

**IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

Kenneth E. Goode, Circuit Court Judge

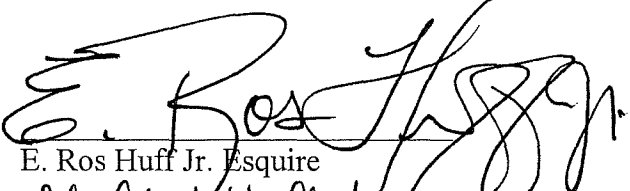
Trial Court Case No. 2006-CP-29-955

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

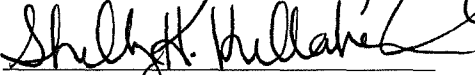
v.

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

PETITION FOR WRIT OF CERTIORARI



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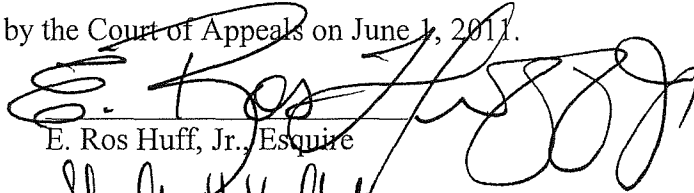
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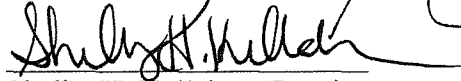
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CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies, pursuant to SCACR Rule 226(d)(1), that the Petition for Rehearing was initially made to the Court of Appeals on August 16, 2010, and finally ruled on by the Court of Appeals on June 1, 2011.



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July 1, 2011

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding and concluding that there was a final adjudication to the Petitioner's obligation to satisfy the June 12, 2002 award?
- II. Were the Petitioner's due process rights under S.C. Const. Art. I, § 22 violated by the Court of Appeals' erroneous decisions to hold the abatement issue as unpreserved thereby denying Petitioner an opportunity to have the issue heard on the merits?
- III. Did the Court of Appeals err in finding that the Claimant's benefits survived her non-work related death when her benefits were awarded under the first paragraph of §42-9-10 and are therefore not covered by the survival provision of §42-9-280?
- IV. Did the Court of Appeals exceed its authority in awarding lump sum benefits to the Grandchildren?

STATEMENT OF THE CASE

Ms. Frances Hudson was found permanently and totally disabled by SC Code Ann. Section 42-9-10 the S.C. Workers' Compensation Commission in an Order dated October 3, 2001. (R.15). Thereafter, Ms. Hudson requested a lump sum award pursuant to a Form 24. (R.132). A hearing was held to determine whether Ms. Hudson was entitled to a lump sum award pursuant to S.C. Code Ann. Section 42-9-301 (1976, as amended).

An order was issued on June 12, 2002 awarding lump sum benefits. The Employer filed a WCC Form 30 appeal indicating it was error to award lump sum payment. No other issues were brought up on appeal. *See Green v. City of Columbia*, 311 S.C. 78, 427 S.E. 2d 685 (SC App. 1993).

Prior to the appeal hearing being held, Ms. Hudson died from non work related causes. On August 23, 2002, upon learning of the Claimant's death, the attorney for the Employer sent a letter to the S.C. Workers' Compensation Commission requesting a dependency hearing. (R.62). The Appellate Panel subsequently affirmed the lump sum award by Order dated January 27, 2003. (R.57). Up until the time Ms. Hudson died on July 30, 2002, the issue of abatement was not applicable or ripe for a hearing. The appellate panel order was appealed by a Petition for Judicial Review to the Circuit Court. (R.135). The Petition, filed pursuant to S.C. Code § 1-23-380 (1976, as amended) and § 42-17-60 (1976, as amended), was limited in scope to the findings of the Appellate Panel. On February 26, 2004, Judge Short issued an Order improperly finding that the issue of abatement was not preserved for appellate review and affirmed the lump sum award to the Claimant. (R.61). The Employer then filed a Notice of Appeal to the S.C. Court of Appeals dated March 24, 2004. (R.141). This Appeal was ultimately withdrawn, thereby

making Judge Short's determination that lump sum benefits was proper and became the law of the case.

