

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody L. James, Appellate Panel Chairman, Commissioner

Appellate Case No.: 2014-002294
WCC File No.: 1106833

Timothy McMahan, (Employee/Claimant),Appellant/Respondent,

vs.

S.C. Department of Education - Transportation (Employer) and
State Accident Fund (Carrier),..... Respondents/Appellants.

INITIAL BRIEF OF RESPONDENTS/APPELLANTS

RECEIVED
DEC 01 2014
SC Court of Appeals

RECEIVED
DEC 01 2014
SC Court of Appeals

J. Gabriel Coggiola, Esquire
George Trask Miars, Jr., Esquire
Willson, Jones, Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
jgcoggiola@wjlaw.net
Attorneys for Respondents/Appellants

November 28, 2014

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal..... 1

Statement of the Case2

Statement of the Facts/Evidence.....4

Standard of Review.....7

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS’ COMPENSATION ACT DOES NOT PROVIDE FOR A POSTHUMOUS DETERMINATION OF A CLAIMANT’S PERMANENTDISABILITY.....9

II. IN THE ALTERNATIVE, IF THE COURT DETERMINES THAT THE WORKERS’ COMPENSATION ACT DOES ALLOW FOR A POSTHUMOUS ADJUDICATION OF PERMANENT DISABILITY, APPELLANT/RESPONDENT’S AWARD FOR BENEFITS WOULD ABATE SINCE HE WAS PARAPLEGIC IN ACCORDANCE WITH S.C. CODE ANN. § 42-9-10(C).....12

Conclusion 16

TABLE OF AUTHORITIES

CASES:

<i>Brown v. South Carolina State Bd. of Education.</i> , 301 S.C. 326, 391 S.E.2d 866 (1990).....	11
<i>Cox v. Bellsouth</i> , 356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003).....	9
<i>Edwards v. Pettit Constr. Co.</i> , 273 S.C. 576, 257 S.E.2d 754 (1979).....	8
<i>Hunter v. Patrick Construction Co.</i> , 289 S.C. 46, 344 S.E.2d 613 (1986).....	7
<i>In re Dickey</i> , 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011).....	11
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	8
<i>Lowe v. Am-Can Transport Services, Inc.</i> , 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).....	8
<i>McDowell v. Stilley Plywood Co.</i> , 210 S.C. 173, 41 S.E.2d 872 (1947).....	8
<i>Mullinax v. Winn-Dixie Stores, Inc.</i> , 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).....	8
<i>Owens v. Herndon</i> , 252 S.C. 166, 165 S.E.2d 696 (1969).....	9
<i>Reed-Richards v. Clemson University</i> , 371 S.C. 304, 638 S.E.2d 77 (Ct.App. 2006).....	14, 15
<i>Stone v. Roadway Express</i> , 367 S.C. 575, 627 S.E.2d 695 (2006).....	10
<i>Stono River Environmental Protection Ass'n v. South Carolina Dept. of Health & Environmental Control</i> , 305 S.C. 90, 406 S.E.2d 340 (1991).....	11
<i>Tall Tower, Inc. v. South Carolina Procurement Review Panel</i> , 294 S.C. 225, 363 S.E.2d 683 (1987).....	11
<i>Tiller v. National Health Care Center of Sumter</i> , 334 S.C. 333, 513 S.E.2d 872 (1947).....	8

STATUTES:

S.C. Code Ann. §1-23-380(A)(6).....	7
S.C. Code Ann. §42-9-280.....	2,3,9,10,12,13,16
S.C. Code Ann. §42-9-300.....	10
S.C. Code Ann. §42-15-60.....	2
S.C. Code Ann. §42-15-80.....	12
S.C. Constitution Article 1, §22 and §3 (2009 & 2011 Supp.).....	11

OTHER

AMA Guides to Permanent Impairment, 6 th Edition.....	14
--	----

STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission Appellate Panel erred in failing to include in their Findings of Fact and Conclusions of Law that the South Carolina Workers' Compensation Act does not allow for the posthumous adjudication of a claimant's permanent disability, and that disability must be determined prior to a claimant's death for benefits to be awarded to any beneficiaries.
2. If the Court determines that the Workers' Compensation Act allows for a posthumous adjudication of a claimant's permanent disability, whether Appellant/Respondent's permanent disability award would abate as a result of his being paraplegic in accordance with S.C. Code Ann. § 42-9-10(C).

STATEMENT OF THE CASE

Appellant/Respondent was involved in an admitted accident arising out of and in the course of his employment with Respondents/Appellants on June 15, 2011. As a result of his accident, Respondents/Appellants provided Appellant/Respondent with authorized causally related treatment in accordance with S.C. Code Ann. § 42-15-60. Unfortunately, Appellant/Respondent died due to causes unrelated to his work accident on October 6, 2012.

