

2011-194189

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

KENNETH E. GOODE, CIRCUIT COURT JUDGE

CASE NUMBER: 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.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the
South Carolina Property and Casualty Insurance Guaranty Association, Carrier ... RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rules 240 and 242, SCACR, Petitioners, Kenneth L. Hudson and Keith B. Hudson, petition this Court to issue a Writ of Certiorari to review the Court of Appeals' decision in 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 v. Lancaster Convalescent Center, Employer, and Legion Insurance Company, in Liquidation through South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Op. No. 4705. The Hudsons respectfully assert the Court of Appeals erred in reversing and/or vacating the South Carolina Workers' Compensation Commission's (Commission's): (a) determination its June 12, 2002 Order requiring the lump sum payment of permanent disability to Ms. Frances S. Hudson constituted a "completely final/vested" accrued benefit, to the extent her estate beneficiaries possessed a "colorable claim. . ." to these funds; (b) approval of their agreement with Co-Respondents, Matthew Deese and Andrew Deese, relative to the distribution of these lump sum compensation proceeds; (c) ruling Appellants, Lancaster Convalescent Center and Legion Insurance Company/South Carolina Property and Casualty Guaranty Association, had disavowed any interest (through stipulation or otherwise) as to the manner in which these lump sum proceeds were distributed among the potential beneficiaries; and (d) conclusion Appellants were obliged to satisfy the Commission's award of interest pursuant to S.C. Code Ann. Section 42-9-240 (1976).

Specifically, the Hudsons believe the Court of Appeals' decision: (a) incorrectly ignores the significance of an accrued benefit in this context (as recognized by both the Commission and Circuit Court), to the extent it ignores the viability of the Estate's claim

to the lump sum proceeds under these rather unique circumstances; (b) inexplicably/inequitably nullified a duly approved settlement agreement by/between the respective “potential beneficiaries”, notwithstanding the Commission’s exclusive statutory authority to approve this agreement and unchallenged rulings establishing its viability; (c) misapprehended the nature/significance of Appellants’ stipulation that, assuming the lump sum proceeds were owed, they had no objection to the manner in which these funds were distributed among the potential beneficiaries; and (d) irreconcilably misconstrued the South Carolina Property and Casualty Insurance Guaranty Association Act to preclude the assessment of certain sanctions (interest) stemming from the Guaranty Association’s actions, as opposed to a derivative obligation of the insolvent insurer.

RULE 226 (d)(1), SCACR, CERTIFICATION

Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on August 16, 2010 and denied by the Court of Appeals on February 4, 2011.

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err in reversing the Commission's ruling relative to the continued viability of Ms. Hudson's June 12, 2002 accrued lump sum disability compensation award, to the extent it held her estate had no claim to these funds, when this determination: (a) mistakenly overlooks the retroactive impact of the subsequent affirmance of this Order; (b) ignores the material distinction between "accrued" and "unaccrued" benefits recognized by this Court in Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695 (2006); (c) incorrectly relies upon the provisions of S.C. Code Ann. Section 42-9-280 (1976), a statute which governs unaccrued claims; and (d) irreconcilably/inequitably prohibits the Estate beneficiaries from sharing in these accrued proceeds?

B. Did the Court of Appeals err in reversing/vacating the Commission's approval of the potential beneficiaries' settlement agreement when: (a) S.C. Code Ann. Section 42-3-180 (1976, as amended) vests the Commission with exclusive authority to approve settlements in this context; (b) the Commission specifically approved the beneficiaries' agreement to divide the lump sum proceeds; and (c) the Court's action not only usurped the exclusive authority of the Commission relative to the approval of settlements, but also necessarily conflicts with the law of this case?

C. Did the Court of Appeals err in allowing Appellants to currently contest the distribution mechanism devised by all potential beneficiaries when: (a) the only reasonable inference which may be gleaned from the evidence contained in the hearing record, much less the substantial evidence, clearly establishes they offered no objection as to the manner in which any funds due would ultimately be distributed among the

respective potential beneficiaries; (b) this stipulation was separate/distinct from their positions that either no funds were payable due to abatement or they needed to be instructed as to which individuals to pay; (c) the existence of this stipulation is amply validated by their consistent representations that they “will not dictate how the award is split up”; and (d) their continued lack of opposition to this distribution agreement is tantamount to a waiver?

D. Did the Court of Appeals err in reversing the Commission’s assessment of interest when: (a) the only reasonable inference arising from the record certainly verifies this sanction was premised upon the Guaranty Association’s actions, rather than an obligation incurred by the insolvent insurer; (b) this sanction was properly imposed per the provisions of S.C. Code Ann. Section 38-31-60 (j) (1976, as amended), which subjects the Guaranty Association to primary liability for its actions; and (c) the Guaranty Association was obliged to satisfy the portion of this sanction attributable to its actions, regardless of whether this interest constituted a “covered claim” within the meaning of S.C. Code Ann. Section 38-31-20 (8) (1976, as amended)?

II. STATEMENT OF THE CASE

On October 23, 1997, the late Frances S. Hudson sustained a compensable injury to her left leg while providing patient care at the Lancaster Convalescent Center facility in Lancaster, South Carolina. (Record on Appeal, p. 5). Specifically, this injury occurred when she: (a) came to the aid of a patient (who had previously slipped on the waxed floor) to prevent her from slipping and falling again; and (b) literally jumped into the path of this patient, forcefully landing on her left leg. (Id.).

