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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1302588
Appellate Case No. 2017-001732

Timothy Causey,.....Appellant,

v.

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

RETURN

This return is filed pursuant to the Court's request. Respectfully, the Respondents' Petition for Rehearing and Request for Oral Argument should be denied.

Rehearing is not needed. This Court's decision is correct and it did not overlook or misapprehend any relevant facts or law in this claim. Rule 221, S.C.A.C.R. The following are responses to the arguments raised in the Respondents' petition.

I. The questions of dependency and commutation are not relevant to the issue of whether the claim for benefits is compensable.

Timothy Causey died on May 19, 2013. He is survived by his wife, Donna, and two daughters, Sommer and Taylor. (R. 113, 658, 659). S.C. Code Ann. § 42-9-110 provides that a surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee. S.C. Code Ann. § 42-9-290(F) provides that a surviving spouse shall

receive no less than one-half of the benefits paid if there are two or more children. S.C. Code Ann. § 42-9-290 (A) and (D) describe the requisite age and educational status necessary for a child to be presumed dependent and therefore entitled to benefits. The only inquiry necessary as part of a dependency investigation in this case is confirmation that Sommer and Taylor are Timothy Causey's only two children and determination as to their age and educational status at the time of Causey's injury to determine what portion of the non-spousal half of benefits each child would be entitled to. This simple inquiry would in no way, shape, or form impact the Court's decision on the issue of compensability nor the total amount payable to the statutory beneficiaries.

Although Appellant's counsel noted in a prior briefing in 2017 that there was a mistake in the calculation of the payable award that was "easy to fix," that mistake no longer exists and Respondents' concern about this issue is misplaced. (R. 96). S.C. Code Ann. § 42-9-301 describes the mechanism for lump sum benefits and the commutable value of the *future installments* which may be due under this title. S.C. Code Ann. § 42-9-290 provides that the maximum number of weeks payable for a work-related death is 500 weeks. Causey last worked on March 19, 2013, and 463.5714 weeks have elapsed as of the date of this filing. This leaves 36.4286 weeks payable which commutes to 35.7451 weeks. This results in a total owed indemnity benefit as of the date of this filing of 500 weeks.¹ Therefore, the absence of commutation in the hearing commissioner's January 12, 2017, Decision and Order is now a moot issue given the time elapsed since Causey's 2013 injury as the full 500 weeks is now owed.

1. This calculation does not include any pre- or post- judgment interest that may be owed by the Respondents.

II. The Court did not misapprehend the evidence that is in the Record.

The Court did not misapprehend the evidence that is in the Record. The Court engaged in a thorough review of the record and concluded that the Appellate Panel decision erroneously mischaracterized the medical and circumstantial evidence. The Court detailed a number of those instances in its Opinion and the Court is correct on each one of those instances.

Respondents specifically argue that the testimony of Timothy Causey's widow, Donna, concerning the "perfect storm" of circumstances that lead to Causey's illness and ultimate death was improperly considered by the hearing commissioner because it was hearsay. The Court of Appeals, in reviewing the Appellate Panel's findings to determine if they were supported by substantial evidence, did reference the testimony of Mrs. Causey. Respondents contend that her testimony as to the "perfect storm" of Causey's smoke inhalation with H1N1 is "stricken from the record," and therefore, no longer part of the record available for review by the Court of Appeals. (Resp't Pet. Reh'g & Req. Oral Arg. at 8).

Causey's widow testified that following a meeting with one of Causey's doctors that it was her "understanding ... that he had smoke had smoke inhalation with H1N1, which made the entire situation what we would consider to be the perfect storm, which made it twice as bad and that he may not survive" and this is the testimony Respondents believe should be stricken from the record. (R. 139:15-19). As correctly noted in the Appellate Panel's Decision and Order, although the South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission, hearsay testimony is only admissible in a worker's compensation claim "if corroborated by facts, circumstances, and other evidence." *Ham v. Mullins Lumber Co.*,

193 S.C. 66, 82, 7 S.E.2d 712, 719 (1941). Mrs. Causey's testimony as to her understanding² of her husband's medical condition is consistent with the testimony of Dr. Pastis, one of Causey's treating physicians. Dr. Pastis' deposition testimony reflects the following:

Q: And one of the things noted by Ms. Causey in her deposition was that one of the doctors, and she was not able to identify him, indicated to her that – clearly that he had H1N1, but that the smoke inhalation would have made it difficult for him to fight it off, in his circumstance. Is that consistent with your observations of Mr. Causey and his course of treatment?

