THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Timothy Causey,.....Appellant,

v.

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

REPLY TO RETURN TO
PETITION FOR REHEARING

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Statement in Reply

The Appellant's Return to the Petition for Rehearing is remarkable, not for what it argues, but for what it fails to address. Like the Court's Opinion, the Return fails to address fundamental issues necessary for a proper review of the Appellate Panel's final Decision and Order pursuant to the Administrative Procedures Act, including which order is actually under appellate review, the precise "legal error" ascribed, what evidence must be considered "substantial," the meaning of proximate cause, when the injury occurred, the identity of the Appellant, and even why the amount and beneficiary of the award is not only relevant, but crucial to the determination of the pre-requisite legal issues. As to the limited arguments the Appellant does raise in the Return, they bely a fundamental misunderstanding of the substantial evidence standard of review, the evidence in the record, the necessity of following the applicable law, and preserving issues for appeal.

Arguments

I. Which Order is under Appellate Review?

The Return argues that "Appellant established by the greater weight of the evidence that Causey's death was causally connected[1] to his employment" and that substantial evidence supports *the Hearing Commissioner's finding* of causation – a finding that was reversed and vacated by the Workers' Compensation Commission's Appellate Panel. The Appellant appears to operate under the mistaken belief that the substantial evidence standard of review applies to these vacated findings of the Hearing Commissioner. The Court appears to share this view by "reinstating" the Hearing Commissioner's award. However, it is the the final Decision and

[1] S.C. Code Ann. § 42-9-290 only provides benefits where "death results proximately from an accident." Therefore, proof proximate cause is required, not a mere "connection" as the Appellant and Court seem to suggest.

Order of the Commission's Appellate Panel dated July 19, 2017, that is before the Court. The Hearing Commissioner's prior Order is a nullity, and the Court has no authority to "reinstate" it.

Under § 42-17-50, the Appellate Panel's review is *de novo*. This Court has previously acknowledged that it is plain legal error for a reviewing court to "reinstate" a hearing commissioner's findings because to do so is "to determine the facts from conflicting evidence" when "[o]nly the Commission is authorized to do this." Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991). Therefore, whether or not circumstantial evidence or a cautious opinion or speculation or hearsay may have supported the Hearing Commissioner's findings is simply not relevant. *See* Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989) (holding that the Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the hearing commissioner's findings). Because there appears to be misapprehension as to which order is under review, the Respondents respectfully request rehearing.

II. What is the legal error?

The Appellant's Return identifies no legal error committed by the Workers' Compensation Commission's Appellate Panel, but merely endorses the *de novo* review of the evidence -- cast in the light most favorable to his claim -- by the Court of Appeals.[2] The Court similarly identified no error of law in the Appellate Panel's final Decision and Order denying the claim for benefits. The Court's unpublished Opinion does not cite a single statute or regulation, nor does it contain any legal analysis of the seminal issue of proximate cause of death, yet the Court opines that its reversal of the Appellate Panel was for "an error of law." Though unclear, the Court seems to

[2] The Return describes the "error of law" as "misconceptions in recounting and analyzing the medical and circumstantial evidence."

suggest that this "error of law" is the Appellate Panel's decision to give greater weight to the opinions of seven medical experts[3], all of which are stated to a "reasonable degree of medical certainty, than to circumstantial evidence, inadmissible hearsay, and unfounded hypothetical opinions of two other doctors, and a coroner whose opinion was found by the Appellate Panel to carry "no weight" because it was based on "social media" and "TV." (R.p.22, p.588). There is no legal requirement that a reviewing court agree with the Appellate Panel's determination of witness credibility or the weight or sufficiency of evidence. Indeed, nearly a century of jurisprudence requires that the "final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel."[4] Moreover, the Appellate Panel explained in detail the basis for weighing the evidence, both expert and circumstantial, as it did. *Accord* Clark v. Philips Electronics/Shakespeare, 429 S.C. 636, 643, 842 S.E.2d 349, 352 (2020)

The Court's reliance on Mullinax v Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) in an effort to find some "error of law" is likewise misplaced. In *Mullinax*, the

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[3] The Appellant Panel did not "disregard" any evidence, circumstantial or otherwise, as the Court and the Appellant suggests. Indeed, one need look no further than the text of the Appellate Panel's Order to see that all evidence was weighed and considered, including the lay testimony (R. p.16) and the opinions of Dr. Collins (R.pp.25—26), Dr. Pastis (R.pp.27-29), and Mr. Edge (R.pp.21—23), which were all weighed and considered at length in the Appellate Panel's Order. The Appellate Panel simply determined that they were entitled to less weight than the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn, which was within their exclusive province and discretion. *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").