As a consequence of this injury, Ms. Hudson was: (a) assigned impairment ratings to each of her legs; (b) medically restricted to the performance of “no more than sedentary work activities”; (c) deemed an inappropriate candidate for vocational rehabilitation services by Dr. William W. Stewart of the University of South Carolina School of Medicine’s Department of Neuropsychiatry and Behavioral Science, as well as the South Carolina Vocational Rehabilitation Department; and (d) determined by each of these vocational assessors to be incapable of returning to gainful employment due to the physical limitations produced by her injuries. (Record on Appeal, pp. 8 – 11).

By Order dated October 3, 2001, the single commissioner specifically found Ms. Hudson:

(a) “experience[d]. . . constant left leg pain which, despite the therapeutic effects of her medications, makes it very difficult to stand, walk, climb stairs or balance herself”; (b) suffered from “ever increasing right leg pain (including her hip area), which affects her, to a lesser extent, in the same fashion as her left symptoms”; (c) was “currently experiencing constant, severe bilateral leg and hip symptoms, which increase[d]. . . with her level of activity”; and (d) was “permanently and totally disabled as a result of the combination of her bilateral leg/hip symptoms/pathology and the physical/functional limitations produced by these injuries.” (See, Record on Appeal, pp. 12 – 14, 84, 111).

He similarly concluded:

(a) she was “permanently and totally disabled per S.C. Code Ann. §42-9-10 (1976, as amended) as a matter of law based upon the combination of impairment/limitations stemming from her compensable left leg injury and its consequences (left hip and right leg/hip symptoms)”; (b) “these physical impairments/limitations coupled with the vocational deficits identified by Dr. . . [William W.] Stewart and the South Carolina Vocational Rehabilitation Department, prohibit her from providing any form of employment services for which a reasonably stable market exists”; and (c) Defendants were obliged to “pay Ms. Hudson 500 weeks of compensation at the rate of Three Hundred Thirty-two and 43/100 (\$332.43) Dollars per week. . . as a result of her permanent and total disability status. . . .” (See, Record on Appeal, pp. 29 – 30, 85, 112).

When Appellants declined to voluntarily pay her unappealed permanent/total disability award in a lump sum, Ms. Hudson requested this relief through the filing of a Form 24 dated December 14, 2001. Upon assessing this lump sum request, the single commissioner: (a) reconfirmed Ms. Hudson’s permanent/total disability status; (b) thoroughly analyzed not only Ms. Hudson’s intended uses for these funds, but also her ability to appropriately manage the balance of her net proceeds; (c) found that she contributed to the support of her grandchildren (Matthew Deese and Andrew Deese), who regularly assisted her in performing activities of daily living; (d) determined Appellants failed to rebut her “contentions as to the legitimacy of her financial concerns or contemplated uses of the requested funds” and (e) concluded “Ms. Hudson’s best interests warrant[ed]. . . the lump sum payment of her permanent disability award.” (See, Record on Appeal, pp. 48 – 52, 85 – 86, 112).

Based upon these findings, the single commissioner: (a) concluded Ms. Hudson “ha[d] satisfied the requirements of. . . [S.C. Code Ann] §42-9-301. . . [(1976, as

amended)] as a matter of law”; (b) ordered Appellants to pay her “the total commuted value of her previous permanent disability award”; and (c) further recognized her counsel’s entitlement to receive attorney fees, as well as reimbursement for litigation expenses, from this lump sum payment. (See, Record on Appeal, pp. 52 – 56, 86, 112).

By Form 30 dated June 26, 2002, Appellants sought review of the June 12, 2002 ruling, specifically contending: (a) the award was "not in the best interest of the claimant"; (b) the Commonwealth Court of Pennsylvania’s rehabilitation Order "indicated that no benefits can be paid in a lump sum"; and (c) the hearing commissioner's ruling "would be in contravention to the Order of the State of Pennsylvania regarding Legion Insurance Company and the inability of the carrier to pay awards in a lump sum. . . ." (See, Record on Appeal, pp. 64, 86 – 87, 113, 133 – 134).

On July 26, 2002, Ms. Hudson, being “aware of the uncertainties of. . . [her] earthly existence”, executed a Last Will and Testament through which her sons, Kenneth L. Hudson and Keith B. Hudson, were: (a) appointed co-executors of her Estate; and (b) devised “approximately equal shares” of her property interests. (See, Record on Appeal, pp. 87, 113, 235 – 237). Shortly thereafter, on July 30, 2002, Ms. Hudson died of causes which were unrelated to her compensable accident (cancer). (See, Record on Appeal, pp. 87, 113, 238).

Appellants soon: (a) acknowledged their awareness of her death; (b) terminated the payment of weekly compensation; and (c) requested a dependency hearing. (See, Record on Appeal, pp. 64, 113, 262). Additionally, they: (a) continued to actively pursue their appeal of the June 12, 2002 Order; and (b) neither alleged nor intimated that Ms.

Hudson's death had resulted in the abatement of her remaining disability compensation entitlement. (See, Record on Appeal, pp. 64, 70, 87, 113).