A: It is. While severe, most people don't die of this disease. He certainly had a severe case. Those happen without smoke inhalation. But in his case, the timing of it made me think that it exacerbated what was already a severe problem and made it worse.

(R. 545:6-21).

Mrs. Causey's testimony of her understanding is also consistent with the testimony of Dr. Kimberly Collins who stated that had Causey not been involved in the fire and inhaled the chemicals from the fire that he would not have developed H1N1. (R. 176-177).

Despite their protestations, Respondents fail to acknowledge Mrs. Causey's testimony is in fact corroborated by facts, circumstances, and other evidence and is therefore *not* hearsay and therefore could not be stricken from the record.

Respondents are also selective when determining what portions of Mrs. Causey's testimony concerning her understanding admissible. Below is an exchange from the hearing transcript in which Respondents' counsel argued he was allowed to ask Mrs. Causey as to her understanding of her husband's medical diagnosis:

2. Respondents' counsel was willing to rely upon Mrs. Causey's understanding of her conversations with Mr. Causey's medical providers in a different line of questioning during the course of the hearing. (R. 135:5-17).

5 Q: You were there at MUSC when the diagnosis was
6 made, weren't you?
7 A: No, sir. When I got there, they told me that
8 he had H1N1.
9 MR. HUMPHRIES: Your Honor, I'm going to object to
10 this line of examination. The records speak
11 for themselves and asking her is asking her to
12 testify and that's hearsay.
13 A: Right.
14 MR. HUMPHRIES: He's asking her to rely on hearsay,
15 Your Honor.
16 MR. HOWELL: I can ask her what her understanding
17 is.
18 COMMISSIONER: Yeah, she -- you can testify to what
19 your understanding was, but just don't tell him
20 what somebody said. Go ahead.

(R. 135).

In addition to the “perfect storm” testimony that Respondents’ argue was stricken from the record, the Court of Appeals directly quotes Mrs. Causey five times, and mentions her observations several additional times. Of the five times the Court of Appeals quotes directly from Mrs. Causey, all five statements are directly from the transcript of Mrs. Causey’s testimony before the Hearing Commissioner.³ Additionally, all observations of Donna Causey, referenced

3. *Compare* Op. 1 (“Donna Causey observed her husband had ‘watery eyes, [a] runny nose, coughing, red eyes, [and] he kept rubbing his eyes.’”), *with* (R. 117:15-17) (“COMMISSIONER: Yes. What your observations were. [MRS. CAUSEY]: Watery eyes, runny nose, coughing, red eyes, he kept rubbing his eyes.”); *Compare* Op. 1 (“After his return from the area of the fire the second day (Monday morning), Donna observed black discharge on the tissue when Deputy Causey blew his nose, and his eyes were ‘really red, almost swollen.’”), *with* (R. 118:12-19) (“Q: Okay. On his return on that Monday, what – what, if anything, did you note about [Deputy Causey’s] physical condition at that time? [MRS. CAUSEY]: More or less, the blowing nose

by the Court of Appeals in its opinion, come directly from her testimony before the Hearing Commissioner.⁴ The hearsay testimony that Respondents have the greatest objection to in their Petition, is included in Mrs. Causey testimony before the Hearing Commissioner.⁵ (Resp't Pet. Reh'g & Req. Oral Arg. at 7-8).

All of Mrs. Causey's observations and statements, referenced by the Court of Appeals in its review of the Appellate Panel's decision, is from the "transcript of testimony" and is consistent with the "transcript of testimony" from Dr. Pastis and Dr. Collins. Because the APA explicitly includes "[t]he transcript of testimony", among other things, as "constitute[ing] the exclusive record for decision," the Court of Appeals properly reviewed the record as a whole. As

