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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

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Timothy Causey,.....Appellant,

v.

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

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**PETITION FOR REHEARING**
**AND REQUEST FOR ORAL ARGUMENT**
**ON BEHALF OF RESPONDENTS**

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Roy A. Howell, III
Kirsten Leslie Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Respondents

## Statement of the Case

This matter is before the Court of Appeals to review the final Decision and Order of the South Carolina Workers' Compensation Commission's Appellate Panel. After a *de novo* review conducted pursuant to S.C. Code Ann. § 42-17-50[1], the Appellate Panel vacated a previous Order of Hearing Commissioner Campbell because it contained no conclusions of law (rendering it impermissibly vague) and because it was premised on multiple other factual, legal, and evidentiary errors.[2] In addition, 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, properly determined that "overwhelming evidence" supported their finding that the proximate cause of Timothy Causey's unfortunate death was H1N1 "swine flu," unrelated to his employment. Accordingly, the only order to be reviewed by the Court of Appeals is that of the Appellate Panel.

Such review is governed by the Administrative Procedures Act, which mandates that this Court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). 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 Appellate Panel are conclusive. Glover v. Columbia Hospital of Richland County,

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[1] *See* Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967) (holding that this statute empowers the Appellate Panel to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the hearing commissioner); *see also* 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 reserved to the Appellate Panel).

[2] Having been vacated, the Hearing Commissioner's Order became a nullity and no longer in existence. *See* Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (S.C. 1995). (holding that vacating a judgment leaves the case standing as if no judgment had been rendered).

236 S.C. 410, 114 S.E.2d 565 (1960). Indeed, the possibility of drawing different conclusions from the evidence does not prevent the Appellate Panel's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). Furthermore, it is not the province of this Court to weigh the evidence as found by the Appellate Panel and the substantial evidence test "must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Lark v. BiLo, Inc., *supra* (internal citations omitted).

Despite these well-established constraints, the Court of Appeals issued an unpublished decision on January 5, 2022, whereby the Court engaged in extensive judicial fact finding based on its own view of the weight of conflicting evidence on questions of fact and even facts not in evidence. In addition, the Court misapprehended the identity of the parties, the procedural history of the case, and the Hearing Commissioner's award, which it improperly reinstated despite the Appellant's own admission that was affected by two legal errors (R. p.95). Additionally, the Court overlooked the Appellate Panel's seminal legal conclusions, which are the law of the case, and otherwise failed to address any legal arguments under the applicable statutes, S.C. Code Ann. § 42-1-160 and § 42-9-290, resulting in a violation of the Respondents' right to due process. The Respondents further respectfully contend that the Court misapprehended the scope of review and overlooked the weight properly accorded to the evidence by the Appellate Panel, which had the sole discretion and authority to "to determine the facts from conflicting evidence." Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991). In addition, the Court erred as a matter of law in awarding unspecified medical benefits where there has never been any finding that Causey required any medical treatment as a result of his alleged smoke exposure, much less evidence stated to the requisite "reasonable

degree of medical certainty; the Appellant did not raise this issue on appeal; and the Court failed to address S.C. Code Ann. § 42-15-60 or its requirements in making this award.

Pursuant to Rule 221, S.C.A.C.R., the Respondents respectfully seek rehearing on these issues with a request that the Court limit its review to determining whether the Appellate Panel's findings of fact are supported by substantial evidence, in instead of reviewing whether some evidence supported the Hearing Commissioner's vacated decision, or whether the Court's own opinion of the evidence could conceivably support an award of benefits. *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); Ford v. Allied Chemical Corp., 252 S.C. 561, 167 S.E.2d 564 (1969) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel).

## Arguments

### I. The Court misapprehends the identity of the parties, the procedural history of the case, and the Hearing Commissioner's award.

The Court's opinion opens with the following: "[t]he statutory dependents of Horry County Sheriff's Deputy Timothy Causey appeal the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission denying death benefits." This is incorrect. As explained by the Commission's Appellate Panel, there has been "no statutory determination of Causey's dependents" and a "determination of the proper 'dependents' entitled to benefits cannot be determined without a full hearing on the issue of dependency, with specific documentation," as required by S.C. Code Ann. §§ 42-9-110, 42-9-120, 42-9-130, 42-9-280, 42-9-290, 42-9-320 and S.C. Code Regs. 67-602(B), 67-216, and 67-905. (R. pp.35—36). To date, no such

dependency hearing has been conducted and no such documentation has been produced. Therefore, the "statutory dependents" of Causey have not been determined as a matter of law and; therefore, are not the Appellants *sub judice*.

On the Form 52, hearing request by attorney Francis A. Humphries, Jr., filed on April 14, 2016, the moving party in the case *sub judice* was listed as "Estate of Timothy Causey Personal Rep."[3] (R. p.40) The pre-hearing brief filed by Mr. Humphries on August 29, 2016, raises no issue as to dependency and identifies no other parties in interest. (R. pp.48—51). The documentary evidence submitted by Mr. Humphries at the October 14, 2016, hearing did not include the requisite documentation for a determination of dependency and no such documentation appears in the Record.[4] At that hearing, Commissioner Campbell stated for the record that "[t]he claimant is Timothy Causey who is deceased[5]. The attorney is Francis A. Humphries..." While Donna Causey testified at the hearing, she gave no testimony regarding Timothy Causey's estate or his dependents. More importantly, no Guardian *ad Litem* appeared or was even appointed for any minor children.[6] Therefore, there exists no record upon which the

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[3] Considering that the Workers' Compensation Act provides no benefits to an "estate," it is unclear if the Causey's estate is the real party in interest. Equally unclear is whether an "estate" has "substantial rights" amenable to review pursuant to S.C. Code Ann. § 1-23-380 or Rule 201(b), S.C.A.C.R.

[4] S.C. Code Reg. 67-602(B) requires that "[i]n a claim involving a fatality, the claimant must obtain the following items: (1) The death certificate; (2) Marriage license, if any; (3) Divorce decree, if any; (4) Birth certificates of children, if any; and (5) A statement of burial expenses." (emphasis added).

