THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1416804

William F. Poston, Claimant ..... Appellant,

vs.

Randstad North America, Employer and
Indemnity Insurance Co. of N.A., Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

STEPHEN J. WUKELA
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STATEMENT OF ISSUES ON APPEAL

1. **DID THE COMMISSION ERR IN FAILING TO FIND THAT THE CLAIMANT SUFFERED FROM AN OCCUPATIONAL DISEASE?**

    A. **DID THE APPELLATE PANEL ERR IN FINDING THAT CLAIMANT'S DISEASE DID NOT ARISE OUT OF OR IN THE COURSE OF EMPLOYMENT?**

    B. **DID THE COMMISSION ERR IN FAILING TO FIND THAT CLAIMANT'S DISEASE IS PECULIAR TO HIS OCCUPATION AND NOT ONE OF THE ORDINARY DISEASES OF LIFE TO WHICH THE GENERAL PUBLIC IS EQUALLY EXPOSED?**

I. STATEMENT OF THE CASE

This is a Workers' Compensation case. The Appellant filed a claim on November 11, 2014 alleging that he suffered the occupational disease cryptococcal meningitis, a disease peculiar to individuals exposed to airborne soil particles on the job.

The Defendants deny that the disease arose out of the Claimant's employment. After hearing, the Single Commissioner found:

> **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. (R. p. 48, line 23 - p. 51, line 10; R. p. 100, line 10 - p. 102, 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. (R. p. 155, 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. (R. p. 160, line 23 - p. 164, line 18). Further, Mr. Duffy acknowledged that his firm only sampled the surface of the soil. (R. p. 166, 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." (R. p. 167, 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.

(R. p. 167, line 18 - p. 170, 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.
(R. p. 170, 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. (R., p. 172, lines 15-18, p. 175, 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,
(R. p. 180, lines 23-24, ...R. p. 181, 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 .0incident 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.

(R. p. 50, line 1 - p. 51, 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.

(R. p. 51, 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. (R. p. 50, 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.

(R. pp. 18-19).

The Defendants filed a timely appeal to the Workers' Compensation Commission Appellate Panel arguing, essentially, that the Claimant's condition was not caused by exposure to the workplace nor was it peculiar to his employment with the Defendants.

By Order of July 6, 2016, the Appellate Panel reversed the Single Commissioner finding:

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.

(R. pp. 24-40).

II. STANDARD OF REVIEW

It is well established that questions of law decided by the Workers' Compensation Commission, such as the decision as to whether to admit evidence, are decided de novo by this Court. See S.C. Code §1-23-380(5)(d).

Judicial review of the Workers' Compensation Commission Appellate Panel's factual findings based upon evidence, once admitted, is generally governed by the substantial evidence standard. See Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006). In particular, the Appellate Panel's factual findings must be affirmed if supported by substantial evidence in the record. See Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). That is, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(5)(d)(Supp. 2006); see also Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005).

However, a reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole

record." S.C. Code Ann. §1-23-380(A)(5)(e)(Supp. 2006); See also Bass v. Kenco Group, 366 S.C. 450 (Ct. App. 2005).

Thus, where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied).

However, if the evidence is undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law"). Also, when the evidence gives rise to but one reasonable inference, the question becomes one of law for the courts to decide. See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court."); Lorick v. S.C. Electric & Gas Co., 245 S.C. 513 (1965); Kinsey v. Champion American Service Center, 268 S.C. 177 (1977); Smith v. Union Bleachery/Cone Mills, 276 S.C. 454 (1981); Scott v. Havnear Motor Co., 226 S.C. 580 (1955).

ARGUMENT

I. THE COMMISSION ERRED IN FAILING TO FIND THAT THE CLAIMANT SUFFERED FROM AN OCCUPATIONAL DISEASE.

S.C. Code §42-11-10 defines occupational disease. It provides, in pertinent part:

SECTION 42-11-10. "Occupational disease" defined.

(A) "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.