with the black [discharge] on the tissue . . . [his] eyes were really red, almost swollen."); *Compare* Op. 1 ("Upon Causey's return Tuesday morning, 'he coughed up and showed me on the tissue, and it was a yellowish black color. Blew his nose again, it was a black color. The eyes were really red. The nose was constantly draining. Coughing more on Tuesday morning.'"), *with* (R. 119: 5-15) ("[MRS. CAUSEY: upon returning on Tuesday, he was] [a]ctually coughing up, he coughed up and showed me on the tissues, and it was a yellowish black color. Blew his nose again, it was a black color. The eyes were really red. The nose was constantly draining. Coughing more on Tuesday morning."); *Compare* Op. 1 ("By Saturday, Causey 'was gasping with his head down. He just had this ashen look and this bluish color.'"), *with* (R. 121: 24-45) ("[MRS CAUSEY:] . . . When I walked out of the bedroom [Saturday morning], he was propped up on three pillows instead of two and he was gasping with his head down. He just had this ashen look and this bluish color."); *Compare* Op. 5 ("Also hotly disputed as hearsay was Donna's testimony that an unidentified MUSC physician told her that her husband 'had smoke inhalation with H1N1, which make the entire situation what we would consider to be the perfect storm, which made it twice as bad and that he may not survive.'"), *with* (R. 139:15-19) ("[MRS CAUSEY:] My understanding was that he had smoke inhalation with H1N1, which made the entire situation what we would consider to be the perfect storm, which made it twice as bad and that he may not survive.").

4. *Compare* Op. 1, ¶ 4, *and* (R. 120:10-122:4); *Compare* Op. 5, ¶ 3 (referencing Mrs. Causey's cross examination), *with* (R. 129:13-20) (referencing Deputy Causey's four days with a fever) *and* (R. 131:23-132:8) (referencing to Deputy Causey's daughter with a urinary tract infection).

5. *Compare* Op. 5 ("Also hotly disputed as hearsay was Donna's testimony that an unidentified MUSC physician told her that her husband 'had smoke inhalation with H1N1, which make the entire situation what we would consider to be the perfect storm, which made it twice as bad and that he may not survive.'"), *with* (R. 139:15-19) ("[MRS CAUSEY:] My understanding was that he had smoke inhalation with H1N1, which made the entire situation what we would consider to be the perfect storm, which made it twice as bad and that he may not survive.").

such, the Court of Appeals did not misapprehend the evidence contained in the Record or commit a “clear error.” Viewed in the light of this guidance from the APA, every statement and observation of Donna Causey relied upon by the Court of Appeals is properly contained in the record as a whole. The Court did not misapprehend what evidence was in the record and appropriately considered the evidence as reflected in the record.

III. The Court did not overlook or misapprehend the Commission’s legal rulings.

A. S.C. Code Ann. § 42-1-160.

The Hearing Commissioner found that Causey’s death was causally related to his work-related smoke inhalation injury and arose out of and in the course and scope of his employment. (R. 9). Although S.C. Code Ann. § 42-1-160 was not expressly cited in the Hearing Commissioner’s order, the facts and circumstances of the claim were discussed in great detail and are consistent with a finding of a death causally-related to Causey’s work-related smoke inhalation injury arising out of the course and scope of his employment.

The Hearing Commissioner’s decision cited testimony from the hearing, cited the parties’ evidentiary submissions, and provided a single-spaced four-page summary of the evidence. The Hearing Commissioner necessarily considered those facts and circumstances when reaching his conclusion that Causey’s death was causally related to his work-related smoke inhalation injury.

Respondents’ contention that the Appellant Panel’s conclusion that Causey did not sustain any injury to his lungs arising out of and in the course of his employment was not discussed in the Appellant’s Brief and therefore the law of the case which cannot be disturbed on appeal is absurd. Appellant’s Statement of Issue on Appeal was whether the Appellant Panel’s Decision and Order was controlled by legal errors, the core of which was its denial of compensability and which was discussed and argued extensively in the briefing. (Appellant Br.

1). This issue was in no way, shape, or form, abandoned as a claim cannot be compensable unless the injury arose out of and in the course of employment.

Respondents also express concern that the Hearing Commissioner's reinstated Order is impermissibly vague which is incapable of being reviewed. This concern is misplaced. The reinstated order of the Hearing Commissioner contains all the elements that are necessary for an award. *Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 280, 461 S.E.2d 392, 393 (1995); *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 109-10, 156 S.E.2d 646, 648 (1967). The Hearing Commissioner's written Order stated findings of fact and conclusions of law as called for by S.C. Code Ann. § 1-23-350 (Supp. 2020). Precedent explains that no particular format is required, but the commission is required to make findings on the elements that are necessary for an award. *Able Communication v. S.C. Pub. Serv. Comm'n*, 290, S.C. 409, 411, 351, S.E.2d 151, 152 (1986); *Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 280, 461 S.E.2d 392, 393 (1995); *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 109-110, 156 S.E.2d 646, 648 (1967).

