

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Kenneth G. Goode, Circuit Court Judge

Case No.: 2006-CP-29-941 &

2006-CP-29-955

Frances S. Hudson, Deceased Employee, by Kenneth Hudson and Keith Hudson, Co-Executors of her Estate, and Matthew Deese and/or Andrew Deese,.....Respondents.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company in liquidation through S.C. Property and Casualty Insurance Guaranty Association, carrier,.....Appellants.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rules 240 and 242, SCACR, the South Carolina Property and Casualty Insurance Guaranty Association (“SCPCIGA”) hereby petitions this Court for a Writ of Certiorari to review the decision of the South Carolina Court of Appeals in this matter. SCPCIGA respectfully asserts that the Court of Appeals erred in: (1) construing S.C. Code Ann. § 42-9-90 to impose a mandatory penalty despite its express language to the contrary; (2) holding the order of the Honorable Paul E. Short, Jr. to be the law of the case on the issue of abatement; and (3) failing to address the issue of abatement on the merits.

The Court of Appeals issued three different opinions in this case, as a result of the initial hearing and subsequent Petitions for Rehearing. SCPCIGA respectfully asserts that the differing reasoning contained in the three opinions of the Court of Appeals regarding the appropriateness of appellate review of the abatement issue shows that the Court of Appeal’s consideration apparently was a pretext to justify not addressing the issue on the merits.

RULE 242(d)(1), SCACR, CERTIFICATION

SCPCIGA hereby certifies that the following Petitions for Rehearing were made to, and finally ruled on by, the Court of Appeals:

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QUESTIONS PRESENTED FOR REVIEW

- 1. Did the Court of Appeals misconstrue S.C. Code Ann. § 42-9-90 to impose a mandatory penalty despite its express language to the contrary?**
- 2. Did the Court of Appeals err in ruling that the order of the Honorable Paul E. Short, Jr. was the law of the case on the issue of abatement ?**
- 3. Absent the order of the Honorable Paul E. Short, Jr. operating as law of the case on the issue of abatement, should the issue of abatement be addressed on its merits?**

STATEMENT OF THE CASE

The Claimant, Frances Hudson, suffered an admitted accident on October 23, 1997. Following a hearing, Commissioner Lyndon issued an Order on October 3, 2001, finding the Claimant to be totally disabled pursuant to S.C. Code Ann. § 42-9-10. (R. pp. 15-31). Claimant filed a Form 24 on December 14, 2001, requesting a lump sum payment. (R. p. 132). Commissioner Martschink issued an Order dated June 12, 2002, ordering Employer to satisfy the October 3, 2001 award via lump sum payment. (R. pp. 44-56).

The Employer appealed the Order. On July 30, 2002, prior to a ruling in the appeal, Claimant died from cancer which was unrelated to her work injury. On January 27, 2003, the Full Commission affirmed the June 12, 2002 Order. (R. p. 59). Employer appealed to the Circuit Court on February 26, 2003. During the pendency of the appeal, Employer's insurer, Legion Insurance Company, became insolvent and the South Carolina Property and Casualty Insurance Guaranty Association ("SCPCIGA") assumed responsibility for this claim.

The only issues raised by Appellants on appeal to the Circuit Court were: 1) Whether the lump sum award was in the best interest of the claimant; and 2) Whether the award violated the Order of the Commonwealth Court of Pennsylvania regarding Legion Insurance Company's inability to pay awards in lump sum. (R. pp. 135-136). By Order dated February 17, 2004, the Circuit Court affirmed the Full Commission's January 27, 2003 Order. (R. p. 72). The Circuit

Court's Order also made rulings on issues outside those contained in the Full Commission's Order, on Claimant's Form 24, or raised by the Employer on appeal, including: (1) the applicability of Estate of Covington v. AT&T Nassau Metals, 304 S.C. 436, 405 S.E.2d 393 (1991); (2) whether the award abated; and (3) whether Claimant's permanent disability compensation entitlement was finally adjudicated prior to her death. (R. pp. 69-71). The Employer filed an appeal in the Court of Appeals, but later dismissed the appeal. (R. p. 263)

Thereafter, Claimant's sons, Kenneth L. Hudson and Keith B. Hudson, requested a hearing in order to seek payment of the lump sum award as co-executors of her estate. Claimant's grandsons, Andrew and Matthew Deese ("Grandchildren"), also requested the lump sum award as Claimant's next of kin dependents. (R. pp. 184-233). The Defendants position at the dependency hearing was: 1) Claimant's award abated at her death since the award was based on loss of earning capacity (S.C. Code Ann. §42-9-10, first paragraph) and Claimant's cause of death was unrelated to her injury; and 2) If it did not abate, the proceeds would go to the to the minor grandchildren, pro rata, based on their dependency upon Claimant at the time of her death.

