

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

Kenneth E. Goode, Circuit Court Judge

JUN 03 2013

S.C. SUPREME COURT

S.C. Supreme Court

Trial Court Case No. 2006-CP-29-955

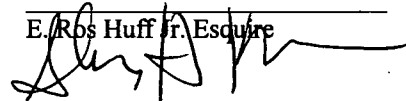
FRANCES S. HUDSON, DECEASED EMPLOYEE, BY KENNETH L. HUDSON AND KEITH B. HUDSON,
CO-EXECUTORS OF HER ESTATE, AS WELL AS MATTHEW DEESE AND OR ANDREW DEESE, OF
WHOM KENNETH L. HUDSON AND KEITH B. HUDSON ARE
PETITIONERS/RESPONDENTS,

v.

LANCASTER CONVALESCENT CENTER, EMPLOYER, AND LEGION INSURANCE COMPANY IN
LIQUIDATION THROUGH S.C. PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION
CARRIER,
RESPONDENTS/PETITIONERS.

Respondent Lancaster Convalescent Center's Reply Brief

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INDEX

Table of Authorities.....	Pg. 2
Questions Presented.....	3
Statement of the Case.....	4
Arguments	
Argument I.....	7
Argument	
II.....	9
Argument III.....	10
Argument IV.....	15
Conclusion	17

TABLE OF AUTHORITIES

Statutes

S.C. Code Ann. § 1-23-380 (1976, as amended).....	4
S.C. Code Ann. § 42-1-70 (1976, as amended).....	17
S.C. Code Ann. § 42-3-180 (1976, as amended).....	5, 7,8,15
S.C. Code Ann. § 42-9-280 (1976, as amended).....	3,5,8,10,11,12,13,14,15,16
S.C. Code Ann. § 42-9-10 (1976, as amended).....	4,7,11,12,13,14
S.C. Code Ann. § 42-9-30 (1976, as amended).....	12,14
S.C. Code Ann. § 42-9-110 (1976, as amended).....	16
S.C. Code Ann. § 42-9-120 (1976, as amended).....	15,16
S.C. Code Ann. § 42-9-290 (1976, as amended).....	16
S.C. Code Ann. § 42-9-301 (1976, as amended).....	4
S.C. Code Ann. § 42-17-40 (1976, as amended).....	5
S.C. Code Ann. § 42-17-50 (1976, as amended).....	10
S.C. Code Ann. § 42-17-60 (1976, as amended).....	4
N.C. Gen. Stat. § 97-37 (2011).....	11

Cases

<i>Cox v. Lunsford</i> , 272 S.C. 527, 252 S.E.2d 918 (S.C. 1979).....	8
<i>Estate of Covington by Montgomery v. AT&T Nassau Metals Corporation</i> , 405 S.E.2d 393, 394 (1991).....	6,11
<i>Ferguson v. Charleston Lincoln Mercury, Inc.</i> , 344 S.C. 502 544 S.E.2d 285, (S.C. Ct. App. 2001).....	10
<i>Green v. City of Columbia</i> , 311 S.C. 78, 427 S.E. 2d 685 (SC App. 1993).....	4,12
<i>Ham v. Mullins Lumber Co.</i> , 193 S.C. 66, 7 S.E.2d 712 (1940).....	13
<i>In re McCracken</i> , 346 S.C. 87, 551 S.E.2d 235 (2001).....	9
<i>Hitter v. McLeod</i> , 274 S.C. 616, 266 S.E.2d 418 (1980).....	10
<i>Kennedy v. South Carolina Retirement systems</i> , 349 S.C. 531, 564 S.E.2d 322 (2001).....	9
<i>Nash v. Tindall Corp.</i> , 375 S.C. 36 (Ct. App. 2007).....	8
<i>Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.</i> , 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983).....	10
<i>Stone v. Roadway Express</i> , 367 S.C.575, 627 S.E.2d 695 (2006).....	9,13,14
<i>Reed v. Medlin</i> , 284 S.C. 585, 328 S.E.2d 115 (S.C. Ct. App. 1985).....	13
<i>Washington v. Whitaker</i> , 317 S.C. 108, 451 S.E.2d 894 (1994).....	13
<i>Wilhite v. Liberty Veneer Co.</i> , 47 N.C. App. 434 (1980).....	11

