THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

R. Michael Campbell, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

Appellate Case No. 2016-001510
WCC File No. 1416804

William F. Poston, Claimant, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant, William F. Poston (Poston), alleged that he suffered an occupational disease while working for Respondents as a heavy equipment operator. Respondents denied the claim. On November 11, 2014, Poston filed a Form 50 to request a hearing with the South Carolina Workers' Compensation Commission (the Commission). The case was heard by Commissioner Melody L. James (Commissioner James) on September 29, 2015. On January 22, 2016, Commissioner James issued a decision and order finding that Poston did suffer a compensable occupational disease while employed by Respondents.

Respondents timely filed a notice of appeal with the Commission for review by the South Carolina Workers' Compensation Commission Appellate Panel (the Appellate Panel). Respondents raised numerous errors on appeal, including but not limited to, the fact that Poston failed to prove the statutorily required elements for an occupational disease. The parties' briefs were timely filed, and the Appellate Panel heard oral arguments on May 16, 2016. On July 6, 2016, the Appellate Panel issued an order reversing Commissioner James. The Appellate Panel found that Poston's disease did not arise out of or in the course of his employment, and that his disease was not peculiar to his employment.

On July 18, 2016, Poston served and timely filed a notice of appeal with the South Carolina Court of Appeals.

STATEMENT OF FACTS

In June of 2014, Poston was hired, through the temporary staffing agency of Randstad North America, to work as a heavy equipment operator. (R. p. 336, lines 12-16). Poston was assigned to work on a job installing pipe for a drainage system at the Rock Tenn plant located in Florence, South Carolina. (R. pp. 338-339). Poston's job duties mainly consisted of driving a large dump truck to haul dirt from one site area to another and to assist other members of the team in laying and installing pipe for the plant's drainage system. (R. pp. 338-339).

According to Poston's testimony, he began suffering from headaches sometime around the first week of July of 2014. (R. p. 345, lines 5-13). At this point, Poston had worked at the job site for over one month with no problems. (R. p. 345, lines 14-17). Nevertheless, Poston presented to his family doctor, Dr. Thomas Keith Stuart, on July 9, 2014 with symptoms of headache and fever. (R. pp. 211-212). Poston was initially diagnosed with bronchitis, prescribed amoxicillin and Tylenol, and was released. (R. pp. 211-212). Following his visit, Poston continued to suffer from headaches and presented to the Marion Hospital Emergency Room on July 12, 2014. (R. pp. 220-222). Poston was ultimately diagnosed with dehydration and discharged. (R. pp. 220-222).

The following week, Poston returned to his family doctor with continued complaints of headaches and dizziness. (R. pp. 213-214). At that time, Dr. Keith referred Poston for a neurology appointment with Dr. Joseph Healy, Jr. (R. pp. 213-214). Dr. Healy saw Poston on July 17, 2014, and admitted him to the Carolinas Hospital System-Marion in Mullins, South Carolina for an MRI. (R. pp. 240-246). Dr. Healy noted that Poston's MRI showed the presence of small lesions, which may represent cryptococcoma. (R. p. 245). Dr. Healy then consulted

with Dr. Temujin Chavez, an infectious disease doctor. (R. pp. 247-249). Dr. Chavez ultimately diagnosed Poston with cryptococcal meningitis. (R. p. 72, lines 15-22).

Cryptococcal meningitis is caused by exposure to cryptococcal fungus. (R. p. 46, line 14-p.47, line 5; R. p. 81, line 12-p. 83, line 2). Cryptococcal fungus is known to travel freely throughout the atmosphere and one is generally exposed to it by breathing in the airborne spores into their lungs. (R. p.83, line 14-p.85, line 1). Cryptococcal fungus is a common fungus that is everywhere in our environment. (R. p.83, line 14-p.85, line 1). It is believed to derive from bird droppings, decaying fruits and plants, and even trees and travels freely throughout the air. (R. p.81, line 12-p.85, line 1).

Poston was treated and released from the hospital on July 24, 2014, and was able to return to work on September 1, 2014. (R. p. 261; R. p. 137, lines 10-12; R. p. 60, lines 20-25). According to Dr. Healy, Poston has no impairment rating or work restrictions but will need future ongoing medical treatment consisting of a prolonged prescription for Fluconazole. (R. p. 63, lines 3-13). Notably, following Poston's release, he returned back to work at the same worksite performing the same job duties prior to his illness. (R. p. 351, lines 4-5).