[5] A deceased person clearly has no rights pursuant to S.C. Code Ann. § 1-23-380 or Rule 201(b), S.C.A.C.R., and no substitution has been sought pursuant to Rule 265, S.C.A.C.R.

[6] S.C. Code Reg. 67-216-(B) requires that "[w]hen a claim involves a fatality, a Guardian *ad Litem* shall represent the minor child or children" and S.C. Code Reg. 67-905(B) further states that a "Guardian *ad Litem* must be appointed according to R. 67-216" in a claim involving a fatality. (emphasis added).

Commission or the Court could determine even the potential statutory dependents of Timothy Causey. It is wholly unclear whether a real party interest exists in this case.

Because the issue of dependency was never raised to or addressed by the Commission, Hearing Commissioner Campbell originally "found" that "Claimant's estate is entitled to death benefits … in the amount of $283,190 (claimant's compensation rate $566.38 x 500)." (R. p.9). The Hearing Commissioner's Order, which fails to mention a single statute or regulation whatsoever, does not elucidate by what authority an award of death benefits could be made to an "estate," nor does it explain how the mandatory provisions of S.C. Code § 42-9-301 and S.C. Code Reg. 67-1605 could be ignored. However, in reversing the Hearing Commissioner, the Commission's Appellate Panel made clear that

> "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.' … 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. Lump sum payments of death benefits are specifically required to be commuted pursuant to S.C. Code Reg. 67-1606. Therefore, because there is no statutory determination of Causey's dependents and because there has been no proper calculation of any lump sum payment, the Hearing Commissioner's award of benefits to the 'estate' is reversed as a matter of law." (R. pp.35--36) (emphasis original) (internal citations omitted).

On appeal, the Appellant raised no legal argument (or even mentioned) these final conclusions of law by the Commission's Appellate Panel and; therefore, are the law of the case. *See* Rule

208(b)(1)(B), S.C.A.C.R., (stating that "[o]rdinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal"); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970) (holding that an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance. It would be pointless to consider the exceptions which do not reach this dispositive finding.").

In fact, the Appellant admitted in their brief to the Appellate Panel that the Respondents herein

> "correctly identify two errors in [the Hearing Commissioner's] award. First, section 42-9-290 explains that benefits for a work-related death are payable to the deceased workers' dependents. Payment does not go to the estate. Second, the award does not properly apply two regulations with respect to lump-sum payments … These errors are easy to fix and they should be fixed." (R. p.95).

The Appellant's legal position on these issues is binding on appeal.

Unfortunately, it appears that the Court misapprehended the Appellate Panel's binding and dispositive legal conclusions and overlooked both the Appellant's prior admissions and the Respondents arguments in this regard (*see* Respondents' Brief Sec. IV) when it "reinstate[d] the Single Commissioner's award of benefits." *See* Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (holding that it was legal error for reviewing court to reinstate a hearing commissioner's award because to do so was "to determine the facts from conflicting evidence" when "[o]nly the Commission is authorized to do this.") Respectfully, the Court lacks authority or jurisdiction to make any award of benefits on appeal, to *sua sponte* reverse the Appellate Panel's seminal legal conclusions, or to otherwise order a non-commuted, lump sum payment to an estate in contravention of statutory law, especially considering that the Court has

done so implicitly and without discussion. *See* In re Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005) (holding that a reviewing court has appellate jurisdiction over only those matters which are properly appealed); *see also* State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (holding that when an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated). Therefore, the Respondents respectfully request rehearing by the Court.

## II. The Court misapprehended what evidence is actually contained in the Record.

In support of the decision to reverse the Appellate Panel's findings of fact, the Court relied on the testimony of Donna Causey regarding what an "unidentified MUSC physician" allegedly told her regarding the cause of Timothy Causey's condition. The Court specifically quoted this testimony and described it as "hotly disputed." Indeed, Donna Causey's testimony was indeed "hotly disputed" with not only a contemporaneous hearsay objection (R. p.138, l.24 – p.139, l.10), but with an appeal of the Hearing Commissioner's evidentiary ruling (R. pp.80—82). The Court's reliance on this testimony reveals a clear misapprehension of the evidence that is actually in the Record, because the Appellate Panel specifically found and concluded:

> "[t]he Hearing Commissioner erred as a matter of law in admitting hearsay testimony into evidence over the Defendants' objections." (R. p.33)

The Appellate Panel's Order further states:

> "[t]herefore, based upon the application of established case law and fundamental standards of fairness, the Hearing Commissioner's decision to admit hearsay evidence is reversed and the testimony is hereby stricken from the record."

Without doubt, this is the very same testimony quoted by the Court in its January 5, 2022, Opinion.[7]

Despite the fact that the Appellate Panel clearly and unequivocally ordered that Donna Causey's hearsay testimony be "stricken from the record," the Court quoted this testimony not once, but twice, and relied upon it in rationalizing its decision, yet wholly failed to explain the basis for impliedly reversing the Appellate Panel's evidentiary ruling. The Respondents respectfully contend that that this implied reversal was clear error and otherwise contrary to prior decisions of this Court, including Wright v. Bi-Lo, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) (holding that hearsay evidence offered for the "truth of the matter asserted" by a widow in a workers' compensation death claim was in admissible), a case that was specifically relied upon by the Appellate Panel.

In addition, the Appellant failed to properly preserve any argument regarding the Appellate Panel's exclusion of this evidence, as their Briefs make only vague, conclusory statements with regard to this ruling without citing any legal authority in support of reversal. Glasscock, Inc. v. United States Fidelity, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (S.C. Ct. App. 2001) (holding that "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review" even if addressed more fully in a Reply Brief). Accordingly, the Respondents respectfully contend that the Court misapprehended its authority to reverse the Commission's

[7] *See* R. pp.80--81 ("[t]he Hearing Commissioner specifically references this hearsay testimony in the second paragraph of the Decision and Order's "Evidence Summary)" and R. p.2 (Hearing Commissioner's "Evidence Summary" containing verbatim quotation of Donna Causey's testimony regarding her conversation with an unidentified MUSC physician).

evidentiary ruling and to rely on evidence that was properly excluded by the Appellate Panel and respectfully request rehearing by the Court.