On October 22, 2004, a Dependency Hearing was held before the Commissioner Bass to determine if any of the unpaid compensation that was due to Ms. Hudson at the time of her death was payable to her next of kin dependents. It was at this time that the Employer raised the issue of abatement for the first time. The Single Commissioner issued an Order on June 3, 2005 awarding benefits payable to Ms. Hudson's beneficiaries (not her next of kin dependent) and finding that Judge Short's Order was the law of the case, thus Defendants could not raise the issue of abatement. (R.75). On June 21, 2005 and June 22, 2005 respectively, the attorneys for the Employer and Guaranty Association thereby filed Form 30's requesting that the S.C. Workers' Compensation Commission review the award of the Single Commissioner. (R.143-150). A hearing was held before the Appellate Panel on February 21, 2006 and an Order issued on July 29, 2006 which affirmed the Order of the Single Commissioner and reversed a portion imposing a 10% penalty. (R.99). Thereafter, the Employer, Guaranty Association, and the Claimant filed Petitions for Judicial Review with the Circuit Court. (R.151 – 183).

A hearing was held before Judge Kenneth G. Goode, who ultimately affirmed the Full Commission's Order with the exception of the portion vacating 10% penalty, which he found the Defendants were responsible for paying. (R.109). It is from this Order that the Appellants appealed to the South Carolina Court of Appeals.

On March 3, 2010, the South Carolina Court of Appeals heard arguments on this matter. The Court of Appeals filed its first opinion on June 30, 2010 affirming the circuit court order (First opinion). The Court of Appeals substituted its opinion of June 30, 2010

and issued an Opinion affirming the Circuit Court in part in reversing in part on February 4, 2011 (Second opinion). On February 22, 2011, the Appellants filed a Petition for Rehearing on the basis that the Circuit Court Order dated February 17, 2004 was not the law of the case; that Judge Short did not have jurisdiction over the issue of abatement; and that Judge Goode's Order of March 27, 2008 must be reversed in so far as he affirms the Commission's July 29, 2006 Order as Ms. Hudson's award abated upon her death pursuant to the *Estate of Covington*, 304 S.C 436, 405 S.E.2d 393 (1991). The Court of Appeals denied the Petition for Rehearing, but substituted the February 4, 2011 opinion with another opinion dated April 21, 2011 (Third opinion). Defendants again filed a Petition for Rehearing on May 4, 2011. The Court of Appeals denied that Petition by Order dated June 1, 2011.

ARGUMENTS

I. The Court of Appeals erred in finding and concluding that there was a final adjudication to the Petitioner's obligation to satisfy the June 12, 2002 award upon the law of the case doctrine.

The Court of Appeals erred in concluding the Order of Honorable Judge Short, dated February 23, 2004, finally determined the issue of abatement by finding Defendants' reliance on *Estate of Covington v. AT&T Nassau Metals Corporation*, 304 S.C. 436, 405 S.E.2d 393 (1991) misplaced upon the law of the case doctrine. The Circuit Court and the Court of Appeals found Defendant's are bound by Judge Short's order. (R.115). However, Judge Short's order makes clear:

“despite the awareness of Ms. Hudson's death, Appellants: (a) never requested the Appellate Panel (*of the SCWCC*) to address any of the current allegations relative to the implications of this event; (b) proceeded to obtain a determination on the merits of their appeal; and (c) limited

their present appeal to two issues (existence of substantial evidence and power of commission to order lump sum payment). In view of these facts, **I conclude these issues exceed the scope of Appellants' February 26, 2003 exceptions and are not properly before this Court.** *emphasis added.*

Judge Short's order then assumes "arguendo the dependency hearing request could conceivably be construed" to have raised the assertions and finds by not bringing them before Judge Short in their February 23, 2003 petition, Defendants abandon their right to litigate the issue and Judge Short further finds reliance on *Estate of Covington*, 304 S.C. 436, 405 S.E.2d 393 (1991) misplaced.

Appellants argue the issue of abatement was not properly before Judge Short. The Order has to assume the issues were raised and properly before Judge Short before making any determinations regarding their merits. It seems clear assumptions cannot be the basis of a Circuit Court ruling. To further illustrate these issues were not properly before Judge Short, Judge Short specifically concludes "these issues exceed the scope of Appellants' February 26, 2003 exceptions and are not properly before this Court."