On January 27, 2003, an Appellate Panel of the Commission affirmed the single commissioner's ruling "in its entirety." Appellants then sought judicial review of the Panel's determination, alleging two grounds of error:

(a) The Commission erred in finding the claimant was entitled to a lump sum payment of her award when the weight of the substantial evidence did not prove such an award would be in the best interest of the claimant; and (b) The Commission erred in awarding the claimant's remaining benefits in a lump sum because such an award is against the Order of the State of Pennsylvania finding that Legion Insurance Company, in rehabilitation, was forbidden from paying any awards by lump sum payment. (See, Record on Appeal, pp. 65, 87 – 88, 113 – 114).

During the pendency of its appeal to the Fairfield County Court of Common Pleas, Legion Insurance Company became insolvent. In view of this fact, the South Carolina Property and Casualty Insurance Guaranty Association assumed "all rights, duties and obligations of. . . [this] insolvent insurer as if the insurer had not become insolvent" per S.C. Code Ann. Section 38-31-60 (b)(1976, as amended).

In this connection, the Guaranty Association retained alternate counsel, who: (a) pursued the exceptions raised by the February 26, 2003 Petition for Judicial Review; (b) **further asserted "the Commission's ruling must be vacated in view of Ms. Hudson's untimely death during the pendency of. . . [the] appeal";** and (c) argued "Ms. Hudson's untimely death nullified the Commission's lump sum award, to the extent it potentially produced an abatement/termination of her claim (including the **unappealed permanent/total disability and attorney fee awards**). . . ." (See, Record on Appeal, pp. 61, 69, 88, 114). (Emphasis added).

Pursuant to an Order dated February 17, 2004, The Honorable Paul E. Short, Jr.

determined:

. . . the Commission's lump sum award is clearly: (a) authorized by. . . [§42-9-301]; (b) supported by the substantial evidence of record; and (c) completely consistent with the unappealed findings relative to her ability to responsibly utilize these funds, which became "the law of the case." Reese v. CCI Construction Company, 334 S.C. 600, 514 S.E. 2d 144, 145 (Ct. App. 1999). (Findings not appealed to Appellate Panel of Commission become law of the case). (See, Record on Appeal, pp. 68, 88 – 89, 114).

He similarly concluded:

. . . (a) the Commonwealth Court's May 28, 2002 Order did not prohibit the Commission from ordering Appellants to satisfy Ms. Hudson's permanent/total disability compensation award in a lump sum; and (b) this Order does not provide them with a means through which to avoid the lump sum payment obligation imposed by the Commission. (See, Record on Appeal, pp. 69, 89, 114).

In addressing Appellants' abatement argument ("assuming arguendo their dependency hearing request could conceivably be construed to have raised" this assertion), Judge Short specifically (alternatively) held:

In this regard, I likewise conclude Appellants' reliance on the Supreme Court's decision in Estate of Covington v. AT&T Nassau Metals Corporation, 304 S.C. 436, 405 S.E. 2d 393 (1991), **to the effect Ms. Hudson's claim potentially abated upon her death, is misplaced**, as: (a) Covington involved a death occurring "prior to. . . [the] adjudication" of the underlying workers' compensation claim; (b) the current record unquestionably establishes Ms. Hudson's entitlement to permanent/ total disability compensation had been finally adjudicated; and (c) **the pre-death adjudication of her lump sum entitlement (as affirmed by the Appellate Panel) remained viable absent reversal on appeal**. See generally, Moore v. North American Van Lines, 319 S.C. 446, 462 S.E. 2d 275 (1995) (award of Commission remains effective unless altered on appeal). (See, Record on Appeal, pp. 71, 89, 115) (Emphasis added).

Although Appellants initially sought review of Judge Short's determinations by the Court of Appeals, they subsequently elected to withdraw the appeal. (See, Record on Appeal, pp. 89, 115, 263). In view of this fact, the appeal was dismissed with prejudice on April 20, 2004. (See, Record on Appeal, pp. 73, 90, 115).

On October 22, 2004 and January 25, 2005, the single commissioner conducted a bifurcated hearing in response to Appellants' request for a disability determination. During the second phase of the hearing, the single commissioner specifically noted that **while Appellants reserved their "right to claim that there are no funds payable. . . [, they] ha[d]. . . no objections" as to the manner in which any awarded funds were divided among the respective beneficiaries.** (See, Record on Appeal, pp. 80 – 81, 90, 97, 115 – 116, 192). (Emphasis added).

After assessing all evidence of record, including the findings/determinations which comprise the law of this case, the single commissioner found:

(a) Ms. Hudson's sons are the sole beneficiaries of her estate; (b) Matthew and Andrew Deese were each dependent, to some extent, upon Ms. Hudson for support at the time of her death; and (c) no other individuals have either perfected a claim or established any entitlement to the proceeds previously awarded by this Commission. (See, Record on Appeal, pp. 90, 116). (Emphasis added).

He further found:

. . . the potential beneficiaries' agreement relative to the apportionment/distribution of these proceeds: (a) constitutes a valid/reasonable settlement of disputed claims involving competing interests; and (b) has been acknowledged/accepted by Defendants, who offered no objection to the manner in which these proceeds would be allocated in this instance. (Id.). (Emphasis added).

