BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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SC Court of Appeals

WILLIAM F. POSTON, Claimant/Respondent, vs. RANDSTAD NORTH AMERICA, Employer/Appellant, and INDEMNITY INS. CO. OF N.A., Carrier/Appellant, Defendants/Appellants.	)	WCC FILE NO.: 1416804 **APPELLATE PANEL DESCISION AND ORDER**

HEARING: May 16, 2016, Columbia, South Carolina

PURPOSE OF HEARING: Appellate Panel Review of Issues Raised in Defendants Form 30, Request for Commission Review

APPEARANCES: For the Claimant/Respondent: Stephen J. Wukela, Esquire of Wukela Law Firm, in Florence, South Carolina

For the Defendants/Appellants: Christopher C. Mingledorff, Esquire of Moore Ingram Johnson & Steele, LLP in Charleston, South Carolina

DECISION AND ORDER: Appellate Panel Commissioner R. Michael Campbell, II
Commissioner T. Scott Beck
Commissioner Gene McCaskill

PROCEDURAL HISTORY

Claimant alleged that he suffered an occupational disease while working for Defendants as a heavy equipment operator. Defendants denied the claim. Claimant was treated by Dr. Joseph Healy and Dr. Temujin Chavez for cryptococcal meningitis. While treating, Claimant was out of work for approximately five weeks, but was able to return to full duty. Claimant

returned to full duty for the Employer at the same job site on which he alleged he was exposed to cryptococcal meningitis.

Due to the fact the claim was denied, Claimant filed a Form 50, requesting a hearing. Defendants timely filed a response and raised all appropriate defenses. The case was heard by Commissioner Melody L. James, on September 29, 2015, in Florence, South Carolina. The purpose of the hearing was to determine the issues set forth in Claimant's Form 50 and Defendants' Form 51. On January 22, 2016, Commissioner James issued a Decision and Order with the following Findings of Fact, Rulings of Law, and Order:

Hearing Commissioner's Findings of Fact

1. The parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with William Poston being the Claimant, Randstad Temp Force, LP d/b/a Accustaff being the Employer, and Indemnity Insurance Company of North America being the Carrier.

2. The Claimant has an average weekly wage of $1,083.00 with a corresponding compensation rate of $722.04.

This finding is based on the parties' stipulation. (Tr. p. 4).

3. I find that the Claimant suffers from an occupational disease, i.e. cryptococcal meningitis affecting the whole body system, and, in particular, the brain and spine.

This finding is based on the above set out medical records and testimony.

In particular, Dr. Joseph Healy, the Claimant's treating neurologist and Dr. Temujin Chavez, the Claimant's treating infectious disease physician, testified that the Claimant suffered from crytococcal meningitis as the result of his exposure to airborne soil particles containing

Cryptococcus produced as a result of the dirt moving operations of his job. (See Dep. Healy, p. 8, line 23-p. 11, line 10; Dep. Dr. Chavez, p. 33, line 10-p. 35, line 10).

Moreover, Mr. Duffy, upon whose testimony the Defense relies, is not a physician and offered no opinion as to medical diagnosis or causation, nor would he be qualified to do so. (Tr. p. 38, lines 5-8). Instead, the Defense relies upon Mr. Duffy's soil tests which did not reveal any Cryptococcus spores. I find Mr. Duffy's testimony unpersuasive.

First, Mr. Duffy acknowledges that the soil in question was subject to wind and rain and he has no knowledge of condition of material for year between the date of accident and the test. (Tr. p. 43, line 23-p. 47, line 18). Further, Mr. Duffy acknowledged that his firm only sampled the surface of the soil. (Tr. p. 49, lines 15-17).

In fact, even though the soil tested in Area 1, the area in which the canal was excavated and hard piped, was fill dirt transported from Area 3 and dumped into the hole 20 feet deep, 30-50 feet wide and 1,000-1,500 feet long, Mr. Duffy was very explicit that he was only interested in testing the surface and "not concerned with what's underground." (Tr. p. 50, lines 14-15).

