

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1012533
Appellate Case No. 2017-001732

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SC Court of Appeals

Timothy Causey, Appellant,

v.

Horry County, Self-insured Employer,
through the S.C. Counties Workers'
Compensation Trust, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the Workers' Compensation Commission's denial of death benefits is controlled by legal errors in refusing to evaluate the circumstantial evidence supporting causation, by inaccurately holding the original order granting benefits lacked required details, and by misstating material facts.

STATEMENT OF THE CASE

A. Factual Background

Timothy Causey was an Horry County Sheriff's Deputy. He died two months after working three 12-hour shifts near an extremely large apartment fire.

This fire was massive. It destroyed 26 apartment buildings. (10/4/16 Tr.p.44, line 19 - p.45, line 6). Each of these contained 4 apartment units. *Id.* A witness described seeing trees on fire 60 feet high, hearing explosions, and encountering smoke so thick he could not recognize people next to him. (Id.p.39, line 19 - p.43, line 15). This witness—a fellow deputy who lived in the development—said “it sounded like a war zone.” (Id.p.43, line 12).

The fire was extinguished the first night, (Id.p.58, lines 8-10), but the surrounding areas including the area where Timothy was assigned to work security had heavy smoke for several days. (Id.p.89, line 9 - p.90, line 23). Timothy worked his last full shift from his car because he was already so sick. (Id.p.91, lines 15-24). A police report indicates Timothy showed up for a fourth shift at the site but was sent home. (Defs' APA p.238).

Timothy's wife explained Timothy's symptoms appeared immediately after his first shift. When Timothy came home his eyes were running, his nose was running, he was sneezing, he was coughing, and his throat hurt. (10/14/16 Tr.p.11, line 18 - p.13, line 2). Timothy had been healthy before he left for work. He apparently told a supervisor one of his

daughters might have the flu, (Defs' APA p.238), but Timothy's wife said Timothy was mistaken and everyone was healthy. (10/14/16 Tr.p.10, line 15 - p.16, line 9).

Being ill was very out of character for Timothy. Timothy's wife explained Timothy did not even have a primary care physician "because he was never sick." (Id.p.15, line 1).

Things got worse after each of Timothy's shifts. When Timothy came back from his second shift he was blowing his nose and leaving black residue on the tissue. (Id.p.13, lines 12-16). Dirty mucus ran from Timothy's nose, his eyes were "really red, almost swollen," and Timothy would hold his chest when he coughed. (Id.p.13, lines 15-20). Timothy began coughing up "yellowish black" material and appeared "really weak" after his third shift. (Id.p.14, lines 7-15).

Timothy's wife began seeking medical attention for him, but she explained this was difficult because Timothy did not have a primary care physician and did not want to go to the emergency room. (Id.p.15, lines 1-6). She was eventually able to get an appointment via a fellow nurse—Timothy's wife is a non-practicing nurse, (Id.p.9, line 24 - p.10, line 1)—who made an appointment for Timothy two days after his last full shift. (Id.p.15, lines 9-13).

Timothy was diagnosed with an acute upper respiratory infection. (Claimant's APA, p.2) ("Assessment"). The medical records also reflect the belief that "part of his [symptoms] can be attributed to smoke inhalation." (Claimant's APA, p.3) (under "Cough").

Timothy continued deteriorating. The day after he went to the local doctor he stayed in bed, drinking only water or Gatorade. (10/14/16 Tr.p.15, line 23 - p.16, line 19).

The next day—six days after his first shift at the fire—he had an ashen look and a "bluish color." (Id.p.16, lines 21-25). Timothy's wife took him to the emergency room. *Id.*

Timothy was admitted to the hospital one week after his first shift at the fire. He stayed at this hospital—McLeod in Florence—for five days before being airlifted to the Medical University of South Carolina in Charleston.

Timothy had elevated temperatures at McLeod on several occasions and his tests for the flu were negative. (Claimant's APA, p.5). His initial chest x-ray was "unimpressive," but later scans showed significant changes in both lungs consistent with an acute lung injury. *Id.* (describing "dramatic bilateral interstitial changes"). The impression at McLeod was that Timothy had acute lung injury syndrome, most likely related to smoke inhalation. (*Id.*p.6). McLeod's records also reflect Timothy's blood work showed either an inflammatory component of this condition or the presence of a different, additional illness. *Id.*

Timothy was transferred to MUSC because of his progressive decline. (*Id.*p.5). Timothy arrived at MUSC intubated, sedated, and paralyzed. (Defs' APA, p.111). He immediately underwent a battery of tests, one of which disclosed the presence of the H1N1 virus, commonly called the "swine flu." (*Id.*p.115); (Strange Dep.p.7, line 6 - p.9, line 9).

