

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL**

TIMOTHY CAUSEY,)
)
Claimant/Respondent,)
)
v.)
)
HORRY COUNTY,)
)
Self-Insured Employer)
through the)
)
S.C. COUNTIES WORKERS')
COMPENSATION TRUST,)
)
Defendants/Appellants.)
_____)

W.C.C. FILE NO. 1302588

DECISION & ORDER

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SC Court of Appeals

Statement of the Case

This matter originally came before Hearing Commissioner R. Michael Campbell, II, pursuant to the Forms 52 and 53. The Form 52 alleges that Causey sustained an accidental injury to his lungs on March 13, 2013 and subsequently died on May 19, 2013. The Defendants deny Causey sustained any injury to his lungs on March 13, 2013 and deny that his death due to H1N1 "Swine Flu" two months later was causally-related to his employment. Causey's attending physician, Dr. Charlie Strange, testified that Causey died from Swine Flu and that smoke exposure played no role in his death. In this opinion, Causey's other treating physicians (Dr. Timothy Whelan, Dr. William Largen, and Dr. Dee Ford) concurred. Despite the testimony of Causey's treating physicians, and despite the corroborative opinions of Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, and Dr. Thomas Sporn, Hearing Commissioner Campbell found that "Claimant' [sic] estate is entitled to death benefits."

Hearing Commissioner Campbell's findings were as follows:

1. *While there are numerous expert opinions as to whether claimant's death was causally related to his smoke inhalation, I give the greatest weight to the opinions of the physicians who treated the claimant and the hearing testimony of Dr. Kimberly A. Collins. Therefore, I hereby find, based on a preponderance of the evidence as a whole, that the claimant's death was causally related to his work-related smoke inhalation injury arising out of and in the course and scope of his employment.*
2. *Claimant' [sic] estate is entitled to death benefits pursuant to the Act in the amount of \$283,190.00 (claimant's compensation rated of \$566.38 x 500 weeks) and the payment of all causally related medical treatment.*

By their Form 30, the Defendants raised the following issues on appeal:

1. *The single Commissioner erred as a matter of fact and as a matter of law in failing to consider all of the evidence in the case and in blindly viewing the case from the Claimant's perspective and therefore, the Decision and Order should be reversed and vacated as a matter of law and set for a hearing de novo with a new Commissioner;*
2. *The single Commissioner erred as a matter of fact and as a matter of law in failing to specifically set forth the evidence that was entered into the record and the evidence that was excluded and therefore, there is no way for a reviewing body to determine whether or not he considered all of the evidence in the record and the Decision and Order should be reversed and vacated as a matter of law and set for a hearing de novo with a new Commissioner;*
3. *The single Commissioner erred as a matter of fact and as a matter of law in failing to set forth the objections to APA Submissions that were made on the record and the evidence that was excluded. It is apparent from the Order that the Commissioner's decision was based upon evidence that was excluded and therefore should be reversed and vacated as a matter of law and set for a hearing de novo with a new Commissioner;*
4. *The single Commissioner erred as a matter of fact and as a matter of law in finding that, Timothy Causey, was exposed and inhaled smoke containing, in addition to soot carbon and carbon*

monoxide, numerous other chemical toxins including toxic polyvinyls, polyvinyl chlorides, ammonia and formaldehyde, the error being that there is no competent evidence in the record that the Claimant was exposed to these alleged chemical toxins;

5. *The single Commissioner erred as a matter of fact and as a matter of law in finding that inhaling these alleged toxins materially decreased the Claimant's ability to fight off infection; due to the Claimant's severely depressed immune system, he contracted H1N1; after a prolonged illness, the Claimant died, the error being that the overwhelming evidence in the record does not support this Finding of Fact;*
6. *The single Commissioner erred as a matter of fact and as a matter of law in making Finding of Fact No. 2;*
7. *The single Commissioner erred as a matter of fact and as a matter of law in Finding of Fact No. 4, as the overwhelming evidence in the record does not support this Finding of Fact;*
8. *The single Commissioner erred as a matter of fact and as a matter of law in Finding of Fact No. 5, the error being that this finding fails to consider the entire deposition testimony of Dr. Strange and Dr. Whelan as well as the Statement of Dr. Largen, that the sole cause of the Claimant's death was H1N1 swine flu;*
9. *The single Commissioner erred as a matter of fact and as a matter of law in Finding of Fact No. 7, in misstating the deposition testimony of Dr. Strange. Dr. Strange testified unequivocally that the sole cause of the Claimant's death was H1N1 swine flu and smoke inhalation played no role;*
10. *The single Commissioner erred as a matter of fact and as a matter of law in misstating the deposition testimony of Dr. Whelan who testified under oath after reviewing all of the facts and records that smoke inhalation was not a contributing cause to Claimant's death;*
11. *The single Commissioner erred as a matter of fact and as a matter of law in failing to consider the totality of Dr. Pastis' deposition testimony and in cherry picking portions of his deposition, the error being that the evidence must be considered as a whole;*
12. *The single Commissioner erred as a matter of fact and as a matter of law in failing to consider the totality of the deposition testimony of Dr. Dee Ford, the error being that a review of her entire deposition testimony shows that she could not relate the*