By Order dated June 3, 2005, the Single Commissioner found (a) Kenneth L. Hudson and Keith B. Hudson were "the sole beneficiaries of ... [Claimant's] estate"; (b) Grandchildren "were each dependent, to some extent, upon [Claimant] for support at the time of her death"; (c) these potential beneficiaries had reached "a valid/reasonable settlement of" their respective entitlements to the proceeds of a lump sum permanent/total disability compensation award rendered prior to Claimant's death; and (d) this resolution of their "competing interests...ha[d] been acknowledged/accepted by Defendants... who offered no objection to the manner in which these proceeds would be allocated in this instance." (R. p. 90).

The Single Commissioner also found: (a) Defendants had previously raised the issue of abatement of Claimant's award before the Fairfield County Court of Common Pleas; (b) the Honorable Paul E. Short, Jr. had "not only validated the propriety of...[this] Commissioner's lump sum award, but also specifically" rejected Defendants' abatement argument; (c) Defendants' subsequent abandonment of their appeal of Judge Short's determinations "necessitated 'that any matters disposed of in the February 17, 2004 Order became the law of the case'"; (d) Defendants were obliged to satisfy this unappealed lump sum award (which constituted an "accrued benefit"), notwithstanding any challenge as to the law of the case; and (e) their failure to do so was sufficiently baseless to warrant sanctions and interest. (R. p. 96).

The Single Commissioner's Order was appealed to the Full Commission. On June 29, 2006, the Full Commission affirmed the Single Commissioner's Order with the following modifications: (a) the failure to pursue an appeal on alternative rulings results in the determination "stand[ing] ...as the law of the case." (citations omitted); (b) as recognized under North Carolina law, a lump sum award made prior to a claimant's death is deemed to be an 'accrued' benefit and if no determination of the lump sum award is made prior to death, any entitlements are 'unaccrued' until such time as they are determined. (citations omitted); (c) this case is distinguishable from Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), because Claimant's lump sum award was not an unaccrued benefit within the purview of Section 42-9-280, the award survived her death, and the Defendants' reliance on Stone is misplaced; (d) interest shall be paid from the original date of the award at the maximum legal rate; (e) no penalties should be assessed as Defendants did not pursue a frivolous defense. (R. pp. 103-6).

All parties appealed to the Court of Common Pleas. By Order dated April 7, 2008, Judge Kenneth G. Goode upheld the Full Commission's findings. However, he reinstated the penalty

because he found Appellants' "failure to timely accept liability for the payment of the June 12, 2002 award was unreasonable," and therefore "the Commission erred in vacating the 10% penalty mandated by Section 42-9-90..." (R. p. 127-128). Thereafter, The Appellants appealed the ruling on the issues of the penalty and abatement, *inter alia*, to the Court of Appeals.

The Court of Appeals affirmed the reinstatement of the penalty and ruled that the order of the Honorable Paul E. Short, Jr. was the law of the case on the issue of abatement, and therefore, did not address the issue of abatement on its merits. In reaching its final decision, the Court of Appeals issued three opinions as a result of the original hearing and subsequent Petitions for Rehearings. Despite the Court of Appeals' ruling on the issue of abatement being consistent throughout the multiple opinions, its reasoning differs. This Petition for Certiorari follows.

ARGUMENTS

1. Did the Court of Appeals misconstrue S.C. Code Ann. § 42-9-90 to impose a mandatory penalty despite its express language to the contrary?