## III. The Court overlooked and otherwise misapprehended the Commission's legal rulings, which are the law of the case, and fatal to any claim for benefits.

A. S.C. Code Ann. § 42-1-160

The Appellate Panel concluded that

> "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." (R. p.36).

The Appellant's Brief makes no mention of this conclusion and does not cite or discuss the requirements of S.C. Code Ann. § 42-1-160 whatsoever. Therefore, this conclusion is the law of the case and cannot be disturbed on appeal. Dreher v. Dept. Health & Envt'l Control, 412 S.C. 244, 772 S.E.2d 505 (2015).[8]

The Appellate Panel's final Decision and Order further explains that

> "[t]he Hearing Commissioner made no conclusions of law in his January 12, 2017 Decision and Order and cites no legal authority whatsoever for his award of benefits in this case, which alone is reversible error." (R. p.29)

[8] The Respondents further respectfully contend that the Appellate Panel's finding 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) is also 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. 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).

Because the Hearing Commissioner failed to include a ruling on any finding[9] and because the Appellate Panel's review was *de novo* (S.C. Code Ann. § 42-17-50), the Commission entered its own finding that "Timothy Causey did not sustain any injury to his lungs at work on or about March 13, 2016 or March 16, 2016, as alleged" and; therefore, was not entitled to benefits under S.C. Code Ann. § 42-1-160 as a matter of law.

By reversing the Appellate Panel and reinstating the Hearing Commissioner's Order, the Court is affirming a decision that contains no findings on the seminal facts, contains no actual legal rulings, and which is otherwise contrary to the applicable law. This alone begs many additional questions. For example, the Appellant's Form 52 alleges an accidental injury to the lungs on March 13, 2013, but the pre-hearing brief alleges that March 16, 2013 was the date of injury. The Hearing Commissioner's Order suggests that the "Estate" alleged that the injury occurred "during the dates of March 16—18, 2013 … over the course of three (3) consecutive days" and that he subsequently acquired an infectious disease, H1N1 (swine flu) virus, at an unspecified time some weeks later. However, the Hearing Commissioner made no actual finding of fact under S.C. Code Ann. § 42-1-160 and otherwise failed to specify the date of the accident or the nature of the injury[10], much less the evidence that could support such findings.[11] Because

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[9] The Appellate Panel properly held that the Administrative Procedures Act, S.C. Code Ann. § 1-23-350, requires that an administrative "decision shall include a ruling upon each proposed finding" and that these must be sufficiently detailed to enable an appellate court to review them, citing Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004) and Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1994).

[10] While no claim for H1N1 disease was ever filed, the Hearing Commissioner's Order vaguely suggests that the Defendants are responsible for the same despite the mandates of S.C. Code Ann. § 42-1-160 and the Appellant's failure to meet the requirements of S.C. Code Ann. § 42-11-10, *et. seq.*

[11] *Contra* Owings v. Anderson County Sheriff's Dept., 315 S.C. 297, 299 (S.C. 1993)

the Hearing Commissioner's findings are impermissibly vague, this results in an impermissibly vague finding of fact by the Court on appeal, which is incapable of meaningful review and deprives the Respondents of their right to due process. *See* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, 715 (1940) (holding that "[i]f there is such a thing as due process of law, under it a litigant is entitled to notice of the issues to be met on trial, hearing or appeal").

For example, if the alleged injury were found to have occurred over the course of three days or more (as alleged by the Appellant at the hearing), then it would not meet the definition of an "accident" as a matter of law because S.C. Code Ann. § 42-1-160(F) mandates that any "a series of events" or "over extended periods of time" must meet the requirements of the S.C. Code Ann. § 42-1-172, the repetitive trauma statute, which exclusively governs injuries that are "gradual in onset" and requires a heightened burden of proof.[12] By "reinstating" an order that fails to specify an accident date on these facts, the Respondents are left to speculate whether the award is supported by competent evidence or the applicable law and are left without any

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(stating that "[i]n order to be entitled to workers' compensation benefits, the employee must show he or she sustained an "injury by accident arising out of and in the course of the employment").

[12] The Appellant never actually filed a repetitive trauma claim under S.C. Code Ann. § 42-1-172 and is; therefore, not entitled to benefits under that statute as a matter of law. However, had the issue actually been before the Commission, it is clear that the claim would fail on the basis that there is no competent evidence that "there is a direct causal relationship between the condition under which the work is performed and the injury." Instead, the Appellant relies on opinions regarding the "secondary" and "contributory" or "underlying" nature of Causey's alleged smoke exposure which, by definition, cannot be considered "direct," as required by the repetitive trauma statute. *See* Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012) (holding that "42–1–172(C) expressly creates an additional heightened standard for repetitive trauma injury cases. Specifically, it requires 'medical evidence,' in the form of 'expert opinion or testimony [to be] stated to a reasonable degree of medical certainty.'")

meaningful notice or opportunity to raise these issues on appeal in violation of the right to due process. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, 715 (1940).

In addition, the order reinstated by the Court fails to specify the nature of the alleged injury or whether the compensable injury includes the H1N1 disease for which Timothy Causey was hospitalized and ultimately died.[13] If benefits were indeed awarded for H1N1 disease (given this was what necessitated all of his medical treatment and resulted in his death), this would also be an error of law because an "injury by accident" under S.C. Code Ann. § 42-1-160 "shall not include a disease in any form" and because the Appellant otherwise failed to meet the requirements of S.C. Code Ann. § 42-11-10, which specifically excludes contagious and ordinary diseases like H1N1, which caused a worldwide pandemic that proved fatal to over 18,000 people. (R. p.473—474).