Here, the Hearing Commissioner summarized all of the medical evidence, including the opinion letters from the Employer's retained experts, listed twelve specific findings of fact before concluding, as a matter of law, that the issue between the parties was not a legal dispute, but a factual dispute. (R. 2-9). The Order plainly indicates the basis of the Hearing Commissioner's decision to award the claim: the Hearing Commissioner believed Dr. Collins' testimony and he believed the testimony of Timothy's treating physicians, some of whom supported compensability and none of whom ruled smoke inhalation "out." (R. 9). Based upon his consideration of the record as a whole, the Hearing Commissioner concluded that Appellant satisfied the burden of proof by a preponderance of the evidence. The Order is not vague and leaves no question that the Hearing Commissioner found the claim compensable and awarded

indemnity benefits and ordered payment of causally-related medical treatment as required in compensable death cases.

Respondents also posit that a “critical issue” exists with the alleged lack of “elucidation” on whether (1) the alleged smoke exposure allegedly aggravated H1N1 disease or (2) whether the H1N1 disease pre-existed the alleged smoke exposure. (Resp’s Pet. Reh’g & Req. Oral Arg. at 12). Respondents assert that because these matters were not addressed, the Respondents have been “essentially deprived of due process.” *Id.* at 13. This “critical issue” was in fact addressed by the Hearing Commissioner in his Decision and Order and was in fact specifically appealed by Respondents in their appeal to the Appellate Panel.

The Hearing Commissioner concluded that he gave the greatest weight to the opinions of Dr. Collins and Causey’s treating physicians. (R. 9). Dr. Collins testified that the sequence of events was 1) acute lung injury from smoke inhalation, 2) ARDS acute respiratory distress syndrome, 3) H1N1, and 4) secondary bacterial infections and hemorrhage into Causey’s lungs. (R. 176:22-177:8). Respondents’ fifth exception to the Hearing Commissioner’s Decision and Order was that the Commissioner erred in finding that “inhaling these alleged toxins materially decreased the Claimant’s ability to fight off infection; due to the Claimant’s severely depressed immune system, he contracted H1N1; after a prolonged illness, the Claimant died.” (R. 12). The sequence of events found in the Hearing Commissioner’s Decision and Order necessarily means that neither S.C. Code Ann. § 42-9-35 nor 42-11-10 would apply to the facts of this case as the diagnosis of H1N1 was subsequent to the smoke inhalation injury.

Respondents also assert that the Hearing Commissioner’s Decision and Order is defective because it fails to distinguish whether benefits are payable under § 42-1-160 or § 42-1-172. The Hearing Commissioner concluded that he found that the “claimant’s death was causally related

to his work-related smoke inhalation injury arising out of and in the course of his employment.” (R. 9). The Commissioner’s use of the singular term “injury” suggests that he believes the inhalation injury was a singular event and therefore compensable under S.C. Code Ann. § 42-1-160. Furthermore, Appellant never filed a repetitive trauma claim and never took the position that his injury was the result of repetitive trauma. Therefore, the question of compensability under the repetitive trauma statute⁶ was never before the Commission. (R. 38, 39, 40, 48, 61).

As detailed above, the Court did not overlook or misapprehend the application of the Workers’ Compensation Act and the reinstated Decision and Order of the Hearing Commissioner properly decided that Appellant met the burden of proof by a preponderance of the evidence in establishing that Causey suffered an injury by accident as defined by S.C. Code Ann. § 42-1-160.

B. S.C. Code Ann. § 42-9-290

Likewise, the Court did not misapprehend or overlook any of the provisions of § 42-9-290 when reinstating the Hearing Commissioner’s award of death benefits. The Workers’ Compensation Act provides that if death results proximately⁷ from an accident that the employer shall pay the dependents of the employer for a period of 500 weeks. In the context of workers’ compensation claims, proximate cause is determined based upon whether an injury “arises out of” employment. The Workers' Compensation Act refers to the injury's origin and cause. *Osteen v. Greenville County School District*, 333 S.C. 43 at 50, 508 S.E.2d 21 at 24 (1998); *Baggott v. Southern Music, Inc.*, 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). For an injury to “arise out of” employment, the injury must be proximately caused by the employment. *Osteen*, 333 S.C. at 50,