Timothy had tubes down his throat until the day he died, (Strange Dep., p.15, lines 21-25), and he died about two months after his first shift at the fire. One of Timothy's physicians explained Timothy required a ventilator because his blood could not get adequately oxygenated; Timothy had "air space disease" filling both lungs. (Pastis Depo, pp.8, 10). Another physician explained both of Timothy's lungs had been injured and responded to the injury with "lots of inflammation." (Strange Depo. p.6).

Timothy died because he contracted ventilator acquired pneumonia. The death certificate signed by the pronouncing physician lists the cause of death as "diffuse alveolar

hemorrhage, due to ventilator associated pneumonia, due to prolonged intubation, due to smoke inhalation injury.” (Claimant’s APA, p.72). One of Timothy’s physicians explained people with prolonged intubation are at a high risk of developing these sorts of infections. (Whelan Depo.p.14, line 8 - p.15, line 11).

B. Initial Litigation to the Hearing Commissioner

Timothy died May 19, 2013. (8/5/13 Form 50). A form requesting a hearing on his behalf was filed with the Workers’ Compensation Commission in August of 2013. *Id.* Subsequent filings with the commission include an additional request for a hearing in April of 2015. (4/30/2015 Form 52). The case was tried in front of a single hearing commissioner in October of 2016. (10/14/16 Tr.p.1).

Five witnesses gave live testimony at the hearing. (*Id.*pp.2-3). Seven depositions were submitted for consideration. (*Id.*p.3); see also (7/19/17 Or.p.6).

The case for compensability was supported by lay and expert testimony. The lay testimony consisted of Timothy’s wife’s statements about Timothy’s good health before working at the fire and his rapid decline afterwards. The expert testimony supporting compensability came from medical doctors. (8/29/16 PHB pp.2-3) (pre-hearing summary).

Two physicians opined Timothy’s smoke inhalation impacted his sickness. One was Dr. Nicholas Pastis, a treating physician of Timothy’s, who said “I think I can say with a reasonable degree of certainty it [smoke inhalation] made his [Timothy’s] ability to fight off an infection worse.” (Pastis Dep., p.21, lines 10-17). The other was Dr. Kimberly Collins, a forensic pathologist who said Timothy died as a result of complications from his H1N1 infection and that Timothy’s smoke inhalation made him more susceptible to the infection.

(Collins Dep., p.15, line 25 - p.16, line 18; p.30, line 18 - p.31, line 25). Dr. Collins explained the sequence of events “follow[ed] perfectly.” (10/14/16 Tr.p.72, lines 2-8).

Other doctors held different opinions. Timothy’s other treating physicians would not rule smoke exposure “in” or “out.” Some of these doctors agreed with smoke inhalation being listed in Timothy’s death summary, others did not. Respondents also hired experts, each of which said smoke exposure had no role in Timothy’s death. The medical evidence is not summarized in detail here. It is discussed in the argument section of this brief.

Respondents’ case against compensation is a combination of coincidence and failure of proof. They believe all of Timothy’s symptoms came from swine flu. They also believe the case supporting compensability is speculative because there is no conclusive evidence Timothy had a lung injury or that smoke inhalation makes swine flu worse.

The single commissioner issued a 10-page order awarding benefits. (1/12/17 Or.pp.1-10). The order is fairly comprehensive. It summarizes the case’s background. It summarizes the evidence. It outlines Timothy’s wife’s testimony and it recaps the medical testimony. The order notes Timothy has been recognized by Horry County, the State of South Carolina, and the Federal Government as having died in the line of duty. (Id.p.4). Respondents objected to this testimony at the hearing, (10/14/16 p.56, line 19 - p.58, line 5), but the same testimony was included in a deposition Respondents submitted to the single commissioner. (Thompson Depo.p.18, line 7 - p.22, line 24); (10/14/16 Tr.p.3).