Additionally, the single commissioner found the Commission's October 3, 2001

Order:

(a) does not base Ms. Hudson's award on a specific portion of §42-9-10 (1976, as amended); (b) places great emphasis on the residual loss of use she had experienced to each of her lower extremities; and (c) could legitimately be construed to premise her disability compensation award on either pertinent portion of this statute. (See, Record on Appeal, pp. 85, 124).

He further found/concluded: (a) Appellants had previously raised the issue relative to the potential abatement of Ms. Hudson's claim in connection with its appeal of the lump sum disability compensation award; (b) "Judge Short's Order not only validated the propriety of [the] . . . Commission's lump sum award, but also specifically" rejected this abatement argument; (c) Appellants' subsequent abandonment of their appeal of this Order "necessitated 'that any matters disposed of in the February 17, 2004 Order became the law of the case'"; (d) Appellants were obliged to satisfy this unappealed lump sum award (which constituted an "accrued benefit"), notwithstanding any challenge as to the law of this case, as they had "failed to establish an abatement through operation of §42-9-280"; (e) "their failure to timely accept liability for the payment of the June 12, 2002 award **was unreasonable**"; and (f) the current circumstances warranted not only the **assessment of interest per Section 42-9-240**, but also the 10% penalty mandated by Section 42-9-90. (See, Record on Appeal, pp. 89, 91 – 96). (Emphasis added).

By Order dated July 29, 2006, the Appellate Panel: (a) affirmed each of the single commissioner's factual findings; (b) adopted all but one of his legal conclusions, **including the assessment of interest and the determination relative to Appellants' "unreasonable. . . failure to timely accept liability for the payment of the June 12, 2002 award"**; (c) elaborated on the significance of the "accrued" nature of Ms. Hudson's

claim in this context, particularly in view of the Supreme Court's focus on the "unaccrued" status of Mr. Stone's benefit in holding his previous compensation award abated upon his death; and (d) vacated the 10% penalty, noting Appellants "did not pursue a frivolous defense." (See, Record on Appeal, pp. 102 – 106).

After considering cross-appeals filed by the respective parties, the Circuit Court: (a) "affirm[ed]. . . all rulings contained in the June 29, 2006 Order, with the exception of the portion which vacates this 10% penalty"; and (b) concluded the "provisions of Section 42-9-90 compel a penalty in this instance. . . ." (See, Record on Appeal, p. 129).

Pursuant to a substituted opinion filed on February 4, 2011 (which did not alter the initial rulings on the issues addressed herein), the Court of Appeals determined "Judge Short's ruling on the abatement issue to be the law of the case" and declined to consider the merits of this argument. Additionally, the Court of Appeals affirmed the Circuit Court's reinstatement of the 10% penalty, concluding it was a mandatory sanction. However, notwithstanding the Estate's "colorable claim" to the accrued June 12, 2002 award and the Commission-approved settlement agreement between all potential beneficiaries, the Court of Appeals "direct[ed]. . . all lump sum payments be paid directly to [the]. . . dependent grandsons." It similarly reversed the interest sanction, despite the fact this "penalty" similarly resulted from the Guaranty Association's (as opposed to the insolvent insurer's) conduct.

This Petition follows.

III. ARGUMENTS

A. THE COURT OF APPEALS ERRED IN REVERSING THE COMMISSION'S RULING RELATIVE TO THE CONTINUED VIABILITY OF MS. HUDSON'S JUNE 12, 2002 ACCRUED LUMP SUM DISABILITY COMPENSATION AWARD, TO THE EXTENT IT HELD HER ESTATE HAD NO CLAIM TO THESE FUNDS, BECAUSE THIS DETERMINATION: (A) MISTAKENLY OVERLOOKS THE RETROACTIVE IMPACT OF THE SUBSEQUENT AFFIRMANCE OF THIS ORDER; (B) IGNORES THE MATERIAL DISTINCTION BETWEEN "ACCRUED" AND "UNACCRUED" BENEFITS RECOGNIZED BY THIS COURT IN STONE V. ROADWAY EXPRESS, 367 S.C. 575, 627 S.E. 2D 695 (2006); (C) INCORRECTLY RELIES UPON THE PROVISIONS OF S.C. CODE ANN. SECTION 42-9-280 (1976), A STATUTE WHICH GOVERNS UNACCRUED CLAIMS; AND (D) IRRECONCILABLY/INEQUITABLY PROHIBITS THE ESTATE BENEFICIARIES FROM SHARING IN THESE ACCRUED PROCEEDS.

It is undisputed that: (a) Ms. Hudson was awarded permanent and total disability compensation pursuant to an Order dated October 3, 2001; (b) she subsequently received a lump sum award of this compensation through a **second Order** filed on June 12, 2002; and (c) **this lump sum award was ultimately affirmed via Judge Short's February 7, 2004 Order.**

Significantly, this affirmance "ratifies, confirms, and declares that the . . . [initial] judgment was correct as if there had been no appeal." Collins v. Acree, 614 So. 2d, 391, 392 (Miss. 1993). Accord Moore v. North American Van Lines, 319 S.C. 446, 462 S.E. 2d 275 (1995) (Award of Commission remains viable/in effect absent reversal on appeal). Consequently, when Appellants dismissed their appeal of Judge Short's Order to this Court, the June 12, 2002 lump sum award became "completely final, and its finality relate[d]. . . to the date of its original entry." Geier v. Tjaden, 84 N.W. 2d 582, 583 (N.D. 1957). Accord Calhoun v. Calhoun, 339 S.C. 96, 529 S.E. 2d 14 (2000) (On affirmance of underlying judgment, interest commences "from the same date as if no appeal had been taken. . .").