Miscellaneous

Larson, Workers' Compensation Law Section 89.....	11,14
Larson, Workers' Compensation Law, 89.03 (2001).....	14
82 Am.Jur.2d Workers' Compensation § 670 (2003).....	14

QUESTIONS PRESENTED

- I. Did the court of appeals err in determining that Judge Short's order was the law of the case thereby prohibiting further consideration of the abatement issue, the error being that the issue of abatement was not properly before Judge Short?
- II. Are the respondent's arguments with regard to due process properly before the court?
- III. Did the court of appeals err in determining that the June 12, 2002 award represented an accrued benefit, the error being that the award was still on appeal and not final?
- IV. Did the court of appeals err in determining that the benefits would be subject to SC Code Ann. Section, 42-9-280, the error being that the benefits should abate and the court exceeded its authority in determining who the next of kin dependents were?

STATEMENT OF THE CASE

Ms. Frances Hudson (“Claimant”) was found permanently and totally disabled under SC Code Ann. Section 42-9-10 by the S.C. Workers’ Compensation Commission in an Order dated October 3, 2001. (App. Vol. 1 p. 23). Thereafter, Claimant requested a lump sum award pursuant to a Form 24. (App. Vol. 1 p. 140). A hearing was held to determine whether Ms. Hudson was entitled to a lump sum award pursuant to S.C. Code Ann. Section 42-9-301 (1976, as amended).

An order was issued on June 12, 2002 (Commissioner Sherry Martschink) awarding lump sum benefits (App. Vol. 1 p. 52). The Respondent/Petitioner Lancaster Convalescent (“Employer”) filed a Workers Compensation Commission Form 30 appeal indicating it was error to award lump sum payment. No other issues were raised on appeal. *See Green v. City of Columbia*, 311 S.C. 78, 427 S.E. 2d 685 (SC App. 1993).

Prior to the appeal hearing being held, Ms. Hudson died from non work related causes (Cancer). On August 23, 2002, upon learning of the Claimant’s death, the attorney for the Employer sent a letter to the S.C. Workers’ Compensation Commission requesting a dependency hearing to determine what benefits would be due if due at all. (App. Vol. 1 p. 270). The Appellate Panel subsequently affirmed the lump sum award by Order dated January 27, 2003. (App. Vol. 1 p. 65). Up until the time Ms. Hudson died on July 30, 2002, the issue of abatement was not applicable or ripe for a hearing; therefore, abatement was not an issue that could be raised at the June 12, 2002 lump sum hearing before Commissioner Martschink. The appellate panel order was appealed by Employer with a Petition for Judicial Review to the Circuit Court. (App. Vol. 1 p. 143). The Petition for Judicial Review, filed pursuant to S.C. Code § 1-23-380 (1976, as amended) and § 42-17-60 (1976, as amended), was limited in scope to the findings of the Appellate Panel. Even though the issue of abatement was not raised by appeal and not before

him, on February 26, 2004, Judge Short issued an Order improperly finding that the issue of abatement was not preserved for appellate review and affirmed the lump sum award to the Claimant. (App. Vol. 1 p. 69). Employer then filed a Notice of Appeal to the S.C. Court of Appeals dated March 24, 2004. (App. Vol. 1 p. 149). This Appeal was ultimately withdrawn, thereby making Judge Short's determination that lump sum benefits was proper and became the law of the case. At that time, only the issue of lump sum was the law of the case.

On October 22, 2004, a Dependency Hearing was held before the Commissioner Bass to determine if any of the unpaid compensation that was due to Ms. Hudson at the time of her death was payable to her next of kin dependents. Pursuant to S.C. Code Ann. Section 42-9-280, it was at this time that the Employer could timely and properly raise the issue of abatement for the first time. The Single Commissioner issued an Order on June 3, 2005 awarding benefits payable to Ms. Hudson's beneficiaries (not her next of kin dependent) and finding that Judge Short's Order was the law of the case, thus Respondents could not at the hearing before him raise the issue of abatement. (App. Vol. 1 p. 83). Even though the South Carolina Workers Compensation Commission is charged with the authority to make the findings of fact and conclusions of law, SC Code Ann. Section 42-3-180 and 42-17-40, as who the next of kin dependents were, Commissioner Bass and the Appellate Panel failed to do so. On June 21, 2005 and June 22, 2005 respectively, the attorneys for the Employer and Guaranty Association thereby filed Form 30's requesting that the S.C. Workers' Compensation Commission review the award of the Single Commissioner. (App. Vol. 1 p. 151-158). A hearing was held before the Appellate Panel on February 21, 2006 and an Order issued on July 29, 2006 which affirmed the Order of the Single Commissioner and reversed a portion imposing a 10% penalty. (App. Vol. 1 p. 107). Thereafter,

the Employer, Guaranty Association, and the Petitioners filed Petitions for Judicial Review with the Circuit Court. (App. Vol. 1 p. 23).