The single commissioner’s factual findings begin on page six of his order. (1/12/17 Or.p.6). The single commissioner made 12 factual findings, accurately reciting the evidence. The single commissioner then explained he believed the central dispute was not legal, but

factual, and the single commissioner held Timothy's death was causally-related to the smoke inhalation he suffered at work, noting he based this finding on his review of all the evidence. (Id.p.9). The single commissioner noted there were multiple expert opinions, but he chose to give the greatest weight to Timothy's treating physicians and to the in-person testimony Dr. Collins provided at the hearing. *Id.*

C. Respondents Appeal to the Appellate Panel

Respondents appealed the single commissioner's decision. An appellate panel of the commission reversed the award, giving multiple reasons for the reversal.

The panel held the single commissioner's order did not indicate what evidence was in the record, did not have conclusions of law, and failed to cite legal authority. (7/19/17 Or.pp.5-6). The panel believed this rendered the order defective as a matter of law. *Id.* The panel also held the single commissioner erred in relying on unsubstantiated hearsay. *Id.*

Then, the appellate panel purported to summarize the evidence. This 14-page summary focused on the medical testimony, explaining why the panel believed none of the medical testimony supported a causal relationship between Timothy's smoke inhalation, his immediate sickness, and his precipitous decline. The panel believed Dr. Collins' opinion supporting causation was based on conjecture, speculation, and misinformation. (Id.pp.16-17). The panel found Dr. Pastis' opinion was equivocal and speculative. (Id.p.19). The problem—as the panel seemed to perceive it—was the absence of concrete proof. The panel said “[Timothy] has shown nothing more than that one could speculate smoke exposure [] could have caused some ill-defined injury,” but without “actual evidence” of a lung injury, the panel believed it could not award benefits. (Id.p.20).

ARGUMENT

This ought to be a substantial evidence case. Timothy has the stronger argument given the straightforward timeline of his exposure to smoke, his immediate illness, and his death, but there is some evidence both ways. Respondents have experts who say this is all a coincidence. It would be dishonest to pretend Respondents' evidence does not exist.

But the case does not come to this Court as a substantial evidence case. Instead, it comes presenting issues of law. The appellate panel's order has three critical defects.

First, the appellate panel's order fails to properly apply the law of causation, confusing circumstantial evidence with speculation and ignoring that circumstantial evidence is a sound basis for an award of benefits in a workers' compensation case. Indeed, precedent explains circumstantial evidence can *overcome* medical evidence—sometimes an ounce of common sense is worth a pound of theory. This case is not speculative. It is supported by two experts and by the reasonable inferences from an honest evaluation of the evidence.

Second, the appellate panel incorrectly held the single commissioner's award was structurally defective. The single commissioner's order satisfies the standards for an administrative decision. The order accurately summarized the evidence and explained the single commissioner's reasoning. The order did not rely on unsubstantiated hearsay—the hearsay in question was corroborated by other evidence to which there was no objection. The single commissioner's order was adequate. The alleged deficits do not exist.

Finally, the panel's order misstates key facts and inaccurately analyzes the medical testimony. It was possible for the commission to rule for Respondents, but this order does not demonstrate a correct understanding of the law or a fair evaluation of the evidence.

I. The appellate panel failed to properly apply the law of causation, confusing circumstantial evidence with speculation and holding an award requires objective evidence and indisputable proof.

A workers' compensation award may be based on direct evidence or circumstantial evidence. In this respect, workers' compensation cases are no different than cases in circuit court.

Multiple precedents recognize this principle. *Schrader v. Monarch Mills* explains “[i]t is well settled that circumstantial evidence may be relied upon to settle questions of fact in Workmen’s Compensation matters as well as in other cases.” 215 S.C. 357, 364, 55 S.E.2d 285, 288 (1949). *Kennedy v. Williamsburg County* instructs “[c]ircumstantial evidence has as much probative value in these type cases as in any other class of cases.” 242 S.C. 477, 484, 131 S.E.2d 512, 515 (1963).

Proof by circumstantial evidence does not require proof beyond a reasonable doubt. Proof by circumstantial evidence “need not reach such a degree of certainty as to exclude every reasonable or possible conclusion[.]” *Id.* at 484, 131 S.E.2d at 515. It is sufficient if the facts or the sequence of events “give rise to a reasonable inference that there was a causal connection between [a] claimant’s disability and his prior injury.” *Id.* A case is not speculative if the circumstances would “lead an unprejudiced mind reasonably to infer that [an injury] was caused by [an] accident.” *Ferguson v. State Highway Dep’t*, 197 S.C. 520, 15 S.E.2d 775, 777 (1941). Another case puts the point this way:

post hoc does not always mean propter hoc.¹ Nevertheless, where an accident causing an injury is followed at once by an illness which continues until death ensues, this constitutes a chain of circumstances of probative value, tending

¹“After this, therefore because of this.” Black’s Law Dictionary 1285 (9th ed. 2004).

to show that death resulted proximately from the accident, or that it was at least accelerated thereby, which as a matter of law is sufficient.