Claimant's death in any way to smoke inhalation and testified that it would be pure speculation to do so;

13. *The single Commissioner erred as a matter of fact and as a matter of law in Finding of Fact No. 11, in failing to consider the totality of the testimony of Coroner Edge. Coroner Edge changed the death certificate from the cause of death being natural to accidental without consulting any physician and the parties have never been able to locate the original death certificate;*
14. *The single Commissioner erred as a matter of fact and as a matter of law in Finding of Fact No. 12, in that the testimony of Dr. Collins contains misinformation that is not grounded in science or supported by any medical testimony and is contrary to the overwhelming evidence in the record that the Claimant's death was due solely to H1N1 swine flu and was not in any way related to smoke inhalation;*
15. *The single Commissioner erred as a matter of fact and as a matter of law in finding and ruling that the dispute was solely a factual one;*
16. *The single Commissioner erred as a matter of fact and as a matter of law in finding based upon a preponderance of the evidence as a whole, that Timothy Causey's death was causally related to a work-related smoke inhalation injury arising out of and in the course and scope of his employment, the error being that the overwhelming evidence in the record fails to support this decision and should be reversed as a matter of law;*
17. *The single Commissioner erred as a matter of fact and as a matter of law in finding that the Claimant's estate is entitled to death benefits pursuant to the Act in the amount of \$283,190.00 and the payment of all causally-related medical treatment, the error being that the overwhelming evidence in the record shows that the Claimant's death was solely caused by H1N1 swine flu;*
18. *The single Commissioner erred as a matter of fact and as a matter of law in awarding the Claimant \$283,190.00 in a lump sum, the error being that the Claimant's estate did not request a lump sum payment of the award and if the award is to be paid in a lump sum, it is to be discounted according to the discount tables;*
19. *The single Commissioner erred as a matter of fact and as a matter of law in ignoring the opinions of the defense experts, including Dr. Strange, Dr. Whelan, Dr. Ford, Dr. Mitchell, Dr. Cauthen, Dr. Galphin, Dr. Largan and Dr. Sporn all who opined that the cause of the Claimant's death was H1N1 swine flu;*

20. *The single Commissioner erred as a matter of fact and as a matter of law in allowing Donna Causey to testify concerning hearsay from an unknown medical provider at MUSC which the Commissioner relied on in making his decision in this case;*
21. *The single Commissioner erred as a matter of fact and as a matter of law in allowing Chief Thompson to testify to certain matters that the Defendants objected to at the hearing concerning awards that the Claimant, Timothy Causey, received for allegedly dying in the line of duty;*
22. *The single Commissioner erred as a matter of fact and as a matter of law in failing to find that the Claimant's death resulted from H1N1 swine flu and was not related to smoke inhalation in that the overwhelming evidence in the record shows that the Claimant's death resulted from H1N1 swine flu and had nothing to do with smoke inhalation; and*
23. *The single Commissioner erred as a matter of fact and as a matter of law in failing to comply with the provisions of the Act with regard to the Decision and Order and therefore the Order is improper and invalid as a matter of law.*

After reviewing the briefs filed by the parties and the Record in this matter, and after consideration of the oral arguments of the parties, the Appellate Panel agrees with the Defendants' contentions. Hearing Commissioner Campbell's Decision and Order contains no indication of what evidence was included in the Record and makes no Conclusions of Law whatsoever, which alone constitutes an error of law. However, in this *de novo* review, the Appellate Panel has the duty to make its own findings of fact and conclusions of law consistent with the overwhelming weight of the evidence, which shows that the proximate cause of Causey's unfortunate death was complications of Swine Flu unrelated to his employment. The Hearing Commissioner further failed to cite or discuss any legal authority or make any conclusions of law, which is plain, reversible error. Lastly, the Hearing Commissioner erred as a matter of law in admitting unsubstantiated hearsay evidence and relying on the same in making his conclusory

findings. Therefore, Hearing Commissioner Campbell's Decision and Order is hereby REVERSED and VACATED. (See Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989) ("The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact.")).

Evidence Summary

The record includes the live testimony of Donna Causey, Sheriff Phillip Thompson, Deputy Sheriff Ernest Beaty, Deputy Gerald Del Percio, and Dr. Kimberly Collins. The record also includes the deposition testimony of Dr. Charles Strange, Dr. Timothy Whelan, Dr. Nicholas Pastis, Dr. Kimberly Collins, and Dr. Dee Ford. The deposition of Coroner Robert Edge, the deposition of Sheriff Phillip Thompson, and the statement of Deputy Sheriff Ernest Beaty were also submitted into evidence. Both parties submitted APA submissions, which included medical records and opinion reports from Loris Family Health Center, McLeod Regional Medical Center, MUSC, Dr. Nicholas Pastis, Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, Dr. Thomas Sporn, Dr. William Largen, and Dr. Kimberly Collins. The APA submissions are reflected on the Notice of Submissions that were timely and properly submitted prior to the hearing. The Defendants objected to certain documents coming into evidence, including several highly prejudicial documents the Claimant's attorney submitted concerning awards the Claimant received for allegedly dying in the line of duty. Commissioner Campbell sustained the objection to the Claimant's APAs numbers 17 through 23. However, Commissioner Campbell later allowed Sheriff Thompson to testify about the substance of the excluded documents during the hearing over Defendants' objection to relevance and prejudicial effect. Commissioner Campbell also allowed Donna Causey to testify to hearsay over Defendants' objection.