A hearing was held before Judge Kenneth G. Goode, who ultimately affirmed the Full Commission's Order with the exception of the portion vacating 10% penalty, which he found the Defendants were responsible for paying. (App. Vol. 1 p. 159-191). It is from this Order that the Appellants appealed to the South Carolina Court of Appeals.

On March 3, 2010, the South Carolina Court of Appeals heard arguments on this matter. The Court of Appeals filed its first opinion on June 30, 2010 affirming the circuit court order (**First opinion**). The Court of Appeals substituted its opinion of June 30, 2010 and issued a Second Opinion affirming the Circuit Court in part in reversing in part on February 4, 2011 (**Second opinion**). On February 22, 2011, the Respondents filed a Petition for Rehearing on the basis that the Circuit Court Order dated February 17, 2004 was not the law of the case; that Judge Short did not have jurisdiction over the issue of abatement; and that Judge Goode's Order of March 27, 2008 must be reversed in so far as he affirms the Commission's July 29, 2006 Order as Ms. Hudson's award abated upon her death pursuant to the Estate of Covington, 304 S.C 436, 405 S.E.2d 393 (1991). The Court of Appeals denied the Petition for Rehearing, but substituted the February 4, 2011 opinion with a third opinion dated April 21, 2011 (**Third opinion**). Respondents again filed a Petition for Rehearing on May 4, 2011. The Court of Appeals denied that Petition by Order dated June 1, 2011. Both the Petitioners (Estate) and the Respondents (Employer/Carrier) filed Petitions for Writ of Certiorari to this Court. The Petitions for Writ were granted.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT JUDGE SHORT'S ORDER WAS THE LAW OF THE CASE THEREBY PROHIBITING FURTHER CONSIDERATION OF THE ABATEMENT ISSUE.

Petitioners' entire first argument relies on the contention that Lancaster "invited Judge Short to address the issue of abatement. This argument is flawed for numerous reasons.

In the instant matter, Judge Short never made a ruling with respect to the issue of abatement. Judge Short's order clearly stated that the issue of abatement "exceeds the scope of Appellants' February 26, 2003 exceptions and are not properly before this court." (App. Vol. 1 p. 69). Judge Short did not make an active finding but rather stated that the issues were not before him. Therefore, he did not make a ruling that could be challenged.

Petitioners' contention that Lancaster "invited" Judge Short to make his ruling on abatement is not supported by the record before this Court. The only reference in which Lancaster could find to support Petitioners' argument was Judge Short's own words in his order with respect to abatement. The abatement issue was only mentioned in the context of whether or not the Claimant's award falls under first paragraph of § 42-9-10 and is within the exclusive jurisdiction of the South Carolina workers compensation Commission pursuant to S.C. Code Ann. Section 42-3-180). Moreover, even if Lancaster "invited" him to make a ruling on the issue, he **did not** make a ruling. Judge Short clearly stated that the issue of abatement exceeded the two grounds of appeal and his authority to address an issue not yet ruled upon the South Carolina Workers Compensation Commission.

Petitioners further contend that Lancaster is bound by Judge's Short's statements because it is "the law of the case." It is clear that Judge Short lacked appellate jurisdiction to make his