6. S.C. Code Ann. § 42-1-172.

7. Respondents cite to a number of cases that discuss proximate cause and foreseeability in the context of a fault-based common law negligence analysis. These concepts are slightly different when applied to workers’ compensation claims which are part of a no-fault framework. *Nicholson v. S.C. Dept. of Social Services*, 411 S.C. 381, 390, 769 S.E.2d 1, 5 (2015)

508 S.E.2d at 24; *see also Fowler v. Abbott Motor Co.*, 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1960) (accident “arises out of” employment when it arises because of it, as when the employment is a contributing proximate cause). “It must be apparent to the rational mind, considering all the circumstances, that a causal relationship exists between the conditions under which the work is performed and the resulting injury.” *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct. App. 2007) (citing *Smith v. NCCI, Inc.*, 369 S.C. 236, 253, 631 S.E.2d 268, 277 (Ct. App. 2006); *Broughton v. South of the Border*, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999)).

In *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 140 S.E.2d 173 (1965), our Supreme Court discussed the “arising out of” requirement:

It (the injury) arises “out of” the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises “out of” the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Id., 245 S.C. at 269, 140 S.E.2d at 175 (quoting *Eargle v. S.C. Elec. & Gas Co.*, 205 S.C. 423, 429–30, 32 S.E.2d 240, 242–43 (1944); *In re Employers' Liability Assur. Corp.*, 215 Mass. 497, 102 N.E. 697, 697 (1913)). “For an accidental injury to be compensable under the workers' compensation scheme there must be a causal connection between the employment and the injury;

that is the test and the claimant need prove nothing more.” *Nicholson v. S.C. Dept. of Social Services*, 411 S.C. 381, 390, 769 S.E.2d 1, 5 (2015).

As noted in the Court’s Opinion, the Appellate Panel reached its own proximate cause conclusion based on an erroneous mischaracterization of the medical and circumstantial evidence. There is substantial evidence in the record that Causey’s death was proximately caused by his smoke inhalation injury. For the reasons discussed in detail in Appellant’s briefing and in the Court’s decision vacating the Appellate Panel Order, the Appellate Panel mischaracterized the medical evidence in that it treated legal causation and proximate cause as though they are medical concepts rather than legal concepts. The Court appropriately reversed the Appellate Panel as the Appellate Panel’s decision was affected by an error of law. Specifically, the Court correctly found that misconceptions in recounting and analyzing the medical and circumstantial evidence anchored its causation analysis.

The Court appropriately reinstated the Hearing Commissioner’s Decision and Order which found that Causey’s death was proximately caused by his smoke inhalation as detailed in the Findings of Fact, and specifically the testimony of Dr. Collins and the MUSC death summary. Dr. Collins testified that it was her opinion to a reasonable of medical certainty, more likely than not, that the underlying cause of death for Causey was smoke inhalation. (R. 176:13-19; 629:10-15). She expounded it was her opinion that but for Causey having been involved in the fire and inhaling the chemicals he did over three (3) days, he would not have developed H1N1. (R. 176:20-177:8; 629:16-630:25). She testified “the events, based on the history, scenario and chronology, follow perfectly: acute lung injury from smoke inhalation, ARDS acute respiratory distress syndrome, H1N1, then secondary bacterial infections and hemorrhage into Causey’s lungs.” (R. 177:2-8). This is also consistent with the MUSC hospital death summary

which states that Causey's cause of death was thought to be "hypovolemic shock secondary to diffuse alveolar hemorrhage, secondary to ventilator-associated pneumonia, secondary to prolonged intubation, and secondary to smoke inhalation injury with H1N1 influenza." (R. 222).

It is therefore apparent to the rational mind, considering all the circumstances, that a causal relationship exists between the conditions under which Causey's work was performed and his resulting death. Appellant established by the greater weight of the evidence that Causey's death was causally connected to his employment and as discussed herein the Appellate Panel's reversal of the Hearing Commissioner was based upon an error as a matter of law. As such, the Court did not err in reversing the Appellate Panel and the reinstated Hearing Commissioner's Decision and Order correctly concluded, considering all the circumstances, that Causey's death was causally-related to his employment.