The Circuit Court and the Court of Appeals have divested the South Carolina Workers Compensation Commission of its exclusive jurisdiction to determine issues under Workers' Compensation Code. The underlying issue in this litigation is the effect of the Claimant's death on her previous award for benefits. This is an issue for the Commission to take up first. The parties would present their arguments allowing the Commission to make its own findings of facts and conclusions of law. If a party is aggrieved by the decision of the Commission, they may file exceptions to the appellate court who then can determine the issues in accordance with the law. In the present case, the Circuit Court made and the Court of Appeals upheld a determination on the issue of

abatement without any findings of fact and conclusions of law from the Commission and to do so was an error of law.

Judge Short's Order regarding the issue of abatement is merely dicta, not findings of fact or conclusions of law and bears no relation to the issue of continued viability of the Claimant's action. Dicta is an expression in the court's opinion which goes beyond the facts before the court. Therefore they are the individual views of the author and are **NOT** binding in subsequent cases.

Judge Short states on page nine (9) of his Order, that this Court can consider only matters that were before the Commission and ... to which error has been specifically assigned. *Wall v. C.Y. Thomason Company*, 232 S.C. 153, 101 S.E.2d 286, 288 (1957); *see also Bush v. Gingrey Brothers*, 232 S.C. 20, 100 S.E.2d 821, 824 (1957). (R.69). Judge Short goes on to state on page ten (10) that these issues exceed the scope of Appellant's February 26, 2003 exceptions and are not properly before this Court. (R.70). Judge Short's continued discussion regarding the Defendants/Appellants' assertions regarding a dependency hearing and their reliance on the *Estate of Covington* decision is merely dicta and not binding on either party. (R.71).

II. The Petitioner's due process rights were violated due to the Court of Appeals erroneous decisions to hold the Abatement Issue as unpreserved.

The Commission has exclusive jurisdiction over all claims that fall under the South Carolina Worker's Compensation Act. S.C. Code Ann. Section 42-3-180 (2005). The substantial evidence rule governs the standard of review in a workers' compensation decision. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 681 S.E.2d 595 (S.C. Ct. App. 2009).

A reviewing court can reverse or modify the decisions below **“if an appellant's substantial rights have been prejudiced because the decision is affected by an error**

of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” *Id. See also*; S.C. Code Ann. § 1-23-380(A)(6) (2005) (*emphasis added*).

The Appellants’ due process rights were violated by the ruling that the Abatement Issue was unpreserved on appeal due to the fact that the Appellants never had an opportunity to have the issue heard on the merits and will never have the opportunity to be heard on this issue. Under South Carolina's Constitution, due process in the administrative context is established by S.C. Const. Art. I, § 22. *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146, (S.C. 2010) Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146, (S.C. 2010).

The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, **an opportunity to be heard** in a meaningful way, and judicial review. *Id.* (*emphasis added*).

The first error of law occurred on February 26, 2004, when Judge Short issued an Order improperly finding that the issue of Abatement was not preserved for appellate review. The issue of Abatement as he stated was never properly before him because it was never brought before the Workers Compensation Commission. His scope of review was limited to the issue of Lump Sum benefits. S.C. Code Ann. § 1-23-380 (2005); *see also*; S.C. Code Ann. §42-17-60 (2005). Judge Short’s ruling that the Abatement Issue

was unpreserved for appeal was clearly erroneous in light of the fact that the Abatement issue could not have been brought up on the first appeal because Ms. Hudson died after the grounds of appeal were railed by the filing of the Form 30. When the issue was appropriately before the Single Commissioner during the hearings involving the dependency issue, the Single Commissioner erroneously relied on Judge Short's previous Order by finding that Judge Short's order was the "law of the case." This determination was also an error of law because the review of the dependency hearing was limited to the issues of Abatement and Dependency, and Judge Short's ruling during the Lump Sum appeal was not only irrelevant, but erroneous to the issue on the merits of abatement. S.C. Code Ann. § 1-23-380 (2005). This error of law was relied upon by: both the Appellate Panels of the Workers' Compensation Commission; Judge Short; the Single Commissioner during the Dependency Hearing; Judge Goode, in his review of the Dependency Appeal; and ultimately by the South Carolina Court of Appeals. The Appellants are entitled to a hearing on the merits of the issue of Abatement and have been forever barred from litigating the issue because of an error of law that this Court has the power to correct.