The Single Commissioner imposed a ten percent penalty pursuant to S.C. Code Ann. § 42-9-90 due to his finding that the Appellants pursued a frivolous defense in this claim. (R. 96) During its review of the Single Commissioner's order, the Full Commission reversed this ruling and found that, "no penalties should be assessed, as Defendants did not pursue a frivolous defense." (R.105) The Circuit Court reversed the Full Commission and reinstated the penalty due to a finding that the failure to timely accept liability was unreasonable and, therefore, the penalty was mandatory pursuant to Section 42-9-90. (R.127)

Respondents have not argued that the penalty should be imposed due to stopping weekly payments of benefits to the Estate, which was the basis for the Court of Appeals affirming the reinstatement of the penalty. However, this is inconsistent with the Court of Appeal's holding that it was error to award Claimant's "lump sum to her Estate rather than to her beneficiaries...."

Given that this issue was never raised or argued, it was not properly before the Court. The first step in preserving an issue for appellate review is to actually raise it to the lower court. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731(1998); Smith v. Phillips, 318 S.C. 453, 458, S.E.2d 427 (1995). Moreover, the Estate was never substituted as a party, nor could it have been under the Workers' Compensation Act. Accordingly, payment was never made to the Estate. Payments were made to the decedent, and ceased due to her death. The Single Commissioner imposed the penalty under Section 42-9-90 for pursuit of a frivolous defense – not for stoppage of weekly payments.

The Circuit Court, in reversing the Full Commission on this issue, relied on Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). First, the Circuit Court's reliance on Martin was inappropriate and inapplicable to the facts of this case. The award of penalties in this case was made pursuant to Section 42-9-90. The Martin opinion dealt with an interpretation of penalties assessed under S.C. Code Ann. §42-9-260(G) which applies specifically and exclusively to an employers, "[f]ailure to comply with *this* section..." (relating to improper termination of temporary compensation benefits) (emphasis added) Id. The Martin decision reviewed a completely different statute which did not allow for discretion of the Commission, and determined the time periods applicable for penalty under a different statute. Martin was not, as in this case, a ruling on whether or not a sanction for penalties was applicable in the first instance. Martin ultimately held that if a basis for a Section 42-9-260 penalty for sanctions was upheld, **then** there was no discretion afforded concerning the time periods for which those sanctions should be levied. Conversely, in the instant case, the factual basis for the hearing Commissioner's initial award of penalties under Section 42-9-90, pursuit of a frivolous defense, was actually overturned by the Full Commission.

Moreover, Section 42-9-90 provides:

If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in Section 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, **unless such nonpayment is excused by the Commission** after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(emphasis added).

The express language of this statute gives the Commission the discretion to excuse the nonpayment, and not impose the penalty, if the employer shows that his nonpayment was due to conditions over which he had no control. “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03, at 94 (5th ed.1992)). Not only did the Commission have discretion in imposing a penalty if it found violation of the statute, but the Commission also determined that imposing the penalty had been in error, by finding that a frivolous defense had not been pursued.

Even if the Commission lacked discretion under the statute, to invoke a penalty the imposition of the penalty was based on the Single Commissioner's finding that Defendants pursued a frivolous or meritless defense. The Full Commission did not simply vacate the Single

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Moreover, Section 42-9-90 provides:

If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in Section 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, **unless such nonpayment is excused by the Commission** after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(emphasis added).

The express language of this statute gives the Commission the discretion to excuse the nonpayment, and not impose the penalty, if the employer shows that his nonpayment was due to conditions over which he had no control. “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03, at 94 (5th ed.1992)). Not only did the Commission have discretion in imposing a penalty if it found violation of the statute, but the Commission also determined that imposing the penalty had been in error, by finding that a frivolous defense had not been pursued.

Even if the Commission lacked discretion under the statute, to invoke a penalty the imposition of the penalty was based on the Single Commissioner's finding that Defendants pursued a frivolous or meritless defense. The Full Commission did not simply vacate the Single

Commissioner's imposition of the penalty, but also found that imposition of a penalty was unwarranted because the, "Defendants did not pursue a frivolous defense." (R. 105-6). This finding overturned the Single Commissioner's factual basis for imposing the penalty.

In order to reinstate the penalty, Circuit Court would have to overturn the Full Commission's ruling on the penalty and make its own factual findings as to the basis for the awarding of the penalties. Making the required factual finding is beyond the scope of review for appellate courts in Workers' Compensation cases. The Full Commission is the ultimate finder of fact in a Workers' Compensation case. Foggie v. General Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (S.C.App.,2008); Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Appellate courts are, "limited in their review of the facts to a determination of whether or not there is...[substantial] evidence to support the factual findings of the Commission." Greer v. Greenville Co., 245 S.C. 442, 141 S.E.2d 91 (1965). "A court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Forrest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007).