IV. The Court of Appeals utilized the proper scope of review when reversing the Appellate Panel's Decision.

Under state law, a tribunal reviewing the Appellate Panel's decision may reverse the decision "when it is unsupported by substantial evidence or controlled by an error of law." *King v. Int'l Knife and Saw-Florence*, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011) (citing *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002)). The Appellate Panel's decision was unsupported by substantial evidence and was controlled by an error of law, thereby justifying the Court of Appeal's reversal.

A. The Appellate Panel failed to properly apply the law of causation, confusing circumstantial evidence with speculation, and improperly holding an award requires objective evidence and indisputable proof.

Shrader v. Monarch Mills describes that "[i]t is well settled that circumstantial evidence may be relied upon to settle questions of fact in Workmen's Compensation matters as well as in other cases." 215 S.C. 357, 364, 55 S.E.2d 285, 288 (1949). Additionally, a case is not

speculative if the circumstances would “lead an unprejudiced mind reasonably to infer that [an injury] was caused by [an] accident.” *Ferguson v. State Highway Dep’t*, 179 S.C. 520, 15 S.E.2d 775, 777 (1941). Medical opinions are not an exact science, making them—admissible evidence, not improper speculation—even when they are not indisputable. *See Holly v. Spartan Grain & Mill Co.*, 201 S.C. 183, 187, 42 S.E.2d 59, 61 (1947) (noting a doctor’s testimony, like “any medical testimony is partly conjecture.”); *see also McCarty v. Kendall Co.*, 238 S.C. 493, 120 S.E.2d 860 (1961). The Appellate Panel refused to treat circumstantial evidence and equivocal medical opinions as evidence. Instead, the Appellate Panel improperly dismissed the circumstantial evidence as “speculative” or categorizing it as “no evidence.” (Op. p. 9). The Appellate Panel’s refusal to consider circumstantial evidence as evidence in the case is an error of law, and reversal of the award is required. S.C. Code Ann. 1-23-380(5)(d) (Supp. 2017).

The Panel’s order demonstrates several examples of the failure to weigh all relevant circumstantial evidence. The Panel held that there was “no competent evidence” any smoke exposure injured Causey’s lungs, that there could be no award “[w]ithout actual evidence” Causey injured his lungs, and that the evidence supporting causation was “nothing but impermissible surmise, conjecture, or speculation.” (R. 29-30, 33). Here the Panel demonstrates that they weighed *no* circumstantial evidence that Causey injured his lungs, despite considerable evidence to the contrary.⁸

Additionally, the Panel improperly disregarded the opinions of Dr. Pastis, one of Causey’s treating physicians, and Dr. Collins, both of whom stated their opinions to a reasonable

8. *See E.g.*, R. 118:12-19 (Donna Causey testifying that Timothy’s symptoms appeared the first night he returned from the fire, the next morning blowing his nose and discovering black discharge); R. 471:4-7 (Dr. Strange testifying that he understood the impression from the McLeod physicians that Causey was being treated for smoke inhalation, an injury to his lungs).

degree of medical certainty and supported compensability. The Panel viewed these opinions as having no weight because they were “speculation.” (R. 33). The Supreme Court has noted that the Commission has a duty in this sort of case to weigh the circumstantial evidence in light of the medical possibilities. *Grice v. Dickerson, Inc.*, 241 S.C. 225, 229-230, 127 S.E.2d 722, 725 (1962). The Appellate Panel would have been well within its power to believe a different physician’s opinion or to believe other evidence over opinions supporting compensability, but the Panel did not have the power to dismiss relevant medical opinions as speculation. This is an error of law and the Court correctly reversed the Appellate Panel and reinstated the Hearing Commissioner’s Decision and Order.

B. The Appellate Panel’s decision misstates material key facts and incorrectly describes medical testimony.

The Appellate Panel’s decision is based on a fundamental mischaracterization of material facts in this case. The Court of Appeals was “convince[ed]” after reviewing the record as a whole “that substantial evidence does not support the Appellate Panel’s findings, most notably, its statement that ‘[n]o opinion of any doctor who actually treated Causey supports a finding that Causey sustained any injury due to his alleged smoke exposure.’” (Op. 7). The Court of Appeals acknowledges that the Appellate Panel’s prior finding and their finding that “four of Causey’s treating physicians ‘agreed that smoke exposure played **no role** in Causey’s death’ mischaracterized Dr. Charlton Strange’s testimony.” *Id.* at 2 (emphasis in original). Dr. Strange, one of Causey’s treating physicians, when asked by Respondents’ counsel if he could say to a reasonable degree of medical certainty that smoke inhalation played a role in Causey acquiring H1N1, responded that “I don’t know how to answer [that question] except to say that there is a possibility but not rising to the level of medical probability that the smoke inhalation contributed in a meaningful way to [Causey’s] ultimate outcome.” (R. 478:7-14). Dr. Strange saying that

