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, OF WHOM KENNETH L. HUDSON AND KEITH B. HUDSON ARE
PETITIONERS/RESPONDENTS,

v.

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

Respondent Lancaster Convalescent Center's Reply to Petitioners' Return to Respondents' Petition for Writ of Certiorari

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ARGUMENTS

The Respondent Lancaster Convalescent Center (Lancaster) filed a Petition for Writ of Certiorari on June 28, 2011. The Petitioners Keith and Kenneth Hudson (Petitioners) as co-executors of the estate of Frances L. Hudson filed a reply to the Petition on August 31, 2011. Lancaster submits this return and the following arguments in response to the Petitioners' reply to Lancaster's Petition for Writ of Certiorari:

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT JUDGE SHORT'S ORDER WAS THE LAW OF THE CASE THEREBY PROHIBITING FURTHER CONSIDERATION OF THE ABATEMENT ISSUE.

Petitioners' entire first argument relies on the contention that Lancaster "invited Judge Short to address the issue of abatement and once he (Judge Short) ruled, they were obligated to either (1) appeal his adverse rulings or (2) accept them as the law of the case." This argument is flawed for numerous reasons.

First of all, the cases in which the Petitioners rely are irrelevant to the current situation. Petitioners rely on the decision of Floyd v. Thornton, which states that "one may not on review complain of a ruling which he has invited or induced a trial court to make" to support this argument. Floyd v. Thornton, 220 S.C. 414 (SC 1951).This matter is completely different from the issues raised in Floyd because in that case, the court actually made a **ruling** on the constitutionality of a statute. In the instant matter, Judge Short never made a ruling with respect to the issue of abatement. Judge Short's order clearly stated that the issue of abatement "exceeds the scope of Appellants' February 26, 2003 exceptions and are not properly before this court." (R.70). Because Judge Short made no ruling as to the abatement issue, the Floyd decision is inapplicable.

The Petitioners also rely on the holding in Erickson v Jones Street Publishers, LLC, 368 SC 444, 629 S.E.2d 544 (1970) for the proposition that "a party may not complain on appeal of error or object to trial procedure which his own conduct has induced." In that case, the judge made a jury charge that neither party objected to. That case is also completely irrelevant to the instant matter because Judge Short did not make an active finding but rather stated that the issues were not before him.

Petitioners' contention that Lancaster "invited" Judge Short to make his ruling on abatement is not supported by the record before this Court. The only reference in which Lancaster could find to support Petitioners' argument was Judge Short's own words in his order with respect to abatement. The abatement issue was only mentioned in the context of whether or not the Claimant's award falls under first paragraph of § 42-9-10 and is within the exclusive jurisdiction of the South Carolina workers compensation Commission pursuant to S.C. Code Ann. Section 42-3-180). Moreover, even if Lancaster "invited" him to make a ruling on the issue, he **did not** make a ruling. Petitioners attempt to make Judge Short's statements concerning the abatement issue a ruling by calling it an "alternative ruling." Judge Short clearly stated that the issue of abatement exceeded the two grounds of appeal and his authority to address an issue not yet ruled upon the South Carolina Workers Compensation Commission.

Petitioners further contend that Lancaster is bound by Judge's Shorts "alternative ruling" because it is "the law of the case." It is clear that Judge Short lacked appellate jurisdiction to make his ruling in 2004 on the issue of abatement because abatement was never raised before the South Carolina Workers' Compensation Commission and therefore never ruled upon by the South Carolina Workers' Compensation Commission (See Section 42-3-180). A dependency hearing had been requested prior to the Judge Short's order, at which time the Commission

would determine what benefits, if any, the Claimant's next of kin dependents would be entitled too. By ruling Judge Short's order was a final adjudication of the abatement issue; the court divests the South Carolina Workers' Compensation Commission of its exclusive jurisdiction to determine issues arising under Title 42. S.C. Code Ann. §42-3-180 (S.C. 2007). Because Judge Short lacked appellate jurisdiction to make the ruling, Judge's Short's ruling is merely dicta and not the "law of the case." As the Court in Nash v. Tindall Corp., 375 S.C. 36 (Ct. App. 2007) states "dicta or, as it is also known, dictum is a statement on a matter not necessarily involved in the case, and is not binding as authority." The issue of abatement was not before Judge Short. Therefore, his statements or supposed rulings with regard to abatement are dicta and not binding authority. Moreover, since the parties cannot confer subject matter jurisdiction and the circuit court and the SC Court of Appeals acquires no power to act without jurisdiction, Judge Short's ruling regarding abatement must be set aside and held to have no effect as the ruling is dicta. Cox. v. Lunsford, 272 S.C. 527, 252 S.E.2d. 918 (S.C. 1979).