Causey, a Deputy Sheriff, was part of a security detail assigned to provide traffic control at a fire on March 16, 2013¹. Causey arrived at the scene at approximately 9:00 p.m. and worked until 7:00 a.m. on the morning of March 17, 2013. Causey was not involved in fighting the fire. In fact, he and the other deputies were positioned safely across a road several hundred yards away. Causey was off duty and away from the location of the fire from 7:00 a.m. – 7:00 p.m. following day, during which time the fire was extinguished.

On the night of March 17, 2013, Causey told his supervisor, Lt. Ernest Beatty, that he did not feel well and that his daughter had similar flu, or flu-like, symptoms. (Defendants' APA p. 238; Hrg. T. p.89, lines 19–25). After work on March 18, 2013, Causey went home and was away from the scene for at least another 12 hours. When he returned to work on the evening of March 18, 2013, he was still feeling poorly, so Lt. Beatty allowed Causey to sit in his vehicle for the entire shift. Therefore, any alleged exposure to smoke was necessarily limited.

On March 21, 2013, Causey went to see his family physician, Dr. Kimberly Drayton because he was running a 102-degree fever. (Claimant's APA p. 1). Causey informed Dr. Drayton of his "[s]ick contact was his daughter." Upon questioning, Causey denied having any shortness of breath – only a runny nose, mild cough, and fever. Dr. Drayton felt he may have a bacterial infection and prescribed an antibiotic, Augmentin. Because Causey did not actually have a bacterial infection, he did not get any better. In fact, his symptoms progressively worsened.

¹ Note the Form 52 alleges an accident date of March 13, 2013; however, the Form 58 alleges an accident date of March 16, 2013.

Causey was admitted to McLeod Hospital on March 23, 2013. (Defendants' APA p.8). The initial impression at McLeod was "respiratory infection...likely viral in etiology." (Defendants' APA p. 9). The physicians at McLeod ran a battery of tests and his blood work clearly suggested a viral infection. Causey was eventually transported to MUSC on March 28, 2013. (Defendants' APA #6).

Dr. Charlie Strange, a nationally renowned expert in pulmonary medicine, was Causey's attending physician at MUSC. (Defendants' APA pp.114-115). Dr. Strange ordered a battery of tests, including a specific test for H1N1 "Swine Flu" that McLeod Hospital had not run. All of the tests were negative except for one: the specific test for H1N1 influenza. Dr. Strange's hand-written notes on March 23, 2013 state:

"Mr. Causey has ARDS from H1N1 "swine" influenza, an occasionally fatal respiratory virus." (Defendants APA p. 115).

Dr. Strange also gave deposition testimony regarding the ultimate cause of Causey's death. According to Dr. Strange,

"I believe he died to a reasonable degree of medical certainty of H1N1 influenza associated with ARDS." (Strange T. p.13, lines 4-8).

Dr. Strange was specifically asked about the role alleged exposure to smoke played in Causey's condition and whether the symptoms leading to his hospitalization were most consistent with H1N1 or smoke exposure. According to Dr. Strange,

“I believe they were most consistent with H1N1 in that there was a delay between the worst of his smoke exposure and the onset of his symptoms.” (Strange T. p.13, lines 9—18).

Dr. Strange explained that symptoms of smoke exposure “[a]lmost universally...show themselves within 24 hours” and Causey did not present to the hospital until five days after the fire was extinguished. (Strange T. pp.13-14). Dr. Strange further testified that it would be speculative to suggest that “smoke inhalation contributed in a meaningful way to his ultimate outcome.” (Strange T. pp. 14-15). In fact, Dr. Strange testified unequivocally that

“I don’t believe that the smoke inhalation contributed to the death. I think it is really the H1N1 that set up all the subsequent events.

H1N1 is such a potent and fatal virus that it is hard to imagine, then, in a clinical syndrome associated with ARDS that anything other than H1N1 would be responsible for the cause of symptoms.” (Strange T. p. 21, lines 19—21; p. 23, lines 21—25).

According to Dr. Strange, while there is a *possibility* that alleged exposure to smoke could have played some small role, he could not state such an opinion “most probably to a reasonable degree of medical certainty.” (Strange T. p. 22, lines 16—19). Therefore, the opinions of Dr. Strange as whole do not support the claim for benefits.

MUSC records show that after Causey was diagnosed, he was placed on a ventilator and remained hospitalized over the next two months because of “ARDS due to influenza A H1N1,” as noted by Dr. Pisoni and Dr. Elias. (Defendants’ APA p.166, 168). These MUSC records do not support the claim for benefits.