When confronted with the fact that the Claimant was exposed to the entire volume of fill dirt as it was dumped into the excavated canal, Mr. Duffy testified:

> *Q. BUT, MR. DUFFY, THE ENTIRE - - ALL THAT SOIL WAS PLACED IN THAT VOLUME WHILE MR. POSTON WAS PRESENT, RIGHT?*
> *A. ALL THE - - SAY THAT AGAIN.*
> *Q. WELL, THAT WAS FILL DIRT.*
> *A. THAT WAS FILL DIRT.*
> *Q. IT WAS FILLING IN A HOLE THAT WAS 20-FEET DEEP, - - -*
> *A. RIGHT.*
> *Q. - - - 30 TO 50-FEET WIDE, AND 1,000 TO 1,500-FEET LONG?*
> *A. RIGHT.*
> *Q. RIGHT.*
> *A. RIGHT. RIGHT.*

Q. AND IS IT, THEREFORE, A FAIR ASSUMPTION THAT THE RELEVANT VOLUME THAT YOU ARE SAMPLING IS THAT VOLUME?

A. VOLUME IS DEPTH AND VOLUME IS NO CONCERN TO US.

IT'S THE SURFACE AREA.

Q. WELL, THAT'S WHAT I'M KIND OF GETTING TO. I MEAN, HOW DO WE KNOW THAT WHAT YOU SAMPLED WAS A STATISTICALLY SIGNIFICANT SAMPLE OF THAT DIRT THAT WENT INTO THAT HOLE?

A. AND I JUST ANSWERED THAT. BECAUSE THERE IS NO STATISTICAL TEST TO SAY HOW MANY SAMPLES YOU SHOULD TAKE IN A GIVEN AREA WITHOUT KNOWING THE POPULATION THAT YOU'RE STUDYING. WE HAVE NO IDEA - - IF WE KNOW THERE WERE X NUMBER OF SPORES IN THAT AREA AND WE WERE GOING TO TEST THE CHARACTERISTIC OF THAT SPORE, WE COULD DO A STATISTICAL ANALYSIS.

Q. BUT, MR. DUFFY, YOU JUST TESTIFIED THERE WEREN'T ANY CRYPTOCCAL IN THAT DIRT.

A. AFTER WE GOT THE TEST RESULTS, THAT'S - - THAT'S WHAT THEY TOLD US, CORRECT.

Q. WHAT I UNDERSTAND YOUR TESTIMONY NOW IS, THAT TESTIMONY IS ONLY AS TO THE SURFACE OF THE DIRT. YOU DON'T HAVE ANY OPINION AS TO WHETHER THERE'S CRYPTOCOCCUS UNDER THE SURFACE?

A. NOT CONCERNED UNDER THE SURFACE.

Q. NOT INTERESTED IN KNOWING WHETHER IT'S UNDER THE SURFACE?

A. WELL, THERE - - THE SPORES ARE DISSEMINATED FROM THE SURFACE. THE SPORES DO NOT CLIMB UP AND GO UP THROUGH THE - -

Q. IF IT'S UNDISTURBED, RIGHT?

A. WELL, NO, THEY - - THEY - - THE SPORES, DURING REPRODUCTION, LAND ON THE SURFACE OF THE MATERIAL. THAT'S - - SPORES, WE HAVE SPORES EVERYTHING OF MICROORGANISMS. THEY LAND ON THE SURFACE, AND THEN AS YOU WALK THROUGH, AS YOU DIG OR WHATEVER AND YOU DISTURB THAT SURFACE, THEN YOU HAVE THE OPPORTUNITY OF DISPERSING THOSE SPORES. FROM THREE FEET DOWN - - FROM THREE - - WE

WOULDN'T EXPECT TO FIND SPORES FROM THREE FEET - - -

A. *MR. DUFFY, - - -*

Q. *- - - DOWN BECAUSE THAT'S CONTRARY TO THE SETTLEMENT PROCESS.*

Q. *MY POINT IS THE SURFACE IS THE SURFACE A YEAR LATER. THE DAY MR. POSTON WAS THERE, THAT WAS FILL DIRT THAT WAS GOING IN AND THE SURFACE WAS CHANGING EVERY DAY, RIGHT?*

A. *THE FILL DIRT WAS CHANGING EVERY DAY, BECAUSE?*

Q. *IT WAS BEING EXPOSED TO THE AIR AND GOING AND FILLILNG INTO THE HOLE, RIGHT?*

A. *OKAY.*

Q. *IS THAT YES?*

A. *YES. I'M TRYING TO FOLLOW YOU. THAT'S - - I HAVE TO THINK.*

Q. *BUT YOU CAN'T TELL ME WHETHER THE DIRT THAT WENT INTO THAT HOLE, WITH THE EXCEPTION THAT THAT'S - - THAT IT IS ON THE VERY SURFACE, CONTAINS ANY CRYPTOCOCCUS?*