[4] Barr v. Darlington Co. Sch. Dist., Opinion No. 2018-001237, 2021 WL 3779508 (S.C. Ct. App. Aug. 25, 2021); Jake v. Jones, 240 S.C. 574, 126 S.E.2d 721 (1962) (holding that "in reviewing the acts we do not weigh the testimony."); Hamilton v. Little, 197 S.C. 434, 15 S.E2d 662 (1941) (holding that "[i]t is the duty and power of the appellate Courts to study the testimony to determine whether there is any evidence to support the findings of the fact finding body (the Industrial Commission), but an interpretation or construction thereof adverse to that found by the commission, when the evidence is susceptible of more than one inference or meaning, is an invasion of the province of the commission.").

Court concluded that the Commission "committed legal error when it based its decision solely on the *lack of a medical opinion*," because

> "[t*]he only evidence* in the record shows that Mullinax's incontinence was caused or aggravated by either the injury or its treatment. Therefore, the incontinence is related to the accident as a matter of law." (emphasis added).

This Court has since explained that only when

> "*no evidence* supports the Commission's conclusion, the rule articulated in Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995), governs: "Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission." Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999) (emphasis added).

Respectfully, no reasonable person could legitimately claim that "no evidence" supports the Appellate Panel's conclusions, or that "the only evidence" supports a finding of causation, or that the evidence "is susceptible of but one reasonable inference," such that the factual issue on appeal would be reduced to a question of law for the Court. No reasonable person could review the opinions and testimony of Dr. Strange[5], Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn and conclude that there was a "lack of a medical opinion"

[5] The Court suggests that the Appellate Panel "mischaracterized" the testimony of Dr. Strange by stating that he testified that smoke exposure played no role in Causey's death. Dr. Strange's exact testimony was, "I don't believe that smoke inhalation contributed to the death." (R. p.484, ll.19—20). Therefore, because the words "contribute" and "play a role" have identical meanings in common parlance, the Respondents respectfully contend that the Appellate Panel did not mischaracterize Dr. Strange's testimony.

to support the Appellate Panel's findings. Indeed, not only do the Court[6] and the Appellant[7] admit that there is conflicting evidence in the Record on the issue of causation, but the Appellate Panel clearly relied upon the medical opinions of seven experts – quoted verbatim --who affirmatively opined to a reasonable degree of medical certainty that Causey's death was not caused by his employment, as alleged.[8] Therefore, the issue of causation is not a question of law for the court, but a question of substantial evidence that is easily answered and requires reconsideration, as set forth more fully below.[9]

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[6] The Court's opinion states,

> "Appellant concedes, as she must, that the various doctors – the treating physicians and the Respondents' medical expert witnesses – gave different and, at times, contradictory, opinions regarding the severity of H1N1 in an otherwise healthy individual and the problems a smoke inhalation injury could cause…"

[7] The Appellant's Brief to the Court of Appeals, reads at page 5:

> "Other doctors held different opinions [from Dr. Collins]…Respondents also hired experts, each of which [sic] said smoke exposure had no role in [Causey's] death."

The Appellant further concedes, at page 7:

> "It would be dishonest to pretend Respondents' evidence does not exist."

[8] The Court asserts that "the Appellate Panel did not lack a causation opinion. Despite this, it reached its own proximate cause conclusion…" This is a curious statement, not simply because only the Appellate Panel could actually reach a conclusion as to "proximate cause" after weighing all of the evidence, but also because the mere fact that an opinion in favor of causation exists in some form does not end the inquiry. Again, Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn all gave "a causation opinion," they simply were not favorable to the Appellant.

[9] In Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E.646 (1938), the Supreme Court explained that where a lower appellate judge made

> "himself a participant with the Commission in determining whether the conclusions of the Commission have adequate support in the evidence … This is just what he is forbidden to do. If there were absolutely no evidence in support of the findings of fact by the Commission, we might say that the question thus becomes a question of law. But whether there is a sufficiency of evidence is strictly a matter of fact, and the findings of the Commissioner thereabout are final."

