THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 30 2017
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEALS

Unpub. Op. No. 2017-UP-336
(filed August 2, 2017)

Clarence Winfrey, Employee,.....Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

McAngus Goudelock & Courie, LLC
Brett H. Bayne
Meridian Building
1320 Main Street, 10th Floor (29201)
P.O. Box 12519
Columbia, South Carolina 20211-2519
(803) 779-2300

Certification of Counsel

The undersigned certifies that a petition for rehearing was filed on August 17, 2017, and finally ruled on by the Court of Appeals on September 28, 2017.

Questions Presented

I. Whether the Court of Appeals erred as a matter of fact and law by misapprehending and/or failing to consider the full record and actual testimony of the medical doctors and apply that testimony to the facts as a whole?

II. Whether the Court of Appeals erred as a matter of fact and law by affirming an award that is supported by speculative medical opinions and testimony?

Petitioners Archway Services, Inc. and American Fire & Casualty Insurance Company c/o Liberty Mutual Group hereby petition this Court for a Writ of Certiorari pursuant to the South Carolina Appellate Court Rules 221(a) and 242. The subject Order (No. 2017-UP-336) was filed by the Court of Appeals on August 2, 2017. (Appx. 652-668). Petitioners moved for rehearing on August 17, 2017, (Appx. pp. 669-677), which Respondent Clarence Winfrey ("Claimant") opposed. (Appx. pp. 678-680). The Court of Appeals denied Petitioners' rehearing petition in an Order dated September 28, 2017. (Appx. p. 651).

STATEMENT OF THE CASE

This claim arises out of an alleged accident on May 22, 2013. Although this claim has a complicated procedural history, for purposes of this Petition, the following procedural background is relevant: Claimant, who was employed by Archway Service, Inc. ("Employer"), filed a Form 50 alleging he had suffered an injury by accident on May 22, 2013, as the result of touching a broken wire on a rotisserie oven and being shocked. He alleged injury to multiple body parts, including his heart, left hand/arm/shoulder, neck, head (brain), chest. (Appx. pp. 71-73). Petitioners filed a Form 51, denying the claim and asserting that Claimant had "failed to [meet] his burden of proving that he sustained a compensable injury or illness pursuant to the Act." (Appx. p. 75).

The parties filed Form 58 Pre-Hearing Briefs[1] and were heard by Single Commissioner Susan Barden on January 13, 2014.[2] On February 27, 2014,

[1] Petitioners' main argument as stated in their Pre-Hearing Brief was that they "dispute that the shock either caused the myocardial infarction or that the shock caused the VSD." (Appx. p. 183).

[2] Commissioner T. Scott Beck had heard the parties at a prior hearing on November 13, 2013, (Appx. pp. 441-467), after which he issued an order finding that Petitioners had

Commissioner Barden found that Claimant injured his neck and left shoulder in an admitted accident on May 22, 2013. She found Claimant's testimony to be "very credible." In addition, she accorded greater weight to the opinions of Drs. Lide, Travis and Greenfield and held that Claimant met his burden of proving that "the electric shock ultimately resulted in Claimant's heart attack, regardless of the date on which the infarction occurred," and despite Claimant's pre-existing heart disease, the fact that he is a smoker and has hypertension, as well as a family history of coronary artery disease. Commissioner Barden ordered Petitioners to provide medical treatment and to reinstate temporary total benefits until Claimant reached maximum medical improvement. She held that, "benefits for the head/brain are denied at this juncture" and that "all other issues are held in abeyance for further decision by the Commission." (Appx. pp. 28-49).

Petitioners filed a timely Form 30, (Appx. pp. 216-219), appealing this decision to the Full Commission, which reversed Commissioner Barden's findings and substituted its own. In particular, the Commission found Claimant failed to prove any compensable injury to his brain/head, which issue Commissioner Barden left open. (Appx. pp. 21-22, 25-26). The Commission also omitted Commissioner Barden's credibility finding. (Appx. pp. 18-24). The Commission stated that Claimant "was momentarily shocked by a rotisserie oven he was working on," and noted that Claimant continued to work the rest of that day and the next day. Claimant presented to Doctor's Care on May 28, 2013, six

