, no

odor of alcohol about his clothes or person. (R. p. 116, line 23-p. 117, line 4) (direct examination); (p. 118, lines 1-3) (cross-examination); (p. 124, lines 22-22) (redirect).⁹

Deputy Coroner Reynolds, on whose testimony Respondents relied below, was close enough to the body to inject a needle into the chest cavity – and he too reported no odor of alcohol. Instead, he said he detected no evidence of alcohol use. (R. p. 275, lines 14-20) (Reynolds Dep. 35:14-20) (emphasis added):

Q Was there any inclination from anybody that you gathered whether or not the individual may have been under the influence?

A Nobody told me anything about that.

Q So there was no evidence that you saw on the scene that would indicate that?

A Not that I can recall, sir.

⁹ He testified:

Q. All right. Did you ascertain any – any indication that alcohol had been used by this decedent?

A. None.

Q. Okay. No odor of alcohol –

A. None.

Q. – about his person or his clothes or anything?

A. None.

(R. p. 116, line 23-p. 117, line 4) (direct exam).

Q. All right. In moving the body around from that standpoint did you ascertain any odor of alcohol?

A. No, sir.

(R. p. 118, lines 1-3) (cross-examination by Mr. Johnson).

Q. Okay. And in regards to alcohol did you –

A. No, I didn't detect any alcohol, sir.

(R. p. 124, lines 21-22).

The Decedent's live-in girlfriend and his daughter were also each up close and personal with the body. They each kissed him, and Shanice laid her head on his chest. Neither smelled any odor of alcohol.¹⁰

The Blood Draw

Introduction

Given the lack of evidence of alcohol on the decedent or at the scene, how does the panel conclude that the Worker was drunk? It does so by reliance on a blood test, which in turn relies on blood drawn a few hours after the death. Two experts testified as to the blood draw on which the panel relied. They each testified that the blood draw

¹⁰ As Mr. Redmond explained (R. p. 99, line 19-p. 100, line 3),

- A. – they were crying and leaned over and kissed him.
Q. Did each of them kiss him?
A. Yes, sir.
Q. And when they kissed him, where did they kiss him?
A. On the cheek.
Q. Okay. So, they both got up close and personal with the body themselves?
A. Yes, sir. Shanice just laid her head on him and –
Q. Okay.
A. – and – and was crying.

But neither one smelled any odor of alcohol on him. “Q. All right. Did you detect any type of alcohol odor on him? A. No, sir; I didn’t smell anything on him.” (R. p. 150, lines 11-12) (testimony of Margaret).

Shanice testified similarly.

- Q. Now, your mother testified and got very emotional about hugging your father; did you do anything like that?
A. Yes, sir; I did.
Q. What did you do?
A. I hugged him and I kissed him on his cheek and forehead.
Q. Okay. Did you – did you ascertain any odor of alcohol about him?
A. No, sir; I didn’t.

(R. p. 171, lines 12-20).

would be reliable only if an examination was first done to rule out internal injuries. No such examination was done.

Moreover, as that blood draw resulted in a blood alcohol reading of 0.2088 or 0.221 (Deposition of Robert Sears (hereinafter "Sears Dep."), 14:2-3) (R. p. 296, lines 2-3), at which point the Worker would have reeked of alcohol, the blood draw is contradicted by a mountain of substantial, probative, and competent evidence.

The two experts

Opinions as to the validity of the blood draw were provided by two experts.

Mr. Robert Sears has a master's degree in pharmacology from the school of pharmacy at USC, and he also attends trainings. (R. p. 300, lines 9-14) (Sears Dep. 18:9-24). These trainings primarily concern how to operate the equipment once blood is sent to his agency. (Sears c.v., pp. 1-7) (R. pp. 339-345) (listing trainings). He is a toxicologist with the South Carolina Law Enforcement Division, Forensic Services Section. (R. p. 16) (02-28-14 Order, p. 5). At the time of his deposition, he had held that position for approximately 24 years. *See* Sears c.v., p. 1, R. p. 339 (toxicologist with SLED Forensic Services since 1988) (deposition was 08/28/2012).

