

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

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AUG 17 2017

SC Court of Appeals

Appellant Case No. 2014-001788

Clarence Winfrey, Employee, Respondent Respondent,

v.

Archway Services Inc, Employer, and
American Fire & Casualty Insurance Company c/o
Liberty Mutual Group, Carrier, Appellants,

**APPELLANT’S PETITION FOR REHEARING OF
THIS COURT’S UNPUBLISHED OPINION NO. 2017-CP-336**

TO: PRESTON F. MCDANIEL, ESQUIRE, ATTORNEY FOR RESPONDENT

YOU WILL PLEASE TAKE NOTICE that Appellants hereby petition this Court for a Rehearing pursuant to the South Carolina Appellate Court Rules 221(a) and 240. The subject Order (2017-UP-336) was filed by this Court on August 2, 2017.

This Court, like the Commission, misapprehended or failed to consider the full record and actual testimony of the medical doctors—not just the written opinions created by Respondent—and apply that testimony to the facts as a whole. As discussed below, each and every doctor, when deposed, equivocated and backed off the written opinions

issued prior to the deposition. Despite this, this Court, like the Commission, relied almost entirely on the written opinions of the doctors.

For these reasons, as explained more fully below, this Court should grant rehearing, reverse the Opinion, and reverse the underlying Commission Decision and Order.

Medical/Factual Background

Respondent notified Employer he was shocked while working on a rotisserie oven on May 22, 2013. (R. pp. 200-201). Employment records of Respondent indicate that he continued working the remainder of the day and the entire following day. (R. pp. 203-204). An email from Respondent to Employer indicates that he was experiencing only neck pain on May 27, 2013 (5 days post-accident). (R. p. 201). Respondent first presented to Doctor's Care on May 28, 2013 (6 days post-accident) complaining that he woke up sweating that morning (6 days post-accident) (R. p. 188). Respondent was treated by Dr. Greenfield at Doctors' Care. Dr. Greenfield noted that Respondent had some tenderness in his shoulder and neck area. Id. Further, Dr. Greenfield noted that Respondent did not complain of any chest pressure. Id.

Dr. Greenfield testified in her deposition that the testing she conducted could not give any indication as to when Respondent suffered the myocardial infarction. Specifically, **Dr. Greenfield stated that the myocardial infarction "...could have been 5 days ago..." and further admitted that the acute myocardial infarction could have occurred the evening of May 27 or the morning of May 28.** (R. p. 355, line 10-p. 356, line 8). Further, Dr. Greenfield indicated that she based portions of her opinion on articles that she read relating to electrocution from lightning strikes. When asked about these

articles, Dr. Greenfield admitted the voltage involved in those articles was 10,000,000 volts—an amount that is 20,000-40,000 times higher than the voltage involved in this claim. (R. p. 371, line 19-p. 372, line 4). Additionally, Dr. Greenfield stated that Respondent presented without any chest pain. (R. p. 359, lines 5-9, p. 367, lines 3-8). **Dr. Greenfield also noted the pain in Respondent's arm and shoulder was not indicative of having sustained a myocardial infarction.** (R. p. 359, lines 13-25). Dr. Greenfield's deposition testimony directly contradicts her prior written opinion obtained by Respondent's counsel stating Respondent's heart condition was caused by the electrical shock.

Respondent was then referred to and saw Dr. Dasgupta at the South Carolina Heart Center on May 28. Dr. Dasgupta also noted sweating and noted that Respondent denied chest pain but did have minimal left shoulder pain. (R. pp. 190-192). Dr. Dasgupta diagnosed Respondent with an acute myocardial infarction. Id. Dr. Dasgupta indicated that Respondent had a prior history of hypertension, tobacco abuse (one pack a day smoker), as well as a significant family history for heart disease (Respondent's father passed away from coronary disease and myocardial infarction). Id. Dr. Dasgupta also noted that Respondent appeared to have a ventricular septal defect as a possible completion of his acute myocardial infarction. Id. Dr. Dasgupta referred Respondent to Lexington Medical Center where Dr. Travis performed surgery to repair an acute ventricular septal defect that formed following the myocardial infarction. (R. pp. 194-196).