---

stopped compensation after a good faith investigation of this claim. That finding was upheld by the Commission, which also found that "a heart attack and its relationship to a work related inquiry is a medically complex case." (Appx. pp. 50-67). This Commission Decision was the subject of a separate appeal to the Court of Appeals, which affirmed the Commission on this point. (Court of Appeals Unpublished Opinion No. 2017-UP-338, p. 6). Claimant sought rehearing of Opinion No. 2017-UP-338, which was denied on September 28, 2017.

days after the shock. The Commission noted Claimant had a family history of coronary disease, had smoked a pack of cigarettes a day for 35 years and drank a case of beer per week. (Appx. pp. 5, 17). However, the Commission affirmed that Claimant proved he had suffered a compensable injury to his heart, giving greater weight to the opinions of Drs. Lide, Travis and Greenfield, (Appx. pp. 89, 113, 155), than to Petitioners' proffered expert, Dr. Feldman. (Appx. p. 97).

Petitioners appealed this decision to the Court of Appeals, which heard oral argument on December 6, 2016 and issued Unpublished Opinion No. 2017-UP-336 on August 2, 2017. (Appx. pp. 652-668). Petitioners moved for rehearing, (Appx. pp. 669-677), which was denied on September 28, 2017. (Appx. p. 651).

Petitioners now seek review by this Court.

BACKGROUND FACTS

On May 22, 2013, Claimant was working on a rotisserie oven when he was "momentarily shocked." Following the accident, Claimant continued working the remainder of the day and the entire following day, May 23, 2013, (Appx. pp. 5, 203-204), after which he had scheduled time off. An email from Claimant to Employer indicates that he was experiencing only neck pain on Monday, May 27, 2013 (five days post-accident). (Appx. p. 201).

Claimant first presented to Doctor's Care six days after his electrical shock, on May 28, 2013, complaining that he had woken up that morning sweating. Claimant was treated by Dr. Greenfield,[3] who noted that Claimant had some tenderness in his shoulder and neck area. Dr. Greenfield noted that Claimant did not complain of any chest

[3] Dr. Greenfield is board certified in Family Practice, but is not a cardiologist. (Appx. p. 307, lines 15-17; p. 314, line 14).

pressure. (Appx. pp. 188).

Claimant was referred to Dr. Dasgupta at the South Carolina Heart Center on May 28. Dr. Dasgupta's notes reflect that Claimant denied any chest pain but had minimal left shoulder pain. Dr. Dasgupta diagnosed Claimant with an acute myocardial infarction. He recorded that Claimant had a prior history of hypertension, tobacco abuse (35 year pack-a-day smoker), drank a case of beer per week, and had a significant family history for heart disease (Claimant's father passed away from coronary disease and myocardial infarction). Dr. Dasgupta also noted that Claimant appeared to have a ventricular septal defect as a possible completion of his acute myocardial infarction. Dr. Dasgupta referred Claimant to Lexington Medical Center. (Appx. pp. 190-196).

Claimant underwent surgery at Lexington Medical Center to repair the ventricular septal defect caused by the plaque rupture and subsequent myocardial infarction. Dr. Travis performed the surgery, which was successful. (Appx. pp. 166-167).

Dr. Travis provided a written opinion that Claimant's "electrical shock caused his heart attack and his ventricular septal defect." (Appx. p. 89). Dr. Travis described the mechanism of Claimant's injury at a later deposition as being a plaque rupture that caused a myocardial infarction that caused the ventricular septal defect. (Appx. p. 411, line 24 – p. 412, line 2). Dr. Travis also explained that plaque ruptures can be caused by many things including getting up the wrong way from a couch, strenuous activity, stressful events in someone's personal life, emotional stresses, and many other things. (Appx. p. 412, lines 3-11). Further, when 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," (Appx. p. 412, lines 12-15), his response was, "[i]s

there a definitive way to—collate one to another **absolutely not**." (Appx. p. 412, lines 16-18) (emphasis added). Dr. Travis speculated that, "the [electrical shock] ***could*** of started the whole domino effect." (Appx. p. 427, line 23-24) (emphasis added). Finally, Dr. Travis indicated that the neck pain Claimant experienced could have been "just neck pain," and not related to his heart condition. (Appx. p. 428, lines 12-16).

Dr. Travis indicated that part of his opinion based on the presence of a plaque on Claimant's heart. However, Dr. Travis stated that this was his first open heart surgery on a patient who had received an electrical shock. (Appx. 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 on Claimant's heart is related to electrical shock or whether or not the plaque he observed is common in electrical shock. (Appx. p. 427, lines 6-12).