Professor Ellen C. Riemer, M.D. is a forensic pathologist on the faculty at MUSC. (Deposition of Prof. Ellen C. Riemer, M.D. (hereinafter, "Riemer Dep.") 7:12-18) (R. p. 354, lines 12-18). She is a publishing scientist in the field, with numerous peer-reviewed publications. (Riemer c.v. pp. 5-6) (R. pp. 394-95) (listing peer-reviewed scientific publications). Following her graduation from medical school, she was further trained at Columbia-Presbyterian Medical Center in New York, in the Office of the Chief Medical Examiner of the State of Maryland, and at Johns Hopkins. She was on the faculty of

Wake Forest University School of Medicine, also doing pathology, before coming to MUSC. (R. p.352, line 15-p. 354, line 18) (Riemer Dep. 5:15-7:18).

The two experts testified that the blood draw would be valid only under conditions not present here. Dr. Riemer listed more conditions than did Mr. Sears, but they each agreed that such a blood draw—consisting of inserting a needle into the chest cavity—would be valid only if one had first ruled out internal injuries. (R. p. 297, line 22-p. 298, line 1) (Sears Dep. 15:22-16:1) (the chest-stick method of drawing blood is appropriate “provided that they did an external exam on the body, and felt like there was no significant internal trauma.”); (R. p. 386, lines 4-23) (Riemer Dep. 39:4-23) (agreeing with Mr. Sears’s quotation above).

Yet there is nothing in the record to indicate that he performed any such examination. The uncontroverted testimony is that he did not.¹¹

Moreover, the testimony from those in a position to judge is that it was more likely than not that he did suffer internal injuries. “[T]he details of the collision make it likely there were internal injuries.” (R. p. 372, lines 8-9) (Riemer Dep. 25:8-9). “[I]t’s more likely that he had internal injuries that are obscured by not having had an autopsy.” (R. p. 372, lines 18-20) (Riemer Dep. 25:18-20).¹² EMT/Paramedic Redmond testified

¹¹ Mr. Reynolds testified that he did not even examine the clothes. (R. p. 266, line 15-p. 267, line 2) (Reynolds Dep. 26:15-27:2). Instead, he took his information from the EMS and the highway patrol. (R. p. 258, lines 16-20, p. 259, lines 20-22, p. 262, lines 20-23, page 263, lines 12-13, p. 275, lines 8-9) (Reynolds Dep. 18:16-20, 19:20-22, 22:20-23, 23:12-13, 35:8-9).

¹² Dr. Riemer, who is a professor at MUSC specializing in these matters, reviewed the MAIT report and saw the photographs. (R. p. 357, lines 10-18) (Riemer Dep. 10:10-18) (MAIT report); (R. p. 358, lines 2-19) (Riemer Dep. 11:2-19) (MAIT Report and its included photographs); (R. p. 359, lines 7-15) (Riemer Dep. 12:7-15) (same); (R. p. 372, lines 1-2) (Riemer Dep. 25:1-2) (“I saw the photos of the accident and the body at the scene.”).

She also reviewed the SLED toxicology report; the deposition of Mr. Sears; and the deposition of the deputy coroner who drew the blood. (R. p. 357, line 20-p. 358, line 1) (Riemer Dep. 9:20-11:1).

that he probably “had a massive internal injury.” (R. p. 95, lines 6-7) (Tr. Hr’g 44:6-7). So too did funeral director Pinckney testify to the fact that internal injuries were likely, although the hearing officer erroneously sustained an objection to his testimony on the grounds of lack of basis: “[Y]ou could tell basically by limberness in the neck and also the – the movement that there were internal injuries.” (R. p. 116, lines 3-11).

II. ARGUMENT

Standards of Construction

Workers’ compensation law is to be liberally construed to effect its beneficent purpose. Any reasonable doubt regarding construction is to be determined in favor of coverage. The converse is equally true: any exception or defense to coverage is to be narrowly construed, and any reasonable doubt is to be resolved so as to limit the defense.

[W]orkers’ compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act; only exceptions and restrictions on coverage are to be strictly construed. *See Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (“[W]orkers’ compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers’ compensation coverage must be narrowly construed.” (internal citation omitted)); *Cross v. Concrete Materials*, 236 S.C. 440, 114 S.E.2d 828 (1960) (stating workers’ compensation law will be construed liberally to effect its beneficent purpose); *Olmstead v. Shakespeare*, 348 S.C. 436, 559 S.E.2d 370 (Ct. App. 2002) (noting the law is liberally construed to apply coverage, while exceptions are strictly construed).

James v. Anne’s, Inc., 390 S.C. 188, 197-198, 701 S.E.2d 730, 735 (2010).

