THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. 1302588
Appellate Case No. 2017-001732

Timothy Causey, Claimant,.....Appellant,

v.

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

FINAL BRIEF OF THE RESPONDENTS

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Statement of the Case

The Appellant, Causey, was assigned to provide traffic control at the perimeter of a fire on March 16, 2013[1]. (R. p.192, lines 18—24). Causey arrived at the scene at approximately 9:30 p.m. and worked until 7:00 a.m. on the morning of March 17, 2013. (R. p.194, lines 15—19; p.463). Causey was not involved in fighting the fire. In fact, he was positioned safely across a road several hundred yards away. Causey was off-duty and away from the fire the following day, during which time the fire was extinguished. (R. p.196, lines 1—3; p.463).

[1] Note the Appellant's Form 52 alleges an accident date of March 13, 2013; however, the Form 58 alleges an accident date of March 16, 2013. (R. p.40, p.42).

On the night of March 17, 2013, Causey told his supervisor that his daughter had flu-like symptoms and that he did not feel well. (R. p.463; p.193, lines 19–25). After his shift, Causey went home and was away from the scene for at least another 12 hours. (R. p.463). When he returned to work on the evening of March 18, 2013, Causey sat in his vehicle for the entire shift. (R. p. 196, line 20 – p.197, line 4). Therefore, Causey's alleged exposure to smoke was limited.

On March 21, 2013, Causey saw his family physician because he was running a 102-degree fever and informed her that his "[s]ick contact was his daughter." (R. p.217). Upon questioning, Causey denied having any shortness of breath. (R. p.217). He was prescribed an antibiotic, Augmentin, for a presumed bacterial infection. (R. p.219). Because Causey actually had a virus, not a bacterial infection, his condition progressively worsened.

Causey was admitted to McLeod Hospital on March 23, 2013. (R. p.233). The initial impression at McLeod was "respiratory infection...viral in etiology." (R. p.234). The physicians at McLeod ran a battery of tests and his blood work clearly suggested a viral infection. (R. pp. 311—332). Causey was subsequently transported to MUSC on March 28, 2013. (R. p.334).

Dr. Charlie Strange, a nationally-renowned expert in pulmonary medicine, was Causey's attending physician at MUSC. (R. pp.339-340). Dr. Strange ordered a battery of tests, including a specific test for H1N1 "Swine Flu" that McLeod Hospital had not run, which confirmed that Causey's symptoms were caused by H1N1 influenza. Dr. Strange's hand-written notes on March 23, 2013 state:

> "Mr. Causey has ARDS[2] from H1N1 'swine' influenza, an occasionally fatal respiratory virus." (R. p. 340).

Dr. Strange also gave deposition testimony regarding the ultimate cause of Causey's death. According to Dr. Strange,

> "I believe he died to a reasonable degree of medical certainty of H1N1 influenza associated with ARDS." (R. p.476, lines 4—8).

Dr. Strange further testified that it would be speculative to suggest that "smoke inhalation contributed in a meaningful way to his ultimate outcome." (R. pp. 477--478). In fact, Dr. Strange explained that

> "I don't believe that the smoke inhalation contributed to the death. I think it is really the H1N1 that set up all the subsequent events.
>
> ***
>
> H1N1 is such a potent and fatal virus that it is hard to imagine, then, in a clinical syndrome associated with ARDS that anything other than H1N1 would be responsible for the cause of symptoms." (R. p. 484, lines 19—21; p. 486, lines 21–25).

[2] Acute Respiratory Distress Syndrome.

Causey filed a Form 52 on April 14, 2016 alleging that he sustained an accidental injury to his lungs on March 13, 2013 and subsequently died on May 19, 2013. (R. p.40). The Respondents, Horry County and the South Carolina Counties Workers' Compensation Trust, denied the claim by Form 53 dated May 13, 2016 on the basis that Causey did not sustain any injury to his lungs on March 13, 2013 and that his death due to H1N1 "Swine Flu" two months later was not causally-related to his employment. (R. p.41).