Dr. Dee Ford also treated Causey at MUSC. According to Dr. Ford’s testimony, there is no way to say to a reasonable degree of medical certainty that alleged smoke exposure had anything to do with Causey’s condition or death. (Ford T. p. 18). In fact, none of the objective medical evidence indicates that Causey suffered from any significant injury to his lungs due to smoke exposure or inhalation. (Ford T. p.23, lines 19–24). Importantly, Dr. Ford concurred with Dr. Strange’s opinion that the sole cause of Causey’s condition was H1N1, to “a reasonable degree of medical certainty.” Dr. Ford’s opinions do not support the claim for benefits.

Causey died on May 19, 2013 due to complications from being on a ventilator. Although the admitting and treating diagnosis was ARDS secondary to H1N1 Swine Flu, a Death Summary prepared by Dr. Timothy Whelan and Dr. William Largen mentions multiple factors as the possibly contributing cause of death:

“Cause of death is thought to be hypovolemic shock secondary to diffuse alveolar hemorrhage, secondary to ventilator-associated pneumonia, secondary to prolonged intubation, and secondary to smoke inhalation injury with H1N1 influenza.” (Claimant’s APA p.9).

This Death Summary is the first report that proposes smoke inhalation as a possible contributing cause of death. When Dr. Whelan was deposed, he amended his Death Summary statement. In fact, Dr. Whelan testified,

“to a reasonable degree of medical certainty” that “the cause of death was due to complications associated with ARDS secondary to H1Ni.” (Whelan T. p. 15, lines 14–22).

Dr. Whelan went on to explain that, after reviewing the medical literature, he “found nothing to suggest that individuals who have smoke inhalation are at increased risk of viral infection” (Whelan T. p.16, lines 18–20). Dr. Whelan ultimately testified that he would amend the written death summary to conform with his opinion, as follows:

“The medical certainty would be cause of death is thought to be hypovolemic shock, secondary to diffuse alveolar hemorrhage, secondary to ventilator associated pneumonia, secondary to H1N1...”

which excludes any speculation regarding the role of any alleged exposure to smoke. (Whelan T. p. 28, lines 20–24). Therefore, Dr. Whelan’s ultimate opinions do not support the claim for benefits.

In addition, Dr. Whelan’s resident who co-signed the death summary at MUSC, Dr. Largen, issued a statement that

“Both Dr. Whelan and Dr. Strange have opined that [Causey’s] exposure to smoke was not a contributing factor in Mr. Causey’s death. I would defer any opinions regarding the cause of Mr. Causey’s death to those of Dr. Whelan and Dr. Strange. I would also agree that the ultimate cause of Mr. Causey’s death was complications of Acute Respiratory Distress Syndrome secondary to H1N1 swine flu.”

(Defendants’ APA #13). Therefore, Dr. Largen’s opinions do not support the claim for benefits.

Furthermore, although the proximate cause of Causey’s death was clearly and undeniably ARDS secondary to H1N1 Swine Flu, the record contains a “Certificate of Death,” which makes absolutely no mention of H1N1. (Claimant’s APA #16). This death certificate is based upon the reports of attending physician Dr. Timothy Whelan and his resident Dr. William Largen, whose ultimate opinions are best described in his subsequent deposition testimony and statements discussed above, in which both experts amended their original assumptions regarding the possible role of alleged smoke exposure. However, it is clear that both Dr. Whelan and Dr. Largen believed the cause of death to be “Natural,” as indicated on the medical “Certificate of Death” dated May 20, 2013. (Claimant’s APA p.72).

Despite the medical certification that Causey’s death was due to “natural” causes, the coroner, Mr. Robert Edge², subsequently issued a “Supplemental Report of Medical Certification of on June 3, 2013 contradicting the opinions of the treating medical

² Mr. Edge’s education consists of “an associate’s degree from Tech” and attendance at “mortuary science school.” (Edge T. p.5, lines 17–20).

experts. (Claimant's APA p. 73). On this form, Mr. Edge stated the reason for the "Supplemental Report" was threefold: "Autopsy Findings," "Toxicology Findings," and "Cause of Death Pending on Original Certificate." Not a single one of these reported reasons is true. "Cause of Death" was not listed as "pending" on the original death certificate — *which to date has never been produced by any source* — because the original medical Certificate of Death clearly lists the cause of death as "natural" and due to "diffuse aveolar hemorrhage." (Claimant's APA p. 72). More importantly, there was *no autopsy and no toxicological studies* were ever performed on Causey. Essentially, all three of the reasons stated for Mr. Edge's "Supplemental Report" were incorrect.

In addition, Mr. Edge testified that everything he learned about Causey's death was from "social media, TV." (Edge T. p.10, lines 9–10). He admits that he did not have any contact with Causey's treating physicians and did not review any of his medical records. (Edge T. p. 10). However, this did not stop Mr. Edge from speculating that Causey's death was caused by an accident at work on March 16, 2013 — a statement completely lacking in either foundation or credibility.

As a result, Mr. Edge was asked whether he was familiar with H1N1 Swine Flu, to which he responded,

"To be real honest with you, I don't know a whole lot about it other than the fact that it, it can kill you." (Edge T. p.11, lines 5–11).