“In determining whether a work-related injury is compensable, the Workers’ Compensation Act is liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed.”

Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citing *Dickert v. Metropolitan Life Ins., Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991)). “Any

reasonable doubt as to the construction of the Act will be resolved in favor of coverage.” *Id.* at 455-56, 535 S.E.2d at 442 (citing *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S.E.2d 639 (1992)).

Standard of Review

A decision of the appellate panel should be overturned if it is controlled by an error of law or is clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. “An appellate court can reverse or modify the Commission’s decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.” *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) (citing, e.g., *Fishburne v. ATI Sys. Int’l*, 384 S.C. 76, 84, 681 S.E.2d 595, 599-600 (Ct. App. 2009)). “Under the APA, a reviewing court determines whether . . . the Commission’s findings of fact are supported by substantial evidence in the record and whether the Hearing Panel’s decision is affected by an error of law.” *Id.* at 541, 689 S.E.2d at 618. ““Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.”” *Whigham v. Jackson Dawson Communs.*, 410 S.C. 131, 134-35, 763 S.E.2d 420 (2014) (quoting *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)). *See also Pierre*, 386 S.C. at 540, 689 S.E.2d at 618 (similar).

The appellate panel’s order may also be overturned or modified if it is in violation of law, is arbitrary or capricious or is characterized by an abuse of discretion. S.C. Code Ann. § 1-23-380:

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;

....

(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.

Similarly, “The Court may find the Commission’s findings clearly erroneous if they are based on a mistaken view of the evidence.” *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 245, 762 S.E.2d 19, 21 (2014).

Recent cases have demonstrated the Supreme Court’s willingness to overturn panel decisions denying workers’ compensation payments where the evidence, taken as a whole, does not support the denial, *e.g.*, *Whigham v. Jackson Dawson Communs.*, 410 S.C. 131, 763 S.E.2d 420 (2014); *State Accident Fund v. S.C. Second Injury Fund*, 409 S.C. 240, 762 S.E.2d 19 (2014). Where a panel has inaccurately determined that sufficient evidence has been presented to overcome a presumption, it is to be reversed. *State Accident Fund* (“substantial evidence” is required to overcome a presumption; the panel’s denial of compensation claimed to be, but was not truly, based on substantial evidence).

Burdens

While Section § 42-9-60 of the South Carolina Code allows intoxication to be a defense against paying the Worker compensation, it places the burden of proving that intoxication caused the injury squarely on the party alleging intoxication. “In the event that any person claims that the provisions of this section are applicable in any case, the

burden of proof shall be upon such person.” S.C. Code Ann. § 42-9-60 (emphasis added).

See also Chandler v. Suitt Constr. Co., 288 S.C. 503, 343 S.E.2d 633 (Ct. App. 1986) (interpreting the provision).

As has been explained, in the specific context of tests of blood alcohol in workers’ compensation law, “The expert witness who offers the results of these types of scientific tests must be in a position to [explain] the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in *the particular case*.” *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 600-01, 468 S.E.2d 420, 422 (N.C. App. 1996) (alteration in original) (emphasis in original) (internal quotation marks omitted).

North Carolina case law regarding workers’ compensation is entitled to special weight. *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 241-242, 750 S.E.2d 97, 101 (Ct. App. 2013),

Because South Carolina adopted large portions of the North Carolina Workers’ Compensation legislation, we rely on North Carolina precedent in Workers’ Compensation cases. Decisions of North Carolina courts interpreting that state’s Workers’ Compensation statute are entitled to weight when South Carolina courts interpret the South Carolina Workers’ Compensation Law because the South Carolina statute was fashioned after that of North Carolina.

The Panel Erred in Relying on the Unreliable Blood Draw

The panel erred in relying on a test that is reliable only if one has first ruled out internal injuries, as internal injuries were not ruled out here. It simply makes no sense to rely on unreliable information. To do so is an abuse of discretion, an error of law, clearly erroneous, and a mistaken view of the evidence. The Court can and should reverse on this basis alone. *State Accident Fund, supra*; *Whigham, supra*; *Pierre, supra*.

If the Court wishes to look further, additional reasons to reverse the panel abound.

The panel's error here is amplified because all the testimony from those in a position to judge is that internal injuries were in fact likely. *See* pages 13-14, *supra*.