See also, Scott v. Havnear Motor Co., 226 S. 580, 86 S.E.2d 475 (1955) (holding that "where conflicts in the expert testimony are found … [i] is the prerogative of the commission, not the court, to weigh and consider such testimony.").

In addition, there is no basis for the Court's suggestion, or the Appellant's accusation, that the Appellate Panel did not consider circumstantial evidence or even opinions based on unfounded hypotheticals – the Appellate Panel simply accorded it less weight than other evidence it found more compelling. For example, the Appellate Panel clearly considered and weighed the testimony of Dr. Collins, the pathologist hired by the Appellant who based her opinions on circumstantial evidence and assumptions. The Appellate Panel described her testimony as "medical evidence that could conceivably support a claim for benefits." The Appellate Panel also explained why Dr. Collins's testimony was given less weight than the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn, including the fact that she is not a pulmonologist, and she did not treat Causey. More importantly, Dr. Collins admitted that her opinions are based upon the assumption that smoke exposure "lead to acute lung injury" (R. p.170), despite her subsequent admission that not all smoke exposure causes lung injury (R. p.185). When questioned as to the basis for presuming the existence of some "lung injury" in this case, Dr. Collins testified, "we don't have any medical records documenting" damage to the respiratory system, "[w]e just know he inhaled the smoke." (R. 623). Given the abundance of expert opinions that Causey did not have a

smoke-induced lung injury, including Dr. Strange[10], Dr. Whelan[11], Dr. Ford[12], Dr. Mitchell[13], Dr. Cauthen[14], and Dr. Sporn,[15] and even Dr. Pastis;[16] the Appellate Panel properly determined that

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[10] Dr. Strange testified, "I don't believe that the smoke inhalation contributed to his death," based on the timing and sequence of events. (R. p.484, ll.19—20). Dr. Strange's testimony; therefore, does not support Dr. Collins's assumption that there was any lung injury as a result of smoke exposure.

[11] Dr. Whelan testified, "I don't believe that Mr. Causey had a significant smoke inhalation…" (R. p.504, ll.15-16). Dr. Whelan further described that the type of smoke inhalation that causes lung injury as "massive … like a fireman who is in the building … They get thermal injuries to their nares [nostrils], their posterior pharynx … there was no mention of that in the chart, that there was any thermal injury." (R. p.504, ll.10—20). There being no evidence that Causey had a "massive" exposure to smoke and no evidence of a thermal injury to his nose or mouth, Dr. Whelan's testimony does not support Dr. Collins's assumption that there was any lung injury as a result of smoke exposure.

[12] Dr. Ford testified,

> "[w]e don't know" if Causey suffered a smoke inhalation injury, there is no way to establish such an injury to a reasonable degree of medical certainty, and that such injury could not even be inferred or assumed without (1) evidence of a "substantial and extensive onsite exposure to smoke. By which I mean, firefighters, who go into burning buildings. Something very profound" and (2) "external signs of smoke injury to the nose, to the eyes, to the hair." (R. p.566, 568--569).

However, Dr. Ford did not find "anything that indicates any sort of thermal injury or any significant injury to the lungs from smoke inhalation." (R. p.571, ll.19—24). Therefore, Dr. Ford's testimony does not support Dr. Collins's assumption that there was any lung injury as a result of smoke exposure.

[13] Dr. Mitchell's opinions do not support Dr. Collins's assumption that there was any lung injury as a result of smoke exposure. In fact, Dr. Mitchell addressed Dr. Collins's assumption regarding the existence of a smoke inhalation injury and stated that such injuries

> "are immediately obvious to all parties and result in the immediate need of medical attention. Mr. Causey did not seek medical attention until 3/21/13 (5 days after his initial exposure to smoke from the perimeter of a fire that we was not directly involved in fighting) …The type of injury Dr. Collins described with smoke inhalation could not have occurred to Mr. Causey given his remote location from the fire and his clinical course (i.e. significant smoke inhalation can cause thermal burns that require immediate attention, however, this type of injury leads to obvious physical signs that were not noted on Mr. Causey and Mr. Causey would have sought medical attention before 3/21/13)…His exposure to smoke from a distant fire probably had no effect on his clinical course." (R. p.219).