On May 16, 2013, Appellant/Respondent filed a Form 50 Hearing Request, alleging injuries by accident to his head, brain, back, internal organs, teeth, legs, mouth, and ribs, arising out of and in the course and scope of his employment with the employer on June 15, 2011 and seeking an award of permanency to be paid to Appellant/Respondent's beneficiaries. Respondents/Appellants filed a Form 51 answer on June 13, 2013, admitting injury to the back only, and denying Appellant/Respondent's entitlement to permanent disability since Appellant/Respondent died from unrelated causes prior to reaching maximum medical improvement ("MMI"). A hearing was held before the Workers' Compensation Commission on August 15, 2013.

At the August 15, 2013 hearing before the Single Commissioner, Appellant/Respondent's estate took the position that they should be allowed to have a posthumous determination of Appellant/Respondent's disability, and the Appellant/Respondent should be deemed permanently and totally disabled as a result of his having a greater than 50% disability to the spine. (Hr. Tr., p. 5). Respondents/Appellants took the position that (1) Appellant/Respondent was not at MMI, (2) Appellant/Respondent's estate is not entitled posthumously litigate disability in accordance with the S.C. Code Ann. § 42-9-280, and (3) Appellant/Respondent suffered from paraplegia as a

result of his work related injury, and therefore, even if an award of post mortem disability was allowed, it would abate pursuant to South Carolina Code § 42-9-280. (Hr. Tr., p. 6).

On March 24, 2014, the Single Commissioner issued an Order finding that Appellant/Respondent's estate was entitled to an award of permanent and total disability due to the Appellant/Respondent having a greater than 50% disability to the spine.¹ On March 27, 2014, Respondents/Appellants filed a Form 30 Request for Full Commission Review. Following oral arguments on July 22, 2014, the Workers' Compensation Full Commission Appellate Panel issued an Appellate Panel Decision and Order on September 30, 2014. In the Order, the Full Commission Appellate Panel reversed the decision of the Single Commissioner and ruled that based on the medical evidence in the record, Appellant/Respondent had not reached MMI prior to his death. The Order further states that since the Full Commission Appellate Panel found that Appellant/Respondent was not at MMI at the time of his death, the Appellate Panel did need feel the need to reach the additional issues raised by Respondents/Appellants.

On October 21, 2014, Appellant/Respondent filed the first Notice of Intent to Appeal. Appellant/Respondent argues that the Workers' Compensation Commission Full Appellate Panel erred in finding that Appellant/Respondent was not at MMI. On October 29, 2014, Respondents/Appellants filed a second Notice of Intent to Appeal. Respondents/Appellants agreed that the Full Appellate Panel correctly denied permanent and total disability benefits based on the fact that Appellant/Respondent was not at MMI; however, in an abundance of caution, Respondents/Appellants appealed the Full Appellate Panel's failure to include in their findings of fact and conclusions of law that the South Carolina Workers' Compensation Act does

¹ The Commissioner, pursuant to stipulations of the parties, held that such award would be held in trust until a good faith dependency investigation was performed to determine beneficiaries of this award.

not allow for the posthumous adjudication of permanent disability, and that disability must be determined prior to a claimant's death for benefits to be awarded to beneficiaries.

On November 13, 2014, the Clerk of Court for the South Carolina Court of Appeals sent notice to the parties consolidating the multiple notices of appeal for consideration by the Court. On November 22, 2014, Appellant/Respondent filed his Initial Brief with the Court of Appeals, arguing that the Full Commission Appellate Panel erred in finding that Appellant/Respondent was not at MMI. Pursuant to instructions from the Deputy Clerk, Respondents/Appellants were directed to respond to the issues raised in Appellant/Respondent's Initial Brief within the thirty (30) day period set forth in Rule 208(a)(b), SCACR, and Respondents/Appellants' current filing serves as Respondents/Appellant's Initial Brief of the issues raised in their October 29, 2014 Notice of Intent to Appeal.

STATEMENT OF THE FACTS/EVIDENCE

Appellant/Respondent was injured by accident on June 15, 2011, while a working as a mechanic for Respondents/Appellants. (Hr. Tr., p. 10). Appellant/Respondent jacked a school bus up by the bumper, and he was underneath the axel repairing the vehicle when the bumper broke, causing the school bus to fall on him with the axel crushing his spine. (Hr. Tr., p. 6)

The first medical report from MUSC in evidence is dated June 16, 2011. This was a report from the transfer of the Appellant/Respondent from the ICU floor. Appellant/Respondent was admitted for "status post crush injury with T-12 compression fracture and paraplegia." (Appellant/Respondent's APA p. 26) (emphasis added). Appellant/Respondent's injury complex was noted to be T-12 compression fracture with retropulsion and paraplegia (Id.).