After the surgery, Claimant began treating with Dr. Lide on an outpatient basis for his heart condition. In September 2013, Dr. Lide signed a check-the-box opinion stating Claimant's heart condition was caused by the electrical shock. (Appx. p. 113). However, in a later deposition, Dr. Lide agreed that neither he nor anyone else knows "what causes plaque rupture." (Appx. p. 360, lines 13-22). Dr. Lide also testified that he did not "know whether the electrical shock caused the plaque rupture...." (Appx. p. 361, lines 14-15). Further, Dr. Lide testified that he is not familiar with any research and he has not conducted any research on whether an electrical shock even ***can*** cause a myocardial infarction or a ventricular septal defect and, if so, what the timeline would be. (Appx. p. 365, line 13 – p. 366, line 1). Dr. Lide also indicated that the longer in time the heart condition develops from an alleged precipitating event, in this case the electrical shock, the less likely it is that the heart condition is related to the alleged precipitating event.

(Appx. p. 366, lines 2-6). Finally, Dr. Lide stated what he considered to be "overwhelming evidence" that the electrical shock caused Claimant's condition, which was "proximity in time." (Appx. p. 367, lines 20-21).

In September 2013, Dr. Greenfield also signed a check-the-box opinion stating Claimant's heart condition was caused by the electrical shock. (Appx. p. 155). However, at a later deposition, Dr. Greenfield testified that the testing she conducted could not give any indication as to when Claimant suffered the myocardial infarction. Specifically, Dr. Greenfield stated that the myocardial infarction "could have been 5 days ago," or it could have occurred the evening of May 27 or the morning of May 28. (Appx. 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. (Appx. p. 371, line 19 – p. 372, line 4). Additionally, Dr. Greenfield stated that Claimant presented without any chest pain. (Appx. p. 359, lines 5-9, p. 367, lines 3-8). Dr. Greenfield also noted the pain in Claimant's arm and shoulder was not indicative of having sustained a myocardial infarction. (Appx. p. 359, lines 13-25).

Dr. Feldman reviewed Claimant's medical records and noted that Claimant's "occluded right posterior descending artery ... appeared to be a relatively fresh occlusion according to his angiographic report." Dr. Feldman expressed an expert opinion that, "with reasonable certainty the highest likelihood was that [Claimant's] VSD was acquired from his acute myocardial infarction." He also stated that it "is of the highest

certainty [that this was a spontaneous plaque rupture which had no relation to the electrical shock] since there is no clear cut correlation between plaque ruptures and electrical shocks." Dr. Feldman also explained that, "[t]he odds of having electrical shock to account for the VSD are quite low given the anatomical relationship of his VSD to his occluded PDA vessel." (Appx. p. 198).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2013). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. Conversely, "[a] reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* Bursey v. South Carolina Dep't of Health & Envt'l Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Frame v. Resort Services Inc., 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). In particular, Workers' Compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). A reviewing court should reverse,

remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

ARGUMENT

This Court's review is warranted because this case raises the novel question of whether the Commission can base a compensation award on written medical opinions that are later contradicted in deposition testimony to the extent that the opinions are rendered speculative and inconclusive. This issue is not only novel but crucial in light of the Commission's determination that, "a heart attack and its relationship to a work related inquiry is a medically complex case." (Appx. pp. 50-67).

I. The Court of Appeals erred as a matter of fact and law by misapprehending and/or failing to consider the full record and actual testimony of the medical doctors and apply that testimony to the facts as a whole.

II. The Court of Appeals erred as a matter of fact and law by affirming an award that is supported by speculative medical opinions and testimony.