[14] Dr. Cauthen opined, "there is no evidence to support that Mr. Causey himself had any significant smoke inhalation that would cause a major degree of thermal injury to support a potential disruption of normal host immune defense mechanisms … the sole cause of death [is] ARDS secondary to H1N1 influenza…" (R. p. 447). *See also*, R. pp.448—449). Therefore, Dr.

Dr. Collins's opinion was based on more than circumstantial evidence, she had engaged in speculation by assuming the existence of a lung injury without adequate basis. The Appellate Panel also noted that Dr. Collins's testimony on the ultimate question – whether the proximate cause of Causey's death was smoke exposure – did not support an affirmative finding under S.C. Code Ann. § 42-9-290, as Dr. Collins agreed with the majority of experts that the proximate cause of Causey's death was complications of H1N1 Swine Flu. (R. p.26, citing pp.635-636, p.179).

Similarly, the Appellate Panel did not "disregard" the opinions of Dr. Pastis, but carefully considered them. The Appellate Panel did not discount Dr. Pastis's opinion because it was based on circumstantial evidence. In fact, to some degree, all of the experts' opinions were based upon circumstantial evidence that Causey was exposed to smoke while policing the perimeter of a fire. Instead, as explained in the Appellate Panel's Order, Dr. Pastis's opinion regarding the

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Cauthen's opinions do not support Dr. Collins's assumption that there was any lung injury as a result of smoke exposure.

[15] Dr. Sporn's opinions do not support Dr. Collins's assumption that there was a lung injury as a result of smoke exposure. Dr. Sporn opined that "at no time was Mr. Causey under treatment for smoke inhalation or thermal injury to the airway, nor do medical reports detaining his examinations indicate findings of peripheral stigmata to permit such a diagnosis." (R. p.452). In fact, Dr. Sporn specifically called Dr. Collins's opinion "unreliable":

> "Her opinion that smoke inhalation resulted in the development of a local immunodeficiency state in Mr. Causey's lungs that rendered him 'defenseless,' facilitated or otherwise contributed to the development of H1N1 infection is speculative and lacks foundation. There is no medical evidence that Causey had sustained significant smoke inhalation …" (R. p.452).

Dr. Sporn further explained that no even circumstantial evidence supports Dr. Collins's assumption.

[16] Dr. Pastis's testimony's is as follows:

> Q. Do you have evidence that he had a burn injury to the airways in this case?
> A. That I don't. I don't have a picture of the airways.
> Q. So in this case, you're speculating that he had a burn injury to the airway.
> A. Correct." (R. p.538, ll.6-12).

Therefore, Dr. Pastis's testimony does not support Dr. Collin's assumption that there was any lung injury as a result of smoke exposure.

proximate cause of Causey's death was based on an unproven hypothetical (*a.k.a.* speculation) and; therefore, it was accorded less weight than the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn. Importantly, it was Dr. Pastis, himself, who admitted that his ultimate opinion was based on "speculation" --

> *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. p. 537, l.10—p.538, l.24) (emphasis added).

Until now, it was well-settled, not only that awards of compensation cannot be based on speculation, but that "the probative value of expert testimony based upon hypothetical facts stands or falls with the existence of the facts upon which it is predicated."[17] Based upon this well-settled law, it was well-within the Appellate Panel's discretionary authority to determine

[17] Smith v. Southern Builders, 202 S.C 88, 24 S.E.2d 109 (1943); *see also* Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949) (holding that "medical evidence based on hypothetical questions has no value beyond the extent it is predicated upon facts actually proven in the record.").

that testimony of Dr. Pastis (and Dr. Collins) on the issue of the proximate cause of Causey's death was of less probative value than the opinions of Dr. Strange, Dr. Whelan, Dr. Largen, Dr. Ford, Dr. Mitchell, Dr. Galphin, Dr. Cauthen, and Dr. Sporn because their opinions are based on a hypothetical fact (*i.e.*, a burn injury to the airway) that is admittedly supported by nothing more than speculation.