Mr. Edge went on to admit that he was not aware that Causey had even been diagnosed with H1N1 when he sought to amend the Death Certificate, much less that the treating physicians had opined that H1N1 was the cause of death. Despite lacking any knowledge

of Causey or his cause of death other than what he “assumed” from social media and the television (Edge T. pp. 15–16), Mr. Edge amended and supplemented the medical certification of death and drew baseless conclusions regarding the cause. Ultimately, Mr. Edge was forced to admit that he would defer to the actual doctors who treated Causey as to the true cause of death. (Edge T. p.25, lines 17–20). Therefore, the testimony and reports of Mr. Edge are accorded no weight by the Appellate Panel.

Due to the complex nature of the claim, the Defendants referred the case to Dr. John Mitchell for a records review to determine whether Causey sustained any injury to his lungs as a result of alleged exposure to smoke and whether such exposure was the proximate cause of Causey’s death. Dr. Mitchell, a board certified pulmonary specialist, issued a report dated December 7, 2015 and fairly analyzed the symptoms associated with H1N1 versus smoke inhalation injury. (Defendants’ APA # 10). Based upon his review of all the records, Dr. Mitchell opined that:

“Mr. Causey’s case is more consistent with an individual with H1N1 disease as opposed to an individual with smoke inhalation...In my opinion to a reasonable degree of medical certainty, Mr. Causey’s symptoms and unfortunate death were solely caused by H1N1 disease and were not caused, aggravated, or accelerated by his smoke exposure.”

(Defendants’ APA p. 217). Dr. Mitchell’s opinions do not support the claim for benefits.

Columbia pulmonologist, Dr. Robert Galphin, also reviewed the medical records in this claim and opined that

“Based on review of the records the patient’s disease and death were the result of viral influenza (H1N1 flu). ARDS is a known complication of influenza and has been noted with H1N1 flu. While upper respiratory tract irritation is seen with smoke exposure and inhalation, ARDS would not be expected from smoke inhalation. The patient’s death was to a degree of medical certainty most probably due to influenza caused by the H1N1 virus.” (Defendants’ APA p. 220).

Another Columbia pulmonologist, Dr. Gregory Cauthen, concluded:

“it is my opinion to a reasonable degree of medical certainty that the cause of death of Mr. Causey was ARDS resultant from a severe infection of H1N1 influenza...I have personally seen during this time period similar cases of the H1N1 influenza virus cause ARDS and death in normal healthy hosts. Additionally, there is no valid human scientific evidence to validate that there is a causative association between smoke inhalation and the contributions to the severity of influenza. Additionally, it appears that there is no evidence to support that Mr. Causey himself had any significant smoke inhalation that would cause a major degree of thermal injury to support a potential disruption of normal host immune defense mechanisms. I provide the above support as evidence for my opinion to the sole cause of death as ARDS secondary to H1N1 influenza with no other mitigating circumstances.”

(Defendants’ APA p. 221–222). Clearly, neither Dr. Galphin, nor Dr. Cauthen’s opinions support the claim for benefits.

Likewise, the opinions of Dr. Thomas Sporn do not support the claim for benefits. Dr. Sporn is the Chief of Pulmonary and Thoracic Pathology at Duke University Medical Center and has expertise in diseases and occupationally-related injuries of the lung and chest. After reviewing Causey's medical records and all of the deposition testimony, Dr. Sporn concluded

"...it is my opinion that any exposure to smoke that Mr. Causey may have sustained during his service as a sheriff's deputy assigned to the perimeter of the Carolina Forest fire in March of 2013 did neither cause nor contribute to his death from complications of H1N1 infection...at no time was Mr. Causey under treatment for smoke inhalation or thermal injury to the airway, nor do medical reports detailing his examinations indicate findings or peripheral stigmata to permit such a diagnosis. Alternatively, the symptom complex and findings that caused Mr. Causey to seek medical attention and the subsequent clinical events that culminated in his death are entirely consistent with H1N1 infection."

(Defendants' APA pp. 226—227).

The medical evidence that could conceivably support a claim for benefits came from a pathologist hired by the Claimant, Dr. Kim Collins. Dr. Collins did not treat or even evaluate Collins, but reviewed Causey's medical records, as did Dr. Sporn, Dr. Cauthen, Dr. Galphin, and Dr. Mitchell, though the latter are pulmonologists specializing in disorders of the lung. While the Hearing Commissioner inexplicably relied on the opinions of Dr. Collins to the exclusion of all of the other medical experts in this claim, it is clear that her testimony is based upon surmise, conjecture, and

speculation and, at least in part, upon misinformation. For example, Dr. Collins was forced to admit that she had no idea what Causey's role was in fighting the fire in May 2013...

“He might have been fighting the fire— the apartment fire or might have been assisting in keeping the barrier. I am not sure.” (Collins T. p.18, line 23— p.19, line 1).