The mere fact an injury occurs due to a heart attack during or following employment will not, by itself, support a compensation award. *See, for example,* Lorick v. South Carolina 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). In order to be compensable, an injury must be proximately caused by an accident which arose out of and in the course of employment. *E.g.*, Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). The burden is on the claimant to establish causation for the heart attack injury. In heart attack and stroke cases, the claimant must present competent and reliable evidence of a causal connection between the work he performed and the heart condition/injury. Lorick, 245 S.C. at 518,

141 S.E.2d at 664.

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, 245 S.C. 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 claimant must present an expert opinion at least to the effect that the accidental injury "most probably" caused the disability or death. 245 S.C. 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 that the accident or conditions of employment "most probably induced or precipitated the heart attack or other coronary condition which caused the Claimant's injury." Lorick, 245 S.C. 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, Claimant, as well as the Commission and the Court of Appeals, relied almost exclusively on the written questionnaires issued by Drs. Greenfield, Travis, and Lide. However, each and every doctor in this case gave contradictory deposition

testimony ***after*** they issued a written opinion proctored by Claimant's counsel. The Court of Appeals improperly disregarded 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 becomes clear that the doctors' opinions do not meet the standard required to support an award. Each and every doctor gave expert medical deposition testimony in which they indicated (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 Claimant'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 Commission Decision and the Court of Appeals' Opinion No. 2017-UP-336, that both the Commission and the Court of Appeals 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 below and in the underlying briefs, the tenuous connection between Claimant's work accident on May 22, 2013 and his ventricular septal defect, where there is no definitive medical evidence to support the electrical shock-heart attack link is insufficient to sustain a finding of compensability. Each doctor can only say definitively

that the shock "could" or "may" or "might" have caused the heart injury. Further, the two heart doctors indicated that neither they nor anyone else can tell what causes a plaque rupture in the first place and that it could 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.

The sequence of medical events in this claim is not disputed. Claimant suffered an electrical shock at work on May 22, 2013. Sometime between May 23, 2013 and May 28, 2013 Claimant suffered an acute myocardial infarction/plaque rupture. The acute myocardial infarction/plaque rupture led to Claimant developing an acute ventricular septal defect. The ventricular septal defect required surgical intervention on May 29, 2013.

As previously noted, the key to determining whether or not Claimant's ventricular septal defect is compensable is determining whether or not the myocardial infarction/plaque rupture was caused by the electrical shock.[4] If the electrical shock did not cause the myocardial infarction/plaque rupture then the ventricular septal defect **cannot** be found to be compensable as it was directly caused by the myocardial infarction/plaque rupture. In order to find that the myocardial infarction/plaque rupture was caused by the electrical shock, the Commission had to determine the date on which it occurred and that it was caused by the electrical shock. Absent a finding of **when** Claimant suffered the myocardial infarction and/or plaque rupture that led to his

[4] As noted throughout, the causative chain at issue is whether the (1) Electrical Shock caused the (2) Acute Myocardial Infarction/Plaque Rupture which then caused the (3) Ventricular Septal Defect. If the acute myocardial infarction/plaque rupture was **not** caused by the electrical shock then the ventricular septal defect is **not** compensable.

ventricular septal defect, the Commission Decision is based on surmise, conjecture and speculation, and the Court of Appeals erred in affirming it. Likewise, absent a finding of **what** caused Claimant's myocardial infarction and/or plaque rupture that led to his ventricular septal defect, the Commission Decision is based on surmise, conjecture and speculation, and the Court of Appeals erred in affirming it.

In Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960), the Supreme Court stated that, "the rule of liberal construction of the compensation acts in favor of the employee ... does not dispense with the necessity of evidence to support the award, or of making proof prerequisite to recovery, **does not permit a court to award compensation where the requisite proof is lacking**, and ... does not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are. A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim." 236 S.C. at 445-446, 114 S.E.2d at 831 (emphasis added). The Supreme Court went on to state that "[i]t has been mistakenly said in one or more of our decisions ... that doubt of causal connection between injury and death or disability should be resolved in favor of compensability. That is error because it would found a conclusion of fact upon doubt whereas **such finding must be upon evidence, not doubt** ... There is no sound reason for the translation of the rule of liberal construction of the law to the finding of the facts to the end that doubt with respect to the latter shall be resolved in favor of the claimant. Doubt, as the foundation of a factual finding, can hardly be distinguished from surmise, speculation and conjecture which countless cases have condemned as a substitute for

facts and legitimate inferences. **Conviction, not doubt, is the proper basis of a conclusion of fact.**" 236 S.C. at 447, 114 S.E.2d at 832 (emphasis added).