There is no evidence in the record of any other employees working at the Rock Tenn plant suffering from any illnesses or diseases as a result of their employment. (R. p. 138, lines 2-7). Additionally, there is no evidence in the record of the cryptococcal fungus ever having been found at Poston's worksite. (R. p. 193, lines 19-22).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Appellate Panel. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, an appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1–23–380(5)(d), (e); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010).

The Appellate Panel is the ultimate factfinder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, an appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. Pierre, 386 S.C. at 540, 689 S.E.2d at 618 (2010). "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). Although, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." Id.

ARGUMENT

1. The Appellate Panel's ruling that Poston did not suffer from an occupational disease is supported by substantial evidence and should be affirmed.

Poston did not suffer an "occupational disease" as defined by S.C. Code Ann. § 42-11-10. Specifically, according to S.C. Code Ann. § 42-11-10, Poston must prove the following elements to prevail under a theory of occupational disease: (1) a disease, (2) that the disease arose out of and in the course and scope of the claimant's employment, (3) that the disease is due to hazards in excess of those hazards that are ordinarily incident to employment, (4) that the disease is peculiar to the occupation in which the claimant was engaged, (5) that the hazard causing the disease is one recognized as peculiar to a particular trade, process, occupation, or employment, and (6) that the disease directly resulted from the claimant's continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment. See also, Fox v. Newberry Cty. Mem'l Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995).

The burden is upon the claimant in an occupational disease case to prove such facts as will entitle the claimant to compensation. Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986), rev'd, 292 S.C. 489, 357 S.E.2d 456 (1987). The Appellate Panel found that Poston failed to prove the statutorily required elements for an occupational disease. Specifically, the Appellate Panel "found it difficult to place weight on causation when there is no evidence that the spores ever existed on the worksite." (R. p. 39). In fact, during the Appellate Panel hearing, Commissioner Beck asked counsel for Poston if there was ever any evidence that the spores existed at the worksite, to which counsel for Poston conceded that there was no evidence of the cryptococcal fungus at the worksite. (R. p. 193, lines 19-22). Additionally, Commissioner Beck questioned counsel for Poston about whether or not it was a "fatal flaw" that no evidence existed to suggest the cryptococcal fungus ever existed at the

worksite. (R. p. 195, lines 2-4). As the ultimate finder of fact, the Appellate Panel is in the best position to draw conclusions and inferences from the evidence at hand. Clearly, the Appellate Panel found it important that no evidence of the cryptococcal fungus ever existed at the worksite.

A. The Appellate Panel's ruling that Poston's disease did not arise out of or in the course of employment is supported by substantial evidence and should be affirmed.

An injury or disease "arises out of employment" if it is proximately caused by the employment. S.C. Code Ann. § 42-11-10; See also, Fox v. Newberry Cty. Mem'l Hosp., 316 S.C. 537, 451 S.E.2d 28 (S.C. App. 1994). Therefore, it must be proven that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury or disease. Mohasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 138, 345 S.E.2d 249, 254 (Ct. App. 1986), rev'd, 292 S.C. 489, 357 S.E.2d 456 (1987). Arising out of refers to the origin and cause, whereas in the course and scope of refers to the injury's time, place, and circumstances. Osteen v. Greenville Cnty. Sch. Dist., 333 S.C. 43, 50, 508 S.E.2d 21, 24, (1998). A "possibility" that the injury or illness arose from employment is not enough. Richardson v. Wellman Combing Co., 233 S.C. 454, 105 S.E.2d 602 (1958).

Neither Dr. Healy nor Dr. Chavez's testimony supports a finding of causation. Dr. Healy simply stated that Claimant's employment likely caused his cryptococcal meningitis because he has "no alternative explanation." (R. p. 49, lines 20-22). Dr. Healy further admitted that he did not consider any other environmental or social factors besides Poston's current employment. In fact, Dr. Healy was specifically asked, "[d]id you subsequently get some work history or some other information to help you identify the etiology of the cryptococcal infection?" (R. p. 48, lines 8-10). In response, Dr. Healy testified, "[w]ell, you know, that's probably more conjecture, but the main place that it comes from is the environment". (R. p. 48, lines 11-13).