The Workers' Compensation Commission's Appellate Panel conducted a *de novo* review of the claim on April 18, 2017 and vacated a previous opinion of Hearing Commissioner R. Michael Campbell, II, which failed even make any conclusions of law and failed to even cite any legal authority. (R. pp.199--215; pp.10—37). By its final Decision and Order dated July 19, 2017, the Workers' Compensation Commission found that:

> *"1. Based upon the greater weight of the evidence in the record, including the opinions of Dr. Charlie Strange, Dr. Timothy Whelan, Dr. William Largen, Dr. Dee Ford, Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, and Dr. Thomas Sporn, Timothy Causey did not sustain any injury to his lungs at work on or about March 13, 2016 or March 16, 2016, as alleged.*
>
> *2. Based upon the greater weight of the evidence in the record, including the opinions of Dr. Charlie Strange, Dr. Timothy Whelan, Dr. William Largen, Dr. Dee Ford, Dr. John Mitchell, Dr. Robert Galphin, Dr. Greg Cauthen, and Dr. Thomas Sporn, Timothy Causey's death on May 19, 2013 was not caused,*

aggravated, or accelerated by any alleged work accident on or about March 13, 2016 or March 16, 2016, as alleged." (R. p.36).

As a result, the Workers' Compensation Commission concluded that:

"2. Timothy Causey did not sustain any injury to his lungs as a result of any alleged exposure on or about March 13, 2016 or March 16, 2016 arising out of, or in the course of his employment as required by S.C. Code Ann. § 42-1-160,

3. Timothy Causey's death on May 19, 2013 did not result proximately from any alleged accident arising out of or the course of his employment, as required by S.C. Code Ann. § 42-9-290." (R. pp.36—37).

The Respondents respectfully submit that the Workers' Compensation Commission's findings of fact are supported by substantial evidence in the record and that the Commission's conclusions are supported by the applicable law. Therefore, the Respondents respectfully request that the Workers' Compensation Commission's final Decision and Order be affirmed in accordance with the Administrative Procedures Act.

Standard of Review

This Court must affirm the findings of fact made by the Workers' Compensation Commission if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). It is well-settled that "substantial evidence" is evidence which, considering the record as a whole, would allow reasonable minds to reach the

conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). Furthermore, where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). Indeed, the possibility of drawing different conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). Therefore, an appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record, such as when an award is based on surmise, conjecture or speculation. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

The case *sub judice* involves only a simple question of substantial evidence, as the Appellant's attempted arguments center only on the weight given certain speculative, and otherwise inadmissible, evidence by the Workers' Compensation Commission. The Respondents respectfully contend that, considering the record as a whole, reasonable minds would easily reach the conclusion reached by the Commission's Appellate Panel and; therefore, the Commission's final Decision and Order should be affirmed in accordance with the Administrative Procedures Act, S.C. Code Ann. § 1-23-380.

Arguments

I. The Workers' Compensation Commission's conclusion that Causey did not sustain any injury by accident on or about March 16, 2013, as required by S.C. Code Ann. § 42-1-160, is supported by substantial evidence and the applicable law.

While Causey may have been exposed to smoke at work on or about March 16, 2013, the Commission's Appellate Panel determined that the greater weight of the evidence supports a finding that this alleged exposure did not cause any injury to his lungs. On March 16, 2013, Causey worked on the perimeter of a fire directing traffic. (R. p.192, lines 18--24). He did not seek or require medical treatment on March 16, 2013, nor did he report any accident or injury involving exposure to smoke. In fact, Causey did not seek medical treatment until March 21, 2013, at which time he denied having any shortness of breath and was misdiagnosed with a bacterial infection. (R. pp.217--219). Once Causey received proper medical testing, he was diagnosed with H1N1 Swine Flu, which every single medical expert who treated Causey concluded was unrelated to any alleged smoke exposure.

