

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1205798

BRIETT JOHNSON,  
Employee,  
Claimant,  
vs.  
PIKE ELECTRIC, INC.,  
Employer,  
AND  
LIBERTY MUTUAL INSURANCE  
COMPANY  
Carrier,  
Defendants.

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OCT 31 2014

SC Court of Appeals

DECISION AND ORDER OF THE  
APPELLATE PANEL

Appellate Panel Review Hearing held in Columbia, South Carolina on August 11, 2014,  
per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed September 26, 2014.

APPEARANCES:

Claimant/Appellant represented by  
Gregory B. Askins, Esquire, of Hemingway, South Carolina  
and Brooks R. Fudenberg, of Mount Pleasant, SC

Defendants/Respondents represented by  
J. Brandon Hylton, Esquire of Florence, South Carolina.

## **STATEMENT OF THE CASE**

The parties were heard by Commissioner Avery B. Wilkerson, Jr. on November 4, 2013 in Florence, South Carolina. On February 28, 2014, he issued the following Findings of Fact, Conclusions of Law and Order.

### **FINDINGS OF FACT OF THE SINGLE COMMISSIONER**

Based upon the evidence submitted at the hearing, it was found as a fact that:

1. The parties were provided directives for a proposed Order on December 11, 2013.
2. The Decedent, Briett Johnson, suffered a fatal automobile accident on May 17, 2012.
3. The blood alcohol level drawn approximately three hours after death was a .208.
4. On May 17, 2012, the Decedent was an employee of Pike Electric.
5. On May 17, 2012, the Decedent was returning from a worksite in Winnsboro, South Carolina to his home in Johnsonville, South Carolina in a work truck owned by Pike Electric.
6. The Decedent had a .208 blood alcohol level at the time of the accident.
7. Other than the blood sample, there was no evidence of alcohol use found at the accident scene and no detectable odor of alcohol in the truck or on the Decedent's body; however, none of the witnesses had training on the detection of alcohol and Mr. Redmond had no training on looking for evidence of alcohol at an accident scene.
8. The lack of alcohol containers at the scene is inconsequential, as the Decedent may have consumed alcohol before entering his car, or as Mr. Redmond testified, alcohol containers are not always found at accident scenes involving alcohol as individuals can throw out the alcohol container so as to not keep evidence in a car.
9. Deputy Coroner Reynolds followed the correct protocol in drawing blood from the Decedent's heart on the date of accident.
10. The blood sample was taken by Deputy Coroner Reynolds as it is standard protocol to draw blood at any wreck scene and based on Mr. Reynolds's discussion with the highway patrol; moreover, Mr. Redmond testified that blood samples are taken at accident scenes and submitted to SLED to determine if alcohol was present even if alcohol containers are not found at an accident scene.
11. Deputy Coroner Reynolds followed the correct protocol submitting the vial sample of blood to the South Carolina Law Enforcement Division.