If the Court remains of the opinion that the Appellate Panel erred as a matter of law in its treatment of this conflicting evidence, whether direct or circumstantial, then it is incumbent upon the Court to remand the claim to the Appellate Panel to reconsider all of the evidence consistent with the Court's ruling as to the law. Instead, the existing Opinion misapprehends the Court's authority and the fact that "only the Commission is authorized to pass upon the weight of the evidence in a workers' compensation case."[18] The Respondents respectfully contend that this misapprehension and the failure to identify any legal error necessitates reconsideration.

III. What evidence is substantial on the issue of proximate cause?

S.C. Code Ann. § 42-9-290 specifically requires proof that "the death results proximately from an accident." The Appellant's Return mistakenly suggests "proximate," as used in S.C. Code Ann. § 42-9-290, doesn't really mean "proximate" as it has been defined in South Carolina jurisprudence, citing cases involving the application of S.C. Code Ann § 42-1-60, a statute which does not even contain the term "proximate." However, "the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation." Municipal Assn of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). Furthermore, because the

[18] *See* Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d. 646 (1967).

Workers' Compensation Act is a statute in derogation of common law, the Court must "strictly construe its terms." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). Therefore, the Appellant's argument that it is entitled to benefits even without proof of actual "proximate cause" as expressly required by S.C. Code Ann. § 42-9-290 – an argument seemingly endorsed by the Court's Order – is without merit.

In addition, the Appellant's claim (and the Court's finding) that substantial evidence[19] supports a finding of proximate cause misses the mark and misapprehends the object of the substantial evidence inquiry under the Administrative Procedures Act. The question is not whether evidence favorable to the Appellant is "substantial," the question is whether the evidence upon which the Appellate Panel relied can be considered as such.[20] Respectfully, the evidence relied upon by the Appellate Panel in this regard is unequivocal and overwhelming.

Even Dr. Collins testified at the hearing that the "proximate cause" of death was complications of H1N1:

> "Q. He would not have died but for the fact that he had H1N1, correct?"
>
> A. Correct." (R. p.179, l.24 – p.180, l.1).

Dr. Collins also testified at her deposition regarding the "proximate" cause of death:

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[19] The Court and the Appellant appear to rely on evidence that smoke inhalation was a "secondary" or "underlying" cause. However, "proximate" does not mean "secondary" or "underlying," it means "direct" and "immediate." *See* McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct.App.1998) (holding "[p]roximate cause is the efficient or direct cause of an injury"); State v. Clary, 222 S.C. 549, 551, 73 S.E.2d 681, 682 (1952) (approving a jury instruction saying proximate cause "is the immediate cause").

[20] *See* Willard v. Commissioners of Public Works of City of Spartanburg, 219 S.C. 477, 65 S.E.2d 874 (1951) (holding that it "is well settled that findings of fact of by the Industrial Commission are conclusive and binding upon both the court of common pleas and the Supreme Court, if there is any competent evidence reasonably tending to support them, even though there is evidence that would have supported a finding to the contrary.").

"[t]hat is why he died on that day, was because of the complications of H1N1." (R. p.635--636).

Therefore, the testimony of Dr. Collins does not support a finding that the proximate cause of death was exposure to smoke.

In addition, the treating pulmonologist, Dr. Strange, testified

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

***

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

This testimony constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Dr. Ford testified,

"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).

This testimony constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Dr. Whelan opined,

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

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> 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).

This testimony constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Dr. Largen, agreed that

> "exposure to smoke was not a contributing factor in Mr. Causey's death … the ultimate cause of Mr. Causey's death was complications of Acute Respiratory Distress Syndrome secondary to H1N1 swine flu." (R. p.450).

This opinion constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Dr. Mitchell, also 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).

This opinion constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Pulmonologist Dr. Galphin likewise 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).

This opinion constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Dr. Cauthen, yet another pulmonologist, stated,

> "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).

This opinion constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

Additionally, Dr. Sporn, Chief of Pulmonary and Thoracic Pathology at Duke University Medical Center, opined that

> "Severe H1N1 infection is solely responsible for Mr. Causey's death." (R. p.452).

This opinion constitutes substantial evidence in support of the Appellate Panel's finding that alleged smoke exposure was not the proximate cause of death.

The Court is not at liberty to simply ignore or re-weigh these opinions based on the Court's own opinion of them, because

> "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."