The Appellate Panel relied specifically on the opinions and testimony of Dr. Strange, who was the first to properly diagnose Causey with Swine Flu. Dr. Strange testified that it would be speculative to suggest that "smoke inhalation contributed in a meaningful was to his ultimate outcome." (R. p.477 line 12 – p.478, line 18). In fact, Dr. Strange testified that

> "I don't believe that the smoke inhalation contributed to the death. I think it is really the H1N1 that set up all the subsequent events.

***

> H1N1 is such a potent and fatal virus that it is hard to imagine, then, in a clinical syndrome associated with ARDS that anything other than H1N1 would be responsible for the cause of symptoms." (R. p.484, lines 19—21; p.486, lines 21–25).

The Appellant makes a spurious argument that Dr. Strange was not willing to "rule out" smoke inhalation as the cause of Causey's death because he testified that

> "we could ***speculate*** but not prove that the smoke inhalation that he did have made his presentation of H1N1 worse..."

and that it was "possible," but <u>not</u> "probable" that there was any relationship between smoke and the flu. (R. p.477 line 12 – p.478, line 18) (emphasis added). The Appellate Panel did not mischaracterize this evidence in its final Order, it merely discounted it as speculative, and concluded that "the opinions of Dr. Strange as whole do not support the claim for benefits." (R pp.17--18). Such evidence includes Dr. Strange's unequivocal testimony that "[i]t is my opinion to a reasonable degree of medical certainty" that Causey's ARDS "was caused by his H1N1 virus" and that Causey "died to a reasonable degree of medical certainty of H1N1 Influenza associated ARDS." (R. p.475 lines 4—12; p.476 lines 4—8).

The Appellate Panel further relied upon the opinions of Dr. Dee Ford, who also treated Causey at MUSC. (R. p.19). According to Dr. Ford's testimony, there is no way to say to a reasonable degree of medical certainty that alleged smoke exposure had

anything to do with Causey's condition or death. (R. p.567). In fact, according to Dr. Ford, none of the objective medical evidence indicates that Causey suffered from any significant injury to his lungs due to smoke exposure or inhalation. (R. p.571, lines 19—24). Importantly, Dr. Ford concurred with Dr. Strange's option that the sole cause of Causey's condition was H1N1, to "a reasonable degree of medical certainty." (R. p.567, lines 3—15). The Appellate Panel did not "mischaracterize" the opinions of Dr. Ford, but properly determined that Dr. Ford's opinions support a finding that Causey did not sustain any injury on March 16, 2013. (R. p.19).

Likewise, Dr. Whelan, another of Causey's treating physicians at MUSC, testified that he did "not believe that Mr. Causey had a significant smoke inhalation that resulted in ARDS" and that it would be impossible to state to any degree of medical certainty that exposure to smoke played any role in Causey's death. (R. p.504, line 15—505, line 11). Dr. Whelan testified,

> "to a reasonable degree of medical certainty" that "the cause of death was due to complications associated with ARDS secondary to H1Ni." (R. p.502, lines 14—22).

Dr. Whelan went on to explain that, after reviewing the medical literature, he "found nothing to suggest that individuals who have smoke inhalation are at increased risk of viral infection" (R. p.503, lines 18—20). Dr. Whelan ultimately testified that he would amend a previous death summary he signed to conform with this opinion, as follows:

> "The medical certainty would be cause of death is thought to be hypovolemic shock, secondary to diffuse alveolar hemorrhage, secondary to ventilator associated pneumonia, secondary to H1N1...,"

which excludes any speculation regarding the role of any alleged exposure to smoke. (R. p.515, lines 20—24). While the Appellant suggests that Dr. Whelan "could not say smoke inhalation did not contribute," the Respondents were under no burden of disproving the claim[3] and the Appellate Panel properly determined that the opinions and testimony of Dr. Whelan, taken as a whole, support a finding that Causey did not sustain any injury on March 16, 2013. (R. p.20).