As recognized by this Court in Stone, 627 S.E. 2d at 700, a **prospective** award or entitlement to compensation constitutes an “**unaccrued**” benefit. See also, Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.C. 2d 566, 569 (N.C. App. 1980), rev.’d in part on other grounds, 303 N.C. 281, 278 S.E. 2d 234 (N.C. 1981) (Absent determination of lump sum award, entitlements to compensation are “ ‘unaccrued’ until such time as they are determined. . . .”). “[S]ince a compensation award, unlike a tort award, is a personal one based on the employee’s need for a substitute for lost wages and earning capacity, **in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments.**” Stone, supra (internal citations omitted). (Emphasis added).

In this regard, the Legislature chose to **preserve certain unaccrued benefits through passage of Section 42-9-280**. This statute provides that if “an employee receives or is entitled to compensation. . . 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.” As a consequence, “dependent survivors. . . receive all benefits due an injured worker who lost the use of a scheduled member (§42-9-30), or ‘lost both hands, arms, feet, legs or vision in both eyes, or any two thereof’ (second paragraph of §42-9-10). . . .”; otherwise, unaccrued benefits are not survivable. Stone, supra.

Conversely, “it is generally held that a claim for compensation which has accrued, but is unpaid, at the time of death of the employee constitutes an asset of the estate in the

absence of any provisions to the contrary.” Inman v. L.A. Meares, 247 N.C. 661, 101 S.E. 2d 692, 694 (N.C. 1958); McCulloch v. Catawba College, 266 N.C. 513, 146 S.E. 2d 467, 471 (N.C. 1966) (“Compensation which accrues. . . during the lifetime of an injured worker but is unpaid at his death becomes an asset of his estate.”) These rulings of the North Carolina Supreme Court are consistent with Professor Larson’s treatise, which verifies “[a]ccrued but unpaid installments are, of course, an asset of the estate, like any other debt.” Larson’s Workers’ Compensation Law, (2000) §89.02.

“[A] **lump sum award made prior to. . . [a Claimant’s] death is deemed to be [an]. . . ‘accrued’ benefit. . .**” Wilhite, 267 S.E. 2d 566, 568. (Emphasis added). As the ultimately affirmed June 12, 2002 lump sum award constituted an accrued benefit, it **does not fall within the purview of Section 42-9-280**. Rather, all sums owed by Appellants are properly an asset of the estate - - **subject to the beneficiaries’ Commission-approved distribution agreement**.

Accordingly, the Hudsons respectfully request this Court to grant their Petition, review the Court of Appeals’ decision, permit oral argument and issue a decision finding that: (a) the lump sum payment required by the June 12, 2002 Order constitutes an accrued benefit; (b) identification of the beneficiaries of this accrued benefit (as well as any associated sanctions) is not governed by Section 42-9-280; and (c) while these funds are properly payable to the Estate, **distribution shall be accomplished in accordance with the settlement terms previously approved by the Commission**.

B. THE COURT OF APPEALS ERRED IN REVERSING/VACATING THE COMMISSION'S APPROVAL OF THE POTENTIAL BENEFICIARIES' SETTLEMENT AGREEMENT BECAUSE: (A) S.C. CODE ANN. SECTION 42-3-180 (1976, AS AMENDED) VESTS THE COMMISSION WITH EXCLUSIVE AUTHORITY TO APPROVE SETTLEMENTS IN THIS CONTEXT; (B) THE COMMISSION SPECIFICALLY APPROVED THE BENEFICIARIES' AGREEMENT TO DIVIDE THE LUMP SUM PROCEEDS; AND (C) THE COURT'S ACTION NOT ONLY USURPED THE EXCLUSIVE AUTHORITY OF THE COMMISSION RELATIVE TO THE APPROVAL OF SETTLEMENTS, BUT ALSO NECESSARILY CONFLICTS WITH THE LAW OF THIS CASE.

Specifically, S.C. Code Ann. Section 42-3-180 (1976, as amended) provides:

All questions arising under this Title, **if not settled by agreement of the parties interested therein with the approval of the Commission**, shall be determined by the Commission, except as otherwise provided in this Title. (Emphasis added).

As confirmed by its plain language, this statute: (a) authorizes “the parties interested. . . [in any] questions arising under. . . [the South Carolina Workers’ Compensation Act to] settle” their dispute; and (b) “expressly authorize[s]” the Commission to approve any settlements. See, James v. Anne’s, Inc., 390 S.C. 188, 701 S.E. 2d 730 (2010). The Commission’s absolute authority to approve any forms of settlement is further validated by the provisions of S.C. Code Ann. Sections 42-9-390 (Supp. 2006) and 42-17-10 (1976, as amended), which: (a) establish the procedures governing settlements between employee and employer; and (b) likewise mandate Commission approval.