(B) No disease shall be considered an occupational disease when it:

(1) does not result directly and naturally from exposure in this State to the hazards peculiar to the particular employment;

(2) results from exposure to outside climatic conditions;

(3) is a contagious disease resulting from exposure to fellow employees or from a hazard to which the workman would have been equally exposed outside of his employment;

(4) is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication and a natural incident of an occupational disease or unless there is continuous exposure peculiar to the occupation itself which makes such disease a hazard inherent in such occupation;

(5) is any disease of the cardiac, pulmonary, or circulatory system not resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein; or

(6) is any chronic disease of the skeletal joints.

S.C. Code §42-11-10 Ann.

The primary focus of an occupational disease analysis is whether a disease is one

peculiar to the claimant's employment. See, Fox v. Newberry City Mem. Hosp., 316 S.C. 537, 544 (Ct. App. 1994)(rev'd on other grounds, 319 S.C. 278 (1995)). That is, even where a claimant cannot identify a distinct accidental contact with a germ or contaminant, the law of occupational disease recognizes, as compensable, diseases that are distinctively associated with the claimant's type of employment. See Fox at 546 (finding "our inquiry is not focused on whether the disease arose from a single accidental contact. Rather, we focus our inquiry on whether the disease is distinctively associated with employment as defined under §42-11-10.").

In Fox v. Newberry County Mem. Hosp., 316 S.C. 537 (Ct. App. 1994), this Court considered a case in which a nurse contracted hepatitis. The nurse had regular contact with patients but was unable to identify a specific time, place, or source of her infection. See Fox at 540. The Court found that the Claimant had suffered a compensable occupational disease in spite of the absence of evidence of a specific time, place, and source of infection; holding "our inquiry is not focused on whether the disease arose from a single accidental contact. Rather, we focus our inquiry on whether the disease is distinctively associated with employment as defined under §42-11-10." Fox at 546.[1]

The Fox Court reviewed, with approval, the reasoning of the North Carolina Supreme Court in Booker v. Duke Medical Cntr., 297 N.C. 458 (N.C. 1979). There, the North Carolina Supreme Court found compensable occupational disease in the case of a lab technician who frequently handled blood samples and contracted hepatitis. See Fox at 544-545.

[1] The Supreme Court reversed on other grounds, finding the Court of Appeals erred in not remanding the matter for specific findings on the six occupational disease elements.

There, the lab technician was unable to identify the time and place he became infected. Id. at 545. Nevertheless, the North Carolina Court "focused on whether 'there was a recognizable link between the nature of the job and an increased risk of contracting the disease in question.'" Fox at 545 (quoting Booker, 256 S.E.2d 189, 198). The North Carolina Court went on to note that "In the case of occupational diseases, proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence." Booker, 256 S.E.2d 189, 200.

The Booker Court found that the nature of the claimant's occupation combined with the absence of evidence of contact with hepatitis outside of employment (claimant had never had hepatitis before the job and had never known any person outside of employment who had hepatitis) sufficient to establish occupational disease; even in the absence of any evidence establishing the specific time, place, and source of infection at the job. See Booker at 201.

This Court applied the same logic in Muir v. C.R. Bard, Inc., 366 S.C. 266 (Ct. App. 1999). There, a catheter inspector contracted hepatitis. The claimant could not identify a specific time, place, or source of the infection. Nonetheless, the Court found that expert opinion testimony provided substantial evidence that the circumstances of the claimant's job created a peculiar hazard of risk of contracting hepatitis and such was more likely than not the case. See Muir at 285-290.

Thus, our courts have found that occupational disease does not require evidence of the specific time, place, or source of infection. With occupational disease, proof of causation, by necessity, must be based upon circumstantial evidence. Our courts focus upon whether the disease is distinctly associated with the claimant's employment. That is,

whether there was a recognizable link between the nature of the job and an increased risk of contracting the disease.

While there are no reported South Carolina opinions, at least one other jurisdiction has recognized cryptoccocal meningitis as an occupational disease. See Florida Power Corp. v. Stenlolm, 577 So.2d 977, 978, 982, (Ct. App. FL 1991)(finding cryptoccocal meningitis compensable occupational disease involving "an infection involving the covering of the brain and spinal cord, or meninges, caused by a yeast or fungus ... found in soil, grain, fertilizer, flowers, corn, milk, peach juice, dust, and in pigeon feces" even where there was no evidence presented that the specific pigeon feces to which the claimant was exposed contained the fungus).