A fourth physician who treated Causey, Dr. Largen, concurred with the opinions of Dr. Strange and Dr. Whelan, after reviewing the aforementioned deposition testimony. (R. p.450). The Appellate Panel did not "misinterpret" the opinions of Dr. Largen, as the Appellant suggests. Instead, the Appellate Panel properly determined that the opinions of Dr. Largen support a finding that Causey did not sustain any injury on March 16, 2013. (R. p.21).

As noted by the Appellate Panel, "[n]o opinion of any doctor who actually treated Causey supports a finding that Causey sustained any injury due to his alleged smoke exposure." (R. p.22). This is a factually-correct statement and the Appellant cites no evidence to the contrary. Of course, the possibility of drawing different conclusions

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[3] *See* Herndon v. Morgan Mills, 246 S.C. 201, 209, 143 S.E.2d 376, 380-381 (1965) (for the proposition that the "difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shirt the burden to the other party." (internal citations omitted)).

from the evidence does not prevent the Commission's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996).

Furthermore, even among the medical experts who did not treat Causey, but who reviewed Causey's records, four pulmonologists— Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn — also concluded that Causey did not sustain any injury as a result of smoke exposure. These opinions constitute additional, substantial evidence that Causey did not sustain any injury on March 16, 2013. Apparently, the Appellant takes no issue with the Appellate Panel's description of these opinions or the fact that they do not support his claim for benefits, as he fails to mention them in his brief to the Court of Appeals.

Dr. Mitchell, a board certified pulmonary specialist, issued a report dated June 27, 2013 and fairly analyzed the symptoms associated with H1N1 versus smoke inhalation injury. (R.pp.440--444). Based upon his review of all the records, Dr. Mitchell opined that:

> "Mr. Causey's case is more consistent with an individual with H1N1 disease as opposed to an individual with smoke inhalation...In my opinion to a reasonable degree of medical certainty, Mr. Causey's symptoms and unfortunate death were solely caused by H1N1 disease and were not caused, aggravated, or accelerated by his smoke exposure." (R. p.442).

Accordingly, the Appellate Panel determined that Dr. Mitchell's opinions support the finding that Causey did not sustain any injury on March 16, 2013. (R. p.23).

Columbia pulmonologist Dr. Robert Galphin also reviewed the medical records in this claim and opined that

> "Based on review of the records the patient's disease and death were the result of viral influenza (H1N1 flu). ARDS is a known complication of influenza and has been noted with H1N1 flu. While upper respiratory tract irritation is seen with smoke exposure and inhalation, ARDS would not be expected from smoke inhalation. The patient's death was to a degree of medical certainty most probably due to influenza caused by the H1N1 virus." (R. p.445).

Another Columbia pulmonologist, Dr. Gregory Cauthen, concluded:

> "it is my opinion to a reasonable degree of medical certainty that the cause of death of Mr. Causey was ARDS resultant from a severe infection of H1N1 influenza...I have personally seen during this time period similar cases of the H1N1 influenza virus cause ARDS and death in normal healthy hosts. Additionally, there is no valid human scientific evidence to validate that there is a causative association between smoke inhalation and the contributions to the severity of influenza. Additionally, it appears that there is no evidence to support that Mr. Causey himself had any significant smoke inhalation that would cause a major degree of thermal injury to support a potential disruption of normal host immune defense mechanisms. I provide the above support as evidence for my option to the

> sole cause of death as ARDS secondary to H1N1 influenza with no other mitigating circumstances." (R. p. 446--447).

Clearly, both Dr. Galphin and Dr. Cauthen's opinions support the Appellate Panel's finding that Causey did not sustain any injury on March 16, 2013. (R. p.24).

