

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/RESPONDENTS.

v.

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

**PETITIONERS' REPLY TO RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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PRELIMINARY MATTER

Pursuant to an opinion filed June 30, 2010, the Court of Appeals affirmed the Circuit Court's determinations that: (a) the Honorable Paul E. Short, Jr.'s February 7, 2004 Order not only specifically addressed, but actually rejected, Respondents' abatement argument; (b) "his ruling became the law of the case. . . [when Respondents] withdrew their. . .[subsequent] appeal"; and (c) imposition of the 10% penalty prescribed by S.C. Code Ann. Section 42-9-90 (1976) was mandatory in this instance. (See, Appendix, pp. 5 – 9).

Additionally, the Court of Appeals: (a) "direct[ed]. . . all lump sum payments be paid directly to [the]. . . dependent grandsons" (Matthew Deese and Andrew Deese), despite the fact the South Carolina Workers' Compensation Commission found Ms. Frances S. Hudson's Estate possessed a "colorable claim" to the accrued June 12, 2002 lump sum compensation award, actually approving a stipulated settlement agreement by/between all of her potential beneficiaries; and (b) reversed an assessment of interest per S.C. Code Ann. Section 42-9-240 (1976). (See, Appendix, pp. 6 – 8).

Subsequently, by Petition filed August 16, 2010, the Hudsons sought rehearing relative to several issues, including: (a) the Estate's legally cognizable claim to the June 12, 2002 accrued lump sum compensation payment; (b) the continued viability of the respective beneficiaries' Commission-approved settlement agreement; (c) the Court's erroneous nullification of this element of the Commission's Order; (d) the impact of Respondents' failure to object to the potential beneficiaries' distribution agreement (to which they have, at minimum, taken no position); and (e) the propriety of the Commission's award of interest. (See, Appendix, pp. 45 – 57).

On February 4, 2011, the Court of Appeals issued an Order specifically denying the Hudsons' Petition for Rehearing. (See, Appendix, pp. 58 – 59). At that time, the Court also

withdrew its June 30, 2010 opinion, substituting a slightly amended version. (See, Appendix, pp. 64 – 74).

While the substituted opinion revised the Court’s analysis of the abatement issue, it reiterated verbatim the substance of each ruling for which the Hudsons seek a Writ of Certiorari. In fact, the only discernible change relates to the transfer of a citation (“emphasis added”) in the Court’s discussion of “Beneficiaries/Next-of-Kin Dependents”. (See, Appendix, pp. 7 & 71).

Notwithstanding the absence of any material distinction between either the analyses or rulings embodied in these opinions, Respondents maintain the issues raised by the Hudsons’ Petition for Writ of Certiorari were “not preserved for review.” However, this argument is inconsistent with both the letter and spirit of the governing rule.

Specifically, Rule 242 (d) (2) of the South Carolina Appellate Court Rules provides in pertinent part that “. . . [o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” In this regard, the Court has held that “. . . [i]n interpreting the language of a court rule,. . . [it will] apply the same rules of construction used in interpreting statutes. Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E. 2d 906, 907 (1994); See also, Garner v. Houck, 312 S.C. 481, 435 S.E. 2d 847 (1993).

As a consequence, the: (a) “words of Rule. . . [242] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule.” (Id.); Transportation Insurance Company and Flagstar Corporation v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E. 2d 687, 690 (2010); and (b) “language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” Eagle Container Co., LLC

v. County of Newberry, 379 S.C. 564, 666 S.E. 2d 892, 896 (2008); Hill v. York County Natural Gas Authority, 384 S.C. 483, 682 S.E. 2d 809, 813 (2009).

Application of these principles verifies the pertinent portion of Rule 242: (a) is obviously intended to ensure issue preservation; (b) obliges a litigant to raise any questions for which he intends to seek this Court's review to the Court of Appeals via a Petition for Rehearing; and (b) **neither requires nor envisions the filing of multiple rehearing petitions following the Court of Appeals' unequivocal denial of a reconsideration request.**

In this instance, the Hudsons' Petition for Rehearing sought reconsideration of several issues, which essentially relate to their entitlement to share in the accrued lump sum compensation award and the South Carolina Property and Casualty Insurance Guaranty Association's obligation to pay interest in accordance with the Commission's ruling. This reconsideration request was subsequently denied on February 4, 2011. While the Court of Appeals filed a revised opinion on that date, the amendments did not change the substance of its rulings on any issues raised by the Hudsons' Petition for Rehearing.