ruling in 2004 on the issue of abatement because abatement was never raised before the South Carolina Workers' Compensation Commission and therefore never ruled upon by the South Carolina Workers' Compensation Commission (See Section 42-3-180). A dependency hearing had been requested prior to the Judge Short's order, at which time the Commission would determine what benefits, if any, the Claimant's next of kin dependents would be entitled too. By ruling Judge Short's order was a final adjudication of the abatement issue; the court divests the South Carolina Workers' Compensation Commission of its exclusive jurisdiction to determine issues arising under Title 42. S.C. Code Ann. §42-3-180 (S.C. 2007). Because Judge Short lacked appellate jurisdiction to make the ruling, Judge's Short's ruling is merely dicta and not the "law of the case." As the Court in Nash v. Tindall Corp., 375 S.C. 36 (Ct. App. 2007) states "dicta or, as it is also known, dictum is a statement on a matter not necessarily involved in the case, and is not binding as authority." The issue of abatement was not before Judge Short. Therefore, his statements or supposed rulings with regard to abatement are dicta and not binding authority. Moreover, since the parties cannot confer subject matter jurisdiction and the circuit court and the SC Court of Appeals acquires no power to act without jurisdiction, Judge Short's ruling regarding abatement must be set aside and held to have no effect as the ruling is dicta. Cox. v. Lunsford, 272 S.C. 527, 252 S.E.2d. 918 (S.C. 1979).

Petitioners' also contend that the issue of abatement was unpreserved because it was not appealed. This is a misstatement of fact. The abatement issue was appealed at the proper time. The first time that the Abatement issue was ripe for determination was before Commissioner Bass at the dependency hearing on October 22, 2004. This hearing was scheduled pursuant to S.C. Code Ann. Section 42-9-280 to determine if any of the unpaid compensation that was due to Ms. Hudson at the time of her death was payable to her next of kin dependents. Commissioner

2

Bass also failed to rule on the merits of the abatement issue even though this was the first time that the issue could have been raised. Petitioners' assertions that Lancaster failed to properly appeal the issue of abatement is simply not true. The ruling of the South Carolina Workers' Compensation Commission that was before Judge Short in 2004 was on the issue of lump sum only, not the issue of abatement, because at the time of the lump sum order of Commissioner Martschink, Ms. Hudson was alive and there could be no next of kin defendant if the claimant is living. My God, can it be any clearer that a live person cannot have any next of kin dependent. People that are alive have relatives, not dependents.

II. RESPONDENT/EMPLOYER'S ARGUMENT WITH RESPECT TO DUE PROCESS IS PROPERLY BEFORE THE COURT

The Petitioner correctly states as a general proposition that "the purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court for a second time." Kennedy v. South Carolina Retirement systems, 349 S.C. 531, 564 S.E.2d 322 (2001). However, Lancaster neither overlooked nor misapprehended the argument that the issue of abatement would never be addressed because raising the issue at any other level would have resulted in an advisory ruling. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that among other things, an advisory ruling on a constitutional issue which may never arise would violate our firm policy of declining to reach constitutional issues unless necessary to the resolution of the appeal before us).

The Due Process argument was not ripe to be brought before a tribunal until Lancaster's right to appeal had been exhausted. Lancaster would not know if the abatement issue would never be addressed until it received its final determination from the South Carolina Court of Appeals.

Therefore, the abatement issue was raised at the proper time. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). See also Hitter v. McLeod, 274 S.C. 616, 266 S.E.2d 418 (1980). Because the issue of Due Process was hypothetical until a final ruling had been made by the SC Court of Appeals, Lancaster properly raised the issue to this Court in its Petition for Writ of Certiorari when the issue was ripe. Lancaster exhausted a right of appeal when it received the final ruling by the South Carolina Court of Appeals. Lancaster has now seeks permission of this Court to protect and grant them the due process to be heard and to receive a ruling on the abatement issue which is an issue the Single Commissioner, the Commission Appellate Panel, and the South Carolina Court of Appeals has failed to rule on.

III. THE JUNE 12, 2002 AWARD WAS NOT AN ACCRUED BENEFIT

While it is true that Ms. Hudson was awarded lump sum benefits by Commissioner Martschink, that order was still on appeal to the Appellate Panel and therefore not final. Pursuant to S.C. Code Ann. Section 42-17-50, the Appellate panel is the final fact finder and not bound by the Order of the Single Commissioner. It is undisputed that Ms. Hudson was receiving weekly installment payments at the time of her death. As such, her benefits had not "accrued" and were contingent in nature because the lump sum award was appealed. This is further evidenced by the undisputed fact that at the time of her death, the Claimant was receiving weekly payments of disability.