Although Dr. Healy admits that cryptococcal meningitis is transmitted by airborne spores throughout the environment, and that it is known to lay dormant in individuals for an extended period of time. (R. p. 47, lines 18-25). In fact, Dr. Healy noted that Poston had likely been infected with the fungus for 18 months. (R. p. 47, lines 22-24). Poston had only been an employee with Respondents for a couple of months. (R. p. 137, lines 6-9).

Notably, Dr. Chavez – Claimant's authorized treating physician who ultimately diagnosed him with cryptococcal meningitis – outright admits that he cannot give an opinion as to the cause of Claimant's cryptococcal meningitis. Specifically, Dr. Chavez was asked, "[a]s we sit here today, do you know how [Claimant] got cryptococcal meningitis?" Dr. Chavez responded, "No, I don't." (R. p. 80, lines 7-9).

Dr. Chavez also admits he has not been able to determine the cause of cryptococcal meningitis for other patients he has treated in the Florence area. When asked, "[b]etween Mr. Poston and the other patients you've treated in this area, in Florence, have you been able to determine how any of them got cryptococcal meningitis?" Dr. Chavez responded, "No. Frankly, no. And that's a complex answer beyond a simple no." (R. p. 81, lines 4-9).

Clearly the Appellate Panel placed great weight on the fact that the authorized treating physician, Dr. Chavez, could not say where Poston contracted cryptococcal meningitis. (R. p. 80, lines 7-9). Whether there is any causal connection between employment and an injury is a question of fact for the Appellate Panel. The [Appellate Panel's] decision must be affirmed if the factual findings are supported by substantial evidence in the record. Sharpe v. Case Produce, Inc., 336 S.C. 154, 159-60, 519 S.E.2d 102, 105 (1999).

Respondents' also hired David Duffy to determine whether cryptococcal fungus was present in the soil at Poston's worksite. Mr. Duffy collected twenty-two (22) various soil samples

from separate areas of Poston's worksite. (R. pp. 383-397). Those samples were sent to EMLS Analytical, Inc., where each one was plated on growth media to determine the presence of cryptococcal fungus. Mr. Duffy's tests and ensuing report ultimately concluded that none of the soil samples tested positive for cryptococcal fungus. (R. pp. 383-397).

Poston has failed to prove that his exposure to cryptococcal fungus arose out of or in the course of his employment. Additionally, Poston has failed to prove that the cryptococcal fungus ever existed at his worksite. For the above mentioned reasons the decision of the Appellate Panel should be affirmed.

B. The Appellate Panel's ruling that Poston's disease is not peculiar to his occupation is supported by substantial evidence and should be affirmed.

An injury or illness is excluded from compensability under the Workers' Compensation Act when it "comes from a hazard to which the workmen could have been equally exposed apart from the employment." Nicholson v. S.C. Dep't of Soc. Servs., 411 S.C. 381, 386, 769 S.E.2d 1, 3 (2015). Therefore, "a claimant's injury is only compensable if the source of the injury is a risk 'peculiar to the work and not common to the neighborhood.'" Skinner v. Westinghouse, 394 S.C. 428, 716 S.E.2d 443 (2011).

In Skinner, the Court held claimant suffered an occupation disease after he was diagnosed with asbestosis from working in a plant that manufactured insulation products. Id. The Court based its ruling on the fact the greater weight of the evidence proved that insulation products contained abnormally high amounts of asbestos that was known to cause claimant's asbestosis and that claimant's level of exposure to asbestos was greater than that of the general public and other occupations. Id. Thus, the Court established not only that claimant was actually, in fact, exposed to a known hazard during the course and scope his employment that can cause his specific disease but, also, that the amount of exposure was in excess of those compared to other

occupations. Id.; See also, Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (S.C. App. 2002) (disease was compensable based on the fact that claimant's exposure to silicosis was greatly in excess of those suffered by the general public and other occupations).

Unlike Skinner, in the present case, there is absolutely no evidence in the record to prove Poston was exposed to a hazard at his work place and that the alleged hazard is peculiar to his employment. Neither Dr. Healy nor Dr. Chavez can confirm, by any standard whatsoever, much less by a reasonable degree of medical certainty, that the soil at Poston's worksite contained the presence of cryptococcal fungus. In other words, there is no evidence in the record which shows even a single spore of cryptococcal fungus at Poston's worksite. (R. p. 193, lines 19-22).

