

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

68952

APPEAL FROM MARION COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No. 2010-CP-33-1048

Betty Joe Floyd as Personal Representative of the Estate of
Scottie Wayne Floyd and as dependent mother beneficiary of
Scottie W. Floyd, deceased employee,Appellant,

v.

Ken Baker Used Cars, Employer, and Legion Insurance Company
In liquidation c/o South Carolina Property & Casualty Insurance
Guaranty Association and Amguard Insurance Company, Carriers, Respondents.

PETITION FOR REHEARING

July 2, 2013

Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Appellant

Other Counsel of Record:

Mark D. Cauthen, Esquire
Peter P. Leventis, Esquire
McKay, Cauthen, Settana & Stublely, P.A.
Post Office Box 7217
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Attorney for Respondent Legion Insurance Co.
In liquidation c/o South Carolina Property &
Casualty Insurance Guaranty Association
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Attorney for Respondent Amguard Insurance Company
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Appellant respectfully requests the Court rehear the above matter. Appellant believes that the Court may have misapprehended certain elements of the Appeal and argues as follows:

STATEMENT OF THE CASE

The deceased Employee Scottie Wayne Floyd, hereinafter referred to as Deceased Claimant, sustained an injury by accident arising out of and in the course of his employment on September 13, 2001, while removing a control arm under tension off of a Mercedes which broke loose and struck Deceased Claimant across his left forehead, nose, head, cheek, breaking his nose and causing a closed head injury.

The Deceased Claimant commenced receiving workers' compensation benefits based on, among other things, brain damage.

On September 5, 2008, Betty Joe Floyd, Deceased Claimant's mother, went into the bedroom in an attempt to arouse Deceased Claimant for supper and discovered that he was deceased. An autopsy was performed on Deceased Claimant which determined that the cause of death was, among other things, "complications of seizure disorder..."

The South Carolina Workers' Compensation Commission denied the Claimant's dependents, statutory beneficiaries, or his estate any further benefits under the Act for impairments resulting from the accident or his death of September 5, 2008. The matter was ultimately appealed to the Marion County Circuit Court and subsequently appealed to the South Carolina Court of Appeals.

Unpublished Opinion # 2013-AP-251 was filed on June 19, 2013 affirming the Decision of the Marion County Circuit Court of the Honorable Thomas Russo dated January 4, 2011.

ARGUMENTS

1. **THE DECEASED CLAIMANT RESPECTFULLY ASSERTS THAT THE COURT HAS MISAPPREHENDED OR MISAPPLIED THE STANDARD OF REVIEW WHEN DETERMINING WHETHER OR NOT THE CLAIMANT'S DEATH ON SEPTEMBER 5, 2008 AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.**

There is no dispute as to the evidentiary issues before the South Carolina Workers' Compensation Commission below as to what was the cause in fact of the Claimant's death. The Deceased Claimant died because he had seizure disorders resulting from his accident of September 13, 2001. This is a causally related death pursuant to Shuler v. Gregory, 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005).

It is equally undisputed and there is no evidence to the contrary that the Deceased Claimant died on September 5, 2008 as a result of his "accidental" and "unsupervised" termination of his anti-seizure medications. Based on these undisputed and uncontradicted facts, the Claimant's death on September 5, 2008 was the result of an independent accident arising out and in the course of his employment on September 5, 2008.

The issue of whether or not such an event is compensable as an injury by accident is a question of law to be reviewed de novo by the Court. (Shuler v. Gregory, 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005); Hall v. Desert Aire, Inc., 376 S.C. 338 (Ct. App. 2007)) The Appellate Court in such a circumstance is not bound by findings based on substantial evidence of the Commission. The question before this Court is not one of factual determination. It is one of interpretation of the law based on this undisputed fact situation.

2. THE DECEASED CLAIMANT ASSERTS THAT THE COURT HAS MISAPPREHENDED OR MISAPPLIED WHETHER OR NOT THE CLAIMANT'S DEATH WAS THE PROXIMATE RESULT OF HIS ACCIDENTAL TERMINATION OF HIS ANTI-SEIZURE MEDICATIONS.

There is no dispute that the Deceased Claimant suffered significant seizures as a result of his brain injury. That finding is the law of the case below. There was an unappealed Order making such a finding when the Deceased Claimant terminated his medications in April 2004 and nearly died as a result. Commissioner Alan Bass issued an Order of December 12, 2007 as follows:

4. I find that the claimant sustained admitted injuries to brain, head, nose, and psyche.

5. In addition to admitted injuries, I find claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury, resulting in extensive pain in his spine requiring orthopaedic treatment.

(Order, Comm. Bass, 12/12/07, p. 9) (R. p. 77)

Further, the unappealed Order determined,

7. The defendants contend that the claimant is refusing medical treatment by failing to comply with directions for taking his headache medication. The defendants are thus claiming that they are entitled to suspend all benefits – presumably including temporary total disability benefits until such time as claimant agrees to remain compliant with his medication.