Likewise, the opinions of Dr. Thomas Sporn support the Commission's finding that Causey did not sustain any injury on March 16, 2013. Dr. Sporn is the Chief of Pulmonary and Thoracic Pathology at Duke University Medical Center and has expertise in diseases and occupational injuries of the lung and chest. After reviewing Causey's medical records and all of the deposition testimony, Dr. Sporn concluded

> "...it is my opinion that any exposure to smoke that Mr. Causey may have sustained during his service as a sheriff's deputy assigned to the perimeter of the Carolina Forest fire in March of 2013 did neither cause nor contribute to his death from complications of H1N1 infection...at no time was Mr. Causey under treatment for smoke inhalation or thermal injury to the airway, nor do medical reports detailing his examinations indicate findings or peripheral stigmata to permit such a diagnosis. Alternatively, the symptom complex and findings that caused Mr. Causey to seek medical attention and the subsequent clinical events that culminated in his death are entirely consistent with H1N1 infection...Severe H1N1 infection is solely responsible for Mr. Causey's death. My opinions are all held to within a reasonable degree of medical certainty."(R. pp. 451—462).

Only Dr. Collins and Dr. Pastis even remotely suggested that Causey sustained any injury as a result of smoke exposure, yet both were forced to concede that their opinions were based, not on objective medical evidence, but on speculation. Therefore, the Commission's Appellate Panel, within its sole discretion, chose to give these opinions little weight.[4] (R. p.31, p.36). As correctly noted by the Appellate Panel, Dr. Collins was forced to concede that she did not even understand the nature of Causey's alleged exposure to smoke, believing him (falsely) to have been actually fighting an apartment fire for three 12-hour shifts. (R. p.617, line 11—p.619, line 15). Dr. Pastis admitted in his deposition that his opinions were based on speculation and he could not state his opinions to a reasonable degree of medical certainty. (R. p.538, lines 6—24). The speculative nature of the Collins and Pastis opinions was taken into consideration by the Appellate Panel when weighing and discounting this evidence. (R. p.31, p.33).

After weighing the totality of evidence, the Appellate Panel found that the greater weight of the evidence does not support a finding or conclusion that Causey sustained any injury to his lungs by accident arising out of, or in the course of, his employment on March 16, 2013, as required by S.C. Code Ann. § 42-1-160. (R. p.36). This finding is supported by substantial, and in fact, overwhelming evidence in the record and, as such, should be affirmed on appeal in accordance with the Administrative Procedures Act.

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[4] Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004) (holding that the final determination of witness credibility and the weight of the evidence is for the Appellate Panel); *see also* Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) (holding that "[w]here the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

Lark v. BiLo, 276 S.C. 130, 276 S.E.2d 304 (1981) (holding that a reviewing court must not disturb the findings of the Workers' Compensation Commission if its findings are supported by substantial evidence in the record as a whole); S.C. Code Ann. § 1-23-380(A)(6).

II. The Workers' Compensation Commission's finding that Causey's death due H1N1 Swine Flu was not causally-related to the alleged accident on or about March 16, 2013 is supported by substantial evidence and the applicable law.

Not only was the Appellant required to prove, pursuant to S.C. Code Ann. § 42-1-160, that Causey sustained an injury arising out of and in the course of his employment on March 16, 2013, but the Appellant was further required to prove that Causey's death on death on May 19, 2013 was the proximate result of a workplace accident pursuant to S.C. Code Ann. § 42-9-290. Substantial evidence clearly supports the Appellate Panel's finding that any alleged exposure to smoke on March 16, 2013 was not the proximate cause of Causey's death and that therefore, the Appellant is not entitled to any benefits as a matter of law.

S.C. Code Ann. § 42-9-290 specifically requires that, to be compensable, a death must result "proximately from an accident." Proximate cause has been well-defined by the South Carolina Courts as "the efficient or direct cause; the thing that brings about the complained of injuries." Platt v. CSX Transp., Inc., 379 S.C. 249, 266, 665 S.E.2d 631, 640 (Ct.App.2008). "Proximate cause requires proof of (1) causation in fact and (2) legal cause." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). In a workers' compensation death case, causation in fact is demonstrated by

establishing the claimant's death would not have occurred "but for" the work accident, while legal cause is proved by establishing foreseeability. Platt, 379 S.C. at 266, 665 S.E.2d at 640. The Commission must look to the natural and probable consequences of the complained of act to determine foreseeability. *See* Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996).

