

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 REPLY BRIEF

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ARGUMENT

This case involves errors of law, not fact. The order below refused to evaluate circumstantial evidence. As to certain items that met the legal definition of evidence the order below refused to acknowledge them as evidence or weigh them. The order misstated other pieces of evidence. These are legal defects, not factual defects.

The standards for causation and for evidence (circumstantial and expert) come from the law. A court cannot affirm the commission's weighing of the evidence when the order below wrongfully refused to place evidence supporting compensability on the scales. That is why the law requires an explanation of an agency's reasoning. A court cannot affirm the result if the result was produced by an unlawful method.

i. The order below does not treat certain competent evidence as legal evidence.

The order below referenced "speculation," (7/19/17 Or.p.24), a lack of "objective medical evidence," (id.pp.10, 17, 22), a lack of "actual evidence," (id.p.20), and described "no competent evidence," (id.p.21), supporting compensability. Respondents repeat this in their brief, claiming Appellant's admission that there is no conclusive proof of a lung injury amounts to a failure to prove causation as a matter of law. (Brief of Respondents, p.16).

Circumstantial evidence is not speculation. Circumstantial evidence *is evidence*. *Kennedy v. Williamsburg County*, 242 S.C. 477, 484, 131 S.E.2d 512, 515 (1963). The order below refused to treat circumstantial evidence as evidence. The commission may not require one type of evidence to the exclusion of another. *Russell v. Wal-Mart Stores*, 415 S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016). That is what happened here.

And there is more than circumstantial evidence supporting compensability. The depositions from Timothy's doctors are easy to read and speak for themselves. Appellant believes the only honest reading of those depositions is that none of Timothy's treating physicians were willing to rule smoke inhalation "out" as a contributing cause to Timothy's fatal dose of swine flu. (Strange Dep.p.15, lines 10-14) (Dr. Strange); (Whelan Dep.p.18, lines 4-13) (Dr. Whelan); (Ford Dep.p.9, line 14 - p.10, line 9 & p.16, lines 10-17) (Dr. Ford); and (Defs' APA p.225) (Dr. Largen, deferring to Dr. Strange and Dr. Whelan). One of Timothy's physicians (Dr. Pastis) supported compensability. (Pastis Dep.p.21, ll.10-17).

Respondents argue the order below rightly disregards that opinion and the opinion of Dr. Kimberly Collins—Appellant's expert witness—as "speculation."

Dr. Collins' opinion and Dr. Pastis' opinion were stated to a reasonable degree of medical certainty. (Collins Dep., p.15, line 25 - p.16, line 18; p.30, line 18 - p.31, line 25) (Dr. Collins); (Pastis Dep.p.21, lines 10-17) (Dr. Pastis). The Commission would have been within its power to believe a different physician's opinion or to believe other evidence over these opinions, but the Commission did not have the power to dismiss these opinions as speculation. Doing so is an error of law. It amounts to leaving competent evidence out of consideration when weighing the strength of the parties' positions.

Multiple precedents—*Brewer v. Charleston Shipbuilding*, *McCarty v. Kendall Co.*, *Grice v. Dickerson, Inc.*, and *Kennedy v. Williamsburg County*, see (Brief of Appellants, pp.16-17)—recognize medical opinions are admissible even when they are not indisputable. Those are only a few of the relevant cases. Respondents say these cases have been rendered obsolete due to the statute requiring medical evidence in "medically complex cases."

Section 42-1-160(E) defines a medically complex case as one “requiring highly scientific procedures or techniques for diagnosis or treatment *excluding* MRIs, CAT scans, x-rays, or other similar diagnostic techniques.” (Emphasis added). Nobody argued this was such a case below. This question has not been subjected to any adversarial testing. And even so, there *was* expert medical testimony supporting compensability. The opinions from Dr. Collins and Dr. Pastis are competent evidence satisfying the statute.

The order below treats legal causation and proximate cause as though they are medical concepts rather than legal concepts. But proximate cause is a legal term, not a medical term. See S.C. Code Ann. § 42-9-290(A) (___) (requiring proximate cause); *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 466, 40 S.E.2d 681, 682 (1946) (proximate cause is determined by “mixed considerations of logic, common sense and experience, policy, and precedent.”). Precedent acknowledges the practice of medicine is not an exact science. *Holly v. Spartan Grain & Mill Co.*, 210 S.C. 183, 187, 42 S.E.2d 59, 61 (1947) (noting a doctor’s testimony “any medical testimony is partly conjecture.”). The order below seems to pretend medical evidence is gospel and the only thing that matters. Unless (of course) the medical evidence supports compensability, in which case the evidence is just speculation because after all, nobody can indisputably prove smoke inhalation makes someone more susceptible to swine flu or makes swine flu more dangerous if contracted.

The case for compensability was supported by two experts and by the strong inferences from the timing of Deputy Causey’s exposure to heavy smoke, his immediate sickness, and his relatively rapid decline into death. The order below is legally defective because rather than believing one side’s evidence over the other, it dismissed the case for

compensability as based on something *less than* evidence. That was wrong. This Court should reverse.

ii. The single commissioner’s decision was not structurally defective.

The order below said the single commissioner’s decision was defective because it did not list all of the evidence in the record and did not contain conclusions of law. (Or.pp.5-6).

The single commissioner’s decision cited testimony from the hearing, it cited the parties’ evidentiary submissions, and it gave a (single-spaced) four page summary of the evidence. (1/12/17 Or.pp.2-5). Agencies have flexibility in crafting decisions; no particular format is required. *Able Communications v. S.C. Pub. Serv. Comm’n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). If the appellate panel did not know what evidence was in the record, it could not have heard the case.

The order below also held the single commissioner relied on inadmissible hearsay. (7/19/17 Or.p.5). Respondents agree. They also accuse Appellants of inappropriately challenging this ruling.

As stated in Appellant’s principal brief, the testimony in question—that Deputy Causey’s smoke inhalation and swine flu were “the perfect storm”—was cumulative to other testimony that was admitted *without objection*. See (Pastis Depo, p.29, lines 6-21). Respondents present no authority supporting the proposition that the appellate panel has the power to “strike” evidence from the record, pretending as though the testimony in question did not exist and precluding argument about the testimony on appeal. And nothing suggests the single commissioner *relied* on this testimony for his award. It appears only one time in his order. (1/12/17 Or.p.2). This is yet another blatant inaccuracy in the decision below.


CONCLUSION

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

Respectfully submitted,

May 2, 2018

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Timothy Causey, Claimant, Appellant,

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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 *Initial Reply Brief* by mailing copies of
the same by United States Mail with first class postage prepaid to the following address:

Roy A. Howell, III
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May 2, 2018


Erin Bridges

May 2, 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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Dear Ms. Kitchings:

Please find enclosed for filing the original one (1) copy of the *Initial Reply Brief* in reference to this matter. I have also enclosed a proof of service upon counsel for the Respondents. Please return the additional filed copy 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
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/emb

Enclosures

cc: Francis A. Humphries, Jr., Esquire
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