White v. Carolina Power & Light Co., 215 S.C. 25, 33, 53 S.E.2d 872, 875 (1949).

Circumstantial evidence can even overcome medical evidence. Precedent recognizes “medical testimony is partly conjecture” because it is “based upon past experience and study.” *Holly v. Spartan Grain & Mill Co.*, 210 S.C. 183, 187, 42 S.E.2d 59, 61 (1947). Lay testimony about an injury was sufficient to overcome negative medical testimony in *Poston v. Southeastern Construction*, where the Supreme Court explained medical evidence does not control because “until medical science has made additional progress” the courts “would [not] be justified in accepting a ‘medical fact’ as determinative when there is testimony of physical facts to the contrary.” 208 S.C. 35, 38, 36 S.E.2d 858, 860 (1946). *Woodson v. Kendall Mills* follows similar reasoning, affirming the commission’s decision to credit the close timing between the claimant’s injury and illness over medical testimony that was either negative or inconclusive. 213 S.C. 395, 399-400, 49 S.E.2d 597, 599 (1948).

The appellate panel’s order reversing the single commissioner made little to no mention of the circumstantial evidence in this case. The order also characterized all the evidence supporting compensability as “speculative” because it was not ironclad. Three times, the panel noted there was no “objective medical evidence” Timothy had a lung injury. (7/19/17 Or.p.10, 17, 22). The panel also held there was “no competent evidence” any smoke exposure injured Timothy’s lungs, (Id.p.21), that there could be no award “[w]ithout actual evidence” Timothy injured his lungs, (Id.p.20), and that the evidence supporting causation was “nothing but impermissible surmise, conjecture, or speculation.” (Id.p.24).

This reasoning is legally defective. Just as one may not pretend Respondents' do not have evidence supporting the claim's denial, the appellate panel could not pretend the circumstantial evidence supporting compensability did not exist. Timothy got sick right after working at the fire. He died within months. *Poston* and *Woodson* affirmed awards based on the same sort of evidence, and they did this over medical evidence that was not helpful. These cases are not outliers. E.g. *Holly*, 210 S.C. at 192, 42 S.E.2d at 63; *Brewer v. Charleston Shipbuilding & Drydock*, 212 S.C. 43, 50, 46 S.E.2d 173, 176 (1948).

The Supreme Court has explained this sort of case "cannot be fairly considered without keeping in mind the coincidence of the accident." *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682 (1946). It has also observed that the commission has a duty in this sort of case to weigh the circumstantial evidence in light of the medical possibilities. *Grice v. Dickerson, Inc.*, 241 S.C. 225, 229-230, 127 S.E.2d 722, 725 (1962).

The appellate panel did not do this evaluation here. Instead it equated circumstantial evidence with speculation. This is an error of law, and reversal is required when an award is controlled by an error of law. S.C. Code Ann. § 1-23-380(5)(d) (___).

II. The single commissioner's decision accurately summarizes the evidence, adequately explains its reasoning, does not rely on inadmissible evidence, and is not legally defective.

The appellate panel held the single commissioner's order was structurally defective. Specifically, the panel held the single commissioner's order did not indicate what evidence was in the record, did not have conclusions of law, and failed to cite legal authority. (7/19/17 Or.pp.5-6). The appellate panel also held the single commissioner erred in relying on unsubstantiated hearsay. *Id.*

The finding that the single commissioner's order did not indicate what evidence was in the record is factually unsound. The single commissioner cited the testimony from the hearing, (1/12/17 Or.p.2), the pre-trial submissions made pursuant to the Administrative Procedures Act, (id.pp.2, 4, 5), the deposition testimony from four of Timothy's treating physicians, (id.p.3), and the deposition testimony from the Horry County Coroner. (Id.pp.4-5). The single commissioner also cited the evidence from Respondents' experts. (Id.p.5). The section titled "evidence of the case" fills four single-spaced pages of the 10-page order. (Id.pp.2-5). Nearly every sentence in this section is followed by a citation to the record.