The record provides substantial evidence for the Full Commission's finding that the defenses pursued by Appellants were in fact reasonable, and neither frivolous nor undertaken in bad faith. The finding of a non-frivolous defense is further substantiated by the Court of Appeals' ultimate ruling that a lump sum award to the decedent/respondent's estate would be improper. Payments were not made by the Appellant Carriers due to the death of the Claimant and the uncertainty that arose from it. Claimant's death, from an unrelated cause, was an event that the employer could not control. The Full Commission, while not ultimately agreeing with Appellant's arguments on abatement, recognized the precarious situation the Appellants were placed in due to the Claimant's death. The Full Commission's finding that the Appellant's

defense was not frivolous was a recognition that a legitimate question existed as to payment of the lump sum and to whom payment was to be made and is tantamount to a finding that payment could not be made without further clarification. Again, this is further highlighted by the fact that the Court of Appeals agreed with Appellants' arguments on this point, and therefore reversed the Circuit Court, ruling that it was in error to award Claimant's "lump sum to her Estate rather than to her beneficiaries...." Given the uncertainty as to which beneficiaries payment was due, assuming any benefits were payable, Appellants could not pay anyone without being exposed to the possibility of paying indemnity benefits twice. An insurer who pays benefits to one party, when another party has a valid claim to the same, can be ordered to pay the full benefits to the second party as well. See Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977); Norwood v. American Tobacco Company, 296 S.C. 415, 373 S.E.2d 694 (Ct. App. 1988).

Had the Appellants paid weekly indemnity benefits to the estate of Frances Hundson after her death, then there would be no basis for the 10% penalty. However, the Appellants would now be required to pay the sum of those weekly indemnity benefits from the date of the Frances Hudson death onward a second time to the decedent/Respondent's next of kin dependents. This would impose what is essentially a 100% penalty. Such an outcome was not the intent of the legislature in enacting Section 42-9-90.

This issue is best summed up by the express language of Section 42-9-90, which requires the imposition on a penalty for nonpayment "**unless such nonpayment is excused by the Commission** after a showing by the employer that owing to conditions over which he had no control such installment could not be paid...." Here, the employer had no control over the Claimant's death from cancer. Furthermore, the Employer could not simply pay the benefits to the Claimant's estate. This point is proven by the Court of Appeals holding that "the circuit

court erred in affirming the Appellate Panel’s decision to award [Claimant’s] to the Estate....” Despite this quoted ruling, the Court of Appeals, in analyzing the penalty issue, states the Appellants “simply stopped paying compensation to the Estate.” Notably, the Appellants never paid benefits to the Estate. Payments that were being made to the Claimant and ceased on her death.

Most importantly, the Court of Appeals recognized that the Appellants had a non-frivolous defense, which expressly negates the reason the penalty was originally imposed, but went on to hold that imposition of the penalty was mandatory. The circuit court’s reversal of the Full Commission’s excuse of the nonpayment is also improper as it is based on a ground which was not raised before the Commission or at any point prior to appellate review. This holding is contrary to the express language of Section 42-9-90 and unjustifiably replaces the factual findings of the Full Commission with those of the reviewing appellate courts.

2. Did the Court of Appeals err in ruling that the order of the Honorable Paul E. Short, Jr. was the law of the case on the issue of abatement ?

Following the Single Commissioner’s award of lump sum benefits for the Claimant, Employer appealed the ruling to the Full Commission. Prior to the hearing before the Full Commission, the Claimant died from causes not related to her employment or the injury for which she had been awarded compensation. Thereafter, the Full Commission affirmed the Single Commissioner’s order awarding a lump sum.

The Employer appealed the Full Commission's Order to the Circuit Court. During this appeal, the Employer, for the first time, attempted to raise the death of Claimant and resulting abatement of the underlying award. Judge Short correctly ruled that the issue Claimant's death and resulting abatement were not properly before the Court. However, Judge Short went on to address the issue *arguendo* and was not persuaded by the Employer's arguments on the issue.