The Appellant could have proven "legal cause" only by establishing that Causey's death occurred as a natural and probable consequence of the work accident. "When the injury complained of is not reasonably foreseeable...there is no liability." *See* Eadie v. Krause, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct.App.2008). There is no evidence in the record that H1N1 Swine Flu is a natural or probable consequence of alleged smoke exposure. Instead, the H1N1 virus caused a world-wide pandemic and is responsible for over 18,000 deaths. (R. p.473, line 23 – p.474, line 14). In addition, there is no evidence in the record that death by Swine Flu was a reasonably foreseeable consequence of alleged smoke exposure. According to our appellate courts, when the cause of the employee's death may be as reasonably attributed to an act for which the employer is not liable as to one for which he is liable, the employee has failed to carry the burden of establishing the work accident proximately caused his injuries. *See* Mellen v. Lane, 377 S.C. 261, 280, 659 S.E.2d 236, 246 (Ct.App.2008).

Here, the Appellant has admitted that Causey "died because he contracted the H1N1 virus — the "swine flu." (R. p.84,¶ 3; p.85, ¶ 4). However, the Appellant's Form 52 Hearing Request makes no claim for, nor mention of, the H1N1 Swine Flu virus. Instead, the Appellant's only claim was for an "accidental injury to the lungs on 3/13/13." The Appellant also admitted that there is no evidence as to whether Causey contracted H1N1 "before, during, or after the fire." Furthermore, not only did the

Appellant admit that H1N1 was the proximate cause of Causey's death, but the Appellant further admitted that "there is no objective evidence conclusively proving [Causey] injured his lungs..." (R. p.91, ¶ 2, line 9). Therefore, the Appellant admittedly failed to prove "causation in fact" as a matter of law. *See* Elrod v. All, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) (holding that the general rule is that the parties to an action are judicially concluded and bound by their pleadings.)

In addition, the Commission properly relied upon the opinions of the medical experts who treated Causey (Dr. Strange, Dr. Ford, Dr. Whelan, and Dr. Largen) who also concluded that the proximate cause of Causey's death was H1N1 Swine Flu, not smoke exposure -- in concluding that the claim does not satisfy the requirements of S.C. Code Ann. § 42-9-290. (R. p.476, lines 4—8; R. p.484, lines 19—21; p.486, lines 21—25; R. p.567; R. p.502, lines 14—22; R. p.225). Furthermore, four (4) different pulmonologists who reviewed Causey's medical records (Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn) independently concluded that that the proximate cause of Causey's death was H1N1 Swine Flu, not smoke exposure. (R. p.442, p.445, pp. 446—447; pp.451—452).

Not even the opinions of Causey's experts, a pathologist who reviewed records (Dr. Collins) and a pulmonologist whose opinions were based on speculation (Dr. Pastis), support a finding that smoke exposure was the proximate cause of Causey's death. At her deposition, Dr. Collins admitted that all of Causey's treating physicians opined that Causey died of complications of H1N1 Swine Flu and in this opinion she concurred to a reasonable degree of medical certainty. (R. p.615, lines 11-23). Dr. Collins also conceded that Causey would not have died but for the fact that he had H1N1

Swine Flu. (R. p.616, lines 18—24). Furthermore, Dr. Pastis conceded that his opinions as to causation were based on pure speculation. (R. p.538, lines 6—24).