Dr. Travis described the mechanism of Respondent's injury as being a plaque rupture that caused a myocardial infarction that caused the ventricular septal defect. (R. p.

411, line 24-p. 412, line 2). **Dr. Travis indicated that plaque ruptures can be caused by many things including getting up the wrong way from a couch, strenuous activity, stressful events in your personal life, emotional stresses, and many other things.** (R. p. 412, lines 3-11). Further, **Dr. Travis was asked “...other than the timing of the heart attack...there’s no way to know for certain the plaque rupture was caused by the electrical shock, is that correct?”** (R. p. 412, lines 12-15). **Dr. Travis response was that “[i]s there a definitive way to—collate one to another absolutely not.”** (R. p. 412, lines 16-18) (emphasis added). **Dr. Travis also stated that “the [electrical shock] could of started the whole domino effect.”** (R. p. 427, line 23-24) (emphasis added). Finally, Dr. Travis indicated that the neck pain Respondent experienced “could be just neck pain.” (R. p. 428, lines 12-16).

Dr. Travis indicated that part of his opinion formed because of the presence of a plaque on Respondent’s heart. However, Dr. Travis stated that this was his first open heart surgery on a patient who had received an electrical shock. (R. p. 427, lines 2-5). Further, **Dr. Travis stated that he had never “read about or seen anything” related to whether or not the plaque he observed is related to electrical shock or whether or not the plaque he observed is common in electrical shock.** (R. p. 427, lines 6-12). Dr. Travis’ deposition testimony directly contradicts the prior written opinion requested by Respondent’s counsel stating Respondent’s heart condition was caused by the electrical shock.

After the surgery, Respondent began treating with Dr. Lide on an outpatient basis for his heart condition. In his deposition, **Dr. Lide stated that no one knows what causes a plaque rupture in the heart.** (R. p. 360, lines 13-15). **Dr. Lide agreed with**

the statement that “...we don’t really know what causes plaque rupture.” (R. p. 360, line 22). Dr. Lide also testified that “I don’t know whether the electrical shock caused the plaque rupture... .” (R. p. 361, lines 14-15)¹. Further, Dr. Lide testified that he is not familiar with any research and he has not conducted any research on whether an electrical shock can cause a myocardial infarction or a ventricular septal defect. (R. p. 365, line 13-p. 366, line 1). Dr. Lide also indicated that the longer in time the heart condition develops from the precipitating event (in this case an electrical shock), the less likely it is the heart condition is related to the electrical shock. (R. p. 366, lines 2-6). Finally, Dr. Lide stated his overwhelming evidence that the electrical shock caused Respondent’s condition was “proximity in time.” (R. p. 367, lines 20-21). Dr. Lide’s deposition testimony directly contradicts the prior written opinion requested by Respondent’s counsel stating Respondent’s heart condition was caused by the electrical shock.

Legal Analysis

The mere fact an injury occurs due to heart attack during employment will not, by itself, support a compensation award. *See, for example, Lorick v. S.C. Elec. & Gas Co.*, 245 S.C. 513, 141 S.E.2d 662 (1965); *Rivers v. V.P. Loftis Co.*, 214 S.C. 162, 51 S.E.2d 510 (1949); *Price v. B.F. Shaw Co.*, 224 S.C. 89, 77 S.E.2d 491 (1953). The injury must be proximately caused by an accident which arose out of the employment. The burden is on the Respondent to establish causation for the heart attack injury. In heart attack and

¹ Note that Dr. Travis’ statements, and the uncontested medicals, indicate the sequence of events is a plaque rupture/myocardial infarction which resulted in the ventricular septal defect. Dr. Lide therefore readily admits he has no idea if the chain of events alleged by Respondent was caused by the alleged electrical shock.

stroke cases, the Respondent must present competent and reliable evidence of a causal connection between the work he performed and the heart condition/injury.

In Lorick, the court held causation is a medical question which only experts can establish. *See also Wynn v. Peoples Natural Gas Co.*, 238 S.C. 1, 118 S.E.2d 812 (1961).

Specifically, the Supreme Court stated:

“It is our conclusion that the medical testimony here falls far short of that required to prove causation. The Commission could not make a determination of causal connection between an accident and death by coronary occlusion independent of supporting medical testimony where assessment of the precipitating cause requires expert knowledge...”