Moreover, neither the Hearing Commissioner, nor the Court, elucidate whether the alleged smoke exposure allegedly aggravated H1N1 disease, or whether the H1N1 disease pre-existed the alleged smoke exposure. This is a critical issue, as S.C. Code Ann. § 42-9-35 governs cases with a heighted burden of proof where a pre-existing condition is alleged to have been aggravated and there are additional legal requirements for cases where there is a subsequent intervening cause. *See* Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007) (holding that the well-established "Gordon rule" applies in such cases). Neither analysis could be applied or

[13] The Hearing Commissioner makes no finding (or conclusion) regarding H1N1 disease, only that "claimant's death was causally related to his work-related smoke inhalation injury." (R. p.9, #1). In addition, the Appellant never filed a claim alleging entitlement to benefits for H1N1 disease, nor has an accident on any date between March 23 and March 28, 2013 (when the Appellant alleges H1N1 was contracted) ever been alleged.

argued here because there has been no determination of the underlying factual issues and even the Appellant's favored experts disagree on the issue.[14]

Because neither the Hearing Commissioner, nor the Court, actually addressed any of these seminal issues, and because the propriety of the Hearing Commissioner's order was not the subject of the present appeal, the Respondents could not raise these questions to the Court and have been essentially deprived of due process by virtue of the Court's decision to reinstate the Hearing Commissioner's award.[15] Accordingly, the Respondents respectfully contend that rehearing should be granted to address these issues which have been overlooked and otherwise misapprehended.

B. S.C. Code Ann. § 42-9-290

Before "death benefits" can be awarded in a workers' compensation claim to any person or entity, S.C. Code Ann. § 42-9-290 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,

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[14] The Appellant claims that Causey contracted H1N1 disease sometime between March 23 and March 28, 2013 (R. p.94), which is five to 10 days after he last worked or was allegedly exposed to smoke. Dr. Pastis speculated that Causey had H1N1 disease prior to his alleged smoke exposure. (R. pp.545—545). Dr. Collins gave testimony that she believed just the opposite. (R. pp.176—177).

[15] The Court's Opinion states in the final paragraph, "we reverse the decision of the Appellate Panel and reinstate the Single Commissioner's award of benefits." It is unclear, however, whether the Court has also "reinstated" the Hearing Commissioner's findings of fact or whether it has placed its imprimatur on the Hearing Commissioner's failure to make any conclusions of law.

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 Timothy Causey's death occurred as a natural and probable consequence of the alleged 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." (*See supra*, footnote 10). 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, l.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 determining 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, ll.19—21; p.486, ll.21—25; R. p.567; R. p.502, ll.4—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 opined 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 Dr. Collins, the pathologist hired by the Appellant, 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, ll.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, ll.18—24). Dr. Collins specifically admitted that H1N1 was the "proximate" cause and "why he died that day." (R.p.635, l.16—p.636, l.11). At the hearing, Dr. Collins confirmed her opinion that "the proximate cause of Mr.

Causey's death was complications due to acute respiratory distress syndrome secondary to H1N1." (R. p.179, ll.9—16).

After considering and weighing all of the evidence in the record and the Appellant's own admissions, the Appellate Panel properly concluded that the claim did not meet the "proximate cause" requirements of S.C. Code Ann. § 42-9-290. (R. p.37 #3). However, in reversing the Appellate Panel's decision and entering an award in the Appellant's favor, the Court fails to address either the legal requirements of S.C. Code Ann. § 42-9-290 or the requirements of finding proximate cause generally. Moreover, by "reinstating" the Hearing Commissioner's award of death benefits, despite the fact that the Hearing Commissioner made no finding or conclusion as required by S.C. Code Ann. § 42-9-290, the Court has essentially eliminated the Appellant's burden of proof[16] and otherwise ignored the requirements of both S.C. Code Ann. 1-23-350, which mandates that "[a] final decision and order shall include findings of fact and conclusions of law, separately stated," and S.C. Code Ann. § 42-17-40, which requires a commission award to contain "a statement of the findings of fact, rulings or law, and other matters pertinent to the question at issue." *See also* Aristizabal v. Woodside-Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 ("if a material fact is contested, the [Commission] must make a specific, express finding on it") (internal citations omitted). Despite the Court's award of

[16] The "burden lies with the claimant to demonstrate causation by a preponderance of the evidence. Whether any causal connection exists between a claimant's employment and an injury is a question of fact for the single commissioner or full commission." South Carolina Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003) (internal citations omitted)). In addition, 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 shift the burden to the other party." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 209, 143 S.E.2d 376, 380 (1965). Respectfully, the mere fact that it is "possible" that Causey could have been injured as alleged is a legally-insufficient basis upon which to base an award of workers' compensation benefits.

benefits, there are no findings of fact or rulings of law to support an award under S.C. Code Ann. § 42-9-290, or which address the material and contested issue of whether the "proximate cause" of Causey's death was the alleged smoke exposure. Only the Commission has the authority or jurisdiction to address this issue. The Commission did so and its finding and conclusions in this regard are supported by substantial evidence and the applicable law. Therefore, the Court's award is based on plan error and requires rehearing.

**IV. The Court misapprehended the scope of review and overlooked the weight properly accorded to the evidence by the Appellate Panel.**

A. Weight of Conflicting Evidence

The Judiciary's authority to review a decision by the administrative branch of government, including a final decision by the Workers' Compensation Commission's Appellate Panel, was granted by the Legislature pursuant to the Administrative Procedures Act. Specifically, S.C. Code Ann. §1-23-380 states that

> "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact."

This clearly means that the Court may not conduct a *de novo* review of the weight to be accorded the evidence, yet this is exactly what the Court did in the case *sub judice*.

For example, the Court acknowledged that Dr. Whelan, Dr. Ford, and Dr. Largen all agreed with Dr. Strange's opinion as to causation.[17] Dr. Strange testified,

> "I believe that [Timothy Causey] died to a reasonable degree of medical certainty of H1N1 influenza associated ARDS.

[17] In addition to this testimony of the treating physicians, the Appellant's Brief admits, "Respondents also hired experts, each of which said smoke exposure had no role in Timothy's death." (Appellant's Brief, p.5).

***

I don't believe that smoke inhalation contributed to the death." (R. p. 476, ll.7—8; p.484, ll.19—20).

Dr. Whelan testified,

"I think that the cause of his death was due to complications associated with ARDS secondary to H1N1.