Recognizing this fact, the Hudsons, out of an abundance of caution, petitioned this Court for Writ of Certiorari within the 30 day period mandated by Rule 242 (c). As the Court of Appeals was still considering Respondents' second Petition for Rehearing (which arguably addressed a substantive revision of the original ruling), this Court dismissed their Cert Petition without prejudice. However, once the Court of Appeals entered its final denial of Respondents' third Petition for Rehearing, the Hudsons again sought a Writ of Certiorari within the specified time frame.

Given these facts, as well as the plain language and purpose of Rule 242 (d), the Hudsons respectfully submit: (a) they have fully complied with this rule; and (b) the issues raised by their June 24, 2011 Petition for Writ of Certiorari are properly before the Court.

ARGUMENTS

A. THE JUNE 12, 2002 LUMP SUM AWARD CREATED AN ACCRUED BENEFIT.

Respondents initially argue that because an Appellate Panel of the Full Commission is empowered to conduct a *de novo* review of the single commissioner's decision, the: (a) June 12, 2002 lump sum compensation award was effectively nullified by Ms. Hudson's death; and (b) authorities cited in the Hudsons' Petition relative to the effect of Judge Short's February 17, 2004 Order are "completely irrelevant". However, these contentions fundamentally misconstrue the impact of an unsuccessful appeal.

"Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered." Brown v. Brown, 286 S.C. 56, 331 S.E. 2d 793 – 794 (1985); Moore v. North American Van Lines, 319 S.C. 446, 462 S.E. 2d 275, 276 (1995). This rule is certainly applicable in the workers' compensation context, to the extent that ". . . [w]hen [an] award of the . . . Commission [is] reversed by the Circuit Court, it bec[omes]. . . of no effect and [is]. . . no longer in existence." Miller v. Springs Cotton Mills, 225 S.C. 326, 82 S.E. 2d 458, 461 (1954); Moore, supra.

Conversely, an affirmance of the underlying ruling "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); See also, Pearle Optical v. Georgia State Board of Examiners in Optometry, 219 Ga. 856, 136 S.E. 2d 371, 373 (Ga. 1964); Tidwell Homes, Inc. v. Sharif, 169 Ga. App. 270, 312 S.E. 2d 616, 617 (Ga. App. 1983) (Upon affirmance "the judgment of the lower court is in full force and effect, precisely the same as if no appeal to this court had been taken."). As a consequence, Respondents' abandonment of their appeal of Judge Short's Order resulted in the single commissioner's June 12, 2002 lump sum compensation award becoming "completely final. . .

[effective] the date of its original entry.” Geier v. Tjaden, 84 N.W. 2d 582, 583 (N.W. 1957); See also, Calhoun v. Calhoun, 339 S.C. 96, 529 S.E. 2d 14, 18 (2000) (On affirmance of underlying judgment, interest commences **“from the same date as if no appeal had been taken. . . .”**). (Emphasis added).

Once the June 12, 2002 lump sum award was affirmed, it became an accrued benefit. See, Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E. 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) (“ . . . [A] lump sum award made prior to . . . [a Claimant’s] death is deemed to be [an]. . . ‘accrued’ benefit. . . .”); See also, Larson’s Workers’ Compensation Law, (2008) Section 89.02. In view of this fact, the Court’s ruling in Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695, 700 (2006) does not (as Respondents maintain) support the notion of abatement in this instance, as Stone’s award of weekly permanent/total disability compensation was an **“unaccrued benefit. . . .”** (Emphasis added).

The provisions of **S.C. Code Ann. Section 42-9-280** (1976) are likewise **inapplicable** because: (a) they **relate exclusively to prospective awards or entitlements to compensation, which are, by their very nature, unaccrued benefits**; and (b) Ms. Hudson’s **entitlement to the lump sum payment of her permanent/total disability compensation award had accrued (through the retroactive effect of affirmance) prior to her death**; and (c) this **vested interest** in the lump sum payment was **properly devisable**.