Nothing supports the panel's conclusion that the single commissioner's order is legally defective because it does not comprehensively list every piece of evidence. Precedent explains no particular format for orders is required. *Able Communications v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). The commission must state its findings of fact and conclusions of law, S.C. Code Ann. § 1-23-350 (Supp. ____), and the commission is required to make findings on the elements that are necessary for an award. *Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 280, 461 S.E.2d 392, 393 (1995); *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 109-110, 156 S.E.2d 646, 648 (1967).

Here, the single commissioner listed 12 findings of fact before concluding, as a matter of law, that the issue between the parties was not a legal dispute, but a factual dispute. (1/12/17 Or.pp.6-9). The order plainly indicates the basis of the single commissioner's decision to award the claim. The single commissioner believed Dr. Collins' testimony and he believed the testimony of Timothy's treating physicians, some of whom supported compensability and none of whom ruled smoke inhalation "out." (Id.p.9).

There is yet another reason the panel's finding on this point does not make sense. The panel said there was "no indication of what evidence was included in the [r]ecord," (7/19/17 p.5), but a list of the parties' evidentiary submissions had been filed well in advance of the hearing. (8/29/16 PHB pp.4-5; Def. 8/19/16 Supp. Notice of Witnesses and Written Med. Reports). The transcript from the hearing begins by noting the objections to those submissions before ruling those submissions would be admitted. (10/14/16 Tr.p.4, line 7 - p.6, line 9). The panel had no problem listing the evidence. (7/19/17 Or.p.6). Thus, the panel's own order undermines its finding that the single commissioner's order was defective. If there was no way to know what was in the record, the panel could not have heard the case.

The panel's finding that the single commissioner "admitted unsubstantiated hearsay and rel[ie]d on the same" is also incorrect. (Id.p.5).

First, the hearsay in question was substantiated. Timothy's widow explained an MUSC physician gave her the impression Timothy's combination of smoke inhalation and swine flu was "the perfect storm." (10/14/16 p.34, lines 14-19). She gave this answer multiple times. First, in response to a question from Respondents' counsel, where the objection was not hearsay, but that the answer was non-responsive. (Id.p.30, line 21 - p.31, line 11). Later, on re-direct, Timothy's widow reiterated that this was her impression—that Timothy's smoke inhalation made his situation worse. (Id.p.33, line 21 - p.34, line 19).

The thrust of this testimony was affirmed by Dr. Pastis, who was specifically asked whether this recollection from Timothy's widow was consistent with her opinion. (Pastis Depo, p.29, lines 6-21). Dr. Pastis' testimony was admitted twice—as an APA submission and also as an exhibit—without objection. (Claimant's APA, p.19); (10/14/16 Tr.p.3).

Second, nothing supports the panel's finding that the single commissioner "relied" on this testimony in awarding the claim. The testimony is referenced one time in the single commissioner's order; in the "summary of the evidence." (1/12/17 Or.p.2). It is not referenced anywhere in the order's findings of fact or in the language of the award. As with the panel's finding that the single commissioner's order is structurally defective, the panel's finding on hearsay does not make any sense and is incorrect.

III. The appellate panel's decision misstates key facts, incorrectly describing medical testimony and failing to properly apply the law with respect to medical testimony.

The appellate panel's order begins by finding four of Timothy's treating physicians agreed smoke exposure "played no role" in Timothy's death. (7/19/17 Or.p.1). The order also rejects the opinions of Dr. Collins and Dr. Pastis as speculative. (Id.pp.16-17, 19).

There are two reasons this analysis is legally defective. First, the panel misstated the witness testimony in important respects. None of Timothy's treating physicians were willing to rule smoke inhalation "out" to a reasonable degree of certainty and one of them (Dr. Pastis) fully supported compensability.

Second, the panel did not properly apply the standards for medical testimony. Medical testimony is not speculative just because it is not backed by objective evidence. Also, medical testimony is not irrelevant just because it is stated in terms of possibilities rather than to a reasonable degree of certainty.

a. The panel misstated the medical testimony.

The appellate panel's decision begins by stating Dr. Charlton Strange testified smoke exposure played no role in Timothy's death and that three of Timothy's other treating

physicians—Dr. Timothy Whelan, Dr. William Largen, and Dr. Dee Ford—“concurred.” (7/19/17). This summation is not accurate.