Following Judge Short's ruling, Appellant's filed an appeal with the Court of Appeals but subsequently withdrew it. Thereafter, Claimant's Estate, dependent Grandchildren sought payment of the lump sum award, and the imposition of sanctions before the Single Commissioner. The Order from this hearing is the genesis of this appeal. During the hearing before the Single Commissioner, Appellants argued their liability had abated upon the death of Claimant.

The Single Commissioner found that the portion of Judge Short's order that discussed the abatement issue *arguendo* bound the parties due to Employer's withdrawal of the appeal from Judge Short's order. The Single Commissioner went on to address the issue of abatement *arguendo* and ruled against Appellants' arguments on the issue. This outcome was repeated in appeals before the Full Commission and the Circuit Court before Judge Goode, with both ruling the issue was precluded under the law of the case doctrine, addressing the issue of abatement *arguendo*, and ruling against the Appellants' arguments on the issue.

Finally, Appellants appealed the issue to the Court of Appeals, which ruled the issue of abatement was precluded from review under the law of the case doctrine. However, unlike the Single Commissioner, Full Commission, and the Circuit Court, the Court of Appeals refused to address the issue on its merits. In its original Opinion, the Court of Appeals found that the issue of abatement had been raised at the earliest possible point, i.e. before the Appellate Panel. As a result, the Court of Appeals held that the issue of abatement had been properly before the Appellate Panel and the Circuit Court. The Court of Appeals also ruled that Judge Short had addressed the merits of the abatement issue and found it to be unpersuasive. The Court of Appeals held that Judge Short's ruling on the merits of the issue was the law of the case.

SCPCIGA filed its original Petition for Rehearing to challenge this ruling. Given that Judge Short's order expressly found that the abatement issue was not properly before him and that he only addressed the merits of the issue *arguendo*, SCPCIGA argued that the merits of the issue had not been determined and the parties could not be bound by the alleged ruling on the merits. Following SCPCIGA's original Petition for Rehearing, the Court of Appeals withdrew its original Opinion and issued a substituted Opinion on February 4, 2011.

In its reissued Opinion, the Court of Appeals based its refusal to address the merits of the abatement issue on a finding that Judge Short's ruling that the abatement issue was unpreserved is the law of the case. Despite the changed reasoning for the holding on the abatement issue, the first sentence of the Conclusion Section of the reissued opinion states: "Judge Short's order addressing abatement on the merits is the law of the case."

In response to the Substituted Opinion of February 4, 2011, SCPCIGA filed a Petition for Rehearing, on February 22, 2011, based on the same grounds as those stated in the Original Petition for Rehearing. After reviewing the second Petition for Rehearing, the Court of Appeals substituted the second filed Opinion with a third Opinion on April 21, 2011. The only modification in the Third Opinion was to change the language in the Conclusion Section that "Judge Short's order addressing abatement on the merits is the law of the case..." to read "Judge Short's ruling finding the abatement issue unpreserved is the law of the case."

SCPCIGA respectfully asserts that the differing reasoning contained in the three opinions of the Court of Appeals regarding the appropriateness of appellate review of the abatement issue shows that the Court of Appeal's consideration was a mere pretext to justify not addressing the

issue on the merits. Based on the authority of Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009), the Court of Appeals, in its final opinion, reasoned:

Judge Short's order found this issue was not properly before the circuit court in 2004 **because Employer and the Guaranty Association failed to raise it to the Appellate Panel after Hudson died.** Employer and the Guaranty Association appealed Judge Short's ruling but later withdrew the appeal. Thus, we find Judge Short's ruling finding the abatement issue unpreserved is the law of the case.

(emphasis added). SCPCIGA respectfully submits that the Court of Appeals's ruling that Judge Short's Order is the law of the case as to the issue of abatement is not correct.

To view this matter in the proper procedural context, one must look at it as two separate sets of proceedings. The first set of proceedings were those initiated by the Claimant relating to the initial award. These proceedings concluded in the appeal from Judge Short's order that was later dismissed. In the first set of proceedings, the issue of abatement could not properly be raised since it was never presented to the Single Commissioner as the Claimant did not die until after the Single Commissioner had heard the matter and issued her order awarding the lump sum.

As a result of the Claimant's death, payment under the standing order could not be effected as there existed no party to which to make payment. This inability to make payment resulted in the second set of proceedings. The second set of proceedings were initiated by Kenneth Hudson and Keith Hudson, as Co-Executors of the Estate of Frances S. Hudson, and the Grandchildren in order to establish the proper party for receipt of payment. This current appellate review is part of second set of proceedings not the first.