The right to receive benefits following the death of a claimant fall under S. C. Code Ann. § 42-9-280 (S.C. 2007). In South Carolina, “a cause of action created by statute survives when and only when some provision for its survival is made in the statute itself, or in some other statute.” Ferguson v. Charleston Lincoln Mercury, Inc., 544 S.E.2d 285, 288 (2001). Workers’ compensation is a cause of action created by statute. See generally, S.C. Code Title 42. See also Estate of Covington by Montgomery v. AT&T Nassau Metals Corporation, 405 S.E.2d 393, 394 (1991); the compensation afforded by the Act is statutory in character, and the right of any claimant thereto is dependent upon the terms and conditions of the statute. Petitioners attempt to distinguish the Estate of Covington case from the instant situation on the basis that Covington died prior to the adjudication of her workers compensation claim. However, Hudson likewise died prior to the final adjudication of her claim because an appeal was still pending when she died of unrelated causes (cancer). Since the lump sum order was under appeal the only order that was final was the order awarding weekly payments of disability benefits.

Petitioners continue to rely on North Carolina cases to support their arguments. See Wilhite v. Liberty Veneer Co., 47 N.C. App. 434 (1980). Contrary to Petitioners’ assertions, the North Carolina statute interpreted in this and the previously cited North Carolina cases are markedly different from the South Carolina statute. The North Carolina Statute specifically provides for the **estate** to take in situations like this. As that statute states:

When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative,...

See N.C. Gen. Stat. § 97-37 (emphasis added)

The South Carolina statute has no specific statement that provides for the personal representative to take. South Carolina Code Ann. § 42-9-280 states:

When an employee receives or is entitled to compensation under this Title *for an injury covered by the second paragraph of § 42-9-10 or § 42-9-30* and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this Title and the dependents of such employee are awarded compensation therefore, all right to unpaid compensation provided by this section shall cease and determine.” S.C. Code § 42-9-280.

Pursuant to the South Carolina statute, which is controlling in this matter, the threshold determination in a case in which the employee dies from an unrelated cause before he has been paid all benefits for his workers’ compensation claim, is whether the award is “for an injury covered by the second paragraph of § 42-9-10 or § 42-9-30.” S.C. Code § 42-9-280. In this case, the Claimant received her compensation award under the first paragraph of § 42-9-10. Thus, she does not fall within the terms of the statute and her award abated upon her death.

Commissioner Lyndon specifically awarded benefits under the first paragraph of § 42-9-10 due to the fact that the Claimant suffered from total wage loss due to her work related injury. The first mention of paragraph 2 of §42-9-10 is found in the order of Commissioner Bass on June 3, 2005. However, the only issues before Commissioner Bass were: a) defendants obligations to satisfy prior orders of this commission; b) identity of Ms. Hudson’s next of kin dependents; and c) whether the imposition of sanctions is warranted in this instance. (App. Vol. 1 p. 83). Commissioner Bass’ order rewrites the basis of the original decision of Commissioner Lyndon i.e. loss of earning capacity under § 42-9-10, first paragraph, without the issue ever being properly raised or litigated before Commissioner Bass. Due process requires notice of issues to be litigated (see Green v. City of Columbia, 427 S.E.2d 685, 311 S.C. 78 (1993). Petitioners

should have sought a § 42-9-10 second paragraph determination in the initial stages of litigation and not some five years later and certainly not after Ms. Hudson's death made it a necessary factor in prevailing in litigation.

Section 42-9-280 does not provide for the survival of Claimant's award, as it was not contemplated within that statute. Instead the Legislature specifically decided that the only awards under § 42-9-10 that would be payable to the next of kin dependents would be those within the second paragraph. Because the Legislature chose not to provide for the survival of benefits awarded under the first paragraph of § 42-9-10, the award abated upon Claimant's death. "[U]nless a statute *specifically provides* for the survival of an action for personal injury, it does not lie after the injured person's death." Reed v. Medlin, 328 S.E.2d 115, 118 (1985) (emphasis added), *overruled on other grounds by* Washington v. Whitaker, 451 S.E.2d 894 (1994).