In this regard, it has been consistently held that: (a) “settlement agreements are not binding until they have been approved” (Mackey v. Kerr-McGee Chemical Company, 280 S.C. 265, 312 S.E. 2d 565, 567 (Ct. App. 1984)); (b) once approved, settlements “are binding on the parties as an unappealed order, decision, or award” (Spivey v. Carolina Crawler, 367 S.C. 154, 624 S.E. 2d 435, 437 (Ct. App. 2005); and (c) the issues falling

within the parameters of the settlement agreement are not subject to collateral attack. (See, McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E. 2d 130 (1990)). Accord Pruitt v. Knight Publishing Company, 289 N.C. 254, 221 S.E. 2d 355, 358 (N.C. 1976); Morrison v. Public Service Company of North Carolina, Inc., 182 N.C. App. 707, 643 S.E. 2d 58, 60 – 61 (N.C. App. 2007) (“In approving a settlement agreement the . . . commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree.”). See also, Flemon v. Dickert-Kewoee, Inc., 259 S.C. 99, 190 S.E. 2d 751, 752 (1972) (South Carolina Workers’ Compensation Act “was fashioned upon the North Carolina Workmen’s Compensation Act”); Hines v. Hendricks Canning Company, 263 S.C. 399, 211 S.E. 2d 220, 223 (1975); Wilkerson v. Palmetto State Transp. Co., 371 S.C. 365, 638 S.E. 2d 109, 115 (Ct. App. 2007) (Opinions of the North Carolina Appellate Courts “construing. . . [its Act] are entitled to great weight”).

Inspection of the Commission’s July 29, 2006 Order unequivocally establishes it determined: (a) Kenneth L. Hudson, Keith B. Hudson, Matthew Deese and Andrew Deese were the only parties who had “either perfected a claim or established any entitlement to the proceeds previously awarded by [the]. . . Commission”; (b) these “potential beneficiaries’ agreement relative to the apportionment/distribution of. . . [the lump sum] proceeds. . . constitutes a valid/reasonable settlement of disputed claims involving competing interests”; and (c) not only the lump sum proceeds, but also any penalties and interest would “be divided in accordance with the parties’ distribution formula. . . .”

Additionally, while the Court of Appeals held Appellants did not “stipulate to the manner of dividing the lump sum award” (a conclusion which will be addressed below), they have nonetheless conceded, at minimum, taking “no position on this issue. . . .” (See, Final Brief of Appellant (Lancaster Convalescent Center/Legion Insurance Company), p. 31). Co-Respondents Deese similarly neither challenged the Commission’s approval of this settlement nor their obligation to comply with its terms.

It has been routinely held that an unchallenged ruling “becomes the law of the case and precludes further consideration of the issue on appeal”. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E. 2d 470, 472 (1997); Judy v. Martin, 381 S.C. 455, 674 S.E. 2d 151, 153 (2009). As the Commission’s acknowledgement and approval of “all potential beneficiaries[,]” agreement to distribute the lump sum proceeds (including penalties) was not contested on appeal by any party (recalling the Appellants took no position on this issue), it became the law of this case.

Consequently, once the continued viability of the lump sum award was affirmed, it did not become “the task of the Court to decide the rights of the. . . [respective beneficiaries] as if there had been no agreement.” See generally, Burnett v. Burnett, 290 S.C. 28, 347 S.E. 2d 908, 909 (Ct. App. 1986); Snell v. Snell, 299 S.C. 406, 385 S.E. 2d 211, 215 (Ct. App. 1989). Rather, it was incumbent upon the Court to honor the Commission-approved settlement agreement, which: (a) remained binding on all beneficiaries; and (b) required that 50% of these proceeds be divided between the Hudsons, while allocating the remaining funds to Matthew Deese and Andrew Deese.

However, by requiring that the lump sum proceeds be paid solely to the “dependent grandsons”, the Court clearly: (a) usurped the Commission’s exclusive

authority relative to the approval of settlements per the Act; (b) ignored the law of this case, which verifies the absence of any challenge as to the viability of this settlement agreement by/between the respective beneficiaries; and (c) erroneously invalidated an agreement that had the effect of a binding Order of the Commission.

Accordingly, the Hudsons request that the Court grant their Petition, review the Court of Appeals' decision, permit oral argument and issue a decision finding the Court of Appeals' failure to recognize their right to share in the lump sum proceeds (as well as any sanctions) in accordance with the beneficiaries' settlement agreement constituted an error of law. They further request that this Court reverse the Court of Appeals' ruling on this issue and require distribution of all sums due/payable in accordance with the Commission-approved settlement agreement.

C. THE COURT OF APPEALS ERRED IN ALLOWING APPELLANTS TO CURRENTLY CONTEST THE DISTRIBUTION MECHANISM DEvised BY ALL POTENTIAL BENEFICIARIES BECAUSE: (A) THE ONLY REASONABLE INFERENCE WHICH MAY BE GLEANED FROM THE EVIDENCE CONTAINED IN THE HEARING RECORD, MUCH LESS THE SUBSTANTIAL EVIDENCE, CLEARLY ESTABLISHES THEY OFFERED NO OBJECTION AS TO THE MANNER IN WHICH ANY FUNDS DUE WOULD ULTIMATELY BE DISTRIBUTED AMONG THE RESPECTIVE POTENTIAL BENEFICIARIES; (B) THIS STIPULATION WAS SEPARATE/DISTINCT FROM THEIR POSITIONS THAT EITHER NO FUNDS WERE PAYABLE DUE TO ABATEMENT OR THEY NEEDED TO BE INSTRUCTED AS TO WHICH INDIVIDUALS TO PAY; (C) THE EXISTENCE OF THIS STIPULATION IS AMPLY VALIDATED BY THEIR CONSISTENT REPRESENTATIONS THAT THEY “WILL NOT DICTATE HOW THE AWARD IS SPLIT UP”; AND (D) THEIR CONTINUED LACK OF OPPOSITION TO THIS DISTRIBUTION AGREEMENT IS TANTAMOUNT TO A WAIVER.