Bannister v. Shepherd et al, 191 S.C. 165, 169, 4 S.E.2d 7 (1939). In addition, even the possibility that a different inference could have been drawn from the evidence does not prevent the Appellate Panel's finding from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996).

Therefore, the Court is not at liberty to give greater weight to evidence properly discounted by the Commission, including hearsay evidence the Appellate Panel specifically

ordered stricken from record.[21] Moreover, the Court's opinion as to the weight or sufficiency of opinions offered by Dr. Collins, Dr. Pastis, and Mr. Edge, is of no consequence.[22] In fact, the burden was upon the Appellant to prove his claim "to the satisfaction of the commission, not this court."[23] In addition, the Appellate Panel's basis for discounting the opinions of Dr. Collins, Dr. Pastis, and Mr. Edge was well-founded. The Court simply has no authority to give the opinions of Dr. Collins or Dr. Pastis, much less hearsay, more weight than the medical experts upon whom the Appellate Panel relied.[24] Therefore, it appears that the Court misapprehends the substantial evidence in the record supportive of the Appellate Panel's decision and instead focuses on whether there was evidence to support the vacated order of the Hearing Commissioner. Respectfully, this warrants reconsideration.

IV. When was the injury?

The Petition for Rehearing begs the question, when did the alleged injury occur? Was it a single event on a single date, or was it gradual in onset over a period of time? The Appellant's Return, like the Court's Order (and that of the Hearing Commissioner), simply ignores this basic question, revealing a fundamental flaw in the Court's analysis and award of benefits. The

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[21] The Appellate Panel concluded that "the Hearing Commissioner's decision to admit hearsay evidence is reversed and the testimony is hereby stricken from the record." (R. p.33). Both the Appellant and the Court inexplicably rely (and repeatedly quote) this evidence, which was "stricken from the record." The Court's opinion fails to explain the basis for the implied reversal of the Appellate Panel's ruling in this regard, or the legal basis for so doing.

[22] Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E. (2d) 845 (1967) (holding the credibility and weight of the doctor's testimony is for the trier of fact)

[23] Frady v. Pacific Mills, 231 S.C. 601, 99 S.E.2d 398 (1957); *see also* Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995) (rejecting the argument that the Commission erred in giving too much weight to the medical testimony to a doctor who did not treat the employee because "[t]he credibility and weight of the doctor's testimony is for the trier of fact.").

[24] Lark v BiLo, 276 S.C. 130, 276 S.E.2d 304 (1981) (holding that "the substantial evidence test 'need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.'" (internal citations omitted).

Appellant's Form 58, Pre-Hearing Brief, alleges the injury occurred over the course of three days, March 16, March 17, and March 18, 2013.[25] The Appellant's Brief to the Court of Appeals similarly alleges that the injury was gradual in onset and that over the course of three days, "things got worse after each of [Causey's] shifts." (Brief pp.1—2). However, S.C. Code Ann. § 42-1-60(F). specifically excludes from the definition of "accident" any series of events over an extended period of time. Instead, any injury that is "gradual in onset" must meet the requirements of the S.C. Code Ann. § 42-1-172, the repetitive trauma statute, which has a heightened burden of proof.[26]

The Appellant now argues that it "never filed a repetitive trauma claim," making clear that it is not entitled to benefits under S.C. Code Ann. § 42-1-172. However, the Appellant fails to address why it is not bound by its previous pleadings claiming the injury was gradual in onset over the period of three days and why it is not bound by the requirements of S.C. Code Ann. § 42-9-160(F). Neither the Hearing Commissioner[27], nor the Court, explain this either, both

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[25] "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

[26] Note that the Hearsay testimony stricken from the Record by the Appellate Panel is inadmissible under S.C. Code Ann. § 42-1-172 – not only because the alleged declarant is unidentified – but because the alleged statement of opinion was not "to a reasonable degree of medical certainty." *See* Michau v. Georgetown County, 369 S.C. 589, 723 S.E.2d 805 (2012) . The same is true under S.C. Code Ann. § 42-1-160(E), but given the fact that the Court has failed to elucidate why it readmitted hearsay testimony, it is unclear whether these statutes or governing case law were considered.