there is a medical possibility that smoke inhalation contributed in a meaningful way to Causey's death is a far cry from the assertion that Dr. Strange testified smoke exposure played no role in Causey's death. For this reason, the Appellate Panel materially misstated material medical testimony and thus committed a reversible error of law.

Further, legal reasoning built upon a false or misleading factual-foundation results in a faulty legal conclusion, and as such, is an error of law. The South Carolina Supreme Court notes that “[f]or [workers’ compensation] appellate purposes, an abuse of discretion [justifying reversal,] occurs where the ruling is based on an error of law *or, where the ruling is grounded upon factual findings, is without evidentiary support.*” *Trotter v. Trane Coil Facility*, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011) (emphasis added) (citations omitted). The Court of Appeals notes this concept almost directly, “[t]he Appellate Panel’s factual misconceptions in recounting and analyzing the medical and circumstantial evidence anchored its causation analysis, resulting in an error of law.” (Op. 7). Because the Court of Appeals views the Panel’s findings as lacking evidentiary support, the opinion commits an error of law, and the Court of Appeals is within its right to reverse the Appellate Panel’s decision. *King*, 395 S.C. at 442.

In reversing the Appellate Panel’s decision, the Court of Appeals grounded their opinion on the basis that the Appellate Panel’s decision mischaracterized facts, thus “substantial evidence does not support the Appellate Panel’s findings,” and their analysis “result[ed] in an error of law.” (Op. 7). Because it is proper for a reviewing tribunal to reverse an Appellate Panel’s decision on these grounds, the Court of Appeals did not “improperly re-weigh the evidence to reach its desired conclusion” as Respondents argue. (Resp’t Pet. Reh’g & Req. Oral Arg. at 30).

V. The Court did not err in awarding medical benefits

During the course of the hearing in front of the Hearing Commissioner, Appellant requested that the death benefit be awarded to include “payment of all medical treatment leading up to his --- from treatment to his death.” (R. 111). As part of his APA submissions, Appellant provided the Hearing Commissioner with a “Damages Listing” which itemized the medical expenses incurred during the course of hospital stay. (R. 53). Respondents did not object to this APA submission. (R. 5-6).

The Hearing Commissioner went into great detail in his Decision and Order as to how the entirety of Causey’s medical course was causally related to his work-related smoke inhalation. The Hearing Commissioner’s Order devotes more than a page to the medical conditions suffered by and causally-related to Causey’s work-related smoke inhalation. (R. 8-9). Finding of Fact 12 cites with specificity the hearing testimony of Dr. Kimberly Collins. This Finding extensively quotes Dr. Collins who testified that in her opinion as follows:

(Causey) was a healthy young man until he experienced the three days of smoke inhalation, and that lead to what we call an inhalation injury which led to acute lung injury. And in that process, his immune system –particularly in the lungs that help you fight off what you are breathing in, all the germs, etcetera – during this time he developed H1N1 influenza, influenza A. Secondary to developing influenza, he had secondary bacterial infections, such as Klebsiella, pseudomonas, and then those caused a pulmonary hemorrhage. So he actually dies of pulmonary hemorrhage and the bacterial infections due to the H1N1 influenza, due to smoke inhalation.

(R. 8).

As recounted in the Hearing Commissioner’s Order, Dr. Collins stated her opinion to a reasonable of medical certainty, more likely than not, that the underlying cause of death for Causey was smoke inhalation. (R. 4). The Hearing Commissioner’s Order found as fact Dr. Collins’ opinion that but for Causey having been involved in the fire and inhaling the chemicals he did over three (3) days, he would not have developed H1N1. (R. 5). The Hearing

Commissioner also found as fact Dr. Collins' opinion that the events, based on the history, scenario and chronology, follow perfectly: acute lung injury from smoke inhalation, ARDS acute respiratory distress syndrome, H1N1, then secondary bacterial infections and hemorrhage into Causey's lungs. (R. 9). This testimony can only be interpreted to mean that all of Causey's medical treatment from March 21, 2013, until his passing on May 19, 2013, was causally related to his smoke inhalation.