***

I do not believe that Mr. Causey had a significant smoke inhalation that resulted in ARDS. That is not the cause of the ARDS." (R. p.502, ll.17—19; p.504, ll.15--17).

Dr. Largen opined,

"Both Dr. Whelan and Dr. Strange have opined that [Timothy Causey's] exposure to smoke was not a contributing factor in Mr. Causey's death. I would defer to any opinions regarding the cause of Mr. Causey's death to those of Dr. Whelan and Dr. Strange. I would also agree that the ultimate cause of Mr. Causey's death was complications of Acute Respiratory Distress Syndrome secondary to H1N1 swine flu." (R. p.450).

Dr. Ford also testified that he would agree with Dr. Strange, to a reasonable degree of medical certainty, that

"H1N1 is such a potent and fatal virus that it is hard to imagine, then, in a clinical syndrome associated with ARDS, that anything else other than H1N1 would be responsible for the cause of his symptoms." (R. p.567, ll.6—10).

Clearly, the above-quoted opinions constitute substantial evidence on the seminal legal issue of whether accidental smoke exposure was the proximate cause of Causey's death under S.C. Code Ann. § 42-9-290.

However, instead of considering this substantial evidence in support of the Commission's findings and conclusions on this issue, the Court engaged in a tortured re-weighing of the opinion evidence, alleging that these experts

> "relied upon the mischaracterization of Dr. Strange's testimony in responding to questioning during their own depositions … While it is true that these physicians agreed with Dr. Strange's statements as conveyed to them, these witnesses were not given the context and clarification Dr. Strange provided when further examined."

The Court's allegation in this regard is made out of proverbial whole cloth. No misrepresentations were ever made by the Respondents and, perhaps more importantly, all three experts had benefit of the entirety of Dr. Strange's testimony and the context of his opinions before rendering their own. Dr. Whelan testified, in response to a question from the Appellant's attorney, that he "reviewed Dr. Strange's deposition," in addition to other records related to this case, in preparation for his deposition. (R. p.516, ll.17-20). Dr. Largen's statement plainly states, "I have reviewed the deposition of Dr. Timothy Whelan as well as the deposition of the admitting physician, Dr. Charlton Strange, III, regarding the cause of Mr. Causey's death." (R. p.450). Likewise, Dr. Ford testified that prior to his deposition, in addition to reviewing Mr. Causey's medical records, he "also reviewed the depositions of Drs. Strange, Whelan and Pastis." (R. p.553, ll.19—23). Therefore, it cannot reasonably be said that Dr. Whelan, Dr.

Largen, or Dr. Ford "relied upon the mischaracterization of Dr. Strange's testimony" in rendering their own opinions.[18]

Not only are the Court's allegations regarding the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, and Dr. Ford unfounded, but even engaging in such analysis clearly exceeds the Court's authority under S.C. Code Ann. § 1-23-380(5) and demonstrates, not only bias, but a willingness to engage in pure, impermissible, speculation by suggesting that if Dr. Whelan and Dr. Largen and Dr. Ford had been asked different questions, they would have given different answers, and thus produced a different outcome in favor of the Appellant. But S.C. Code Ann. § 1-23-380 does not give the Court the authority to engage in such speculation[19], or otherwise question the veracity of evidence that the Appellate Panel found persuasive. Indeed the Court is "without power to pass upon the force and effect of such evidence" because "in workmens' compensation cases the Courts are not triers of facts" and are not "at liberty to interfere with them." Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952). If the Appellant's attorney believed the opinions of Dr. Whelan and Dr. Largen and Dr. Ford were based on unfounded hypotheticals, he should have questioned them on this issue, instead of asking the Court to play Monday morning quarterback.

The Court's improper weighing of competent expert testimony in contravention of S.C. Code Ann. § 1-23-380 is further demonstrated by the Court's statement that "Appellant

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[18] The Court also chose to weigh the MUSC Death Summary differently than did the Appellate Panel, which correctly noted that the Death Summary was amended by its authors and ultimately did not support a claim for benefits. (R. pp.20—21).

[19] *See* Clark v. Philips Electronics/Shakespeare, 429 S.C. 636, 643, 842 S.E.2d 349, 352 (2020) (holding that a finder of fact "may not rest its findings on speculation or guesswork" and quoting Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) for the proposition that "[w]orkers' compensation awards must not be based on surmise, conjecture or speculation.").

concedes, as she must, that the various doctors … gave different and, at time, contradictory, opinions" regarding causation, including Dr. Mitchell[20], Dr. Galphin[21], Dr. Cauthen[22], and Dr. Sporn[23], all "concluded that Causey did not sustain any injury as a result of smoke exposure." Of course, since time immemorial it has been well-settled that where there are conflicts in the evidence over a factual issue (either by different witnesses or in the testimony of the same witness), the findings of fact of the Appellate Panel are conclusive. Stokes v. First Nat'l Bank, 306 S.C. 46, 401 S.E.2d 248 (1991); Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). Equally well-settled is the maxim that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Appellate Panel's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). In fact, our Supreme Court first explained in 1939 that

> "where a witness' testimony conflicts with other testimony, or where conflicts arise in his own testimony, it then becomes a matter of opinion for the triers of the facts, and [the Court is] not permitted to disturb findings of fact where there is testimony to sustain them."

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[20] Dr. John Mitchell, a board-certified pulmonologist, opined that "to a reasonable degree of medical certainty, Mr. Causey's symptoms and unfortunate death were solely caused by H1N1 disease and were not cause, aggravated, or accelerated by his smoke exposure." (R. p.442).

[21] Pulmonologist Dr. Robert L. Galphin, Jr., opined that Causey's "death was to a degree of medical certainty most probably due to influenza caused by the H1N1 virus." (R. p.445).

[22] Dr. C. Gregory Cauthen, also a pulmonologist, opined that "it is my opinion to a reasonable degree of medical certainty that the cause of the death of Mr. Causey was ARDS resultant from a severe infection of H1N1 influenza." (R. 447).