The Judge Short's Order from the first set of proceedings cannot serve as the law of the case on this issue. An order "becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter..." Matheson v. McCormac, 186 S.C. 93

(1938). Furthermore, the doctrine of collateral estoppel serves to prevent a party from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997). The first set of proceedings were brought by the Claimant. Following the withdrawal of the appeal of Judge Short's Order, the second set of proceedings was initiated by Kenneth Hudson and Keith Hudson, as Co-Executors of the Estate of Frances S. Hudson, and the Grandchildren. Since the two sets of proceedings involved different parties, a procedural ruling in the first case cannot serve as law of the case in the second proceeding.

Moreover, the issues Appellants raised during the second set of proceedings were not litigated and were not issues in the first set of proceedings that resulted in Judge Short's Order. The only issues properly before Judge Short were the issues raised in Appellant's Petition for Judicial Review which were: (a) whether the Commission erred in finding Ms. Hudson's best interests were furthered by her receipt of a lump sum payment; and (b) whether the Commission was prohibited from awarding a lump sum payment per the terms of the March 28, 2002 Rehabilitation Order issued by the Commonwealth Court of Pennsylvania. Therefore, the issues/defenses raised by the Appellants in the second set of proceedings were not issues in the first of proceedings and were not litigated. For this reason, the Appellants are not now collaterally estopped to assert these issues/defenses.

Similarly, *Res Judicata* will not block the issues/defenses. *Res Judicata* is shown if (1) the identities of the parties are the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Riedman Corporation v. Greenville Steel Structures, Inc., 308 S.C. 467, 468-69, 419 S.E.2d 217, 218 (1992). None of the three elements of *Res Judicata* are satisfied.

With respect to the first element, the parties are not the same. The decedent was the Claimant in the first set of proceedings. On the other hand, Claimant's Sons and Grandchildren, all of whom are Claimant's potential beneficiaries, are pursuing the second set of proceedings.

With respect to the second element, the subject matter of this litigation is entirely different than the initial proceeding. The Circuit Court clearly stated in its Order that the Appellants "limited their present appeal to two issues (existence of evidence and power of Commission to order lump sum payment)." (R. p. 70). The issues which are the subject of this petition are dependency, potential abatement/survivability of the award, and the identity of the person(s) entitled to Claimant's benefits should the award survive, if anyone.

As to the third element, a court of competent jurisdiction must have made a ruling. The Circuit Court clearly provided in its Order that the issues regarding the potential implications of Claimant's death "exceed the scope of Appellants' February 26, 2003 exceptions and are not properly before this Court." (R. p. 70). As a result, the Circuit Court's Order cannot be construed to have ruled on those issues. Therefore, the elements of *Res Judicata* are not met.

This Court dealt with an identical issue in Stone v. Roadway Express, 367 S.C. 575 (2006), and concluded that the only issue on appeal from the hearing on the compensability of the award was the compensability of the award. In addition, this Court agreed that the parties were different. As a result, neither *Res Judicata* nor collateral estoppel applied to prevent the Employer/Carrier from asserting the § 42-9-280 defense at the dependency hearing.

3. Absent the order of the Honorable Paul E. Short, Jr. operating as law of the case on the issue of abatement, should the issue of abatement be addressed on its merits?

The first paragraph of S.C. Code Ann. § 42-9-10 provides for compensation to an employee whose injury results in total incapacity or “wage loss.” The second paragraph of this statute provides for total and permanent disability resulting from “the loss of both hands, arms, feet, legs, or vision in both eyes, or any two thereof...” This distinction in the basis of a total and permanent disability determination is important as it relates to survivability of a compensation award should the claimant die from non-work related causes.

Commissioner Lyndon in his October 2001 Order finding permanent and total disability utilized the “wage loss” basis, or first paragraph, of Section 42-9-10. His Order finds and determines in relevant part as follows:

16. I further find: ... (b) Dr. Stewart’s opinions and Ms. Hudson’s contention that she is incapable of returning to gainful employment are validated by the South Carolina Vocational Rehabilitation Department’s determination that her severe handicaps prohibit meaningful vocational rehabilitation; and (c) a reasonably stable market does not exist for the types of services she is capable of providing.