S.C. Code Ann. § 42-15-60 provides that "the employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief . . ." The statute goes on to state that the Commission may also order medical treatment "for an *additional* time" beyond the ten-week period" if "in the judgment of the commission [treatment] *will* tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty." (emphasis added). The "expert medical evidence stated to a reasonable degree of medical certainty" standard that Respondents rely upon is referring to prospective treatment that an injured worker may need in the future beyond the ten-week period. Causey first sustained his injury on March 16, 2013, and he died on May 19, 2013, meaning he only required medical treatment for a 9.2857-week period after the date of his injury, which is clearly and unequivocally less than ten weeks.

Additionally, S.C. Code Ann. § 42-15-60, provides that "[i]f in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission." Respondents declined to provide Appellant with any medical care related to his smoke inhalation injury despite Causey's

emergent need for treatment and the Hearing Commissioner decided, in his discretion, that the cost of those services be paid by the employer as provided for in S.C. Code Ann. § 42-15-60. (R. 9).

In their Petition, Respondents express concern that they were given no notice or opportunity to be heard concerning the payment of medical treatment which thereby allegedly violated their constitutional due process protections. (R. 31). In their initial appeal of the Hearing Commissioner, the Respondents detailed their exceptions in a Form 30 filed with the Commission. The only exception related to medical treatment is found in item 17 which states that the

single Commissioner erred as a matter of fact and as a matter of law in finding that the Claimant's estate is entitled to death benefits pursuant to the Act in the amount of \$283,190.00 and the payment of all causally related medical treatment, the error being that the overwhelming evidence in the record shows that the Claimant's death was solely caused by H1N1 swine flu.

(R. 13).

This exception concerning the order of payment of causally-related medical treatment raised no concern with respect to S.C. Code Ann. § 42-15-60 but rather with respect to whether Causey's death was causally-related. The entirety of this appeal has centered around whether the Appellate Panel erred as a matter of law in concluding that Causey did not die as a result of his work-related smoke inhalation thereby denying an award of benefits. Those benefits as prescribed in the Workers' Compensation Act include both indemnity benefits under S.C. Code Ann. § 42-9-290 and an award of causally related medical treatment as provided for in S.C. Code Ann. § 42-15-60. Both of those benefits were awarded by the Hearing Commissioner and those are the benefits referenced in Appellant's Statement of Issue on Appeal. (Appellant Br. 1).

For the reasons stated above, the Court did not err in reinstating the Hearing Commissioner's Decision and Order, specifically to include, his order that the Respondents be responsible for the payment of all casually related medical treatment.

CONCLUSION

Upon a finding that the Appellate Panel decision was legally defective and not supported by substantial evidence, the Court was correct to reverse the decision of the Appellate Panel and reinstate the Hearing Commissioner's award of benefits including medical benefits. (Op. 11-12); *See James v. Anne's Inc.*, 390 S.C. 173, 188, 192, 701 S.E.2d 730, 732 (2010) (finding an appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and the conclusions of the agency are affected by an error of law). This Court's decision is correct and it did not overlook or misapprehend any relevant facts or law in this claim. Rule 221, S.C.A.C.R. The Respondents' Petition for Rehearing and Request for Oral Argument should be denied.

Respectfully Submitted,



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Attorneys for Appellant

February 4, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1302588
Appellate Case No. 2017-001732

Timothy Causey, Appellant,

v.


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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Return to Petition for Rehearing* by email only to the following:

Roy A. Howell, III, Esq.
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February 4, 2022



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February 4, 2022

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SC Court of Appeals

VIA EMAIL ONLY - ctappfilings@sccourts.org

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Timothy Causey (dec.) v. Horry County
Appellate Case No.: 2017-001732

Dear Ms. Kitchings:

Enclosed for filing, please find a *Return to the Petition for Rehearing* in reference to this case as well as a Proof of Service for same.

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

Yours truly,



Allison P. Sullivan

APS/knr
Enclosures

cc: Roy A. Howell, III, Esq.
Kirsten L. Barr, Esq.
Francis A. Humphries, Jr., Esq.
William Henry Monckton, IV, Esq.