The Single Commissioner here found that the Claimant's cryptococcal meningitis was an occupational disease suffered as a result of the Claimant's exposure to Cryptococcus in airborne dust to which he was exposed during earth moving activities. (R. pp. 13-19, Findings of Fact Nos. 3-8). The Commissioner did so based on the uncontradicted opinions of the Claimant's treating neurologist and infectious disease doctor. (R. p. 42, line 23 – p. 51, line 10).

The Commission's Appellate Panel reversed, finding "We find it difficult to place weight on causation when there is no evidence that the spores ever existed on the worksite" and "we are not persuaded that the disease claimant contracted is peculiar to his employment with Defendants." (R. p. 39).

The Commission's Order was summary. Its rationale, confined essentially to those two sentences, is insufficient to allow this Court to determine whether it was supported by substantial evidence. See, Muir v. C.R. Bard, Inc., 336 S.C. 266, 284 (Ct.

App. 1999)(citing Parsons v. Georgetown Steel, 318 S.C. 63 (1995) for proposition that "findings of fact of administrative body must be sufficiently detailed to enable reviewing court to determine whether findings are supported by evidence").

This summary ruling does reveal that the Commission erred, as a matter of law, in inserting a requirement in this occupational disease case that the claimant prove the specific time, place, and source of his infection, i.e., that the specific spores of fungus with which he was infected were in the specific soil to which he was exposed.

This is not the standard of evidence previously required by our courts conducting an occupational disease analysis, was not the standard applied in Fox and Muir, and, if adopted here, would effectively transform all of occupational disease into injury by accident given that occupational disease, by its very nature, must be proven by circumstantial evidence.

Moreover, the Commission ignored the substantial evidence in the record contained in the uncontradicted opinions of the Claimant's treating doctors establishing causation, and the peculiar association of the disease to the Claimant's employment as an earth mover:

A. THE APPELLATE PANEL ERRED IN FINDING THAT CLAIMANT'S DISEASE DID NOT ARISE OUT OF OR IN THE COURSE OF EMPLOYMENT.

Dr. R. Joseph Healy, the Claimant's treating neurologist, testified that individuals who are using heavy equipment, moving and disturbing large amounts of soil, are uniquely subject to cryptococcal meningitis infection because the fungus grows in the soil and is inhaled when the soil is disturbed. (R. p. 48, line 8 - p. 51, line 10). At deposition, Dr. Healy opined to a reasonable degree of medical certainty that Claimant contracted

fungal meningitis as a result of exposure to disturbed soil on the job. (R. p. 48, line 23 - p. 51, line 10.) Dr. Chavez, the Claimant's treating infectious disease physician agreed. (R. p. 100, line 24 - p. 102, line 10).

Defendants rely on testimony of their expert, David A. Duffy. On cross-examination Mr. Duffy testified that he was not a neurologist, or an infectious disease doctor, or an M.D. at all; that he was not qualified to offer medical opinions as to diagnosis or causation; and that he did not intend to offer any such opinions. (R. p. 154, line 15 - p. 155, line 8).

The sole contention in Mr. Duffy's testimony was that a year after the Claimant's alleged exposure, Mr. Duffy obtained 25 soil samples with Q-tips at the work site, and that those samples did not contain any Cryptococcal fungus.

Mr. Duffy admitted, however, that the soil to which the Claimant was exposed filled a volume 20 feet deep, 30-50 feet wide, and 1,000-1,500 feet long, that he made no effort to sample underground, that he tested only a portion of the surface area, and that the volume was of no concern to him. (R. p. 167, line 18 – p. 170, line 22).

Further, when Mr. Duffy was questioned by the Single Commissioner about the statistical significance of the number of surface soil samples he took, Mr. Duffy 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,
>
> (R. p. 180, lines 23-24, ...R. p. 181, lines 22-24).

The Single Commissioner found that, by his own admission, Mr. Duffy's testing

for Cryptococcal fungus on the soil surface a year later, had no statistical significance. (R. pp. 13-17).