Conversely, Mr. Duffy tested several areas of the soil at Poston's worksite. (R. pp. 383-397). Dr. Chavez confirmed that the presence of cryptococcal fungus can live on the surface of soil for an extended period of time. (R. p. 106, lines 5-8). Thus, in July of 2015, Mr. Duffy tested a total of twenty-two (22) various soil samples taken from various areas of Poston's worksite. (R. pp. 383-397). Not a single sample contained the presence of cryptococcal fungus. (R. pp. 383-397).

Nevertheless, assuming arguendo Poston was exposed to cryptococcal fungus at his workplace, the evidence reflects that Poston's exposure was not peculiar to his particular employment. Dr. Chavez testified "[t]here are definitely people like you and I (referring to doctors and lawyers who work indoors) who sometimes get cryptococcus and I don't know if it comes from the environment we work in or whether we're driving in a car and we have the windows down and the trade winds blow, you know, a dust into us and then we get Cryptococcus." (R. p. 84, lines 4-10). Thus, any person in any profession or setting is

potentially exposed to cryptococcal fungus. Even while performing the simple and quite routine task of driving a car with the window down.

We are all exposed to cryptococcal fungus on a daily basis throughout our daily routines. In fact, as the Court reads this brief, they are likely exposed to cryptococcal fungus. The Appellate Panel placed a great deal of weight on this evidence, and note in their order that "based upon the scientific and medical evidence, we are not persuaded that the disease [Poston] contracted is peculiar to his employment with [Respondents]." (R. p. 39).

C. The Appellate Panel's ruling that Poston's disease is a disease of life to which the general public is equally exposed is supported by substantial evidence and should be affirmed.

S.C. Code Ann. § 42-11-10(B)(4) provides that "[n]o disease shall be considered an occupational disease when it is one of the ordinary diseases of life to which the general public is equally exposed." Before a disease can be considered an occupational disease, claimant must prove that the worker was exposed to hazards greater than those of the general public. Mohasco Corp., Dixiana Mill Div. v. Rising, 292 S.C. 489, 357 S.E.2d 456 (1987).

In the present case, the evidence shows Poston's disease is one to which the general public is equally exposed on a regular basis. Dr. Healy specifically testified in his deposition that "[t]he majority of people probably are infested with it (cryptococcal fungus), but they fight it off." (R. p. 55, lines 11-14). Dr. Healy continued to testify that "I mean, everybody – we're all exposed to it (cryptococcal fungus) but, you know, the incidence is very, very low and the incidence in an immunocompetent person is extremely low." (R. p. 57, lines 20-23).

Likewise, Dr. Chavez doesn't even know how Poston contracted the illness. (R. p. 80, lines 7-9). He testified "[s]o what it generally comes down to is no one really knows entirely. There are suspicions on how people get cryptococcal infections." (R. p. 81, lines 12-14). "It's

thought to be in bird droppings that go into soil samples ... but it's also thought to possibly be involved in like decaying matter, whether it's vegetables or plants. And you know, trees, particularly eucalyptus and gattii." (R. p. 82, lines 18-24). Dr. Chavez even went so far as to testify that any individual driving down the road with the window down is exposed to cryptococcal fungus in the air. (R. p. 84, lines 7-10).

According to Poston's own treating physicians, everyone in the general public is exposed to cryptococcal fungus at any time. Plants, animals, dirt, trees and simply driving down the road with the window down are all possible sources and exposures to cryptococcal fungus that the general public is equally exposed to on a daily basis.

As the ultimate fact-finder, it is within the Appellate Panel's discretion to discount medical evidence and choose between conflicting lay testimony in denying the compensability of an employee's claim. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160–61, 519 S.E.2d 102, 105–06 (1999).

2. The court should dismiss Poston's appeal due to the fact that his brief was not timely filed?

Poston failed to timely file his initial brief with this Court pursuant to Rule 208(1), (4), SCACR. Pursuant to 208(4), SCAR, and Rule 260(a), SCAR, Poston's brief is to be dismissed, and may not be reinstated without "good cause shown". The Court has ruled that the right to an appeal may be lost, and an appeal can be dismissed for the failure to serve and file an initial brief and designation of matter. Roberts v. LaConey, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007); see also, State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007). Poston has not provided evidence of "good cause shown" and Respondents would ask that his appeal be dismissed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the order and ruling of the Appellate Panel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I, Michael E. Patterson, Jr., certify Respondent's Final Brief complies with Rule 211(b), SCACR.

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