III. The Court of Appeals committed an error of law in relying upon the "law of the case" doctrine in this matter.

Under *Judy v. Martin*, which the court cites as authority for the "law of the case doctrine," "a party is precluded from **re-litigating**, after an appeal, matters that were either (1) not raised on appeal, but should have been, or (2) raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 457, 674 S.E.2d 151,153 (2009), (*emphasis added*). This doctrine is inapplicable to this matter of abatement because: (1) the abatement issue was never litigated in the first place during

the lump sum hearing before Commissioner Martschink on June 12, 2001; (2) the issue should not and could have not have ever been raised on the appeal regarding the lump sum Order because the claimant Hudson was alive, and (3) the issue was never expressly rejected by the appellate court.

The Appellants are not “re-litigating” the issue of Abatement because the issue was never litigated before the Commission during the lump sum hearing. At the Dependency Hearing (second round of appeals), Commissioner Bass declined to address the issue of Abatement and instead determined that Judge Short’s Order concerning the lump sum benefits and declining to hear the abatement issue as unpreserved, was the law of the case (R.75). The ruling by Judge Goode on March 27, 2008 which found that Judge Short’s Order is the law of the case is not binding and does not represent the law of the case because the issue of abatement was not properly before Judge Short. Moreover, the Circuit Court Order of Judge Goode on March 27, 2008 was based on the assumption that the abatement issue was properly before Judge Short.

The Commission has exclusive jurisdiction over all claims that fall under the South Carolina Worker’s Compensation Act. Therefore, the issue of Abatement must first be presented to the Workers Compensation Commission before a Court can review the decision and make a ruling. The Claimant was still alive during the initial request for lump sum payment of benefits, thus the abatement issue was not ripe for determination before Commissioner Martschink at the lump sum hearing. Moreover, the Claimant was still alive when the employer filed the Form 30 Request for Commission Review of the lump sum payment. It is axiomatic that “before any action can be maintained, there must exist a justiciable controversy.” *James v. Anne's, Inc.*, 390 S.C. 188, 701 S.E.2d 730 (S.C.

2010). A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Id. Therefore, Judge Short's Order stating that the issue was unreserved is erroneous because the issue of Abatement was not justiciable at the time that Appellant's made their arguments to the Commissioner Martschink on the lump sum issue or when the issue came before the South Carolina Workers Compensation Appellate Panel.

The first time that the Abatement issue was ripe for determination was before Commissioner Bass at the dependency hearing on October 22, 2004. This hearing was scheduled pursuant to S.C. Code Ann. Section 42-9-280 to determine if any of the unpaid compensation that was due to Ms. Hudson at the time of her death was payable to her next of kin dependents. Commissioner Bass also failed to rule on the merits of the abatement issue even though this was the first time that the issue could have been raised. Commissioner Bass' Order of June 3, 2005 awarded benefits payable to Ms. Hudson's beneficiaries and found that Judge Short's order which stated that the issue of abatement was unreserved because Appellant's failed to raise it on appeal was the "law of the case." Since Commissioner Bass failed to rule on the issue of abatement when the issue was ripe for determination during the dependency hearing appeal and the abatement issue was not ripe for review during the lump sum appeal when Judge Short heard the matter, the issue of Abatement will never be heard on the merits.

Finally, even if the issue of abatement could have been raised on appeal, it was never expressly rejected by South Carolina Workers Compensation Commission

Appellate Panel or the appellate court. Judge Short in his Order dated February 17, 2004, found that Abatement was not properly before the Circuit Court in 2004 because the employer and guaranty fund failed to raise it to the Appellate Panel after Ms. Hudson died. However, Judge Short did not have jurisdiction over the issue of abatement as it was not decided on by the South Carolina Worker's Compensation Commission who retains exclusive jurisdiction pursuant to S.C. Code Annotated Section 42-3-180. If he did not have jurisdiction over the issue, neither he, nor any other tribunal expressly rejected the issue. Therefore, Judge Short's discussion of the Defendants/Appellants assertions regarding Dependency or Abatement is merely dicta and not the "law of the case" Dicta is an expression of the Court's opinion which goes beyond the facts before the court. *See Nash v. Tindall Corp*, 375 S.C. 36, 650 S.E.2d 81 (SC App. 2007).