At the commencement of the January 25, 2005 hearing, the single commissioner confirmed the respective beneficiaries had agreed to divide all sums payable in the following fashion: (a) one-half to the Hudsons (to “be divided in whatever way [they]. . . see fit”); and (b) the remaining half equally to Matthew Deese and Andrew Deese. (See, Record on Appeal, pp. 189 – 190). Additionally, the commissioner verified that while Appellants’ counsel maintained “there are no funds payable he has no objections to. . . [the potential beneficiaries] splitting the funds up as. . . [they saw] fit, if’ the claim remained viable. (See, Record on Appeal, pp. 192).

While Appellants argued “the estate takes nothing”, this contention was made in the context of an absolute denial of liability (“It does not survive”; “We’re saying that we don’t owe anybody.”) (See, Record on Appeal, pp. 217, 219 and 228). This characterization of Appellants’ position is validated by their subsequent representations that: (a) they “took no position. . . [as to the] agreement between the alleged beneficiaries/next-of-kin dependents”; (b) if “an award is due, then [they]. . . are not a party to an agreement between the next-of-kin dependents and/or beneficiaries and **will**

not dictate how the award is split up.” (See, Final Brief of Appellant (Lancaster Convalescent Center/Legion Insurance Company), p. 31). (Emphasis added).

“A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties thereto or their attorneys. . . [and is] binding upon those who make them.” Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 632 S.E. 2d 874, 879 (Ct. App. 2006); McCrea v. City of Georgetown, 384 S.C. 328, 681 S.E. 2d 918, 921 (Ct. App. 2009). Significantly, “[a] stipulation does not require an affirmative statement and silence may be assent in some circumstances, particularly if the [party]. . . had an opportunity to object and failed to do so.” State v. Wade, 181 N.C. App. 295, 639 S.E. 2d 82, 85 (N.C. App. 2007). See also, State v. Alexander, 359 N.C. 824, 616 S.E. 2d 914, 917 (N.C. 2005) (“Silence, under some circumstances, may be deemed assent. . .”).

In this regard, Appellants: (a) did not contemporaneously challenge the accuracy of the single commissioner’s characterization of their stipulation; (b) only contested the Estate’s capacity as a beneficiary in the context of their general denial of liability based upon the abatement theory; and (c) have since represented to the Court of Appeals that they have never objected to the potential beneficiaries’ distribution agreement (“took no position on this issue”), statements which are tantamount to a waiver.

Given these facts, as well as the Court of Appeals’ rejection of the abatement argument, the potential beneficiaries’ settlement agreement controls any distribution of the accrued lump sum proceeds. The distribution issue: (a) was either abandoned through Appellants’ entry of a stipulation as to the binding nature of the potential beneficiaries’ distribution agreement; or (b) became moot and/or has been waived due to an absence of any objection to this Commission-approved agreement.

Accordingly, the Hudsons respectfully request that the Court grant their Petition, review the Court of Appeals' decision, permit oral argument and issue a decision finding that all parties must abide by the potential beneficiaries' Commission-approved settlement relative to the distribution of the lump sum proceeds. They further request this Court to reverse the Court of Appeals' decision relative to this issue and recognize their entitlement to 50% of all sums due (compensation and sanctions).

D. THE COURT OF APPEALS ERRED IN REVERSING THE COMMISSION'S ASSESSMENT OF INTEREST BECAUSE: (A) THE ONLY REASONABLE INFERENCE ARISING FROM THE RECORD CERTAINLY VERIFIES THIS SANCTION WAS PREMISED UPON THE GUARANTY ASSOCIATION'S ACTIONS, RATHER THAN AN OBLIGATION INCURRED BY THE INSOLVENT INSURER; (B) THIS SANCTION WAS PROPERLY IMPOSED PER THE PROVISIONS OF S.C. CODE ANN. SECTION 38-31-60 (J) (1976, AS AMENDED), WHICH SUBJECTS THE GUARANTY ASSOCIATION TO LIABILITY FOR ITS CONDUCT; AND (C) THE GUARANTY ASSOCIATION WAS REQUIRED TO SATISFY THE PORTION OF THIS SANCTION ATTRIBUTABLE TO ITS ACTIONS, REGARDLESS OF WHETHER THIS INTEREST CONSTITUTED A "COVERED CLAIM" WITHIN THE MEANING OF S.C. CODE ANN. SECTION 38-31-20 (8) (1976, AS AMENDED).

The Guaranty Association was established in 1971 (per Act No. 534) "to provide protection for insureds in the event their insurance carriers become insolvent." Builders Transport, Inc. v. South Carolina Property and Casualty Insurance Guaranty Association, 307 S.C. 398, 415 S.E. 2d 419, 423 (Ct. App. 1992). To accomplish this end, the Guaranty Association: (a) "is considered the insurer to the extent of its obligation on the covered claims"; and (b) assumes derivative liability as to the "obligations of the insolvent insurer as if the insurer had not become insolvent" in connection with the payment of "covered claims". See, Section 38-31-60 (b).