Lastly, Ms. Hudson's benefits were contingent in nature and ceased with her death. Therefore, they were un-accrued benefits. Ms. Hudson's benefits were accruing each week as payments became due and therefore were contingent upon her living and still being disabled. An Order dated June 12, 2002 by Commissioner Martschink for the first time granted the Ms. Hudson's request for a lump sum payment. (App. Vol. 1 p. 52). However, Defendants filed a Request for Full Commission Review of this decision (appeal). . During the pendency of the appeal, the Claimant died of unrelated causes. Therefore, because this Order was under appeal, it was not final and binding. "All findings of fact and law by the hearing commissioner become and are the law of this case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). At the time of her death, the Claimant was still receiving her benefits on a weekly basis, therefore as stated in Larson's, "when the award, although fixed for a number of

weeks, is paid weekly or periodically, most jurisdictions in the absence of a special statute to the contrary have held that heirs (next of kin) have no claim upon the un-accrued payments since the award is a personal one, based upon the employee's need for a substitute for lost wages and earning capacity." Larson, Workers' Compensation Law, § 89.03 (2001). Further, as stated in Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695, 700 (2006), a Claimant's beneficiaries and/or next of kin dependents are not entitled to unaccrued benefits. In the Stone decision, the Supreme Court specifically stated that

The language of §42-9-280 is plain. The Legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member...i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not. The Legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well. Id.

In this case, just as in the Stone case, the Claimant was awarded compensation for a loss in earning capacity under the first paragraph of § 42-9-10. Thus, she was being compensated for her loss of earning power, rather than any loss of use of a specific body member. Therefore, her claim for compensation ceased with her death. As the Claimant has no benefits to pass to her beneficiaries/next of kin dependents, there is no further claim under the Act. *See generally* S.C. Code Ann. § 42-9-280 (Providing for the survival of benefits only for a loss under the second paragraph of § 42-9-10 or under § 42-9-30); Larson, Workers' Compensation Law, § 89 (2001)("As a general proposition, the right to receive future workers' compensation benefits is not inheritable."); and 82 Am.Jur.2d *Workers' Compensation* § 670 (2003)("It is generally recognized that upon the death of a worker receiving compensation benefits, the worker's

personal representative has no right to any benefit payments which were not due and payable at the time of the worker's death.”).

IV. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE BENEFITS WOULD BE SUBJECT TO S.C. CODE ANN. SECTION 42-9-280, WHEN THIS AWARD SHOULD ABATE, AND EXCEEDED ITS AUTHORITY IN AWARDING THE LUMP SUM BENEFITS WITHOUT A COMMISSION DETERMINATION AS TO WHO THE NEXT OF KIN DEPENDENTS WERE UNDER 42-9-280.

The Petitioners contend that the Court of Appeals erred in reversing/vacating the Commission's approval of the potential beneficiaries' settlement agreement. However, as the Court of Appeals correctly states, there was never such an agreement. Neither the Respondent Employer nor the Guaranty Association acknowledged and accepted the beneficiaries' settlement of their respective entitlement to the lump sum proceeds. As the court of appeals states, "there is no such stipulation by Employer's counsel on the record that he had no objection to the manner in which the funds were split."

Moreover, the Court of Appeals found that if this award should not abate, then it is subject to S.C. Code Ann. Section 42-9-280 wherein the proceeds should be split between the next of kin dependents. While it is the Respondents' belief that 42-9-280 does not apply to this situation because Ms. Hudson's award was subject to paragraph one as discussed above, even if this award was subject to 42-9-280, the Court of Appeals exceeded its scope of review when it *sua sponte* awarded the benefits to Ms. Hudson's dependent grandchildren. The SC Workers' Compensation Single/Hearing Commissioner or the Appellate Panel never made a determination of who the next of kin dependents were pursuant to S.C. Code Ann. Section 42-9-280 and the SC Workers Compensation Commission has exclusive jurisdiction to make this finding first. S.C. Code Ann. Section 42-3-180. The Commission made no finding as to whether the grandchildren

(next of kin) were dependent at least three months before Ms. Hudson's accident as required by S.C. Code Ann. Section 42-9-120.

Commissioner Bass' Order of June 3, 2005 awarded benefits payable to Ms. Hudson's beneficiaries, not her next of kin dependents as required by Section 42-9-280. The Court of Appeals, in its substituted order of April 21, 2011 reversed this decision and instead determined that the unpaid balance of Ms. Hudson's lump sum award should go to her dependent grandchildren rather than to her sons as beneficiaries of the estate pursuant to S.C. Code Section 42-9-280. Respondents assert that neither Commissioner Bass' Order awarding the unpaid benefits to the sons, nor the Court of Appeals order reversing that portion and awarding the benefits to the grandchildren are correct.