A finding that Claimant's ventricular septal defect was work-related without first finding when the myocardial infarction/plaque rupture occurred in relation to the electrical shock and what caused the myocardial infarction/plaque rupture constitutes an award that is based on nothing more than surmise, conjecture and speculation. Pursuant to Cross, the Commission is required to make findings based upon "evidence, not doubt." 236 S.C. at 447, 114 S.E.2d at 832; *see also* Tiller, 334 S.C. at 339, 513 S.E.2d at 845 (Commission awards "must not be based on surmise, conjecture or speculation"). Thus, in this case, the Commission was required to make findings of fact based on the medical evidence of: (1) when the myocardial infarction/plaque rupture occurred, and (2) that the myocardial infarction/plaque rupture was caused by the electrical shock. Absent these findings, the Commission cannot make a finding that the ventricular septal defect is a compensable injury.

The Court of Appeals and Commission erred in relying on the written opinions of Drs. Travis, Lide and Greenfield for two basic reasons: (1) Dr. Travis' and Dr. Lide's opinions that the electrical shock caused Claimant's heart condition are based solely on the sequence of events between the shock and the acute myocardial infarction as well as the presence of a plaque on Claimant's heart; and (2) Drs. Travis', Lide's and Greenfield's opinions are based on an "estimation" that Claimant was shocked by 480 volts of electricity, a fact which Claimant failed to establish.

First, Dr. Travis' and Dr. Lide's opinions are grounded solely in the relationship in time between the electrical shock and the heart condition as well as a plaque on

Claimant's heart. Dr. Travis described the mechanism of Claimant's injury as being a plaque rupture that caused a myocardial infarction that caused the ventricular septal defect. (Appx. p. 411, line 24 – p. 412, line 2). However, both Dr. Travis and Dr. Lide indicated that the specific cause of plaque ruptures is unknown, and that they can be caused by many things including getting up the wrong way from a couch, strenuous activity, stressful events in someone's personal life, emotional stresses, and many other things. (Appx. p. 412, lines 3-11 (Dr. Travis)) (*see also* Appx. p. 360, lines 13-20 (Dr. Lide agreeing that, "we don't really know what causes plaque rupture"). 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?" Dr. Travis' response was: "**[i]s there a definitive way to—collate one to another absolutely not**." (Appx. p. 412, lines 12-18) (emphasis added). Dr. Travis also stated that, "the [electrical shock] **could**[5] of started the whole domino effect." (Appx. p. 427, lines 23-24). Finally, Dr. Travis indicated that the neck pain Claimant experienced – and that Claimant's deposition testimony reveals was the **only** pain he experienced through at least two days post-accident – "could be just neck pain [unrelated to a heart condition]." (Appx. p. 428, lines 12-16).

Dr. Lide also testified, "**I don't know whether the electrical shock caused the plaque rupture**..."[6] (Appx. p. 361, lines 14-15). Further, Dr. Lide testified that **he is**

[5] "Could" is insufficient to support a finding of medical causation under the Act. Tiller, 334 S.C. at 339, 513 S.E.2d at 845 (Commission awards "must not be based on surmise, conjecture or speculation").

[6] 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 Claimant was caused by the alleged electrical shock.

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. (Appx. p. 365, line 13 – p. 366, line 1). Dr. Lide also indicated that the longer in time the heart condition develops from an alleged precipitating event, in this case the electrical shock, the less likely it is the heart condition is related to the alleged precipitating event. (Appx. p. 366, lines 2-6). Finally, **Dr. Lide stated what he considered to be "overwhelming evidence" that the electrical shock caused Claimant's condition, which was simply "proximity in time."** (Appx. p. 367, lines 20-21). Essentially, Dr. Lide readily admits: (1) he has no idea what started the causal chain for the ventricular septal defect, (2) he has no idea if an electrical shock can even cause a VSD, and (3) like Dr. Travis, his only basis for his opinion is the sequence of events (*e.g.*, A then B, therefore A caused B).

Dr. Greenfield testified in her deposition that the testing she conducted could not give any indication as to when Claimant suffered the myocardial infarction. Specifically, Dr. Greenfield stated that the myocardial infarction "could have been 5 days ago," but it **could have occurred the evening of May 27 or the morning of May 28.** (Appx. p. 315, line 10 – p. 316, line 8).[7]

Dr. Travis also indicated that part of his opinion formed because of the presence of a plaque on Claimant's heart. However, Dr. Travis stated in his deposition that this

[7] 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. (Appx. p. 331, line 19 – p. 332, line 4). Additionally, Dr. Greenfield stated that Claimant presented without any chest pain. (Appx. p. 319, lines 5-9; p. 327, lines 3-8). Dr. Greenfield also noted the pain in Claimant's arm and shoulder was not indicative of having sustained a myocardial infarction. (Appx. p. 319, lines 13-25).

was his first open heart surgery on a patient who had received an electrical shock. Further, Dr. Travis stated that **he had <u>never</u> "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. (Appx. p. 427, lines 2-12). The testimony indicates that Dr. Travis essentially guessed or speculated that the plaque he observed was related to an electrical shock based solely on the fact that Claimant had experience an electrical shock of unknown voltage a week prior. This is clearly an insufficient basis on which to ground a medical opinion as it related to causation under the Act.