Petitioners' also contend that the issue of abatement was unpreserved because it was not appealed. This is a misstatement of fact. The abatement issue was appealed at the proper time. 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. Petitioners' assertions that Lancaster failed to properly appeal the issue of abatement is simply not true. The ruling of the South Carolina Workers' Compensation Commission that was before Judge Short in 2004 was on the issue of lump sum

only, not the issue of abatement, because at the time of the lump sum order of Commissioner Martschink, Ms. Hudson was alive and there could be no next of kin defendant if the claimant is living. My God, can it be any clearer that a live person cannot have any next of kin dependent. People that are alive have relatives, not dependents.

II. RESPONDENT/EMPLOYER'S ARGUMENT WITH RESPECT TO DUE PROCESS IS PROPERLY BEFORE THE COURT

The Petitioner correctly states as a general proposition that "the purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court for a second time." Kennedy v. South Carolina Retirement systems, 349 S.C. 531, 564 S.E.2d 322 (2001). However, Lancaster neither overlooked nor misapprehended the argument that the issue of abatement would never be addressed because raising the issue at any other level would have resulted in an advisory ruling. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that among other things, an advisory ruling on a constitutional issue which may never arise would violate our firm policy of declining to reach constitutional issues unless necessary to the resolution of the appeal before us).

The Due Process argument was not ripe to be brought before a tribunal until Lancaster's right to appeal had been exhausted. Lancaster would not know if the abatement issue would never be addressed until it received its final determination from the South Carolina Court of Appeals. Therefore, the abatement issue was raised at the proper time. "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." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). See also Hitter v. McLeod, 274 S.C. 616, 266 S.E.2d 418 (1980). Because the issue of Due Process was

hypothetical until a final ruling had been made by the SC Court of Appeals, Lancaster properly raised the issue to this Court in its Petition for Writ of Certiorari when the issue was ripe. Lancaster exhausted a right of appeal when it received the final ruling by the South Carolina Court of Appeals. Lancaster has now filed a Petition for Writ of Certiorari and seeks permission of this Court to protect and grant them the due process to be heard and to receive a ruling on the abatement issue which is an issue the Single Commissioner, the Commission Appellate Panel, and the South Carolina Court of Appeals has failed to rule on, and keeps saying that Judge Short's 2003 dicta ruling, is the law of the case.

III. THE JUNE 12, 2002 AWARD WAS NOT AN ACCRUED BENEFIT

Petitioners mischaracterize and oversimplify Lancaster's arguments with respect to the 2002 lump sum award being un-accrued. Lancaster has never said that the 2002 lump sum award was nullified by Ms. Hudson's death. Rather, it argues that the lump sum award was not final because a proper appeal was pending at the time of her death and the benefits abated upon Ms. Hudson's death by **statute.**

While it is true that Ms. Hudson was awarded lump sum benefits by Commissioner Martschink, that order was still on appeal to the Appellate Panel and therefore not final. Pursuant to S.C. Code Ann. Section 42-17-50, the Appellate panel is the final fact finder and not bound by the Order of the Single Commissioner. It is undisputed that Ms. Hudson was receiving weekly installment payments at the time of her death. As such, her benefits had not "accrued" and were contingent in nature because the lump sum award was appealed. This is further evidenced by the undisputed fact that at the time of her death, the Claimant was receiving weekly payments of disability.

The right to receive benefits following the death of a claimant fall under S. C. Code Ann. § 42-9-280 (S.C. 2007). 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., 544 S.E.2d 285, 288 (2001). Workers' compensation is a cause of action created by statute. *See* generally, S.C. Code Title 42. *See also* Estate of Covington by Montgomery v. AT&T Nassau Metals Corporation, 405 S.E.2d 393, 394 (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. Petitioners attempt to distinguish the Estate of Covington case from the instant situation on the basis that Covington died prior to the adjudication of her workers compensation claim. However, Hudson likewise died prior to the final adjudication of her claim because an appeal was still pending when she died of unrelated causes (cancer). Since the lump sum order was under appeal the only order that was final was the order awarding weekly payments of disability benefits.