[27] The Appellant's Return now argues that the Hearing 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." (Return p. 10). First, whether the injury is "singular" is not at all dispositive of the issue, as the text of the repetitive trauma statute, S.C.

having wholly failed to address the statutory requirements or even mention S.C. Code Ann. § 42-1-160 in their orders. Respectfully, the law is clear: any alleged lung injury occurring over the course of three days cannot be considered an injury by accident under S.C. Code Ann. §42-1-160(F) as a matter of law. Therefore, the Respondents request rehearing based on the apparent misapprehension of the facts to which the Appellant is judicially bound and the application of the law thereto.

V. Who is the Appellant?

The Petition for Rehearing argues that "it is wholly unclear whether a real party in interest exists in this case." The Return fails to address this issue. Instead, the Return alleges that Causey was survived by a wife and introduces the Court to two purported daughters, neither of whom have ever filed a claim under the Workers' Compensation Act.[28] Clearly, these daughters are not parties, having made no appearance by Guardian *ad Litem*[29], attorney, or otherwise at any stage of the proceedings. On information and belief, at least one of these daughters was 21 years old at the time of Causey's death. Pursuant to S.C. Code Ann. § 42-9-290, a surviving spouse, minor child, and adult child do not have equal rights under the Workers' Compensation Act.

Code Ann. § 42-1-172, itself speaks in terms of "an injury," making it necessarily applicable to "singular" injuries. The Appellant's facile argument also conveniently ignores the fact that the Appellant did not allege a "singular event" in its pleadings and S.C. Code Ann. § 42-1-160 is not mentioned anywhere in the Hearing Commissioner's Order, which was vacated as a result. Respectfully, at this stage in the litigation we should not be forced to guess about the existence of material facts pertaining to seminal legal issues.

[28] "The right to compensation under [Title 42] is barred unless a claim is filed with the commission within … two years of the date of death." S.C. Code Ann. § 42-15-40. *See also*, Steele v. Self Serve, Inc., 335 S.C 323, 516 S.E.2d 674 (Ct. App. 1999).

[29] 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).

More importantly, as explained by the Appellate Panel, there has been "no statutory determination of Causey's dependents" and "the proper 'dependents' entitled to benefits cannot be determined without a full hearing on the issue of dependency, with specific documentation[30]," 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). Therefore, it is clear that the Court's assumption that this appeal was brought by the "statutory dependents" is unfounded, as a class of persons with disparate interests that have yet to be determined -- some of whom have filed no claim and made no appearance -- cannot be considered the real party in interest.

The Petition for Rehearing also raises the fact that the Appellate Panel conclusively determined that "there is no statutory authority for an award of any workers' compensation benefits to an 'estate.'" (R. pp.35--36) This is the law of the case, as the issue is not even mentioned the Appellant's Brief to the Court of Appeals.[31] The Return to the Petition for Rehearing likewise fails to address this seminal issue. Therefore, it is equally clear that Causey's "estate," assuming it exists[32], is not the real party in interest, as an "estate" has no rights under the Workers' Compensation Act – by the Appellant's own admission -- and *ipso facto* has no "substantial rights" amenable to review pursuant to S.C. Code Ann. § 1-23-380 or Rule 201(b), S.C.A.C.R. (R. p.95).

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[30] 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).

[31] *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.").

[32] No probate documents have ever been submitted into evidence in this claim.

The Respondents respectfully contend that the failure to properly identify the "Appellant" herein, or even a real party in interest, constitutes a fundamental misunderstanding of the laws which govern an award of workers' compensation benefits upon the death of an employee and the foundations upon which the Workers' Compensation Commission's Appellate Panel denied and dismissed the claim for such benefits. As such, the Court should reconsider its reversal of the binding conclusions of the Appellate Panel.

VI. What is the award?

The Order of the Court of Appeals states,

> "we reverse the decision of the Appellate Panel and reinstate the Single Commissioner's award of benefits."

The "Single" or "Hearing" Commissioner's award reads,

> "Claimant's estate is entitled to death benefits pursuant to the Act in the amount of $283,190.00 (claimant's compensation rate of $566.38 x 500 weeks)..." (R. p.9).