Second, Dr. Travis', Dr. Lide's and Dr. Greenfield's opinions are based on speculation that the specific underlying causal event was a shock by 480 volts of electricity. Dr. Travis' written statement suggests Claimant suffered "a large electrical shock," (Appx. p. 89), while Dr. Lide's and Dr. Greenfield's check-the-box opinions indicate that Claimant's condition was caused by 480 volts of electricity. (Appx. pp. 113, 155). However, in their depositions, all three doctors admitted they did not know the voltage of the shock.

When Dr. Travis was asked to confirm whether he believed that Claimant's "condition was brought about by electrical shock of 480 volts," he answered, "I believe it, absolutely, had cause (sic) the defect on presentation." However, **Dr. Travis admitted that he had no any idea what amount of voltage actually shocked Claimant**. Further, Dr. Travis admitted that the entire basis of his opinion related to voltage of the shock causing Claimant's condition came from Claimant himself. (Appx. p. 406, line 20 – p. 407, line 8). Likewise, at his deposition, Dr. Lide stated, "[t]he details

of the shock are beyond me," and, "I did not investigate the scene. I do not know what equipment he was working on ... and **I certainly have no data to indicate to me whether 480 volts would be strong enough to cause the problem that 120 volts wouldn't cause ... I have done no research on this.**" (Appx. p. 357, line 7 – p. 358, line 9). When asked about this opinion at her deposition, Dr. Greenfield stated, "[Claimant] told me it was 480." Dr. Greenfield admitted that she did not run any tests to determine voltage and when asked if she had any personal knowledge of the actual voltage of the machine, she responded, "I would not have the foggiest [idea]." (Appx. p. 310, lines 11-23).

Claimant failed to prove this fact, which is essential to a finding of compensability.[8] At the Hearing, Claimant could not testify to the exact voltage of the machine. Instead, Claimant stated that the voltage into the machine "...was at 240. I mean, it's 240 or above..." (Appx. p. 492, line 25). Further, Claimant could only state the machine was "at least 240 volts." (Appx. p. 522, lines 16-24). Although the Commission found that Claimant believed the actual voltage was 480 volts, (Appx. p. 19), that is nothing more than speculation, which is insufficient to support an award. Mark Warren's testimony revealed that the machine Claimant was using was rated for a maximum 480 volts but that it could run on 208 volts. Further, Mr. Warren testified that the machine should have been running at 208 volts per leg. (Appx. p. 526, line 24 – p.

[8] The Commission pointed out that Petitioners did not prove whether the voltage Claimant experienced was 240 as opposed to 480, so it relied "on Claimant's estimation." (Appx. p. 19). However, it is the claimant who bears "the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade v. Champion Labs, 330 S.C. 8, 11 496 S.E.2d 856, 858 (1998). The Commission erred as a matter of law by placing a burden on Petitioners to *disprove* Claimant's estimation/speculation regarding the voltage.

527, line 4). The evidence in the record clearly establishes that there is no basis for a finding by Dr. Travis, Dr. Lide or Dr. Greenfield that Claimant suffered a shock of 480 volts. Because all three doctors' written opinions are based upon a shock of 480 volts, which is clearly speculative and contradicted by the evidence, these medical opinions are insufficient to support the Commission Decision.