12. There is no evidence that the blood sample was contaminated or tampered with.
13. The Decedent was traveling at an estimated speed of 95 miles per hour at the time of the accident.
14. Traveling at 95 miles hour was not the Decedent's normal nature, based on the testimony of Shanice Hamilton and Margaret Hamilton.
15. The opinion of Dr. James Ballenger, Mr. Robert Sears, and Dr. Elaine Riemer is that a blood alcohol level of .208 causes impairments to judgment and motor control.
16. Based on the report of Dr. Ballenger and the testimony of Mr. Robert Sears that the Decedent's blood alcohol level of .208 was the cause of the Decedent's accident.
17. I give greater weight to the Assistant Coroner report, the SLED toxicology report, the testimony of Don Reynolds, the testimony of Robert Sears than the testimony of Dr. Elaine Riemer, as to the validity of the blood sample and to Mr. Robert Sears regarding the cause of this accident.
18. I give equal weight to the report of Dr. Elaine Riemer and the report of Dr. James Ballenger. They are opposite in nature to the final findings as to causation of the accident.
19. The testimony of John Pinckney and Tom Redman conflicts with each other as to where each was standing when transferring the Decedent's body.
20. Mr. Tom Redman, was a friend of the Decedent's family who became emotional at the hearing as to the death of the Decedent.
21. Based on the testimony of Shanice Hamilton and Margaret Hamilton, and the phone records in the APA submissions, the Decedent made telephone calls to both Margaret and Shanice on the date of the accident and the last indication the Decedent made to either witness was that he was not going to the athletic banquet; moreover, the Decedent was unaware Shanice Hamilton was receiving an award at the banquet.
22. Testimony that the Decedent often surprised his family by saying he would be delayed but would show up on time, or that he would not attend a certain function and would show up to surprise his family is not a consideration in deciding this case, as it would be speculation to find that the Decedent may have been coming home to attend the athletic banquet, especially when the last conversation he had with Margaret Hamilton and Shanice Hamilton was that he was not going to come to the banquet and did not know that Shanice Hamilton was receiving an award that night. Therefore, even though the accident happened at 6:05 p.m. just outside of Johnsonville, S.C. which is where the Decedent lived and where the athletic banquet of Shanice Hamilton began at 6:00 p.m. that same day, there was no evidence presented that the Decedent was going to surprise his family at the athletic banquet.

23. Liberty Mutual paid \$2,500 of funeral benefits and Pike Electric paid the remainder of the funeral bills; however, payment of the funeral bill is not an admission of liability.
24. If the case were compensable, which it is not, I would find that the Defendants completed a good faith investigation into possible defendants. I would also find that Shanice Hamilton would have been the sole taker of benefits.
25. Sarah Ann Johnson was still married to the Decedent at the time of the accident, but they have not lived together for over 19 years.
26. I do not find the testimony of Sarah Ann Johnson that she was abandoned and she never filed anything for desertion to be credible and that she had the greatest gain in this case.
27. Margaret Ann Hamilton is the biological mother of Shanice Hamilton and the girlfriend of the Decedent, and was never married to the Decedent.
28. Based on the greater weight and preponderance of the reliable and substantial evidence in the record, I find that the proximate cause of the accident was the Decedent's intoxication, as he had a blood alcohol level of .208, which impaired his judgment and reasoning to believing that traveling at 95 miles an hour was reasonable.

#### **CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER**

1. Section 42-17-40 of the South Carolina Code of Laws (1976, as amended) is applicable in governing the conduct of hearings and renderings of awards.
2. Section 42-9-60 of the South Carolina Code of Laws (1976, as amended) is applicable in determining that an employee whose injury or death is occasioned by intoxication is not entitled to benefits under the *South Carolina Workers' Compensation Act*.
3. *Airco, Inc. v. Hollington*, 269 S.C. 152, 236 S.E.2d 804 (1977) is applicable in determining when an employer and carrier have performed a good faith investigation as to potential dependents of a deceased claimant.

#### **ORDER OF SINGLE COMMISSIONER**

Based on the above Findings of Fact and Conclusions of Law, the undersigned Commissioner orders as follows:

1. IT IS ORDERED that Shanice Hamilton is the sole dependent of the Decedent;

2. IT IS FURTHER ORDERED that Employer/Carrier has made a reasonable, due and diligent investigation to determine those persons who may be entitled to benefits under the South Carolina Workers' Compensation Act and is hereby discharged from payment to any other individuals who may claim to be dependents of the Decedent.
3. IT IS FURTHER ORDERED that the Decedent was intoxicated at the time of the accident.
4. IT IS FURTHER ORDERED that the Decedent's intoxication was the cause of the Decedent's accident.
5. IT IS FURTHER ORDERED that any dependents, including Shanice Hamilton, are not entitled to any benefits under the South Carolina Workers' Compensation Act.