IV. The Court of Appeals erred in finding that the Claimant's benefits survived her non-work related death because her benefits were awarded under the first paragraph of 42-9-10 and are therefore no covered by the survival provision of § 42-9-280.

The Claimant was receiving an award of total disability benefits pursuant to the Order dated October 3, 2001, in which Commissioner Lyndon found and concluded that the Claimant was entitled to permanent and total disability based on her work related injuries pursuant to the first paragraph of S.C. Code Ann. § 42-9-10 (2005). (R.29) However, the Claimant died as a result of non work related causes prior to receiving all of her benefits, thus the Claimant's right to compensation ceased and abated upon her death and her beneficiaries and/or next of kin dependents cannot make a claim for her compensation.

In South Carolina, "a cause of action created by statute survives when and only when some provision for its survival is made in the statute itself, or in some other

statute.” *Ferguson v. Charleston Lincoln Mercury, Inc.*, 344 S.C. 502 544 S.E.2d 285, (S.C. Ct. App. 2001). Workers’ compensation is a cause of action created by statute. *See* generally, S.C. Code Title 42. *See also Estate of Covington*, 304 S.C 436, 405 S.E.2d 393 (1991). The compensation afforded by the Act is statutory in character, and the right of any claimant thereto is dependent upon the terms and conditions of the statute.

Therefore, the survivability of the Claimant’s workers’ compensation claim depends on the statutory provision for its survival. Although the Act does, in certain limited situations, provide for the survival of an action, in this instance it does not. South Carolina Code Ann. § 42-9-280 (2005), is entitled Payment of unpaid balance of compensation when employee dies. This code section states in its entirety:

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

Pursuant to this statute, the threshold determination in a case in which the employee dies from an unrelated cause before he has been paid all benefits for his workers’ compensation claim, is whether the award is “for an injury covered by the second paragraph of § 42-9-10 or § 42-9-30.” S.C. Code § 42-9-280 (2005). In this case, the Claimant received her compensation award under the first paragraph of § 42-9-10. Thus, she does not fall within the terms of the statute and her award abated upon her death.

Commissioner Lyndon specifically awarded under the first paragraph of § 42-9-10 due to the fact that the Claimant suffered from total wage loss due to her work related injury. In particular, he states on page eight (8) of the Order that:

“Ms. Hudson’s bilateral leg symptoms most probably prohibited her from maintaining/sustaining regular, full time employment.” (R.22).

This language in of itself shows that the Claimant suffered from wage loss. Secondly, he states in his Order on page eleven (11) that ...

“a reasonably stable market... [did not exist] for the types of services she is physically, vocationally and educationally capable of performing; and her handicaps were, in fact, too severe for there to be a reasonable expectation that she can be rehabilitated to the extent she could legitimately compete for gainful employment.” (R.75).

Further, Commissioner Lyndon states on page thirteen (13)

“a reasonably stable market does not and will [not] exist for the types of services she is capable of providing.”

Commissioner Lyndon found on page fourteen (14) that the Claimant 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.”

This language in Commissioner Lyndon’s Order indicates that the Claimant is permanently and totally disabled due to wage loss.

A careful reading of § 42-9-10 demonstrates a difference between an award under the first paragraph versus an award under the second paragraph. Claimants who are compensated under the first paragraph of § 42-9-10 are compensated for their incapacity to work. Referring to S.C. Code § 42-1-120, disability is defined as the incapacity because of injury to earn the wages which the employee was receiving at the time of the

injury in the same or any other employment. In contrast, a claimant awarded benefits under the second paragraph of § 42-9-10 or § 42-9-30 are compensated for the loss of specific body parts.¹ Section 42-9-30 illustrates the difference between “loss” and “loss of use” of specific body parts. Due to this distinction, it becomes evident that “loss” means the actual body part is missing, while “loss of use” pertains to the functional incapacity.

The second paragraph of § 42-9-10 applies to the “*loss of* both hands, arms, feet, legs, or vision in both eyes, or any two thereof.” S.C. Code Ann. § 42-9-10 (2005) (emphasis added). It does not provide for the *loss of use* of body parts. While § 42-9-30 has a provision that states “total *loss of use* of a member...shall be considered as equivalent to the *loss* of such member,” § 42-9-10 has no such provision. It cannot be said that this was an unintentional omission by the drafters of the Act.