17. Based upon these facts, I also find Ms. Hudson: ... (b) is 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.

And further held under the relevant, “Conclusion of Law” that:

4. I conclude Ms. Hudson is permanently and totally disabled per S.C. Code Ann. Section 42-9-10 (1976, as amended) as a matter of law based upon the combination of impairments/limitations stemming from her compensable left leg injury and its consequences (left hip and right leg/hip symptoms). In this regard, I further conclude that these physical impairments/limitations coupled with the vocational deficits identified by Dr. Stewart and the South Carolina Vocational Rehabilitation Department, prohibit her from providing any form of employment services for which a reasonably stable market exists.

(R. pp. 27-8, 29-30.)

Commissioner Lyndon found Claimant lost the ability to compete in the open job market due to her left leg injury and the *symptoms* she was experiencing with her right leg/hip area **and her inability to return to any gainful employment**. Commissioner Lyndon did not find that Claimant had a loss of or loss of use of both legs, hips, or any combination thereof which would entitle Claimant to seek total disability under the second paragraph of Section § 42-9-10. Commissioner Lyndon's findings clearly indicate Claimant was compensated under the first paragraph of § 42-9-10 because that is the only portion requiring proof of incapacity to work.

S.C. Code Ann. § 42-9-280 states in relevant part:

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.

This provision has been construed to allow for survivability of only awards based upon a scheduled injury (§42-9-30 or second paragraph of §42-9-10), not awards based on wage loss. Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006).

This Court decided years ago the benefits provided pursuant to § 42-9-10 are contingent, and not payable when an employee dies of unrelated causes. In Ashley v. Ware Shoals Mfg. Co., 42 S.E.2d 390, 394 (S.C. 1947), this Court determined liability for payment of total disability under Section [42-9-10] is contingent in nature as the employee may die during the period of such disability from a cause wholly disconnected with the accidental injury sustained. Workers Compensation benefits are statutorily derived, and any right a claimant may have to any such benefit is dependent upon the terms and condition of these statutory provisions. It is well-settled that a cause of action created by statute survives 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 (S.C. 2001).

In this case, Claimant received benefits pursuant to the first paragraph of § 42-9-10. As a result, § 42-9-280 does permit survivability of such an award. In the absence of any other statutory provision, the Claimant's award abated upon her death from cancer on July 31, 2002. Unless 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 (S.C. App. 1985), *overruled on other grounds by* Washington v. Whitaker, 451 S.E.2d 894 (S.C. 1994); *See also* Chapman v. Home Indemnity Co., 442 S.2d 1388, 1389 (La. 1983) ("Once an employee dies, the disability terminates and along with it goes the employer's obligation to pay").

Respondents alleges the award of a lump sum payment was a final award and thus an accrued benefit at the time of her death. Interestingly, Respondent suggests the Court look years ahead to the withdrawal of the appeal to the Court of Appeals by letter dated April 19, 2004 (R. p. 263), to determine whether the benefits were accrued on July 31, 2002, rather than looking at the status of the case on the date of Claimant's death. The only final award at the time of the Claimant's death was the award for the payment of the remaining 500 weeks on a weekly basis. On the date of Claimant's death, the award of a lump sum payment was on appeal to the Full Commission, and Claimant was receiving weekly disability payments. It is well-settled that the award of a Single Commissioner is not "final" pending appeal to the Full Commission. Riddle v. Fairforest Finishing Company 198 S.C. 419 (1942). "All findings of fact and law by the hearing commissioner become and are the law of the case, **except only those within the scope of exception of defendant and the notice given to the parties by the Commission.**" Ham v. Mullis Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)(emphasis added).

Respondent argues that this court should look to North Carolina law for a definition of accrued and unaccrued benefits. In this case, there is no need to go beyond South Carolina law to find a definition for accrued versus unaccrued benefits. In general, North Carolina appellate decisions construing the Workers' Compensation Act, "are entitled to great weight," in South Carolina. Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220, 223 (1975). However, where South Carolina courts have already spoken on the interpretation of a statute, there is no need to look to North Carolina courts for guidance.