At her deposition, Dr. Collins admitted that all of Causey's treating physicians opined that Causey died of complications of H1N1 Swine Flu and in this opinion, she concurred to a reasonable degree of medical certainty. (Collins T. p.16, lines 11-23). Dr. Collins conceded that Causey would not have died but for the fact that he had H1N1 Swine Flu. (Collins T. p. 17, lines 18—24). Dr. Collins was also forced to concede that all of Causey's symptoms were consistent with a viral infection. (Causey T. pp. 21—22). She was forced to concede that there is no objective evidence that Causey suffered any injury due to smoke exposure. (Causey T. p.24—26). Lastly, Dr. Collins was forced to concede that all of the symptoms Causey demonstrated at MUSC and the proximate cause of his death were because of complications of H1N1 Swine Flu. (Collins T. pp.36—37). According to Dr. Collins,

“That's why he died on that day, was because of complications of H1N1.”

(Collins T. p.37, lines 3—4).

In addition, while the Respondent argues that Dr. Pastis gave “unequivocal” testimony that alleged smoke inhalation made Causey’s “ability to fight off an infection worse,” this is simply a mischaracterization of Dr. Pastis’s actual testimony, which was as follows:

Q. So is there any way to state, within a reasonable degree of medical certainty, that the smoke inhalation that allegedly occurred in his case had anything to do with his death?

A. I think that I can say with a reasonably — reasonable degree of certainty, that it made his ability to fight off an infection worse.

Q. Okay. And how did you arrive at that opinion?

A. Physiology. That you have an injury to your defense cells and your ability to clear secretions. But not based on any H1N1 study, as we said.

Q. Okay. Not based upon any H1N1 study and not based on any scientific literature; is that correct?

A. No, that’s not — not entirely correct. There is scientific literature on burn injuries to the airways.

Q. Do you have any evidence that he had a burn injury to the airways in this case?

A. That, I don’t. I don’t have picture of the airways.

*Q. **So in this case, you’re speculating that he had a burn injury to the airway.***

*A. **Correct.***

Q. Without proof of that, you can't state, to a reasonable degree of medical certainty, most probably, that the smoke inhalation had anything to do with his death, can you?

A. I would be uncomfortable saying that it had nothing to do with his death.

Q. And we can speculate that it might have, but in terms of testifying, to a reasonable degree of medical certainty, based upon evidence in this case, you can't state that, can you?

A. **Based on the evidence that I have, it would be speculation.**

(Depo. of Dr. Pastis, p. 21 line 10 — p. 22, line 24) (emphasis added). Dr. Pastis was also forced to concede that he could not say whether Causey's H1N1

“was just a very horribly severe case or whether [smoke inhalation] contributed. There's no way to decipher that out. Because H1N1 can be this severe on its own.”

(Depo. of Dr. Pastis, p. 30, line 21 — p. 31, line 3). Dr. Pastis also admitted that H1N1 was the primary cause of Causey's death. (Depo of Dr. Pastis, p. 31, line 20— p. 32, line 1). Therefore, Dr. Pastis's opinions as to causation are not only *equivocal*, they are admittedly based upon nothing more than speculation, and do not support a finding that the alleged accident on March 16, 2013 was the proximate cause of Causey's death, as required by S.C. Code Ann. § 42-9-290. In fact, Dr. Pastis's opinions do not even support the Respondent's allegations that “smoke inhalation made [Causey] more

susceptible to the virus,limited his ability to fight the virus, or ... he contracted the virus at McLeod.” Nothing but pure speculation could support such allegations. Therefore, the speculative opinions of Dr. Pastis should be accorded no weight.

When the record is reviewed as a whole, it is clear that the Respondent has shown nothing more than that one could speculate that smoke exposure on March 16, 2013 could have caused some ill-defined injury to Causey’s lungs, and that if one so speculates, one could further speculate that such an injury could have impacted Causey’s ability to fight a deadly flu virus. But such speculation is insufficient. Without actual evidence that Causey sustained an injury to his lungs on March 16, 2013 and that such injury to his lungs was the proximate cause of his death, he is not entitled to benefits under S.C. Code Ann. § 42-9-290 as a matter of law.

Discussion

I. Causey did not sustain any injury by accident on or about March 13, 2013, as required by S.C. Code Ann. § 42-1-160, based upon the greater weight of the evidence in the record and the applicable law.

The Hearing Commissioner made no conclusions of law in his January 12, 2017 Decision and Order and cites no legal authority whatsoever for his award of benefits in this case, which alone is reversible legal error.³ More importantly, the greater weight of

³ South Carolina Code Annotated section 1-23-350 (2005) provides, in relevant part, that “[i]f . . . a party submitted proposed findings of fact, [an agency] decision shall include a ruling upon each proposed finding.” The findings of fact made by the appellate panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004). When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the

the evidence in the record does not support the Hearing Commissioner's finding that Causey sustained a "work-related smoke inhalation injury." While Causey may have been exposed to smoke at work on or about March 16, 2013, there is simply no competent evidence that this alleged exposure caused any injury to his lungs as alleged.

On March 16, 2013, Causey worked on the perimeter of a fire directing traffic. He did not seek or require medical treatment on March 16, 2013, nor did he report any accident or injury involving exposure to smoke. In fact, Causey did not seek medical treatment until March 21, 2013, at which time he was misdiagnosed with a bacterial infection. Once Causey received proper medical testing, he was diagnosed with H1N1 Swine Flu, which every single medical expert who treated Causey concluded was unrelated to any alleged smoke exposure.