Commissioner Lyndon’s findings made it clear that the Claimant was compensated under the first paragraph of § 42-9-10 because that is the only part that requires proof of the incapacity to work. Evidence of vocational ability would be completely unnecessary if trying to prove the second paragraph since it does not concern the capacity to work.

Commissioner Bass’ order tries to rewrite the basis of the original decision of Commissioner Lyndon i.e. loss of earning capacity under § 42-9-10, first paragraph,

¹ This is not the only place the legislature has noted a distinction between different types of benefits, and linked the second paragraph of § 42-9-10 with § 42-9-30. For example, sections 42-9-160 and 42-9-170 each link the two. See, S.C. Code Ann. § 42-9-160 (“unless the later injury be a permanent injury *such as specified in § 42-9-30 or the second paragraph of § 42-9-10*[.]”)(emphasis added); S.C. Code Ann. § 42-9-170 (“if an employee receives a permanent injury *as specified in § 42-9-30 or in the second paragraph of § 42-9-10*...”)(emphasis added). Clearly, the legislature intended to draw a distinction between permanent loss and awards intended to provide for the inability to earn wages, and provided for the survivability of the former, and not the latter. S.C. Code Ann. § 42-9-280.

without the issue ever being litigated before Commissioner Bass because Commissioner Lyndon's Order is the law of the case.

Because the Legislature chose not to provide for the survival of benefits awarded under the first paragraph of § 42-9-10, the award abated upon Claimant's death. "[U]nless a statute *specifically provides* for the survival of an action for personal injury, it does not lie after the injured person's death." *Reed v. Medlin*, 284 S.C. 585, 328 S.E.2d 115 (S.C. Ct. App. 1985) (emphasis added), *overruled on other grounds by Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994).

"As a general proposition, the right to receive future workers' compensation benefits is not inheritable." Larson, *Workers' Compensation Law*, § 89 (2001). *See also* 82 Am.Jur.2d *Workers' Compensation* § 670 (2003) ("It is generally recognized that upon the death of a worker receiving compensation benefits, the worker's personal representative has no right to any benefit payments which were not due and payable at the time of the worker's death.").

Section 42-9-280 contains no survivability provision regarding an award of benefits under the first paragraph of § 42-9-10; therefore, the instant action did not survive Claimant's death. *See generally* S.C. Code Ann. § 42-9-280.

Commissioner Bass erroneously applied the North Carolina case of *Wilhite v. Liberty Veneer Company*, 47 N.C. App. 434, 267 S.E.2d 568, as his legal precedence. First of all, because out of state decisions are not legally binding upon jurisdictions in South Carolina. Secondly, the case is distinguishable.

The relevant North Carolina statute related (but not identical) to the South Carolina statute in this case provides that when employees are entitled to compensation

for an injury under G.S. 97-31, payment of the unpaid balance shall be made to next of kin. N.C. Gen. Stat. § 97-40. In *Wilhite*, there was no debate over whether Claimant's injury would have been covered under G.S. 97-31 and therefore survived Claimant's death. In this case, the main issue is whether Claimant's injury fell under the first or second paragraph of § 42-9-10, because one paragraph is covered by § 42-9-280 and the other is not. Since Claimant's injury did not fall under the portion of § 42-9-10 covered by §42-9-280, Claimant's lump sum award did not constitute an accrued benefit like the Claimant in *Wilhite*. Therefore, *Wilhite* does not shed much light on the matter and it was error to use it as legal precedence.

More than fifty years ago, the Supreme Court of South Carolina explicitly agreed with the argument made herein. That is, they agreed that the benefits payable under § 42-9-10 are contingent, and not payable when an employee dies of unrelated causes. In deciding the case of *Ashley v. Ware Shoals Mfg. Co.*, 42 S.E.2d 390 (1947), Justice Oxner stated the following:

Appellants correctly state that the liability for the payment of total disability under Section [42-9-10] is contingent in nature because (1) *the employee may die during the period of such disability from a cause wholly disconnected with the accidental injury sustained*, and (2) the disability may terminate or change to the status of partial disability before expiration of the maximum period allowed by statute for the payment of total disability. Id. at 394 (emphasis added).

This situation is precisely what happened in the instant case—Claimant died “from a cause wholly disconnected with the accidental injury sustained.” This being the case, the benefits awarded her under § 42-9-10 were contingent in nature and abated upon her death.