Accrued benefits are defined in South Carolina case law, *see* Cullum v. New York Life Ins. Co., 197 S.C. 6 (1941). In interpreting how disability benefits accumulate, the Court in Cullum held, "[t]he disability benefits accrue from day to day as the disability continues...." It naturally follows that in the workers' compensation setting, a claimant similarly accrues workers' compensation benefits from day to day as his/her disability continues. Workers' Compensation benefits are analogous to this example. For each week a claimant is out of work due to the work-related injury, he/she accumulates or accrues a week's worth of benefits.

Further, where the South Carolina and North Carolina relevant statutes contain significant differences reliance upon North Carolina interpretive law is not utilized. The North Carolina counterpart to S.C. Code Ann. § 42-9-280 is N.C.G.S. 97-37 which provides:

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, in lieu of the compensation the employee would have been entitled to had he lived.* (emphasis added)

In contrast to the North Carolina statute, S.C. Code Ann. § 42-9-280 (addressing non-work related death) provides simply that such benefits are payable 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. (emphasis added)

Comparison of the two statutes evidences that North Carolina makes *express* statutory provisions allowing for transfer of benefits in cases of non-work related deaths to the estate or non-dependent relatives while South Carolina explicitly does **not** so provide. The South Carolina provision is mandatory, in that the award “shall be made to his next of kin dependents,” and provides no other options for payment of the award to any persons or entity other than the decedent Claimant’s, “next of kin dependent upon him for support.” S.C. Code Ann. §42-9-280. In direct contrast to the S.C. Code, the North Carolina statutes provide five different potential recipients for the benefits of the decedent Claimant in non-work related deaths, as listed: “*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.” (emphasis added) (N.C.G.S. 97-37).

The Circuit Court Order relies heavily on Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566 (1980) (R. pp. 122-123), which states in pertinent part that:

In North Carolina, in the situation where a claimant dies after a claim has been filed, the claimant's estate may recover all accrued but unpaid benefits, and all unaccrued benefits to which the employee “would have been entitled” had he lived are payable to decedent's dependents pursuant to N.C.Gen.Stat. 97-37. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

Wilhite at 568. This statement should make it abundantly clear that North Carolina has instituted a regime whereby “accrued” and “unaccrued” benefits are distributed to the estate vs. the dependents in different situations and shows a clear distinction between South Carolina and

North Carolina on this point. South Carolina makes no provisions for granting the award to the estate of a decedent Claimant. Furthermore, in South Carolina, workers' compensation benefits can abate, as expressly recognized by South Carolina courts in Stone and Covington.

In Stone, the employee injured his back and lower extremity and subsequently received an award of total disability based upon loss of earning capacity under the first paragraph of § 42-9-10. Stone later died from complications related to a brain tumor. His wife sought to recover benefits remaining in lump sum after her husband's death. The employer argued since Stone's award was based upon the first paragraph of Section 42-9-10 (loss of earning capacity) the right to compensation abated upon Stone's death from the brain tumor. In reversing the award for lump sum benefits to Stone's widow, this Court ruled an award based upon loss of earning capacity under the first paragraph of Section 42-9-10 does not survive where the employee's death was unrelated to his work injury. This Court explained that § 42-9-280 provides for the inheritability of only two types of awards:

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 (§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), 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. *See e.g.*, §§42-9-150; 42-9-160; 42-9-170.

Stone, 627 S.E.2d at 700. Citing Professor Larson, this Court held "since 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." Id. at 700.

In this case, Claimant received an award of total disability based on loss of earning capacity under the first paragraph of Section 42-9-10. Therefore, under the rule set forth in Stone and the plain language of Section 42-9-280, Claimant's award does not survive her death, and her dependents may not receive the unaccrued compensation benefits. As noted by Professor Larson, "as a general proposition, the right to receive future workers' compensation benefits is not inheritable." Larson's Workers' Compensation Law §89.03 (2001). See also Am. Jur. 2nd 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).

CONCLUSION

For the forgoing reasons, Petitioner respectfully asks this Court to grant this Petition for Certiorari; allow briefing and arguments on all issues; review the decision of the South Carolina Court of Appeals; reverse the South Carolina Court of Appeals' and the Circuit Court's ruling on the imposition of the penalty, law of the case doctrine, and the issue of abatement; and deny the claim for benefits under the Workers' Compensation Act due to abatement upon the death of Claimant.

Respectfully Submitted,



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