Specifically, Dr. Strange was the first to properly diagnose Causey with Swine Flu and he testified that it would be speculative to suggest that "smoke inhalation contributed in a meaningful way to his ultimate outcome." (Strange T. pp. 14-15). In fact, Dr. Strange testified unequivocally that

"I don't believe that the smoke inhalation contributed to the death. I think it is really the H1N1 that set up all the subsequent events.

H1N1 is such a potent and fatal virus that it is hard to imagine, then, in a clinical syndrome associated with ARDS that anything other than H1N1 would be

opportunity to make those findings. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995).

responsible for the cause of symptoms.” (Strange T. p. 21, lines 19–21; p. 23, lines 21–25).

Dr. Ford, who also treated Causey, concurred with this opinion. Dr. Ford further testified that none of the objective medical evidence indicates that Causey suffered from any significant injury to his lungs due to smoke exposure or inhalation. (Ford T. p.23, lines 19–24). Likewise, Dr. Whelan, another of Causey’s treating physicians at MUSC, testified that he did “not believe that Mr. Causey had a significant smoke inhalation that resulted in ARDS” and that it would be impossible to state to any degree of medical certainty that exposure to smoke played any role in Causey’s death. (Whelan T. pp. 17–18). A fourth physician who treated Causey, Dr. Largen, corroborated the opinions of Dr. Strange, Dr. Ford, and Dr. Whelan.

No doctor who actually treated Causey supports a finding that Causey sustained any injury due to his alleged smoke exposure. Among the medical experts who reviewed Causey’s records, four pulmonologists— Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn — concluded that Causey did not sustain any injury as a result of smoke exposure. Only Dr. Collins and Dr. Pastis even remotely suggest that Causey sustained any injury as a result of smoke exposure, yet both were forced to concede that their opinions were based, not on objective medical evidence, but only speculation. In fact, Dr. Collins was forced to concede that she did not even understand the nature of Causey’s alleged exposure to smoke, believing him (falsely) to have been actually fighting an apartment fire for three 12-hour shifts. Dr. Pastis admitted in his deposition that his opinions were based on speculation.

Therefore, the Appellate Panel finds that the greater weight of the evidence does not support a finding or conclusion that Causey sustained any injury to his lungs by accident arising out of, or in the course of, his employment on March 16, 2013, as required by S.C. Code Ann. § 42-1-160.

II. Causey's death due H1N1 Swine Flu was not causally-related to the alleged accident on or about March 16, 2013 based upon the greater weight of the evidence and the applicable law.

The Hearing Commissioner failed to make any rulings of law or otherwise address the statutory requirements that must be met before an award of death benefits can be made. This alone is a reversible error. However, the greater weight of the evidence clearly shows that any alleged exposure to smoke on March 16, 2013 was not the proximate cause of Causey's death and; therefore, the Claimant is not entitled to any benefits as a matter of law.

S.C. Code Ann. § 42-9-290 specifically requires that, to be compensable, a death must result "proximately from an accident." Here, the medical experts who treated Causey — Dr. Strange, Dr. Ford, Dr. Whelan, and Dr. Largen — concluded that the proximate cause of Causey's death was H1N1 Swine Flu, not smoke exposure. (Strange T. p.13, lines 4–8; Strange T. p. 21, lines 19–21; p. 23, lines 21–25; Ford T. p.19; Whelan T. p. 15, lines 14–22; Defendants' APA #13). In addition, four (4) different pulmonologists who reviewed Causey's medical records — Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn —concluded that that the proximate cause of Causey's death was H1N1 Swine Flu, not smoke exposure. (Defendants' APA p. 217; Defendants' APA p. 220; Defendants' APA p. 221–222; Defendants' APA pp. 226–227).

Not even the opinions of the Claimant's experts, a pathologist who reviewed records (Dr. Collins) and a pulmonologist whose opinions were based on speculation (Dr. Pastis), support a finding that smoke exposure was the proximate cause of Causey's death. At her deposition, Dr. Collins admitted that all of Causey's treating physicians opined that Causey died of complications of H1N1 Swine Flu and in this opinion, she concurred to a reasonable degree of medical certainty. (Collins T. p.16, lines 11-23). Dr. Collins also conceded that Causey would not have died but for the fact that he had H1N1 Swine Flu. (Collins T. p. 17, lines 18-24). Likewise, Dr. Pastis conceded that his opinions as to causation were based on pure speculation.

There is simply no competent evidence that Causey — a man with a severe case of H1N1 Swine Flu — would not have died on May 19, 2013 but for his alleged exposure to smoke on March 16, 2013. Therefore, nothing but impermissible surmise, conjecture, or speculation could support a finding that the Claimant has met the burden of proving proximate cause are required by S.C. Code Ann. § 42-9-290 and the Hearing Commissioner's Decision and Order must be reversed.

III. The Hearing Commissioner erred as a matter of law in admitting hearsay testimony into evidence over the Defendants' objections.