Lorick at 527, 141 S.E.2d at 669.

When expert testimony is relied on to establish a causal connection between an accident and subsequent injury, the Respondent must present an expert opinion at least to the effect that the accidental injury “most probably” caused the disability or death. *Id.* at 525, 141 S.E.2d at 669 (quoting Cross v. Concrete Materials, Inc., 236 S.C. 440, 114 S.E.2d 828 (1960)). In heart attack cases, the medical expert must testify accident or conditions of employment “most probably induced or precipitated the heart attack or other coronary condition which caused the Respondent’s injury.” *Id.* at 525, 141 S.E.2d at 668. **It is not sufficient to show that the malady in question “possibly” or “could have” or “might have” resulted from the injury.** Bridges v. Housing Authority, 278 S.C. 342, 345, 295 S.E.2d 872, 874 (1982) (quoting Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969)).

In this case, Respondent seeks to rely almost exclusively on the written questionnaires issued by Drs. Greenfield, Travis, and Lide. However, each and every

doctor in this case gave the above contradictory deposition testimony after they issued a written opinion proctored by Respondent's counsel. Respondent seeks to have this court disregard the deposition testimony which directly contradicts the written opinions. The written opinions cannot be viewed in a static vacuum—rather they must be viewed in conjunction with the deposition testimony and the deposition testimony must be understood to enhance and/or clarify the limited written opinions previously issued. When the written opinions and the deposition testimony are read in tandem, it is clear that the doctors' opinions do not meet the standards for compensability. Each and every doctor gives expert medical deposition testimony in which they indicate (1) they do not actually know when the heart attack occurred, (2) there is no way to say with any certainty what causes plaque rupture (the specific mechanism of Respondent's heart attack), (3) the electrical shock could have caused the heart condition (which clearly insufficient under current law to establish causation), and (4) the only causal link between the shock and the heart attack is "sequence in time" (e.g. the heart attack likely occurred sometime after the shock occurred). It is further clear from the record, including the Full Commission Decision and Order; that the Full Commission wholesale disregarded the deposition testimony of the medical experts and instead only considered the initial questionnaires of the same medical experts—this was error and requires a reversal or a remand for specific consideration of the deposition testimony.

As set out in underlying briefs, this tenuous connection with no definitive medical evidence to support the electrical shock-heart attack link is insufficient to sustain a finding of compensability. Each doctor, as set out above, can only say definitively that the shock "could" or "may" or "might" have caused the heart injury. Further, the two

heart doctors indicated they cannot tell anyone what causes a plaque rupture in the first place and that it may be caused by stress, coughing, exertion, sneezing, or nothing at all. The heart doctors further admitted they have done no research and have no knowledge of electrical shocks causing plaque ruptures, myocardial infarctions, or ventricular septal defects.

For the foregoing reasons, the doctors' opinions under the current laws of this state are clearly insufficient to sustain a finding of compensability and this court should grant rehearing, reverse the Opinion, and reverse the underlying Commission Decision and Order.

McANGUS GOUDELOCK & COURIE, L.L.C.



Brett H. Bayne, Bar No. 100018
1320 Main Street, Meridian 10th Floor
Post Office Box 12519
Columbia, South Carolina 29211-2519
(803) 779-2300

*Attorneys for Appellants, Archway Services Inc.,
American Fire & Casualty Insurance Company,
and Liberty Mutual Group*

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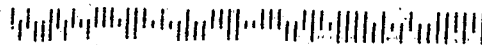
I certify that I have caused to be served Appellants' Petition for Rehearing on the attorney of record for Clarence Winfrey, by hand delivery, on the 16th day of August, 2017 addressed to Preston F. McDaniel, Esquire, The McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201.

McANGUS GOUDELOCK & COURIE, L.L.C.

J. A. Delany for BHB

Brett H. Bayne
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

Attorneys for Appellants, Archway Services Inc.,
Employer, and American Fire & Casualty Insurance
Company c/o Liberty Mutual Group, Carrier



mgc | **INSURANCE
DEFENSE**

POST OFFICE BOX 12519
COLUMBIA, SC 29211

2095.13137/BHB/mdl
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211