Essentially, Respondents sought to engage in protracted litigation in the hope of avoiding the liability imposed by the Commission’s lump sum disability compensation award. However, they “should not be excused from the payment obligation simply because the litigation outlasted the decedent.” Grier v. Yellow Freight System, Inc., 245 Mich. App. 38, 627 N.W. 2d 24, 26 (Mich. App. 2001).

B. ESTATE'S ENTITLEMENT TO ACCRUED LUMP SUM COMPENSATION PROCEEDS.

“. . . [I]t 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 provision to the contrary.” Inman v. L.A. Meares, 247 N.C. 661, 101 S.E. 2d 692, 694 (N.C. 1958); Grier, 627 N.W. 2d at 26 (“We can find no law supporting the proposition that an award due and owing an employee during his lifetime cannot thereafter simply be paid to the employee’s estate.”) Despite Respondents’ contention to the contrary, these holdings are not based upon a conflicting (as compared to South Carolina) statutory framework, but rather: (a) the unique nature of accrued benefits; and (b) the absence of any statutory prohibition against an estate receiving payment of compensation which was fully vested prior to the employee’s death.

While Respondents assert the Court’s decision in Estate of Covington v. AT&T Nassau Metals, 304 S.C. 436, 405 S.E. 2d 393 (1991) is dispositive of this issue, their argument conveniently ignores several factual distinctions, including: (a) Covington **died prior to the adjudication of her workers’ compensation claim**; and (b) Section 42-9-280 was applicable because the **claim was unaccrued**. This argument likewise overlooks the fact Professor Larson, upon whose treatise this Court has repeatedly relied, instructs that “. . . accrued but unpaid installments are, of course, an asset of the estate, like any other debt.” Larson’s Workers’ Compensation Law, (2002) §89.02. Similarly, **no portion of the South Carolina Workers’ Compensation Act precludes payment of a fully vested and accrued benefit to an estate under the present circumstances.**

Although the current fact pattern is likely reflective of a one in a million scenario, it nonetheless warrants acknowledgment that: (a) Ms. Hudson’s accrued claim was not subject to the provisions of Section 42-9-280; (b) the Hudsons, as executors and sole beneficiaries of her Estate,

“had, colorable” claims of the nature validated by the Commission’s Order. (See, Record on Appeal, pp. 95 and 105); and (c) they are entitled to **share in** the accrued lump sum compensation award proceeds based upon not only the **remaining beneficiaries’ stipulated agreement, but also the Commission’s adoption of this distribution mechanism.**

C. **THE RESPECTIVE BENEFICIARIES' AGREEMENT WAS BINDING AND SHOULD NOT HAVE BEEN DISTURBED.**

During his recitation of the parties' positions, the single commissioner confirmed the respective classes of potential beneficiaries (Hudsons and brothers Deese) would each receive one-half of the accrued lump sum compensation award. (See, Record on Appeal, pp. 189 – 190). This **stipulated settlement agreement** was not only acknowledged on the record by counsel for the respective beneficiaries, but also referenced/approved in the body of the Commission's Order. (See, Record on Appeal, pp. 96 – 98, 105 – 106).

Additionally, the single commissioner verified that “. . . [w]hile reserving his right to claim that there are no funds payable. . . [Respondents' counsel] has **no objections to you all splitting the funds up as you see fit, if they are.**” (See, Record on Appeal, p. 192). Significantly, Respondents' counsel made **no contemporaneous statement which either denied or qualified the accuracy of the single commissioner's description of this stipulation.** Rather, he subsequently argued: (a) Ms. Hudson's claim had abated on her death; (b) Section 42-9-280 governed the distribution of any money potentially owed, to the extent “the estate takes nothing”; and (c) the brothers Deese were not entitled to the full lump sum proceeds, as they were only partially dependent on Ms. Hudson.

Subsequently, when addressing the beneficiaries' settlement agreement, **Respondents' counsel repeatedly represented to the Court of Appeals** that: (a) if the “Court finds an award is due, then **Defendants** 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 Appellants, Lancaster Convalescent Center and Legion Insurance Company, p. 31; Final Reply Brief of Appellants, Lancaster Convalescent Center and Legion Insurance Company Final Reply Brief of Appellants, Lancaster Convalescent Center and Legion Insurance Company, p. 21); and (b) assuming the accrued lump sum compensation award remains viable, “the persons who are entitled

to benefits in the amount of such benefits should be clearly specified. . . .” (See, Final Brief of Appellants, Lancaster Convalescent Center and Legion Insurance Company, p. 32; Final Reply Brief of Appellants, Lancaster Convalescent Center, p. 21).