[23] Dr. Sporn, who is the Chief of Pulmonary and Thoracic Pathology at Duke University Medical Center, opined that there "is no medical evidence that Mr. Causey had sustained significant smoke inhalation … Severe H1N1 infection is solely responsible for Mr. Causey's death." (R. p.452).

Bannister v. Shepherd et al, 191 S.C. 165, 169, 4 S.E.2d 7 (1939). Therefore, by acknowledging that there exists a conflict in the evidence, the Court should to have acknowledged that this is where the scope of their authority to review such evidence ends. Instead, the Court erroneously chose to "disturb findings of fact where there is testimony to sustain them," including the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn. *Id.*

B. Scope of Review

In accordance with the mandates of S.C. Code Ann. § 1-23-380(5),

> "The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial right of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The Court has no statutory authority to make findings of fact on appeal and no authority to "reinstate" a Hearing Commissioner's decision that has been vacated by the Appellate Panel.[24] Therefore, the Court clearly misapprehended this authority and overlooked S.C. Code Ann. § 1-23-380(5) when it decided to "reinstate the Single Commissioner's award of benefits."

While the Court suggests that their reversal and reinstatement was premised upon S.C. Code Ann. § 1-23-380(5)(d) – an error of law – the Court, like the Hearing Commissioner, failed to cite any actual laws in it analysis. As noted above, the Court's opinion contains no discussion whatsoever of the laws applied by Appellate Panel in rendering their decision (S.C. Code Ann. § 42-1-160 and § 42-9-290), much less any substantive analysis about the Appellate Panel's application of these laws. Instead, the Court suggest that the Appellate Panel's "error of law" is actually a perceived "mischaracterization of the medical evidence." However, the legal standard for reviewing such evidence under § 42-1-380(5) is whether the Appellate Panel's characterization was

> "(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The Respondents respectfully contend that the Appellate Panel's characterization of the evidence, including the statement that "[n]o opinion of any doctor who actually treated Causey

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[24] *See* 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 was 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).

supports a finding that Caused sustained any injury due to his alleged smoke exposure,"[25] was not "clearly erroneous," "arbitrary or capricious," or "characterized by an abuse of discretion." Quite simply, while the statement of a cautious opinion could conceivably support a finding of causation, the Appellate Panel properly found that after weighing such evidence in this case, it did not. *See* Tiller v. National Healthcare, 513 S.E.2d 843, 334 S.C. 333 (1999) (explaining that while the "expression of a cautious opinion" may support an award if there is other competent evidence in the record, it is the Appellate Panel that "determines the weight and credit to be given to the expert testimony").

C. Coroner Edge

In reversing the Appellate Panel on questions of fact, the Court relies specifically "on Deputy Causey's death certificate" and quotes the cause of death listed on that certificate, as well as the testimony of Coroner Edge. By so doing, the Court appears to have wholly overlooked the fact that the Appellate Panel properly determined that this certificate and Mr. Edge's testimony were to be accorded "no weight." (R. p.23). This decision was well-founded and explained at length by the Appellate Panel. (R. pp.21—23). Indeed, the Appellate Panel noted that Mr. Edge, who did not attend medical school[26], testified

[25] The Appellate Panel weighted and reviewed the opinions of the treating physicians that supports a finding that Causey did not sustain any injury due to alleged smoke exposure at length, with citation to the record. (R. p.30—32, citing R. pp.477—478; R. p.484, ll.19—21; R. p.486, ll.21—215; p.571, ll.19—24; R. pp.504—505; R. p.450). Furthermore, the Appellate Panel's actual findings of fact rely not only on these opinions of the treating physicians, but also the opinions of Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn.

[26] Mr. Edge has an Associate's Degree in Business from Horry Georgetown Tech and went to mortuary science school in Kentucky. (R. p.577).

"that everything he learned about Causey's death was from 'social media, TV … He admits that he did not have any contact with Causey's treating physicians and did not review any of his medical records … He was not aware that Causey had even been diagnosed with H1N1…" (R. p.22, citing R. pp.581-582, p.588).

As such, the Appellate Panel properly found, as was their exclusive province, that Mr. Edge's opinions as to the combined effects of alleged smoke exposure and H1N1 disease were not credible, and this finding should have been affirmed on appeal.[27] For the Court to impliedly reverse the Commission's determination of Mr. Edge's credibility without explanation was wholly arbitrary and; thus reversible error even irrespective of the fact that the Court lacked any authority to make such a finding of fact on appeal.[28]

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[27] *Accord* Rummage v. BGF Industries, 434 SC 441, __ S.E.2d. __ (Ct. App. 2021) (citing Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009) ("The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel") and Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011) ("The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." )*; see also* Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony.").

[28] *See* Crane v. Raber's Discount Tire Rack, 29 S.C. 636, 647, 842 S.E.2d 349, 354 (2020) (holding that "[t]o make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reason the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision"); *see also* Clark v. Philips Electronics/Shakespeare, 429 S.C. 636, 643, 842 S.E.2d 349, 352 (2020) (holding that "[t]he lesson of *Crane* is that the Panel may not base a factual finding on a credibility determination without explaining both the basis of the credibility determination and how the determination rationally affects the disputed fact. An unexplained

D. Testimony of Dr. Pastis

The Court's opinion regards the opinions of Dr. Pastis as being of particular "significance to [its] consideration of the Appellate Panel's order." The Court went on to partially quote passages from Dr. Pastis's testimony, but failed to acknowledge the full context of this testimony, which the Appellate Panel actually reproduced in bold font:

> "*Q. So is there any way to state, within a reasonable degree of medical certainty, that the smoke inhalation that allegedly occurred in his case had anything to do with his death?*
>
> *A. I think that I can say with a reasonably — reasonable degree of certainty, that it made his ability to fight off an infection worse.*
>
> *Q. Okay. And how did you arrive at that opinion?*
>
> *A. Physiology. That you have an injury to your defense cells and your ability to clear secretions. But not based on any H1N1 study, as we said.*
>
> *Q. Okay. Not based upon any H1N1 study and not based on any scientific literature; is that correct?*
>
> *A. No, that's not — not entirely correct. There is scientific literature on burn injuries to the airways.*
>
> *Q. Do you have any evidence that he had a burn injury to the airways in this case?*
>
> *A. That, I don't. I don't have picture of the airways.*

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credibility determination or an unexplained use of a credibility finding means the factfinder's approach was arbitrary rather than rational.").