A. *NO, NOT ALL OF THAT DIRT.*

Q. *YOU CAN'T TELL ME?*

A. *NO.*

Q. *YOU'RE NOT OFFERING AN OPINION AS TO THAT TODAY?*

A. *I'M OFFERING AN OPINION AS TO WHEN WE SAMPLED THAT MATERIAL, WE DID NOT FIND CRYPTOCOCCUS.*

Q. *ON THE SURFACE?*

A. *ON THE SURFACE, YES.*

Q. *BUT YOU DON'T KNOW WHAT'S UNDER THE SURFACE?*

A. *WE DIDN'T TEST UNDER THE SURFACE, CORRECT.*
(Tr. p.50, line 18-p. 53, line 22)

Thus, the reliability of Mr. Duffy's test in undermined by the fact that he made no effort to test the soil under the surface that the Claimant was exposed to as it filled into the hole in the Claimant's presence. As he admitted:

Q. *BUT YOU CAN'T TELL ME WHETHER THE DIRT THAT WENT INTO THAT HOLE, WITH THE EXCEPTION THAT THAT'S - - THAT IT IS ON THE VERY SURFACE, CONTAINS ANY CRYPTOCOCCUS?*

A. NO, NOT ALL OF THAT DIRT.
Q. YOU CAN'T TELL ME?
A. NO.
(Tr. p. 53, lines 9-15).

Finally, Mr. Duffy admitted that, even as to his tests on the surface, he could offer no scientific basis establishing that the number of samples he took were statistically significant or representative of the surface area tested. (Tr., p. 55, lines 15-18, p. 58, lines 15-18). Indeed, when questioned by the undersigned he testified:

BY COMMISSIONER JAMES:

HOW DID YOU COME UP WITH A NUMBER THAT YOU FELT WAS SUFFICIENT?
... SO IT'S NOT BASED ON STATISTICS. IT'S NOT BASED ON A FORMULA. IT'S BASED ON OUR FEELINGS.
(Tr. p. 63, lines 23-24, ...Tr. p. 64, lines 22-24).

4. I find that Claimant's occupational disease, i.e. cryptococcal meningitis, arose out of and in the course and scope of his employment and that it was the direct result of his continuous exposure to airborne dirt particles in the course of his job as an earth moving equipment operator.

This finding is based on the above set out medical records and testimony. In particular, Dr. Healy testified:

Q. Okay. And that's a, that's a fair approach, too, Doctor, and I will tell you that in the law of Workers' Compensation in addition to injury by accident where we can identify a precise exclusive cause, there is also such another thing call "occupational disease," and in the law of Workers' Compensation, an occupational disease involves diseases that are distinctively associated with particular types of employment and particular types of employment activities. Now, occupational disease asks whether the hazards which the Claimant was exposed are access to those incident to other types of ordinary employment. Whether they were especially incident to this type of work and whether that continuous exposure to those job conditions most probably caused the Claimant's condition. Given that kind of

recitation in a nutshell of the law of occupational disease, do you have an opinion to a reasonable degree of medical certainty as to whether cryptococcal meningitis is the type of disease that is distinctively associates with employment involving moving large quantities of soil?
A. Yes.
Q. Okay. And that is your opinion to a reasonable degree of medical certainty?
A. Yes.
Q. Okay. And, again, do you have an opinion as to whether that hazard distinctively associated with earth-moving activities is an hazard that is in excess of the other type of hazards that would normally be involved in normal employment?
A. Yes.
Q. Okay. And I think I've understood then that your opinion also is that his disease was a product of the continuous exposure to those job conditions?
A. Correct.
(Dep. Dr. Healy, p. 10, line 1-p. 11, line 10). (Emphasis added).

5. I find that the Claimant's occupational disease, i.e. cryptococcal meningitis, is due to hazardous exposure to airborne dirt particles, and the Cryptococcus contained therein, in excess of those hazards that are ordinarily incident to employment.

This finding is based on the above set out records and testimony, including that of Dr. Healy, who testified:

Q. Okay. And, again, do you have an opinion as to whether that hazard distinctively associated with earth-moving activities is an hazard that is in excess of the other type of hazards that would normally be involved in normal employment?
A. Yes.
(Dr. Healy, p. 11, lines 1-6).