The Claimant's beneficiaries cannot then claim that Ms. Hudson's workers' compensation benefits fall under the general survivability statute. The Supreme Court of South Carolina has specifically held that S.C. Code § 15-5-90 does not provide for the survival of claims brought under the Workers' Compensation Act. *Estate of Covington v. AT&T Nassau Metals Corporation*, 405 S.E.2d 393, 394 (1991). The Claimant was paid all benefits that were due to her, as she was receiving ongoing benefits until her death. Further, because she was awarded benefits under the first paragraph of § 42-9-10, her estate was not entitled to any benefits to which she would have been entitled had she survived. By the clear terms of § 42-9-280, the Claimant's benefits did not survive her death. By allowing her dependents and/or next of kin within the terms of § 42-9-280 would alter the express intention of the Legislature and is thus prohibited. *See Adkins v. Comcar Industries, Inc.*, 447 S.E.2d 228, 230 (1994), *aff'd*. 475 S.E.2d 762 (1996) (to depart from the meaning expressed by the words is to alter the statute; to legislate and not to interpret.... There is a marked distinction between liberal construction of statutes by which the court determines their true meaning, and the act of a court in engrafting upon a law something that has been omitted, which the court believes ought to have been embraced). Therefore, the Claimant's beneficiaries' claims do not fall under the general survivability statute.

Lastly, the Claimant's benefits were contingent in nature and ceased with her death. An Order dated June 12, 2002 by Commissioner Martschink granted the Claimant's request for a lump sum payment. (R.44-56). However, Defendants filed a Request for Full Commission Review of this decision. (R.133-134). During the pendency of the appeal, the Claimant died of unrelated causes. Therefore, because this Order was

under appeal, it was not final and binding. “All findings of fact and law by the hearing commissioner become and are the law of this case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission.” *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940). At the time of her death, the Claimant was still receiving her benefits on a weekly basis, therefore as stated in Larson’s, “when the award, although fixed for a number of weeks, is paid weekly or periodically, most jurisdictions in the absence of a special statute to the contrary have held that heirs have no claim upon the unaccrued payments since the award is a personal one, based upon the employee’s need for a substitute for lost wages and earning capacity.” Larson, Workers’ Compensation Law, § 89.03 (2001). Further, as stated in *Stone v. Roadway Express*, 367 S.C. 575, 627 S.E.2d 695, 700 (2006), a Claimant’s beneficiaries and/or next of kin dependents are not entitled to unaccrued benefits. In the Stone decision, the Supreme Court specifically stated that

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

In this case, just as in the Stone case, the Claimant was awarded compensation for a loss in earning capacity under the first paragraph of § 42-9-10. Thus, she was being compensated for her loss of earning power, rather than any loss of use of a specific body member. (R. N/A), comparison chart of *Stone* and *Hudson*). Therefore, her claim for compensation ceased with her death. As the Claimant has no benefits to pass to her

beneficiaries/next of kin dependents, there is no further claim under the Act. *See generally* S.C. Code Ann. § 42-9-280 (Providing for the survival of benefits only for a loss under the second paragraph of § 42-9-10 or under § 42-9-30); Larson, Workers' Compensation Law, § 89 (2001)(“As a general proposition, the right to receive future workers' compensation benefits is not inheritable.”); and 82 Am.Jur.2d *Workers' Compensation* § 670 (2003)(“It is generally recognized that upon the death of a worker receiving compensation benefits, the worker's personal representative has no right to any benefit payments which were not due and payable at the time of the worker's death.”)

Benefits awarded pursuant to the first paragraph of § 42-9-10 do not survive a non-work-related death. There is no way around this fact. “It would put an additional burden on the employer, not contemplated by the statutes, to require him to pay either wages or compensation to representatives of an employee who died from natural causes.” *Sherlin v. Liberty Mutual Ins. Co.*, 584 S.W.2d 455, 458 (Tenn, 1979).

Since Claimant was awarded compensation under the first paragraph of § 42-9-10, her award does not come within the clear and unambiguous terms of § 42-9-280, and her benefits ceased with her death. As the Legislature has enacted no provision for the survivability of benefits in this situation, the award did not survive. Likewise, the general survivability statute does not provide any comfort to Claimant's beneficiaries, as it does not apply to workers' compensation benefits.