*Q.* ***So in this case, you're speculating that he had a burn injury to the airway.***

*A.* ***Correct.***

*Q.* *Without proof of that, you can't state, to a reasonable degree of medical certainty, most probably, that the smoke inhalation had anything to do with his death, can you?*

*A.* *I would be uncomfortable saying that it had nothing to do with his death.*

*Q.* *And we can speculate that it might have, but in terms of testifying, to a reasonable degree of medical certainty, based upon evidence in this case, you can't state that, can you?*

*A.* ***Based on the evidence that I have, it would be speculation.***

(R. pp.27—28) (emphasis original to the Appellate Panel Order) (citing R. p. 537, l.10—p.538, l.24). The Court failed to acknowledge that the Appellate Panel was also impressed by the fact that Dr. Pastis was forced to concede that he could not say whether Causey's H1N1

"was just a very horribly severe case or whether [smoke inhalation] contributed. There's no way to decipher that out. Because H1N1 can be this severe on its own." (R. p.28, citing R. p.546, l.21—p547, l.3). The Appellate Panel was also impressed by the fact that Dr. Pastis admitted that H1N1 was the primary cause of Causey's death. (R. p.28, citing R. p.547, l.20—p.548, l.1). Therefore, having reviewed only cherry-picked evidence of cautious support instead of the totality of the evidence as did the Appellate Panel, the Court failed to recognize that Dr. Pastis's cautious opinions as to causation are not only equivocal, but they are admittedly based upon speculation, and as a result, the Appellate Panel properly reasoned that they should be accorded less weight than conflicting testimony given to a reasonable degree of

medical certainty. Because it has been well-settled for nearly a century that "where a witness' testimony conflicts with other testimony, or where conflicts arise in his own testimony, it then becomes a matter of opinion for the triers of the facts," the Court exceeded its authority and erred as a matter of law in reversing the Appellate Panel's determination of the weight to be accorded the opinions of Dr. Pastis. Bannister v. Shepherd, et al., 191 S.C. 165, 169 , 4 S.E.2d 7 (1939).

E. Testimony of Kim Collins

On appeal, the Court also chose to weigh and judge the opinions of the Appellant's pathology expert, Dr. Collins, differently than did the Appellate Panel; however, this also exceeded the Court's authority and was plain error. It appears that the Court chose to review whether the Appellant's losing position was also supported by substantial evidence and to weigh the relative strength of the Appellant's evidence against that of the Respondents. However, this is not how the substantial evidence rule is to be applied, as our Supreme Court has explained that

> "It is not within the province of this Court to determine whether there is a sufficiency of evidence to support the award of the Industrial Commission, but merely to determine whether there is any competent evidence to support it. The function of the Industrial Commission in determining the sufficiency of evidence in support of a claim for compensation is similar to that of a jury in actions at law, and the findings of the commission on matters of fact are final."

Cokeley et al. v. Robert Lee, Inc., 197 S.C. 157, 167 (S.C. 1941) (internal citations omitted).

Here, not only is there competent evidence to support the Appellate Panel's ultimate findings and conclusions under S.C. Code Ann. § 42-1-160 and § 42-9-290 (including the opinions of Dr. Strange, Dr. Whalen, Dr. Ford, Dr. Largen, Dr. Cauthen, Dr. Mitchell, Dr. Galphin, and Dr. Sporn), but the Appellate Panel properly explained why they discounted the

opinions of Dr. Collins.[29] For example, when weighing Dr. Collins's opinions against those of Dr. Strange and Dr. Cauthen, and Dr. Mitchell, and Dr. Galphin, the Appellate Panel noted that they were all pulmonologist specializing in disorders of the lung, such as the one that proved fatal to Causey, while Dr. Collins is a pathologist who never examined him. In the Appellate Panel's estimation, Dr. Collins's opinions were also weighed according to the fact that they were based in part on misinformation (such as the nature of Causey's alleged smoke exposure), and were also based in part on speculation (as to whether Causey's lungs had actually been damaged in any way by alleged smoke exposure).

But most important to the Appellate Panel's analysis of Dr. Collins's opinions was the fact that she conceded that the "proximate cause" of Causey's death was H1N1 Disease, "[t]hat's why he died on that day, was because of complications of H1N1." (R. p.26, citing R. p.635, l.20—p.636, l.4; see also R. p.179, l.9—p.180, l.2). However, the Court failed to acknowledge Dr. Collins's testimony as to the proximate cause of death, or even to acknowledge that this was the seminal issue before the Appellate Panel and before the Court. As such, the Court fails to explain how Dr. Collins's testimony could be competent evidence in support of a conclusion that alleged smoke exposure was the "proximate cause" of Causey's death pursuant to S.C. Code Ann. § 42-9-290. Because the Appellate Panel properly weighed all of the evidence bearing on

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[29] Clearly, the Appellate Panel had the authority and discretion to disregard the opinions of Dr. Collins and Dr. Pastis because there was other competent evidence in the record to the contrary. "The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011).

this issue and properly applied the law to this evidence, the Court should have simply affirmed in accordance with S.C. Code Ann. § 1-23-380.

Respectfully, it was previously well-settled that, in a workers' compensation case, the Commission's Appellate Panel is the ultimate fact finder. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). Indeed, this Court has heretofore repeatedly recognized that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of the court to weigh the evidence as found by the Commission. DeBruhl v. Kershaw Co. Sheriff's Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990) (reversing the appellate court's re-weighing of the evidence on appeal to reach a decision contrary to that of the Commission as legal error) (internal citations omitted). As explained by the Court of Appeals in the seminal case of Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 380, 440 S.E.2 401, 403 (1994),

> "[a]n appeal in a workers' compensation case is not a new trial. Circuit court judges are not at liberty to decide the case as if there had been no decision by the workers' compensation commission."