6. I find that the Claimant's occupational disease, i.e. cryptococcal meningitis, was peculiar to the occupation and employment in which Claimant was engaged.

This finding is based on the above set out medical records and testimony.

In particular, as Dr. Healy testified, cryptococcal meningitis is distinctively associated with employment involving moving large quantities of soil. (Dep. Dr. Healy, p. 10, lines 16-25).

7. I find that the hazard causing Claimant's occupational disease, i.e. cryptococcal meningitis, is one recognized as peculiar to the particular occupation and employment in which the Claimant was engaged.

This finding is based upon the above set out medical records and testimony.

8. I find that Claimant's occupational disease, i.e. cryptococcal meningitis, was a direct result of the Claimant's continuous exposure to the normal working conditions of his particular occupation and employment as a heavy equipment operator which involved, almost exclusively, the moving of large quantities of soil.

This testimony is based upon the above set out medical records and testimony.

9. I find that pursuant to §42-15-20, §42-15-40, Bailey v. Covil Corp., 354 S.E.2d 35 (S.C. 1997), and Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992), the Employer received notice of the Claimant's occupational disease within ninety (90) days of the date Claimant was disabled and could discover with reasonable diligence that his condition was compensable.

This finding is based upon the Defendant's Form 51 admissions.

10. I find that under §42-15-60, Defendants are responsible for all medical treatment rendered to Claimant including medical treatment rendered by Thomas Keith Stewart, MD, Marion Physician Services, LLC, Carolinas Hospital System-Marion, Radiology Assoc. Of Marion Co., R. Joseph Healy, MD, Carolinas Hospital System, Temujin Chavez, MD, Carolinas Infectious Disease, LabCorp, Pee Dee Radiology Group from the date of the injury, July 9, 2014, to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.

This finding is based on the medical records and the above set out testimony.

11. I find Claimant has not reached maximum medical improvement.

This finding is based upon the parties Stipulation that there is no evidence that the Claimant has reached M.M.I. (Tr. p. 7, lines 22-24).

12. I find that Claimant was totally disabled and entitled to benefits pursuant to §42-9-10 for the 8 week period beginning July 9, 2014, through September 1, 2014 in the weekly amount of Seven Hundred Twenty-Two and 04/100 ($722.04) Dollars for a total of Five Thousand Seven Hundred Seven-Six and 32/100 ($5,776.32) Dollars.

This finding is based on the above set out medical records and testimony, in particular the testimony of Dr. Joseph Healy who restricted the Claimant from work due to his condition for said period. (Dep. Healy, p. 11, line 11-p. 12, line 9).

Hearing Commissioner's Rulings of Law

Accordingly, as provided in the Code of Laws of South Carolina, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. Pursuant to §42-1-130, the Claimant was a covered Employee at the time in question; and under §42-1-140, the Defendant/Employer was a covered Employer under the Act.

2. Pursuant to §42-1-40, the compensation rate for Claimant is Seven Hundred Twenty-Two and 04/100 ($722.04) Dollars per week.

3. Pursuant to §42-11-10, et. seq., and Mohasco Corp. Dixana Mill Div. v. Rising, 289 S.C. 130 (S.C. App. 1986), Claimant suffered an occupational disease i.e. cryptococcal meningitis as the direct result of his continuous exposure to airborne dirt particles and the cryptococcal fungus they contain out of and in the course of his employment as an operator of heavy earth moving equipment, in particular:

a. *I find that the Claimant suffers from an occupational disease i.e. cryptococcal meningitis, affecting the whole body system, and in particular, the brain and spine.*

b. *I find that Claimant's occupational disease arose out of and in the course and scope of his employment and that it was the result of his direct and continuous exposure to airborne dirt particles and the cryptococcal fungus they contain in the course of his job as a heavy equipment operator.*

c. *I find that the Claimant's occupational disease is due to hazardous exposure to airborne dirt particles in excess of those hazards that are ordinarily incident to employment.*

d. *I find that the Claimant's occupational disease was peculiar to the occupation and employment in which Claimant was engaged.*

e. *I find that the hazard causing Claimant's occupational disease is one recognized as peculiar to the particular occupation and employment in which the Claimant was engaged.*

f. *I find that the Claimant's occupational disease directly resulted from the Claimant's continuous exposure to the normal working conditions of his particular occupation and employment.*