During the statutory period, counsel for the Claimant filed an application for review of the case setting forth Claimant's grounds for review, a copy of which was furnished to all parties, prior to oral argument presented before the Appellate Panel on August 11, 2014. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration. By appeal, Claimant respectfully submits the following:

1. **Whether the Single Commissioner erred as a matter of fact or of law in concluding that the Defendants have met their or its burden of establishing the defense of intoxication?**

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (2007), review the Award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner. After carefully reviewing the instant case, the Panel, by a majority vote, has determined all of the Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, we make the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

Based upon the evidence submitted at the hearing, we find as a fact that:

1. The parties were provided directives for a proposed Order on December 11, 2013.
2. The Decedent, Briett Johnson, suffered a fatal automobile accident on May 17, 2012.
3. The blood alcohol level drawn approximately three hours after death was a .208.

4. On May 17, 2012, the Decedent was an employee of Pike Electric.
5. On May 17, 2012, the Decedent was returning from a worksite in Winnsboro, South Carolina to his home in Johnsonville, South Carolina in a work truck owned by Pike Electric.
6. The Decedent had a .208 blood alcohol level at the time of the accident.
7. Other than the blood sample, there was no evidence of alcohol use found at the accident scene and no detectable odor of alcohol in the truck or on the Decedent's body; however, none of the witnesses had training on the detection of alcohol and Mr. Redmond had no training on looking for evidence of alcohol at an accident scene.
8. The lack of alcohol containers at the scene is inconsequential, as the Decedent may have consumed alcohol before entering his car, or as Mr. Redmond testified, alcohol containers are not always found at accident scenes involving alcohol as individuals can throw out the alcohol container so as to not keep evidence in a car.
9. Deputy Coroner Reynolds followed the correct protocol in drawing blood from the Decedent's heart on the date of accident.
10. The blood sample was taken by Deputy Coroner Reynolds as it is standard protocol to draw blood at any wreck scene and based on Mr. Reynolds's discussion with the highway patrol; moreover, Mr. Redmond testified that blood samples are taken at accident scenes and submitted to SLED to determine if alcohol was present even if alcohol containers are not found at an accident scene.
11. Deputy Coroner Reynolds followed the correct protocol submitting the vial sample of blood to the South Carolina Law Enforcement Division.
12. There is no evidence that the blood sample was contaminated or tampered with.
13. The Decedent was traveling at an estimated speed of 95 miles per hour at the time of the accident.
14. Traveling at 95 miles hour was not the Decedent's normal nature, based on the testimony of Shanice Hamilton and Margaret Hamilton.
15. The opinion of Dr. James Ballenger, Mr. Robert Sears, and Dr. Elaine Riemer is that a blood alcohol level of .208 causes impairments to judgment and motor control.
16. Based on the report of Dr. Ballenger and the testimony of Mr. Robert Sears that the Decedent's blood alcohol level of .208 was the cause of the Decedent's accident.