In considering and weighing all of the evidence in the record and the Appellant's own admissions, the Appellate Panel properly concluded that the greater weight of the evidence does not support a conclusion that Causey – a man with a severe case of H1N1 swine flu -- would not have died on May 19, 2013 "but for" his alleged exposure to smoke on March 16, 2013. (R. p.33). Therefore, the Commission determined that the Appellant did not satisfy his burden of proof because nothing but impermissible surmise, conjecture, and speculation supported a finding that a work accident on March 16, 2013 was the proximate cause of his death two months later, as required by S.C. Code Ann. § 42-9-290.[5]

III. The Workers' Compensation Commission properly discounted speculative medical opinions that were not stated to "a reasonable degree of medical certainty" in accordance with S.C. Code Ann. § 42-1-160.

The Appellant argues that the Commission should have given greater weight the speculative opinions of their experts, Dr. Collis and Dr. Pastis, despite the fact that they were unable state to "a reasonable degree of medical certainty" that Causey sustained an

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[5] It is well-settled that "claimants who assert their right to compensation must establish by the preponderance of the evidence the facts which will entitle them to an award under the Workmen's Compensation Act and such award must not be based on surmise, conjecture, or speculation. Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (S.C. 1965) (citing Glover v. Columbia Hospital, 236 S.C. 410, 114 S.E.2d 565 (1960)).

injury to his lungs on March 16, 2013, or that his death two months later was a proximate result of any work injury. Causey acknowledges that there is voluminous medical evidence contradicting the opinions of Dr. Collins and Dr. Pastis, and admits that the opinions of Dr. Collins and Dr. Pastis are speculative, but argues nonetheless that this doesn't affect the "relevance" of these opinions. Clearly, it was within the Commission's discretion to determine the weight and sufficiency of the evidence, including the medical evidence.[6]

But the Appellant further argues that case law from more than a half century ago allows him to prove medical causation with mere circumstantial evidence, lay testimony, or even speculation. This argument is plainly contrary to the terms of S.C. Code Ann. § 42-1-160(E) and (G), which since 2007 has required that causation in a medically complex case[7] be proven by medical evidence, specifically "opinion or testimony stated to a reasonable degree of medical certainty." As explained by the Supreme Court when construing an identically-worded statute, this requires that "opinion or testimony" must be "stated to a reasonable degree of medical certainty" to even be *admissible*, much less probative. Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012).

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[6] The "Commission is given discretion to weigh and consider all evidence, both lay and expert, when deciding where causation has been established." Tiller v. Natn'l Health Care Center, 334 S.C. 333, 339-340, 513 S.E.2d 843, 846 (1999) (citing Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946)). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." *Id.*.

[7] The Respondents respectfully contend that the issue of whether Causey's death on May 19, 2013 was caused by a fleeting exposure to smoke some two months earlier is "medically complex."

Therefore, the Appellant's argument that the Commission erred by failing to give these speculative opinions greater weight is simply without merit.

IV. The Workers' Compensation Commission's Appellate Panel properly vacated the prior order of the Hearing Commissioner in accordance with its authority under S.C. Code Ann. § 42-17-50.

The Decision and Order issued by the Hearing Commissioner was replete with deficiencies and legal errors and was properly vacated by the Commission's Appellate Panel. For example, the Hearing Commissioner's Order failed to list the evidence he admitted into the record, despite the fact that many of the proposed evidentiary submissions were contested, including unsubstantiated hearsay evidence[8]. Perhaps

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[8] This unsubstantiated hearsay evidence was stricken from the Record by the Appellate Panel. Nonetheless, the Appellant has chosen to quote this evidence in his brief to the Court of Appeals (p.12, ¶ 3). This is plainly inappropriate. While the Appellant castigates the Appellate Panel's decision in this regard by suggesting that "the panel's finding on hearsay does not make any sense and is incorrect," the Appellant cites no legal authority for this argument, nor does the Appellant attempt to argue that it was reversible error. Therefore, any argument the Appellant attempts here has been abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when an appellant "fails to provide arguments or supporting authority for his assertion"); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review"); *see also* Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) for the proposition that "an unappealed ruling, right or wrong, is the

more importantly, the Hearing Commissioner's Decision and Order makes no Conclusions of Law whatsoever, which the Appellate Panel determined alone constituted an error of law, especially considering the Hearing Commissioner's Order failed to cite or discuss any legal authority.[9] (R. p.9, p.14). In addition, the Hearing Commissioner erred as a matter of law in finding that "Claimant's estate is entitled to death benefits ... in the amount of $283,190 (claimant's compensation rate $566.38 x 500),"[10] in contravention of S.C. Code Ann. §§ 42-9-110, 42-9-120, 42-9-130, 42-9-140,

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law of the case."). (R. p.25—26; p.27—28 #2). It would appear that the only purpose of the Appellant's argument III was an attempt at poisoning the well.