The Single Commissioner found causation based on the uncontradicted medical opinions of the Claimant's treating neurologist and treating infectious disease doctor, both of whom testified to a reasonable degree of medical certainty that the Claimant's exposure to airborne dust particles at the job site caused him to contract Cryptococcal Meningitis. (R. pp. 13-18).

The Commission's Appellate Panel reversed this finding of causation without citing any evidence, much less substantial evidence, to the contrary.

B. THE COMMISSION ERRED IN FAILING TO FIND THAT CLAIMANT'S DISEASE IS PECULIAR TO HIS OCCUPATION AND NOT ONE OF THE ORDINARY DISEASES OF LIFE TO WHICH THE GENERAL PUBLIC IS EQUALLY EXPOSED.

At deposition, Dr. Healy, the Claimant's authorized treating neurologist, testified:

> Q. 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 (sic) 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 (sic) 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.

(R. p. 50, line 1 - p. 51, line 10).(Emphasis added).

Defendants argued to the Appellate Panel that Cryptococcal Meningitis is an ordinary disease of life to which the general public is equally exposed. In support of this argument they pointed to Dr. Healy's testimony that "I mean, everybody - we're all exposed to it..." (R. p. 57, lines 20-21). They also pointed to the deposition testimony of Dr. Chavez that:

> ...there are definitely people like you and I who sometimes get cryptococcus and I don't know if it comes from the environment we work in or whether we're driving in a car and we have the windows down and the trade winds blow, you know, a dust into us and then we get cryptococcus.

(R. p. 84, lines 5-10).

Based on these deposition excerpts, the Defense argued that cryptococcal

meningitis is a common and ordinary disease of life to which the population as a whole is equally exposed and it is not peculiar to the Claimant's occupation of dirt moving.

What the Defense argument glosses over is that Drs. Healy and Chavez did not testify the public is equally exposed to cryptococcal fungus. Nor did they testify that cryptococcal meningitis was an ordinary disease of life. Instead, they testified that cryptococcal meningitis is rare. In fact, Dr. Healy testified "I mean, everybody - we're all exposed to it [Cryptococcal fungus] but, you know, the incidence is very, very low..." (R. p. 57, lines 20-23). Dr. Healy, Dr. Chavez, and even Mr. Duffy, testified that Cryptococcus is associated with bird droppings which are, obviously, found in a higher concentration in soil. (R. p. 50, line 1 - p. 51, line 10; R. p. 82, lines 8-9; R. p. 147, lines 9-22). Similarly, they recognized that those individuals involved in earth moving operations that generate large amounts of airborne soil particles have a higher exposure to cryptococcal fungus than the population at large. (Id. R. p. 100, lines 10-13).

As to the level of risk of exposure for people driving in a car with the windows down, Dr. Chavez testified:

> But I would say if you're looking at risk stratification in regards to who would be at higher risk of having it versus another person, someone who sits - - for example, myself or anybody else who sits in the hospital or in a courtroom who is in a controlled environmental setting without any exposure to birds at the home, then their chance is less.

(R. p. 83, line 21 - p. 84, line 3).(Emphasis added).

In sum, everyone who testified in this case, including Mr. Duffy, recognized that cryptococcal fungus is associated with bird droppings and most commonly found in soil; and therefore, an individual, such as the Claimant, involved in heavy earth moving operations, generating large amounts of dust and airborne soil, has a higher level of

exposure to cryptococcal fungus; and, therefore, was at a higher risk of contracting this very rare disease than ordinary public.

In fact, exposure to airborne dust particles is substantially associated with cryptococcal meningitis. Both the Claimant's treating neurologist and his treating infectious disease doctor testified, to a reasonable degree of medical certainty, that such exposure was the cause of the Claimant's exposure in this case. Their expert medical opinions as to causation were uncontradicted.

CONCLUSION

For the foregoing reasons, the Order of the Appellate Panel should be reversed.

Respectfully submitted,

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January 17, 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1416804

William F. Poston, Claimant ..... Appellant,

vs.

Randstad North America, Employer and
Indemnity Insurance Co. of N.A., Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated: January 17, 2017

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