Petitioners continue to rely on North Carolina cases to support their arguments. See Wilhite v. Liberty Veneer Co., 47 N.C. App. 434 (1980). Contrary to Petitioners' assertions, the North Carolina statute interpreted in this and the previously cited North Carolina cases are markedly different from the South Carolina statute. The North Carolina Statute specifically provides for the **estate** to take in situations like this. As that statute states:

> 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,...
> See N.C. Gen. Stat. § 97-37 (emphasis added)

The South Carolina statute has no specific statement that provides for the personal representative to take. South Carolina Code Ann. § 42-9-280 states:

> 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 the South Carolina statute, which is controlling in this matter, 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. 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 benefits 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. The first mention of paragraph 2 of §42-9-10 is found in the order of Commissioner Bass on June 3, 2005. However, the only issues before Commissioner Bass were: a) defendants obligations to satisfy prior orders of this commission; b) identity of Ms. Hudson's next of kin dependents; and c) whether the imposition of sanctions is warranted in this instance. (R.76). Commissioner Bass' order rewrites the basis of the original decision of Commissioner Lyndon i.e. loss of earning capacity under § 42-9-10, first paragraph, without the issue ever being properly raised or litigated before Commissioner Bass. Due process requires notice of issues to be litigated (see Green v. City of Columbia, 427 S.E.2d 685, 311 S.C. 78 (1993). Petitioners should have sought a § 42-9-

10 second paragraph determination in the initial stages of litigation and not some five years later and certainly not after Ms. Hudson's death made it a necessary factor in prevailing in litigation.

Section 42-9-280 does not provide for the survival of Claimant's award, as it was not contemplated within that statute. Instead the Legislature specifically decided that the only awards under § 42-9-10 that would be payable to the next of kin dependents would be those within the second paragraph. 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, 328 S.E.2d 115, 118 (1985) (emphasis added), *overruled on other grounds by* Washington v. Whitaker, 451 S.E.2d 894 (1994).

Lastly, Ms. Hudson's benefits were contingent in nature and ceased with her death. Therefore, they were un-accrued benefits. Ms. Hudson's benefits were accruing each week as payments became due and therefore were contingent upon her living and still being disabled. An Order dated June 12, 2002 by Commissioner Martschink for the first time granted the Ms. Hudson's request for a lump sum payment. (R.44-56). However, Defendants filed a Request for Full Commission Review of this decision (appeal). (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 (next of kin) have no claim upon the un-accrued 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

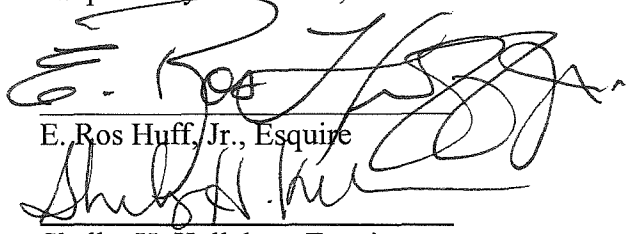
> The language of §42-9-280 is plain. The Legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member...i.e., those who suffered a physical loss, while the dependents of a person totally disabled for 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.

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.29) 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.")

CONCLUSION

Based upon the above cited arguments, Respondent Lancaster Convalescent Center would respectfully submit that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,



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September 21, 2011

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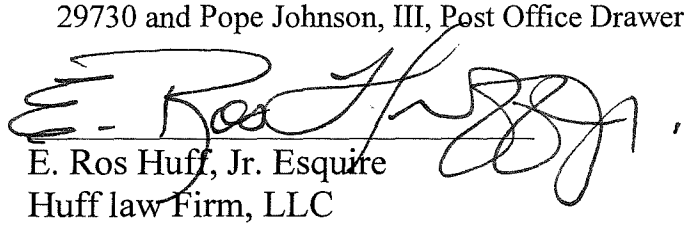
CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Reply to Petitioner's Return to Respondent's 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 **September 21, 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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