To the extent that claimant is not taking his headache medicine as prescribed, I find that such failure is not a refusal within the meaning of §42-15-60. A review of the complete medical record before me – as opposed to a selection of a few stray nuggets here and there – clearly establishes that the claimant's failure to take his medication as prescribed is a byproduct of the claimant's physical injury rather than a conscious decision on his part. There are numerous references to such in the deposition of Dr. Federer and Dr. Evans.

Nor should the claimant's inability to comply with his medication schedule come as a surprise. Dr. Joanne McGee, neuropsychologist and clinical direct of ResCare Premier, opined in a letter dated January 3, 2005 that,

Due to problems with judgment and impulsivity, without supervision he [claimant] would have problems remembering when it is not necessary or more often than prescribed, or BEING NONCOMPLIANT WITH HIS PRESCRIBED MEDICAL REGIMEN. (Emphasis added) (APA #25, p. 401) (R. p. 1334)

Dr. Healy testified in his deposition of April 24, 2006 that as a result of the claimant's injury to his brain,

...We're not dealing with a normal brain, and the areas that are injured, as those types of areas of injuries mature, scar heal, it can sometimes change things and so I'm not sure that it's predictable. (Dep. Dr. Healy, p. 21, lines 8-12) (R. p. 842)

(Order, Comm. Bass, 12/12/07, pp. 10-11) (R. p. 79)

There is no evidence below that the Claimant's death was the result of anything other than his accidental termination of his anti-seizure medications. In fact, the Defendants repeatedly assert that the Claimant's death was not the result of an intentional act of suicide. The undisputed proximate cause of his death was his termination of his medications. Dr. Healy testified in his deposition of August 25, 2009,

Q. Okay. Do you have an opinion to a reasonable degree of medical certainty that the cause of his death was his failure in taking that medication?

A. That's what seems to be most obvious conclusion.

Q. And is that to a reasonable degree of medical certainty?

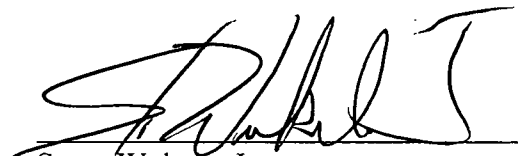
A. Yes.

(Dep. Dr. Healy, 8/25/2009, p. 20, lines 7-13) (R. p. 429)

The requirement that the Deceased Claimant take medications arose out of and was in the course of his employment and his duty to the Employer to submit to medical treatment pursuant to S.C. Code Ann. § 42-15-60.

Just as the Court decided in Shuler, the only issue before the Court was whether or not the claimant was performing duties for the employer that were required under the Act when she was accidentally killed. Claimant's death was an independent accident arising out of and in the course of his employment on September 5, 2008 and is, therefore, compensable pursuant to S.C. Ann. § 42-9-290 and should be paid to his mother, Betty Joe Floyd, pursuant to S. C. Ann. § 42-9-140.

WHEREFORE, your Appellant respectfully prays that the Court reconsider its Decision of June 19, 2013 and allow the Claimant additional argument before this Court and rehearing in the matter.



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(843) 669-5634
Attorney for Appellant

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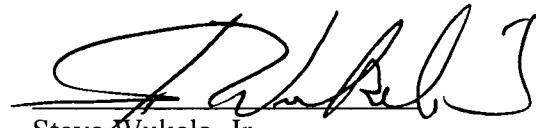
v.

Ken Baker Used Cars, Employer, and Legion Insurance Company
In liquidation c/o South Carolina Property & Casualty Insurance
Guaranty Association and Amguard Insurance Company, Carriers, Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Employer, Ken Baker Used Cars, and the Carriers, Legion Insurance Company in liquidation c/o South Carolina Property & Casualty Guaranty Association and Amguard Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2013 addressed to their attorneys of record respectively Mark D. Cauthen, Esquire and Peter P. Leventis, Esquire, of McKay, Cauthen, Settana & Stubley, P.A., Post Office Box 7217, Columbia, South Carolina 29202, and Edwin P. Martin, Jr., Esquire, Hedrick, Gardner, Kincheloe & Garofalo, LLP, Post Office Box 11267, Columbia, South Carolina 29211.

July 2, 2013



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July 2, 2013

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

RE: **Case No. 2012209586**

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, Deceased Employee, v. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation % South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carriers

Dear Ms. Kitchings:

Enclosed for filing are an original and seven copies of the Petition for Rehearing of the Appellant regarding the above entitled appeal, along with my Proof of Service. Please return a certified copy in the envelope provided.

I am, by copy of this letter, serving a copy of the Petition for Rehearing of the Appellant on Mark D. Cauthen, Esquire, Peter P. Leventis, Esquire, and Edwin P. Martin, Jr., Esquire, as counsel for the Respondents.

Also, enclosed is a check in the amount of \$25.00 for the filing fee for this Petition.

With kind regards, I remain

Sincerely yours,

WUKELA LAW FIRM


STEVE WUKELA, JR.

SWJr/dd

Enclosures

cc: Mark D. Cauthen, Esquire
Peter P. Leventis, Esquire
McKay, Cauthen, Settana & Stublely, P.A.

Edwin P. Martin, Jr., Esquire
Hedrick, Gardner, Kincheloe & Garofalo, LLP

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