4. *Pursuant to §42-15-20, §42-15-40, Bailey v. Covil Corp., 354 S.E.2d 35 (S.C. 1997), and Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992), I find that the Employer received notice of the Claimant's occupational disease within ninety (90) days of the date Claimant was disabled and could discover with reasonable diligence that his condition was compensable.*

5. *Pursuant to §42-15-60, I find that Defendants are responsible for all medical treatment rendered to Claimant including medical treatment rendered by Thomas Keith Stewart, MD, Marion Physician Services, LLC, Carolinas Hospital System-Marion, Radiology Assoc. Of Marion Co., R. Joseph Healy, MD, Carolinas Hospital System, Temujin Chavez, MD, Carolinas Infectious Disease, LabCorp, Pee Dee Radiology Group from the date of the injury, July 9, 2014, to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.*

6. *I find Claimant has not reached maximum medical improvement.*

7. *I find that Claimant is totally disabled and entitled to benefits pursuant to §42-9-10 for the 8 week period beginning July 9, 2014, through September 1, 2014 in the weekly amount of Seven Hundred Twenty-Two and 04/100 ($722.04) Dollars for a total of Five Thousand Seven Hundred Seven-Six and 32/100 ($5,776.32) Dollars.*

Hearing Commissioner's Order

IT IS, THERFORE, ORDERED that the Employer, Randstad Temp Force, LP, d/b/a Accustaff, and the Carrier, Indemnity Insurance Company of North America, shall pay all medical treatment rendered to Claimant, including medical treatment rendered by Thomas Keith Stewart, MD, Marion Physician Services, LLC, Carolinas Hospital System-Marion, Radiology Assoc. Of Marion Co., R. Joseph Healy, MD, Carolinas Hospital System, Temujin Chavez, MD, Carolinas Infectious Disease, LabCorp, Pee Dee Radiology Group from the date of the injury, July 9, 2014, to the date of this Order and continuing for such additional time as will tend to lessen the period of disability.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay to the Claimant weekly benefits at the compensation rate of Seven Hundred Twenty-Two and 04/100 ($722.04) Dollars

for the 8 week period beginning July 9, 2014 through September 1, 2014 in the weekly amount of $722.04 for a total of Five Thousand Seven Hundred Seven-Six and 32/100 ($5,776.32) Dollars.

IT IS FURTHER ORDERED that no hearing costs are assessed in this instance.

STATEMENT OF THE CASE

This is an appeal from the above mentioned Decision and Order of the Single Commissioner. Defendants timely filed a Form 30 to request review by the Appellate Panel. Defendants raised numerous errors on appeal, including but not limited to, the fact that Claimant failed to prove the statutorily required elements for an occupational disease, the fact that Claimant's disease did not arise out of and in the course and scope of his employment, and the fact that the hazard causing Claimant's disease is not peculiar to the occupation and employment in which he was engaged. The parties' briefs were timely filed, and oral argument was heard by the Appellate Panel on May 16, 2016.

STANDARD OF REVIEW

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262, (Ct. App. 2006); see also Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); and Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). Pursuant to S.C. Code Ann. § 42-17-50, the Appellate Panel shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. Pack v. State Dep't of Transp., 381 S.C. 526, 673 S.E.2d 461, (Ct. App. 2009); see also Lowe v. An-Can Transport Services, Inc., 283 S.C. 543, 324 S.E.2d 87 (Ct. App. 1984); and Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967).

EVIDENCE

1. Testimony of Dr. Joseph Healy, Jr.

On February 16, 2015, Employer conducted the deposition of Claimant's neurologist, Dr. Joseph Healy, Jr. According to Dr. Healy's testimony, cryptococcal meningitis is caused by the inhalation of cryptococcal fungus – a type of airborne fungus that is common throughout our environment and everyday lives. (Employer's APA #2 at pp. 6, lines 20-25; 7, lines 18-25). Everyone is exposed to cryptococcal fungus through various environmental factors. (Id. at p. 17, lines 20-23). Even knowing this information, Dr. Healy did absolutely no investigation into Claimant's environmental exposures or possible causes outside of his current employment.