[9] *See* S.C. Code Ann. § 42-17-40 (requiring that the "award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed"); *see also* S.C. Code Ann. § 1-23-350 (stating that a "final decision shall include findings of fact and conclusions of law, separately stated").

[10] There are several obvious, reversible, legal errors implicit in this statement that required reversal by the Appellate Panel. First, there is no statutory authority for an award of any workers' compensation benefits to an "estate." Instead, all of the statutes and regulations governing the payment of death benefits under the Act requires payment to "dependents." S.C. Code Ann. § 42-9-110, 42-9-120, 42-9-130, 42-9-140, 42-9-290, and 42-9-320; S.C. Code Reg. 67-602(B), 67-902. A determination of the proper "dependents" entitled to benefits cannot be determined without a full hearing on the issue of dependency, with specific documentation. In addition, both the applicable statutory and regulatory authority requires that all lump sum payments in excess of 100 weeks must be commuted to present value. S.C. Code § 42-9-301, S.C. Code Reg. 67-1605. Lump sum payments of death benefits are specifically required to be commuted pursuant to S.C. Code Reg. 67-1606.

42-9-290, 42-9-301, and 42-9-320, as well as S.C. Code Reg. 67-602(B), 67-902, 67-1605, and S.C. Code Reg. 67-1606. (R. p.9, #2).

In reversing and vacating the Hearing Commissioner's Decision and Order, the Appellate Panel not only noted the above-referenced legal errors that necessitated reversal, but considered that theirs was a *de novo* review of the evidence. *See* Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989) (holding that "[t]he Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact") (internal citations omitted). In fact, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Ford v. Allied Chemical Corp., 252 S.C. 561, 167 S.E.2d 564 (1969).

The Appellate Panel, in accordance with its duty to make its own findings of fact and conclusions of law consistent with its own view of the greater weight of the evidence and properly determined that "overwhelming evidence" supported their finding that the proximate cause of Causey's unfortunate death was complications of Swine Flu unrelated to his employment. Any prior finding to the contrary by a hearing commissioner is simply irrelevant and otherwise not before the Court of Appeals because it was reversed and vacated by the Appellate Panel. (R. p.15). Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995) (holding that the effect of a reversal is to vacate the judgment and to leave the case standing as if no judgment had ever been rendered); S.C. Code Ann. § 42-17-60 (stating that an award of the Commission's Appellate Panel "is conclusive and binding"); *see also* Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (holding that it was legal error for the appellate courts to "reinstate" a prior order by a hearing Commissioner that were

reversed by the Commission's Appellate Panel, as it would be tantamount to determining the facts from conflicting evidence, a task reserved to the Appellate Panel).

Conclusion

The Respondents, Horry County and the South Carolina Counties Workers' Compensation Trust, respectfully contend that the Workers' Compensation Commission's findings of fact are supported by substantial evidence in the record and that the Commission's conclusions are supported by the applicable law. Therefore, the Respondents respectfully request that the Workers' Compensation Commission's final Decision and Order be affirmed in accordance with the Administrative Procedures Act.

Respectfully submitted,

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1165\1167\Final Brief

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. 1302588
Appellate Case No. 2017-001732

Timothy Causey,
Claimant,.....Appellant,
v.
Horry County, Self-Insured Employer,
through the S.C. Counties Workers'
Compensation Trust,
Defendants,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

June 20, 2018

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