Since its inception, the Guaranty Association has also been: (a) afforded the authority to essentially "perform any. . . acts necessary or proper to effectuate" its primary purpose; and (b) **subject to civil liability ("may sue or be sued")**. See, Act No. 534, 1971 S.C. Acts, 1001, 1005 (currently codified as S.C. Code Ann. Section 38-31-60 (j) (1976, as amended) (Emphasis added). Significantly, while this entity's derivative liability has been refined/restricted to some extent through the passage of various amendments to S.C. Code Ann. Section 38-31-20 (1976, as amended), the Legislature has

not seen fit to limit the Guaranty Association's civil responsibility for its own conduct through adoption of similar amendments to Section 38-31-60.

In 2001, the Legislature amended Section 38-31-20 to exclude interest from the definition of a "covered claim" ("Covered claim' does not include: . . . (h) any claims for interest."). However, a review of Act No. 82, 2001 S.C. Acts, 1959,1969 – 1972 verifies: (a) this reference to interest related solely to "covered claims"; and (b) the provisions recognizing the Guaranty Association's general civil liability were neither amended nor modified.

"Where there are different statutes *in pari materia*, though enacted at different times, and not referring to each other, they are to be taken and construed together as one system and as explanatory of each other." Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 2d 426, 427 (1934); United Technologies v. South Carolina Second Injury Fund, 318 S.C. 213, 456 S.E. 2d 901, 904 (1995). Consequently, : (a) "sections of the Code relat[ing]. . . to the same subject matter. . . must be construed together, keeping in mind of course the legislative intent." Bush v. Gingery Brothers, 232 S.C. 20, 100 S.E. 2d 821, 823 (1957); and (b) enactments "which are part of the same general statutory law of the state should be construed together. . . ." Glover by Cauthen v. Suitt Construction Company, 318 S.C. 465, 458 S.E. 2d 535, 537 (1995).

It is also axiomatic that "words in a statute **must be construed in context**", and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 666 S.E. 2d 892, 895 – 896 (2008); Travelscape, LLC v. South Carolina Department of Revenue, Op. No. 26913, filed January 18, 2011. (Emphasis added).

Additionally, “[a] basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.” Berkebile v. Outen, 311 S.C. 50, 426 S.E. 2d 760, 762 (1993); Kerr v. Richland Memorial Hospital, 383 S.C. 146, 678 S.E. 2d 809, 811 (2009).

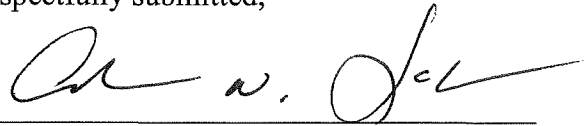
In this regard, consideration of the relevant sections of the South Carolina Property and Casualty Insurance Guaranty Association Act, in light of these fundamental rules of construction, confirms the Legislature: (a) has determined that the Guaranty Association’s liability can be both primary and derivative; (b) a “covered claim” necessarily stems from the Guaranty Association’s derivative liability, as it must “arise . . . out of . . . an insurance policy to which the chapter applies issued by an . . . insolvent insurer”; (c) “claims for interest” can only be excluded in the context of derivative liability (“covered claim”); and (d) this exclusion does not extend to situations to where, as here, the Guaranty Association is primarily liable.

While the Court of Appeals ruled the Commission’s assessment of interest did not fall within the parameters of a “covered claim” and was consequently precluded by the South Carolina Property and Casualty Insurance Guaranty Association Act, the Hudsons respectfully submit this sanction is: (a) **clearly the product of the Guaranty Association’s “unreasonable . . . failure to timely accept liability for the payment of the June 12, 2002 award”** (See, Record on Appeal, pp. 94 – 95); (b) **no less mandated** by statute (Section 42-9-240) than the other (10% penalty per S.C. Code Ann. Section 42-9-90 (1976)) sanction the Court of Appeals affirmed; (c) an **obligation falling within the scope of the Guaranty Association’s primary liability**; and (d) **not derivative of the insolvent insured’s liability (from the date the Guaranty Association undertook**

control of the defense of the underlying claim), so as to be excluded per Section 38-31-20 (8) (h).

Accordingly, the Hudsons request that the Court grant their petition, review the Court of Appeals' decision, permit oral argument and issue a decision finding that the Guaranty Association is obliged to pay the Commission's interest award, effective at least January 25, 2005 (date of "dependency hearing"), to the beneficiaries in accordance with their Commission-approved settlement agreement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew N. Safran". The signature is fluid and cursive, written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LANCASTER COUNTY

COURT OF COMMON PLEAS

KENNETH E. GOODE, CIRCUIT COURT JUDGE

CASE NUMBER: 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.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier ... RESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne M. Branham, legal assistant for Andrew N. Safran, Esquire, Attorney for Petitioners, do hereby certify that on the 24th day of June, 2011, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioner's Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petition for Writ of Certiorari was furnished to counsel for Respondents via first class mail at the following address:

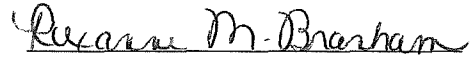
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June 24, 2011