This award was properly reversed by the Appellate Panel because the claim does not meet the requirements of S.C. Code Ann. § 42-1-60 or § 42-9-260 and because

> "there is no statutory authority for an award of any workers' compensation benefits to an 'estate" ...In addition, both the applicable statutory and regulatory authority requires that all lump sum payments in excess of 10 weeks." (R. p.35) (citing S.C. Code Ann. §§ 42-9-110, 42-9-120, 42-9-130, 42-9-140, 42-9-290, 42-9-320, 42-9-301, and S.C. Code Reg. 67-602(B), Reg. 67-902, Reg. 67-1605, and Reg. 67-1606).

The Court fails to even acknowledge this unappealed legal conclusion in its Opinion, much less explain the legal basis for reversing it, especially considered the issue was not preserved for appeal.[33]

The Appellant's Return is likewise silent on these issues and otherwise fails to explain how it is not bound by the previous admission 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…" (R. p.95).

Instead, a strange new argument is presented by the Appellant's Return to Petition for Rehearing: "questions of dependency and commutation are not relevant." The Return does not explain how the amount or beneficiary of the Court's award is not relevant to the appeal, but suggests that in the future there could be "a dependency investigation" and determination of "what portion of the non-spousal half of benefits each child would be entitled to" and a further determination (presumably by the Workers' Compensation Commission) of "the commutable value of the future installments" under S.C. Code § 42-9-301 and S.C. Code Reg. 67-1605. Therefore, it appears that even the Appellant acknowledges that the Court's award is affected by plain error, but the concomitant contention that the Court's award could be modified in the future to comply with the actual law or accommodate future claimants is without merit.

What the Appellant fails to recognize is that any future claim by a statutory dependent would be time-barred under S.C. Code Ann. § 42-15-40 and any dependent who timely filed a

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[33] This issue is not even mentioned the Appellant's Brief to the Court of Appeals. *See* Rule 208(b)(1)(B), S.C.A.C.R., and Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970), *supra*.

claim could only be awarded their pro-rata share of benefits under S.C. Code Ann. § 42-9-290.[34] Furthermore, despite the Appellant's vague suggestions about modifying the Court's award in the future, the Court's award to the "Claimant's estate" could be enforced by the "Claimant's estate" upon conclusion of this appeal by reducing it to judgment (S.C. Code Ann. §42-17-70) and the probate of such an award is not only subject to creditor claims, but provides no guarantee that benefits would be allocated to the purported dependents as contemplated by the Workers' Compensation Act. Certainly, the Workers' Compensation Commission would be precluded from altering the amount the Court's award of a certain sum, awarding benefits to any party other than the estate, or otherwise altering the terms of the Court's Order under the doctrine of *Res Judicata* and the Respondents could not simply ignore a judgment in favor of the "Claimant's estate."[35] Respectfully, the Court appears to have misapprehended the terms of its own award and the basis upon which it was vacated by the Appellate Panel, which alone merits reconsideration.

Conclusion

The Respondents, Horry County and the South Carolina Counties Workers' Compensation Trust, respectfully contend that the final Decision and Order of the South Carolina Workers' Compensation Commission is 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

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[34] *See* Steele v. Self Serve, Inc., 335 S.C 323, 516 S.E.2d 674 (Ct. App. 1999) (holding that a minor child was only entitled to one-third of the maximum death benefits despite the fact that the claims of the surviving spouse and another minor child were barred by the statute of limitations).

[35] The Respondents take no position on the right of actual dependents, should they be determined by the Commission in the future, to collaterally attack the Court's award in the future.

issue a new order affirming the Appellate Panel in accordance with the Administrative Procedures Act and Lark v. BiLo, wherein the Supreme Court explained that the substantial evidence rule allows a reviewing court to reverse the Commission "only in those cases where a manifest or gross error of law has been committed … the substantial evidence test 'need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.'" 276 S.C. 130, 276 S.E.2d 304 (1981) (internal citations omitted).

Respectfully submitted,

February 11, 2022

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1165\1167\Reply to Return to Petition for Rehearing

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Timothy Causey,.....Appellant,

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant, Timothy Causey, was served with the Reply to Return Petition for Rehearing this 11th day of February 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:

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February 11, 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 Reply to Return Petition for Rehearing 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.

Yours very truly,

Kirsten L. Barr

KLB/mec/les
Enc.
cc: Janet Cook, SC Association of Counties (w/enc.) (email only)
Allison Mackey, Horry County (w/enc.) (email only)
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