The panel further erred because, if the test had been accurate, the Worker would have reeked of alcohol. This is just common sense. One does not need training to detect an odor of alcohol at that concentration. *Chandler v. Suitt Constr. Co.*, 288 S.C. 503, 506, 343 S.E.2d 633, 635 (Ct. App. 1986) (holding that evidence that an EMT and a layperson "were in close proximity to the body and detected no odor of alcoholic beverage" is probative evidence that tests claiming to show blood alcohol levels of 0.185 to 0.212 in a decedent were unreliable). Here, the tests claimed to show blood alcohol levels of 0.2088 to 0.221. The panel's determination that some of the witnesses lacked training in detecting alcohol is simply unreasonable, as no training is needed to detect alcohol at these concentrations. It further misunderstands the evidence, as the Highway Patrol is trained in detecting alcohol.

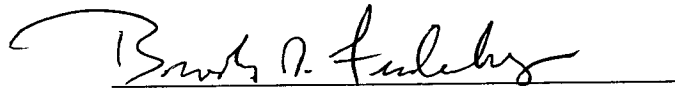
This unreliable test is in conflict with the rest of the evidence.

Finally, the panel erred because there was no expert able to vouch for its correct administration in this particular case. *Charles Keck Logging, supra* (when introducing a test of blood alcohol to deny a Worker the benefits for which he was insured, there must be an expert willing to vouch for its correct administration in the instant case) – something that is sadly lacking from the record here.

Conclusion.

For the above reasons, and such other reasons as may be apparent to the Court, Appellant respectfully requests that the Court REVERSE the panel of the Workers' Compensation Commission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brooks R. Fudenberg", is written over a horizontal line.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Case No. 2014-002366

Briett Johnson, Employee, ... Appellant,

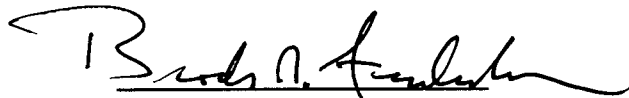
v.

Pike Electric, Inc., Employer, and Liberty Mutual
Insurance Company, Carrier, ... Respondents.

Certificate of Compliance with Rule 211(b)

I certify that the Brief of the Appellant and the Reply Brief of the Appellant
enclosed with this Certificate comply with Rule 211(b), SCACR.

June 29, 2015



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SC Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Case No. 2014-002366

Briett Johnson, Employee, ... Appellant,

v.

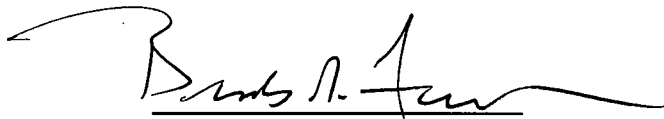
Pike Electric, Inc., Employer, and Liberty Mutual
Insurance Company, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Brief of the Appellant, the Reply Brief of the Appellant,
and the Supplemental Record on Appeal in this case on the Respondents by placing a copy today
in the US Mail, sufficient postage prepaid, addressed to:

Helen F. Hiser, Esq.
McANGUS GOUDELOCK. & COURIE, L.L.C.
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June 29, 2015



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

Re: *Briett Johnson, Employee, Appellant, v. Pike Electric, Inc., Employer, and Liberty Mutual Insurance Company, Carrier, Respondents*
Appellate Case No. 2014-002366

Dear Ms. Kitchings:

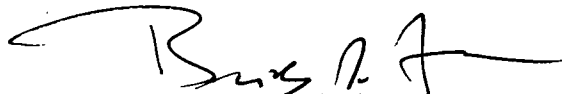
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- One unbound and 14 bound copies of:
 - The Brief of the Appellant
 - The Reply Brief of the Appellant
 - The Supplemental Record on Appeal.
- A Rule 211 Certificate
- A proof of service.
- A copy of this letter
- A return envelope.

It would be appreciated if you would return a clocked copy of the proof of service in the enclosed envelope.

By separate cover, I am sending an unbound and 14 bound copies of the Record on Appeal.

Yours very truly,



Brooks R. Fudenberg

cc: J. Brandon Hylton, Esq.
Weston Adams, III, Esq.

Helen F. Hiser, Esq.
Gregory B. Askins, Esq.



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FROM:

Brooks R. Fudenberg, Esq.
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TO: Hon. Jerry Holtz KITCHINGS
clerk, SC COURT OF APPEALS

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