Dr. Strange did not think smoke inhalation contributed to Timothy’s death, but he also explained smoke inhalation could have “increased Timothy’s chance of acquiring clinical H1N1 and made his clinical course more severe.” (Strange Dep., p.21, line 22 - p.22, line 2). When asked whether he believed swine flu was the sole cause of Timothy’s respiratory distress and death, he answered:

That’s a hard one. There’s pretty big literature out there that shows [] cigarette smokers have more H1N1 than people that don’t smoke and that the H1N1 they do acquire is more serious than people that are nonsmokers. And because Mr. Causey was a nonsmoker, we could speculate but not prove that the smoke inhalation that he did have made his presentation of H1N1 worse than it otherwise would have been.

(Id.p.14, lines 16-23). When asked about a reasonable degree of medical certainty, Dr. Strange answered:

I knew that question was going to come and I don’t know how to answer it except to say that there is a possibility but not rising to the level of medical probability that the smoke inhalation contributed in a meaningful way to [Timothy’s] ultimate outcome.

(Id.p.15, lines 10-14). Dr. Strange’s deposition is not lengthy—none of the depositions are lengthy. A faithful review of the deposition indicates he is not willing to rule smoke inhalation “in” as a cause and he is also not willing to rule it “out.”

The same was true of Doctors Whelan, Largen, and Ford.

Dr. Whelan said it could be correct that smoke inhalation did not contribute to Timothy’s sickness but that it was difficult to know the extent of Timothy’s smoke inhalation and it was difficult to know “any contribution of smoke inhalation to susceptibility to

H1N1.” (Whelan Dep., p.16, lines 5-10). Dr. Whelan gave this answer after being inaccurately told Dr. Strange had completely disqualified smoke inhalation as contributing to Timothy’s condition. Dr. Whelan could not say smoke inhalation did contribute and he could not say smoke inhalation did not contribute. (Id.p.18, lines 4-13).

Dr. Largen did not give a deposition, but gave a one-page signed statement saying he agreed Timothy ultimately died from complications due to swine flu and he deferred any opinions to Dr. Strange and Dr. Whelan. (Defs.’ APA p.225).

Dr. Ford opined there was no way to prove smoke exposure contributed to Timothy’s death, (Ford Dep., p.16, lines 10-17), but Dr. Ford also said the cause of death in Timothy’s MUSC “Hospital Death Summary” was “reasonable,” to a reasonable degree of medical certainty. (Ford Dep., p.9, line 14 - p.10, line 9). The MUSC death summary says Timothy died from “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).

The panel also misstated the testimony of the pathologist supporting compensability, incorrectly saying Dr. Collins’ testimony was based on “misinformation” because she “was forced to admit she had no idea what [Timothy’s] role was in fighting the fire.” (7/19/17 Or.pp.16-17). Dr. Collins acknowledged she did not know what Timothy had been assigned to do. (Collins Dep., p.18, line 11 - p.19, line 13). She also said it did not matter. *Id.*

The appellate panel committed an error of law by misrepresenting this testimony. Some of these experts helped compensability, others were non-committal, but a decision that inaccurately reflects the testimony is clearly erroneous and legally defective.

b. The panel did not properly apply the standards for medical testimony.

Medical testimony must be stated to a reasonable degree of medical certainty if causation is to be based on medical testimony alone, but precedent explains medical testimony is not deemed irrelevant if it is stated in terms of “possibilities.”

The standard for medical proof comes from *Branch v. Pacific Mills*, where the Supreme Court explained it is not sufficient for a doctor to say an ailment “might” have resulted from a particular cause or that a certain act “could” produce a given consequence. 205 S.C. 353, ___, 32 S.E.2d 1, 5 (1944). The doctor “must go further and testify at least that, taking into consideration all the attending data, it is their professional opinion the result in question most probably come from the cause alleged.” *Id.* (quoting a workers’ compensation case from Pennsylvania).

However, the fact that a doctor is not willing to give an opinion to a reasonable degree of certainty does not make the doctor’s opinion irrelevant. In *Brewer v. Charleston Shipbuilding & Drydock*, the Supreme Court again favorably cited a Pennsylvania case, emphasizing medical testimony that an accident or disease “might” have resulted from employment should not be excluded from consideration. 212 S.C. at 49, 46 S.E.2d at 176. The court explained such evidence “may be invaluable, as an expression of a cautious opinion, in corroboration of other testimony.” *Id.*

The reason for this goes back to the first argument in this brief—causation may be based on direct *or* circumstantial evidence, and on medical *or* lay testimony. The Act requires proximate cause for compensation. S.C. Code Ann. § 42-9-290 (____). Proximate

cause is not a medical term, it is determined by “mixed considerations of logic, common sense and experience, policy, and precedent.” *Ballenger*, 209 S.C. at 466, 40 S.E.2d at 682.