V. The Court of Appeals exceeded its authority in awarding the lump sum benefits to the Grandchildren.

The Workers' Compensation Commission by the Appellate Panel did not determine who the beneficiaries/next of kin would be should the claims in fact not abate. While the

Order of the Single Commissioner, which was subsequently affirmed by the Full Commission, named four possible beneficiaries/next of kin dependents, it is not certain that all are entitled to take under the Act. (R.99-108). Keith Hudson and Kenneth Hudson, the Claimant's two biological sons, are personal representatives of the Claimant's estate. Keith Hudson, is not the biological father of Andrew Deese; who is not a grandchild as defined as such under SC Code Ann. § 42-1-70. Andrew is the son of Diane Lynn Deese. Matthew Pope is Keith Hudson's biological son and the biological grandson of the deceased Claimant, Frances Hudson. There are no prior cases exist that have awarded a stepgrandchild benefits.

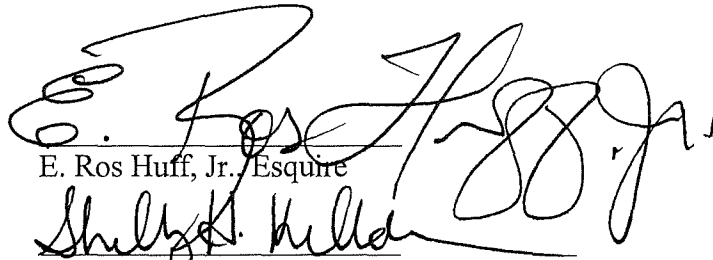
Commissioner Bass' Order of June 3, 2005 awarded benefits payable to Ms. Hudson's beneficiaries. The Court of Appeals in its substituted order of April 21, 2011, reversed this decision and determined that the unpaid balance of Ms. Hudson's lump sum award should go to her dependent grandchildren pursuant to S.C. Code Section 42-9-280. This finding was also in error because the Commission has exclusive jurisdiction pursuant to S.C. Code Ann. Section 42-3-180 (2005). The South Carolina Workers Compensation Commission never made a finding of fact as to who the next of kin dependants of Ms. Hudson are pursuant to S.C. Code Ann. Section 42-9-280. The scope of review was exceeded in this matter when the court *sua sponte* awarded the benefits to Ms. Hudson's dependent grandchildren when the Workers' Compensation Commission never made a determination of who the next of kin dependents were.

CONCLUSION

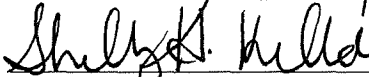
For the forgoing reasons, Petitioner respectfully asks that this Court to grant this Petition for Writ of Certiorari, permit oral arguments on these issues and issue a decision

to reverse the Circuit Court's ruling on the law of the case doctrine and the issue of abatement; and remand this matter to the South Carolina Workers Compensation Commission for a determination on the issues of Abatement and/or to determine the next of kin dependents.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "E. Ros Huff, Jr.", is written over a horizontal line.

E. Ros Huff, Jr., Esquire

A handwritten signature in black ink, appearing to read "Shelby H. Kellahan", is written over a horizontal line.

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July 1, 2011

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

Kenneth E. Goode, Circuit Court Judge

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

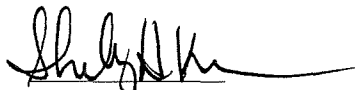
FRANCES S. HUDSON, DECEASED EMPLOYEE, BY KENNETH L. HUDSON
AND KEITH B. HUDSON, CO-EXECUTORS OF HER ESTATE, AS WELL AS
MATTHEW DEESE AND OR ANDREW DEESE,
RESPONDENTS.

v.

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

CERTIFICATE OF SERVICE

I certify that I have served the Petition Writ of Certiorari to Kenneth Hudson and Keith Hudson by depositing a copy of the same in the United States Mail, postage prepaid, on July 1, 2011, addressed to their attorney of record Andrew N. Safran, Post Office Box 12089, Columbia, SC 29211 and Mark Cauthen, PO Box 7217, Columbia SC 29202, attorney for South Carolina Property and Casualty Insurance Guaranty Association, Ann Mickle, 125 Hampton St, Suite 300, Rock Hill, SC 29730 and Pope Johnson, III, Post Office Drawer 11209, Columbia, SC 29211.



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