As noted above, each of the doctors' opinions as set out previously in this Petition – and the Commission's Findings of Fact – can be boiled down as follows: B happened after A, therefore A caused B. The Workers' Compensation Act requires more than just a sequence of events or coincidence in time for a claim to be found compensable. The Act specifically requires a distinct causal relationship between events. Absent that causal relationship, there can be no compensable claim. Drs. Travis', Lide's and Greenfield's written opinions all follow the formula laid out above. Each of their deposition transcripts reveal that their main basis for determining compensability is that an electrical shock (A) happened and, sometime after the electrical shock happened, an acute myocardial infarction (B) happened, therefore the electrical shock (A) caused the acute myocardial infarction (B) – that is simply insufficient to support a finding of compensability under the Act. It is particularly insufficient when there is no evidence to determine, and no medical testimony to support, when the acute myocardial infarction even occurred.[9]

Petitioners assert they do not ask this Court necessarily to weigh conflicting evidence from these witnesses. Rather, Petitioners contend the Commission and the

[9] With the exception of the hospital admittance records on May 28 showing Claimant was admitted with an acute myocardial infarction. In other words, the most likely date of the myocardial infarction *is* the May 28 date of admittance.

Court of Appeals erred by not properly considering all evidence and by reaching an incorrect conclusion in light of the full evidence – specifically the deposition testimony of Drs. Travis, Lide and Greenfield. Their deposition testimony serves to clarify the rationale behind their written opinions. Their written opinions, on their face, state that this is a compensable injury. However, when one reviews the subsequent deposition testimony, it becomes clear that the opinions expressed by Drs. Travis, Lide and Greenfield are anything but clear. In fact, the record demonstrates that the only causal connection Drs. Travis, Lide and Greenfield can actually make between the electrical shock and the myocardial infarction is that the myocardial infarction happened *sometime* after the electrical shock. The Commission and the Court of Appeals erred by relying only on the written opinions of Drs. Travis, Lide and Greenfield and discarding or otherwise discounting their subsequent deposition testimony wherein they clarify the speculative basis for their prior written opinions.

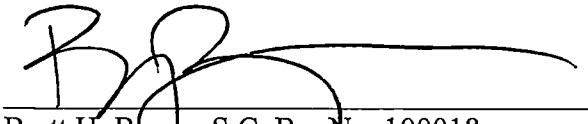
For the foregoing reasons, the Court of Appeals erred in affirming the Commission's award, which is based on speculation, conjecture, surmise, and incorrect information. Dr. Travis', Dr. Lide's and Dr. Greenfield's opinions are based solely on a time relationship and speculative evidence. This Court should grant the Petition for Writ of Certiorari, reverse the Court of Appeals and Commission, and remand with instructions that the Decision must be based on reliable, probative and substantial evidence – not speculation. Alternatively, this claim should be remanded for a new hearing on the merits of compensability related to the alleged heart injury.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of

Certiorari and hold that the doctors' opinions under the current laws of this state are insufficient to sustain a finding of compensability. This Court should reverse the Court of Appeals' Opinion No. 2017-UP-336 and also reverse the underlying Commission Decision.

McANGUS GOUDELOCK & COURIE, LLC



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

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
COURT OF APPEALS

RECEIVED
OCT 30 2017
SC Court of Appeals

Unpub. Op. No. 2017-UP-336
(filed August 2, 2017)

Clarence Winfrey, Employee,.....Respondent,

v.

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

PROOF OF SERVICE

I certify that I have caused to be served Petitioners' Petition for Writ of Certiorari on the attorney of record for Clarence Winfrey, by hand delivery, on the 30th day of October, 2017 addressed to Preston F. McDaniel, Esquire, The McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201.

McANGUS GOUDELOCK & COURIE, L.L.C.

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 Petitioners Archway Services Inc., and American Fire & Casualty Insurance Company c/o Liberty Mutual Group

mgc | INSURANCE DEFENSE

Reply To
BRETT H. BAYNE
Direct Dial: (803) 227-2281
brett.bayne@mgclaw.com

October 30, 2017

BY HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Clarence Winfrey v. Archway Services
Appellate Case No.: 2014-001788
Carrier Claim No.: 22209963
MGC File No.: 2095.13137

Dear Ms. Kitchings:

Please find enclosed for filing a copy of the Petition for Writ of Certiorari in the above-captioned case, which has been filed today with the South Carolina Supreme Court.

By copy of this letter, I am serving counsel of record with the above-referenced Petition for Writ of Certiorari.

Thanking you in advance for your assistance, I am

Very truly yours,

Brett H. Bayne

BHB/mdl
Enclosures
cc: Preston F. McDaniel, Esquire

mgc | INSURANCE DEFENSE

VIA HAND DELIVERY
2095.13137/BHB/mdl
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201