Precedent also explains a medical opinion is not defective if it is “somewhat in the realm of speculation.” Representative cases include *McCarty v. Kendall Co.*, 238 S.C. 493, 120 S.E.2d 860 (1961), *Grice v. Dickerson, Inc.*, 241 S.C. 225, 127 S.E.2d 722 (1962), and *Kennedy v. Williamsburg County*, 242 S.C. 477, 131 S.E.2d 512 (1963). *McCarty* rejects the same argument Respondents leveled at Doctors Pastis and Collins—the allegation was that an expert rescinded his opinion by saying on cross-examination his opinion was more or less conjecture. 238 S.C. at 499-502, 120 S.E.2d at 863-864. The court held it was for the commission to determine whether this expert intended to withdraw his opinion supporting causation. Here, there is no suggestion Doctors Pastis or Collins do not adhere to their opinions that Timothy’s smoke inhalation negatively impacted his illness.

There is a strong case for compensability here. The expert testimony from Doctors Collins and Pastis plainly supports compensability. There are also multiple inferences supporting compensability that arise out of timing. Timothy was not sick before he went to work at the fire but he was sick immediately after. Nobody else in Timothy’s home got sick, not even his wife who was around him constantly when he was hospitalized. (10/14/16 Tr., p.18, line 15 - p.19, line 8). Finally there is the inference Timothy contracted swine flu while he was at McLeod, a hospital stay necessitated by smoke inhalation. (Collins Dep.p.29, lines 1-7). There is an awful lot of smoke here, and as the common saying recognizes, where there is smoke, there is fire.

But there are inferences the other way too. There is evidence other officers went to the hospital. (Clmt. APA, p.5). None of them had any significant health problems due to the fire. *Id.* Swine flu is ordinarily not fatal unless the patient is has a compromised immune system, (Collins Dep.p.32, lines 6-16), but swine flu *is* a deadly virus and there are perfectly healthy people who contract the disease and die. (Whelan Dep.p.11, line 19 - p.12, line 5).

The problem with the case is that the commission did not grapple with these questions. Instead it issued an order that repeatedly misstated evidence, mischaracterized the underlying award, and failed to apply the relevant principles of law.

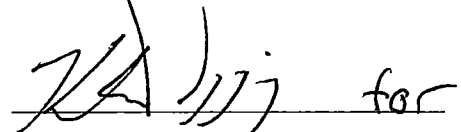
CONCLUSION

For the foregoing reasons this Court should reverse the commission and remand this case for consideration under the proper legal standards.

January 19, 2018

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BA Hewitt for', written over a horizontal line.

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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1302588

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JAN 19 2018
SC Court of Appeals

Timothy Causey, Claimant, Appellant,

v.

Horry County, Self-insured Employer
through the SC Counties Workers'
Compensation Trust, Defendants Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Motion for the Court to Accept the Initial
Brief of Appellant and Designation of Matter to be Included in the Record on Appeal Out
of Time* and the conditionally filed *Initial Brief of Appellant and Designation of Matter to
be Included in the Record on Appeal* by mailing copies of the same by United States Mail
with first class postage prepaid to the following address:

Roy A. Howell, III
Kirsten L. Barr
Trask & Howell, LLC
PO Box 2167
Mt. Pleasant, SC 29465-2167



Erin Bridges

January 19, 2018

January 19, 2018

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Timothy Causey v. Horry County
Case Tracking No.: 2017-001732

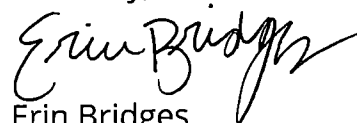
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JAN 19 2018
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Motion for the Court to Accept the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal Out of Time*. Also, please find enclosed the conditionally filed original and one (1) copy of the *Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal*. I have also enclosed a proof of service upon counsel for the Respondents and a check in the amount of \$25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



Erin Bridges

Paralegal to Blake A. Hewitt
Bluestein Thompson Sullivan, LLC

/emb

Enclosures

cc: Francis A. Humphries, Jr., Esquire
Roy A. Howell, III, Esquire