Moreover, Dr. Healy also explained that individuals with cryptococcal meningitis are usually infested with the fungus for an extended period of time before one becomes symptomatic or develops meningitis. (Id. at p. 7, lines 1-5). Dr. Healy explained that the fungus spores are breathed into the lungs and lay dormant for a period of time or causes a very low-level illness. If your immune system is unable to fight the infection off at that point, it can spread into your spinal fluid where it, again, usually lays dormant for an extended period of time before one develops meningitis. (Id. at p. 7, lines 18-24; p. 8, lines 1-2). Specifically as it relates to Claimant, Dr. Healy testified that "he had been ill for some time, probably about eighteen (18) months [before he ever saw me and ordered an MRI]...." (Id). Dr. Healy first saw Claimant in July 2014, only one (1) month after Claimant began working for Employer. Thus, Dr. Healy's timeline is that Claimant had been infected since early 2013.

When asked about Claimant's cause of cryptococcal meningitis, Dr. Healy testified that the likely source was claimant's employment simply because "I have no alternative explanation." (Id. at p. 9, lines 20-22). Notably, Dr. Healy acknowledges that he has absolutely no knowledge

or information regarding Claimant's environmental exposures or factors outside of his employment such as where Claimant lives; any hobbies or activities outside or work: whether he owns any pets or animals; whether he lives near the Purdue chicken facility in Florence; whether Claimant performs any outdoor chores; whether he hunts or fishes; or any other potential sources of exposure to cryptococcal fungus. (Id. at p. 8, lines 8-15). Dr. Healy's opinion as to causation is not direct and that which is normally presented in a workers' compensation claim. Instead, he only links it to Claimant's employment because he has "no alternate explanation." Adopting such a mechanism of causation is quite dangerous and expansive.

2. Testimony of Dr. Temujin D. Chavez.

On March 20, 2015, Employer conducted the deposition of Claimant's authorized treating physician, Dr. Temujin D. Chavez. Dr. Chavez is an infectious disease doctor at CID Carolinas Infectious Disease. According to Dr. Chavez's testimony, he has treated various patients over the years that have been diagnosed with cryptococcal meningitis. (Employer's APA # 3 at p. 5, lines 23-25, p. 6, lines 1-7). His opinion is that no one really knows how cryptococcal meningitis is contracted. There are suspicions it originates from bird droppings, but it is also thought to be present in decaying matter such as trees, vegetables and plants. (Id. at p. 14, lines 10-25). Dr. Chavez acknowledges that cryptococcal fungus is commonly spread through airborne spores. In fact, Dr. Chavez's example of the ease at which someone is exposed is that "anyone can contract it by simply driving down the road with the windows down and breathing it in." (Id. at p. 17, lines 4-10).

Just like Dr. Healy, despite knowing how widespread cryptococcal fungus is in our environment, Dr. Chavez admits that he did no investigation or collected any information regarding where Claimant lived; specific details about his workplace: whether he has any pets or

been around any animals; whether he has a chicken coop or lives near the Purdue chicken facility in Florence; what type of hobbies and activities he enjoys outside or work; whether he hunts or fishes; whether he gardens or works in the yard; or any other details about Claimant's life that would be vital in determining potential exposure to cryptococcal fungus. (Id. at pp. 9-10; p. 18, lines 1-20; p. 44, lines 9-25 (admitting that employment is only possible source he looked into); p. 45, lines 1-11).

When asked specifically if he knew how Claimant contracted cryptococcal meningitis, he responded, "No, I do not." (Id. at p. 13, lines 7-9). Likewise, when asked if he knew how any of his other patients contracted cryptococcal meningitis, Dr. Chavez answered, "[n]o. Frankly, no...." (Id. at p. 14, lines 4-9).

3. Was there any evidence of cryptococcal fungus at Claimant's work site?

In light of the fact that Dr. Healy and Dr. Chavez could not explain when, why or how Claimant became ill, Employer hired David A. Duffy, Certified Industrial Hygienist, for the purpose of obtaining, testing and analyzing soil samples from the work site on which Claimant alleges made him ill. Specifically, Mr. Duffy's analysis would search for the presence of cryptococcal fungus in the soil. Mr. Duffy is a Certified Industrial Hygienist who testified cryptococcal meningitis is a fungus that lives in the environment throughout the world. It is most commonly associated with eucalyptus trees and pigeon guano. (Employer's APA # 4, at p. 1.)