17. We give greater weight to the Assistant Coroner report, the SLED toxicology report, the testimony of Don Reynolds, the testimony of Robert Sears than the testimony of Dr. Elaine Riemer, as to the validity of the blood sample and to Mr. Robert Sears regarding the cause of this accident.
18. We give equal weight to the report of Dr. Elaine Riemer and the report of Dr. James Ballenger. They are opposite in nature to the final findings as to causation of the accident.
19. The testimony of John Pinckney and Tom Redman conflicts with each other as to where each was standing when transferring the Decedent's body.
20. Mr. Tom Redman, was a friend of the Decedent's family who became emotional at the hearing as to the death of the Decedent.
21. Based on the testimony of Shanice Hamilton and Margaret Hamilton, and the phone records in the APA submissions, the Decedent made telephone calls to both Margaret and Shanice on the date of the accident and the last indication the Decedent made to either witness was that he was not going to the athletic banquet; moreover, the Decedent was unaware Shanice Hamilton was receiving an award at the banquet.
22. Testimony that the Decedent often surprised his family by saying he would be delayed but would show up on time, or that he would not attend a certain function and would show up to surprise his family is not a consideration in deciding this case, as it would be speculation to find that the Decedent may have been coming home to attend the athletic banquet, especially when the last conversation he had with Margaret Hamilton and Shanice Hamilton was that he was not going to come to the banquet and did not know that Shanice Hamilton was receiving an award that night. Therefore, even though the accident happened at 6:05 p.m. just outside of Johnsonville, S.C. which is where the Decedent lived and where the athletic banquet of Shanice Hamilton began at 6:00 p.m. that same day, there was no evidence presented that the Decedent was going to surprise his family at the athletic banquet.
23. Liberty Mutual paid \$2,500 of funeral benefits and Pike Electric paid the remainder of the funeral bills; however, payment of the funeral bill is not an admission of liability.
24. If the case were compensable, which it is not, we would find that the Defendants completed a good faith investigation into possible defendants. We would also find that Shanice Hamilton would have been the sole taker of benefits.
25. Sarah Ann Johnson was still married to the Decedent at the time of the accident, but they have not lived together for over 19 years.
26. We do not find the testimony of Sarah Ann Johnson that she was abandoned and she never filed anything for desertion to be credible and that she had the greatest gain in this case.

27. Margaret Ann Hamilton is the biological mother of Shanice Hamilton and the girlfriend of the Decedent, and was never married to the Decedent.
28. Based on the greater weight and preponderance of the reliable and substantial evidence in the record, we find that the proximate cause of the accident was the Decedent's intoxication, as he had a blood alcohol level of .208, which impaired his judgment and reasoning to believing that traveling at 95 miles an hour was reasonable.

### **CONCLUSIONS OF LAW**

1. Section 42-17-40 of the South Carolina Code of Laws (1976, as amended) is applicable in governing the conduct of hearings and renderings of awards.
2. Section 42-9-60 of the South Carolina Code of Laws (1976, as amended) is applicable in determining that an employee whose injury or death is occasioned by intoxication is not entitled to benefits under the *South Carolina Workers' Compensation Act*.
3. *Airco, Inc. v. Hollington*, 269 S.C. 152, 236 S.E.2d 804 (1977) is applicable in determining when an employer and carrier have performed a good faith investigation as to potential dependents of a deceased claimant.

### **ORDER**

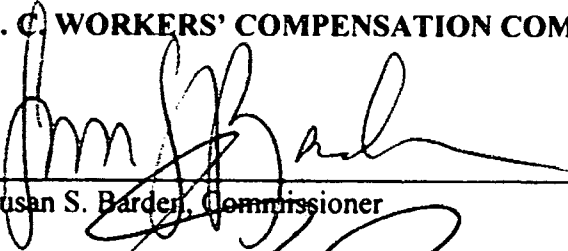
Based on the above Findings of Fact and Conclusions of Law, the undersigned Commissioners order as follows:

1. **IT IS ORDERED** that Shanice Hamilton is the sole dependent of the Decedent;
2. **IT IS FURTHER ORDERED** that Employer/Carrier has made a reasonable, due and diligent investigation to determine those persons who may be entitled to benefits under the *South Carolina Workers' Compensation Act* and is hereby discharged from payment to any other individuals who may claim to be dependents of the Decedent.
3. **IT IS FURTHER ORDERED** that the Decedent was intoxicated at the time of the accident.
4. **IT IS FURTHER ORDERED** that the Decedent's intoxication was the cause of the Decedent's accident.


5. **IT IS FURTHER ORDERED** that any dependents, including Shanice Hamilton, are not entitled to any benefits under the South Carolina Workers' Compensation Act.


**IT IS SO ORDERED.**

**S. C. WORKERS' COMPENSATION COMMISSION**

  
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Susan S. Barden, Commissioner

We concur:

  
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T. Scott Beck, Commissioner

  
\_\_\_\_\_  
Aisha Taylor, Commissioner

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

**By Kim Falls on September 26, 2014**