Neither the Hearing Commissioner (Bass), nor The Workers' Compensation Commission by the Appellate Panel, determined the identity of the next of kin dependents as required by Section 42-9-280, should the claims as a matter of law not abate. While the Order of the Single Commissioner, which was subsequently affirmed by the Full Commission, named four possible beneficiaries/next of kin dependents, it is not certain that all are entitled to take under the Act. (App. Vol. 1 p. 107-116). Keith Hudson and Kenneth Hudson, the Claimant's two biological sons, are personal representatives of the Claimant's estate and are next of kin, but not dependents. Because the Claimant had no surviving spouse under 42-9-110, then those that are wholly dependent at the time of the accident under S.C. Code Ann. Section 42-9-290 take. It must be noted that a living and breathing person must take under 42-9-290, and not an "estate" or beneficiaries, as the Petitioners suggest. Moreover, under 42-9-120, the questions of dependency are determined by facts at the time of the accident and no compensation is allowed unless the person is dependent for three months prior to the accident in accordance with the facts and

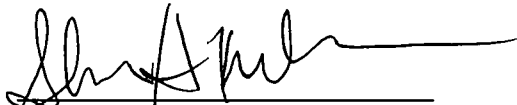
circumstances. There was never a finding as to who was wholly dependent or partially dependent by the South Carolina Workers Compensation Commission and that is an issue that must be taken up by it first. Keith Hudson, is not the biological father of Andrew Deese; who is not a grandchild as defined as such under SC Code Ann. § 42-1-70. Andrew is the son of Diane Lynn Deese. Matthew Pope is Keith Hudson's biological son and the biological grandson of the deceased Claimant, Frances Hudson. There are no prior cases exist that have awarded a step-grandchild benefits.

Respondent contends that the award should abate. However, if it is determined that it does not abate, then the next of kin dependents must be determined by the South Carolina Workers Compensation Commission and not by the SC Court of Appeals. The Court of Appeals does not have jurisdictional authority in naming those dependents without a finding first made by the South Carolina Workers Compensation Commission.

CONCLUSION

Based upon the above cited arguments, Respondent Lancaster Convalescent Center would respectfully submit that the decision of the Court of Appeals with regard to these arguments be reversed.

Respectfully Submitted,



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FRANCES S. HUDSON, DECEASED EMPLOYEE, BY KENNETH L. HUDSON AND
KEITH B. HUDSON, CO-EXECUTORS OF HER ESTATE, AS WELL AS MATTHEW
DEESE AND OR ANDREW DEESE, OF WHOM KENNETH L. HUDSON AND KEITH B.
HUDSON ARE
PETITIONERS/RESPONDENTS.

v.

LANCASTER CONVALESCENT CENTER, EMPLOYER, AND LEGION INSURANCE
COMPANY IN LIQUIDATION THROUGH S.C. PROPERTY AND CASUALTY
INSURANCE GUARANTY ASSOCIATION CARRIER,
RESPONDENTS/PETITIONERS,

CERTIFICATE OF COUNSEL

I hereby certify that the Final Reply Brief of Respondent/Petitioner's in the above
referenced matter complies with Rule 211(b).



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IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 03 2013

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

Kenneth E. Goode, Circuit Court Judge

Trial Court Case No. 2006-CP-29-955

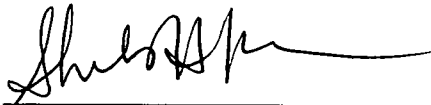
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RESPONDENTS/PETITIONERS,

CERTIFICATE OF SERVICE

I certify that I have served the Reply Brief of Respondent/Petitioner's to Kenneth Hudson and Keith Hudson by hand-delivering a copy of the same on June 3, 2013, to their attorney of record Andrew N. Safran, 1400 Pickens Street, Ste. 104, Columbia, SC 29201 and to Temus C. Miles, Jr., 1303 Blanding Street, Columbia, SC 29201, attorney for South Carolina Property and Casualty Insurance Guaranty Association, and by depositing a copy of the same in the United States Mail, postage prepaid to Ann Mickle, PO Box 10751, Rock Hill, SC 29731 and Pope Johnson, III, Post Office Drawer 11209, Columbia, SC 29211.



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