Here, by disregarding the Appellate Panel's reasoned decisions regarding the weight to be accorded the evidence, the Court treated this appeal as a new trial and improperly re-weighed the evidence to reach its desired conclusion, contrary to that of the Appellate Panel and despite substantial evidence in the Record. Respectfully, by independently judging the credibility and substance of the evidence and re-weighing conflicting evidence on appeal in accordance with its own opinions as to its sufficiency, the Court has not only exceeded its statutory authority under S.C. Code Ann. § 1-23-380, but has violated the separation of powers. The Legislature vested the Workers' Compensation Commission, an agency of the administrative branch, the exclusive power to determine all questions arising under the Workers' Compensation Act pursuant to S.C.

Code Ann. § 42-3-180, and a reviewing court must presume that such determination is correct. Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

**V. The Court erred as a matter of law in awarding medical benefits.**

The vacated order reinstated by the Court includes an award of "all causally related medical treatment. Neither the Hearing Commissioner's vacated order, nor the Court's opinion elucidates what medical treatment received by Causey is casually-related to alleged smoke exposure, making the award impermissibly vague. *See* Hill v. Jones, 255 S.C. 219, 178 S.E.2d. 142 (1970). There are no findings of fact on this issue and there are no conclusions of law whatsoever, in violation of S.C. Code Ann. § 42-17-40(A).

In fact, the Appellant did not even raise any issue with respect to medical treatment or even cite S.C. Code Ann. § 42-15-60 in his Brief. As a result, this issue was not properly before the Court on appeal. *See* Rule 208(b)(1)(B), S.C.A.C.R., (stating that "[o]rdinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal"); *see also* In re Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005) (holding that a reviewing court has appellate jurisdiction over only those matters which are properly appealed); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (holding that when an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated). In addition, the Respondents were given no notice or opportunity to be heard on this issue before the Court's award, thus violating constitutional due process protections.

Moreover, in order to be entitled to medical benefits under the Workers' Compensation Act, a party must actually prove their entitlement pursuant to the terms of S.C. Code Ann. § 42-15-60, which clearly and unequivocally requires "expert testimony stated to a reasonable degree

of medical certainty" that the employee requires medical care or treatment as a result of a work-related injury. Here, there is no such evidence and no expert testified to any degree of medical certainty that Causey required any medical care or treatment for alleged smoke exposure at work. The Court's opinion fails to explain why the statutory burden of proof under S.C. Code Ann. § 42-15-60 (or the Respondent's right to equal protection) does not apply in this case.

By reinstating the Hearing Commissioner's vacated award of medical benefits, the Court has essentially eliminated the Appellant's burden of proof under S.C. Code Ann. § 42-15-60 and otherwise ignored the requirements of the requirements of both S.C. Code Ann. 1-23-350, which mandates that "[a] final decision and order shall include findings of fact and conclusions of law, separately stated," and S.C. Code Ann. § 42-17-40, which requires a commission award to contain "a statement of the findings of fact, rulings or law, and other matters pertinent to the question at issue." *See also* Aristizabal v. Woodside-Division of Dan River, 268 S.C. 366, 234 S.E.2d 21 ("if a material fact is contested, the [Commission] must make a specific, express finding on it") (internal citations omitted). Therefore, the Court's award of medical benefits is based on multiple, plain errors and requires rehearing.

## 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 the applicable law. Therefore, the Respondents respectfully request that the Court of Appeals withdraw its unpublished opinion reversing the Workers' Compensation Commission's final Decision and Order, grant rehearing and oral argument on the issues set forth herein above and issue a new order affirming the Appellate Panel in accordance with the Administrative Procedures Act.

Respectfully submitted,

January 20, 2022

Roy A. Howell, III S.C. Bar #11888
Kirsten Leslie Barr S.C. Bar #15525
Trask & Howell, LLC
Post Office Box 2167
Mount Pleasant, South Carolina 29465
Attorneys for the Petitioners/Respondents

1165\1167\Petition for Rehearing

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

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Timothy Causey,.....Appellant,

v.

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

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**PROOF OF SERVICE**

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The undersigned hereby certifies that the above-named Appellant, Timothy Causey, was served with the Petition for Rehearing and Request for Oral Argument on Behalf of Respondents this 20th day of January 2022, by email and by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

Francis A. Humphries, Jr., Esq
1300 Professional Drive, Suite 102
Myrtle Beach, SC 29577
fhumphries@myrtlebeachlawfirm.net

William Henry Monckton, IV, Esq.
1300 Professional Drive, Suite 102
Myrtle Beach, SC 29577
wmonckton@myrtlebeachlawfirm.net

Allison Paige Sullivan, Esq.
P.O. Box 7965
Columbia, SC 29202
allison@bluesteinattorneys.com

January 20, 2022

Roy A. Howell, III
Kirsten Leslie Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Respondents

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TRASK
HOWELL
WORKERS' COMPENSATION DEFENSE

***Reply to***
Roy A. Howell, III
(843) 881-2236
rhowell@trask-howell.com

January 20, 2022

**Via Email-ctappfilings@sccourts.org and Regular Mail**

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Timothy Causey (dec.) v. Horry County
W.C.C. File No.: 1302588
Appellate Case No.: 2017-001732
Carrier File No.: 2013058409
Date of Accident: March 16, 2013

Dear Ms. Kitchings:

Enclosed herewith for filing, please find our Petition for Rehearing and Request for Oral Argument on Behalf of Respondents and Proof of Service of the same in the above-referenced matter.

By a copy of this correspondence, I am serving the other counsel of record with a copy of our Petition. Also enclosed, please find our check in the amount of $50.00 for the filing fee.

Yours very truly,

Roy A. Howell, III

RAHIII/mec/les
Enc.
cc: Janet Cook, SC Association of Counties (w/enc.) (email only)
Allison Mackey, Horry County (w/enc.) (email only)
Francis A. Humphries, Jr., Esq. (w/enc.) (email/mail)
William Henry Monckton, VI, Esq. (w/enc.) (email/mail)
Allison Paige Sullivan, Esq. (w/enc.) (email/mail)