The Hearing Commissioner permitted Causey's widow to testify regarding an alleged conversation with an unidentified individual regarding the alleged cause of Causey's illness. Despite contemporaneous objections by the Defendants, the Hearing Commissioner admitted this hearsay testimony in violation of the Defendants' constitutional right to confront and cross-examine witnesses and in contravention of well-established case law. The Hearing Commissioner specifically references this

hearsay testimony in the second paragraph of the Decision and Order's "Evidence Summary."

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, S.C.R.E.. The Court of Appeals has previously determined that hearsay evidence offered for "the truth of the matter asserted" by a widow in a workers' compensation death claim is inadmissible. Wright v. Bi-Lo, 442 S.E.2d 186 (S.C. Ct. App. 1994). And while the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission, hearsay testimony is only admissible in a worker's compensation claim "if corroborated by facts, circumstances, and other evidence." Ham v. Mullins Lumber Co., 193 S.C. 66, 82, 7 S.E.2d 712, 719 (1941). Here, not only is the widow's hearsay testimony not corroborated by any evidence, she failed to even identify the source of the hearsay. As explained by the South Carolina Court of Appeals:

"The reason for the rule excluding hearsay is that out-of-court statements are not subject to the same tests of truth as statements made from the witness stand. The out-of-court statement is not made under oath or subject to cross examination in the presence of the Court. There is therefore no opportunity for the court to observe the declarant as he speaks or to investigate either his character or motives. A further reason sometimes given is the misconception to which hearsay may be exposed, due to the ignorance, inattention or bad motives of the hearers. All of these reasons are succinctly set out in Jones v. Charleston & W.C. Ry. Co., 144 S.C. 212, 142 S.E. 516 (1928)."

Bain v. Self Memorial Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984). Therefore, based upon the application of established case law and fundamental standards of fairness, the Hearing Commissioner's decision to admit hearsay evidence is reversed and the testimony is hereby stricken from the record.

IV. The Hearing Commissioner erred as a matter of law in awarding a non-commuted lump sum of 500 weeks of benefits to Causey's "estate."

The Hearing Commissioner "found" that "Claimant's estate is entitled to death benefits ... in the amount of \$283,190 (claimant's compensation rate \$566.38 x 500)." There are several obvious, reversible, legal errors implicit in this statement that require reversal. First, there is no statutory authority for an award of any workers' compensation benefits to an "estate." Instead, all of the statutes and regulations governing the payment of death benefits under the Act requires payment to "dependents." S.C. Code Ann. §. 42-9-110, 42-9-120, 42-9-130, 42-9-140, 42-9-290, and 42-9-320; S.C. Code Reg. 67-602(B), 67-902. A determination of the proper "dependents" entitled to benefits cannot be determined without a full hearing on the issue of dependency, with specific documentation. In addition, both the applicable statutory and regulatory authority requires that all lump sum payments in excess of 100 weeks must be commuted to present value. S.C. Code § 42-9-301, S.C. Code Reg. 67-1605. Lump sum payments of death benefits are specifically required to be commuted pursuant to S.C. Code Reg. 67-1606.

Therefore, because there is no statutory determination of Causey's dependents and because there has been no proper calculation of any lump sum payment, the Hearing Commissioner's award of benefits to the "estate" is reversed as a matter of law.

Findings of Fact

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Based upon the greater weight of the evidence in the record, including the opinions of Dr. Charlie Strange, Dr. Timothy Whelan, Dr. William Largen, Dr. Dee Ford, Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, and Dr. Thomas Sporn, Timothy Causey did not sustain any injury to his lungs at work on or about March 13, 2016 or March 16, 2016, as alleged.
3. Based upon the greater weight of the evidence in the record, including the opinions of Dr. Charlie Strange, Dr. Timothy Whelan, Dr. William Largen, Dr. Dee Ford, Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, and Dr. Thomas Sporn, Timothy Causey's death on May 19, 2013 was not caused, aggravated, or accelerated by any alleged work accident on or about March 13, 2016 or March 16, 2016, as alleged.

Conclusions of Law

1. Timothy Causey was a covered employee and Horry County was a covered employee at the time in question, pursuant to S.C. Code Ann. § 42-1-130 and § 42-1-140,
2. Timothy Causey did not sustain any injury to his lungs as a result of any alleged exposure on or about March 13, 2016 or March 16, 2016 arising out of, or in the course of his employment as required by S.C. Code Ann. § 42-1-160,

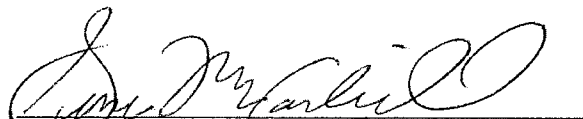
3. Timothy Causey's death on May 19, 2013 did not result proximately from any alleged accident arising out of or the course of his employment, as required by S.C. Code Ann. § 42-9-290.

Order

IT IS, THEREFORE, HEREBY ORDERED that the Decision and Order of Hearing Commissioner Campbell is REVERSED and VACATED.

IT IS FURTHER ORDERED that the claim for benefits under the South Carolina Workers' Compensation Act is DENIED and DISMISSED with prejudice.

IT IS SO ORDERED!


Gene McCaskill, Commissioner

Date: _____

WE CONCUR:


Aisha Taylor, Commissioner


Melody L. James, 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 19, 2017