As discussed in the Hudsons’ Petition for Writ of Certiorari, silence may be construed as assent to a stipulation. Although Respondents have consistently refused to acknowledge any obligation to satisfy the June 12, 2002 accrued lump sum compensation award, **their silence in response to the single commissioner’s characterization** of this stipulation is: (a) wholly **consistent with the statements contained in their Briefs**; (b) an **obvious acknowledgement that the respective beneficiaries’ could divide the funds in whatever manner they saw fit**; and (c) reflective of **either a stipulation consistent with the Commission-approved settlement agreement or the waiver (through silence and subsequent representations to the Court of Appeals) of any right to contest the viability of this agreement.**

The Hudsons would finally note: (a) while the language of S.C. Code Ann. Section 42-9-390 (1986) is not necessarily applicable to the current scenario, **S.C. Code Ann. Section 42-3-180 (1976, as amended) “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); (b) the Commission was consequently empowered to adopt/approve the respective beneficiaries’ stipulated distribution agreement; and (c) given Respondents’ abandonment (through stipulation and/or waiver) of any right to dispute this Commission approved agreement, as well as the fact it actually specifies the proportionate shares allocated to the respective classes of beneficiaries, the Court of Appeals’ nullification of their entitlement to a portion of the accrued lump sum compensation award was clearly erroneous.

D. THE INTEREST ASSESSED AGAINST THE SOUTH CAROLINA PROPERTY AND GUARANTY ASSOCIATION IS A PRIMARY, AS OPPOSED TO DERIVATIVE, OBLIGATION.

It is undisputed that the South Carolina Property and Casualty Insurance Guaranty Association: (a) became a **named Defendant** in connection with this claim prior to entry of Judge Short's February 17, 2004 Order; (b) has since **controlled the direction of this litigation** (actually employing two law firms for this purpose); (c) was **intimately aware** of the legal ramifications resulting from its determination to dismiss the appeal of Judge Short's Order; (d) **nonetheless failed to satisfy an accrued lump sum compensation award "in a timely fashion" (through assertion of an abatement defense). . . [which the Commission determined] was devoid of legal basis"** (See, Record on Appeal, pp. 94 and 103); and (e) has **continued to litigate** the issue relative to its liability to pay in this instance, **notwithstanding the Court of Appeals' ruling that they had abandoned this defense in 2004.**

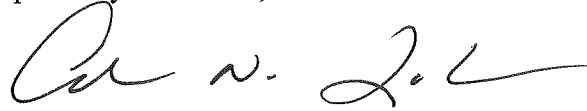
It is equally certain that this Respondent: (a) is subject to civil liability for its actions; (b) has been **solely responsible** for the unjustified delay in payment of this accrued benefit since at least 2004; and (c) **cannot legitimately claim that any interest which has accrued since its abandonment of the appeal of Judge Short's Order is the product of the insolvent insurer's actions.**

Given these facts, the Hudsons respectfully submit: (a) the **interest** allowed by S.C. Code Ann. Section 42-9-240 (1976) **is a sanction**, which **directly results from the Guaranty Association's failure to make timely payment of Ms. Hudson's vested lump sum compensation award**; (b) interest which has accrued since entry of Judge Short's Order is **hardly derivative, as it is certainly the product of the Guaranty Association's knowing/willful/calculated effort to**

avoid this payment obligation; and (c) S.C. Code Ann. Section 38-31-20 (8) (h) (1976, as amended) affords no protection from the assessment of interest under the present circumstances.

Accordingly, the Hudsons again request the Court to grant their Petition for Writ of Certiorari, review the Court of Appeals' decision, permit oral argument and issue a decision endorsing/adopting each of the arguments contained in their Petition, as well as this Reply.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

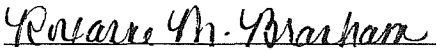
I, Roxanne M. Branham, legal assistant for Andrew N. Safran, Esquire, Attorney for Petitioners, do hereby certify that on the 5th day of August, 2011, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioners' Reply to Respondents' Return to Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioners' Reply to Respondents' Petition for Writ of Certiorari was furnished to counsel for Respondents via first class mail at the following address:

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