Since cryptococcal fungus is known to remain in the presence of soil for extended periods of time, Mr. Duffy collected a total of twenty-two (22) various soil samples among three different areas of Claimant's worksite to test for the presence of Cryptococcus fungus. Each sample was sent to EMLS Analytical, Inc., where they were plated on growth media to determine

if cryptococcal fungus was present. (Id. at p. 3). Mr. Duffy's report ultimately concluded that there was no presence of cryptococcal fungus found in any of the samples taken from Claimant's worksite. (Id). Again, of twenty two (22) samples collected, there was not a single spore of Cryptococcus fungus found.

Both at the September 29, 2015 and May 16, 2016 hearings, Claimant argued Mr. Duffy's opinion was not credible. Despite these arguments, Claimant presented no evidence of the presence of a single spore of cryptococcal fungus at Claimant's work site – a burden which rests upon Claimant. In fact, at the May 16, 2016 appellate panel hearing, counsel for Claimant was directly asked by Commissioner Beck if there was any evidence in the record of the case of cryptococcal fungus at Claimant's work site. Counsel for Claimant could not direct the appellate panel to any such evidence.

FINDINGS OF FACT BY THE APPELLATE PANEL

After careful consideration of all the evidence in the record, including all the sworn testimony, all the APA submissions, all exhibits, the Commission's file, all stipulations, the parties appellate briefs, and oral arguments from the parties, the Appellate Panel rules as follows:

1. Claimant's disease did not arise out of or in the course of his employment with Defendants. We find it difficult to place weight on causation when there is no evidence that the spores ever existed on the worksite.

2. Based upon the scientific and medical evidence, we are not persuaded that the disease Claimant contracted is peculiar to his employment with Defendants.

CONCLUSIONS OF LAW

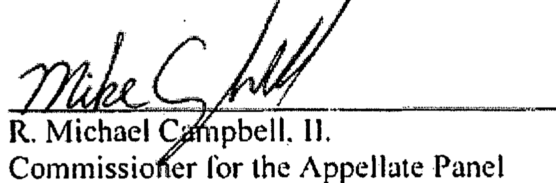
Based upon the foregoing findings of fact and under the South Carolina Code of Laws, as amended, and the applicable case law, the Appellate Panel hereby makes the following conclusions of law:

1. Under S.C. Code Ann. § 42-11-10. Claimant has not met his burden, and did not suffer an occupational disease as set forth in the aforementioned statute. Claimant is not entitled to compensation, and is not entitled to reimbursement for any previous medical treatment, and is not entitled to any further medical treatment. See also Fox v. Newberry County Memorial Hosp., 316 S.C. 537, 451 S.E.2d 28 (S.C. App. 1994) (rehearing denied, certiorari granted in part, reversed in part on other grounds 319 S.C. 461 S.E.2d 391).

ORDER OF APPELLATE PANEL

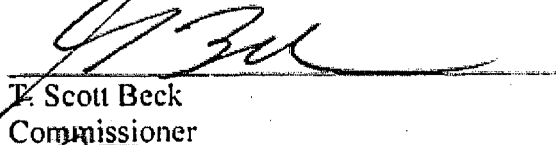
This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel on May 16, 2016. The Appellate Panel considered all of the evidence, and by unanimous vote, **REVERSES** the Decision and Order of the Single Commissioner from January 22, 2016.

IT IS SO ORDERED.

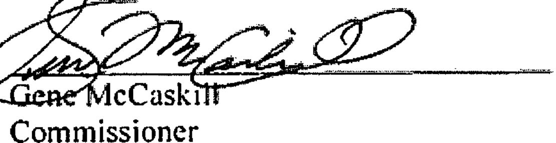


R. Michael Campbell, II.
Commissioner for the Appellate Panel

WE CONCUR:



T. Scott Beck
Commissioner



Gene McCaskill
Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on July 6, 2016

Stephen J. Wukela

From:	appeals@wcc.sc.gov
Sent:	Wednesday, July 06, 2016 12:02 PM
To:	CCMINGLEDORFF@MIJS.COM; MEPATTERSON@MIJS.COM; STEPHEN@WUKELALAW.COM; APPEALS@WCC.SC.GOV
Subject:	Full Commission Order - WCC#:1416804 - POSTON
Attachments:	R08 ORD - SCWCC Order PDF - 7_6_2016 - WCC #_ 1416804.pdf

Attached is the Full Commission Order for WCC#: 1416804

R08 ORD - Full Commission Order - 7/6/2016 - ORDER#: 60682 - WCC #: 1416804