Appellant/Respondent was noted to have previously undergone a T-12 corpectomy and fusion by Dr. Turner on June 15, 2011. (Id.)

The medical evidence clearly shows that Appellant/Respondent suffered from paraplegia as a result of this accident. Appellant/Respondent treated with Dr. Raymond Turner, a neurosurgeon at MUSC. Dr. Turner diagnosed Appellant/Respondent with a T-12 compression fracture on October 10, 2011. (Appellant/Respondent's APA, p. 13). As a result of this condition, Dr. Turner performed a surgical T-11, T-12, and L-1 laminectomy and bilateral foraminotomies, with placement of pedestal screws at T-10 and L-2, and T-12 vertebral corpectomy, and fusion from T-10 to L-2. (Appellant/Respondent's APA p. 32).

Appellant/Respondent returned to MUSC for a urological evaluation on October 13, 2011. (Appellant/Respondent's APA pp. 20-21). This report notes that Appellant/Respondent was experiencing numbness in his bilateral lower extremities, urinary retention, and penile paresthesia. (Id. at 20). Appellant/Respondent was given a voiding trial, which he failed, and Appellant/Respondent noted that his lower extremities felt "numb." (Appellant/Respondent's APA pp. 20-21). Appellant/Respondent's neurological evaluation showed generalized weakness, and that Appellant/Respondent was in a wheelchair, and sensory evaluation showed numbness and tingling in his feet. (Id.). Appellant/Respondent was last seen at MUSC on February 7, 2012, at which time it was again noted that he was in a wheelchair. (Appellant/Respondent's APA p. 24-25). Appellant/Respondent was noted to be moving to Tennessee, and it was recommended that he follow up for pain management and further rehab in Tennessee as soon as possible. (Id. At 24). Appellant/Respondent was never found by MUSC to be at maximum medical improvement. (Appellant/Respondent's APA p. 24-25).

After moving to Tennessee, Appellant/Respondent was seen for an initial evaluation with Dr. Patrick Bolt on April 23, 2012. (Appellant/Respondent's APA pp. 2-5). Dr. Bolt noted that Appellant/Respondent had undergone two spine surgeries following his accident, and Appellant/Respondent's left lower extremity was "numb, and had been since his second surgery. (Id. at 2). Dr. Bolt further noted that Appellant/Respondent had been self-catheterizing since October. (Id.). Dr. Bolt's physical exam noted a "markedly pitched forward gait, unable to heel and toe walk or reciprocating heel and toe walk secondary to ataxia." (Id. at 3). Dr. Bolt admitted that he had not reviewed Appellant/Respondent's medical records from MUSC or his neurosurgeon. In his discussion and plan, Dr. Bolt noted that Appellant/Respondent had a complication of urinary retention and significant left lower extremity pain following his last surgery. Dr. Bolt stated that it was "unclear if the partial spinal cord injury which he sustained was before or after the surgery. The patient reports that it was after the surgery, however it is unclear if this is the case, as certainly he was quite severely affected before the surgery was performed." (Id. at 4). Dr. Bolt stated that he did not plan to take over the Appellant/Respondent's treatment, and that "apparently, the patient is already at maximum medical improvement, but again, I have no records to confirm this." (Id. at 5).

Appellant/Respondent's attorney submitted into evidence a note from Dr. Bolt dated February 27, 2013, over four (4) months after Appellant/Respondent's death, stating that Dr. Bolt had "been asked by Kevin B. Smith of the Hoffman Law Firm, in Charleston, South Carolina to provide Mr. McMahan posthumously with an impairment rating." (Appellant/Respondent's APA, p. 11). Dr. Bolt stated, "I had thought he was previously at maximum medical improvement, apparently that was not the case. I would say that he was at maximum medical improvement when I saw him on 04/23/2012." (Id.). Dr. Bolt notes that "the

patient was totally disabled, and every time that I saw him he was confined to a wheelchair.” (Id.). Dr. Bolt stated that the Appellant/Respondent sustained a “partial spinal cord injury/myelopathy,” with station and gait disorders, neurogenic bladder, neurogenic bowel, and dysesthetic pain. (Id.). Dr. Bolt assigned Appellant/Respondent 54% impairment to the whole person as a result of these conditions, noting that Appellant/Respondent’s spinal cord injury alone constituted a 44% whole person impairment. (Id.). Appellant/Respondent’s attorney submitted into evidence a Form 14B Physician’s Statement prepared by Dr. Bolt, dated February 27, 2013, which noted that Appellant/Respondent’s “nature of injury” was a “T12 burst fracture w[ith] spinal cord injury.” (Appellant/Respondent’s APA p. 1).

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the “substantial evidence” rule as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers’ compensation appeals, may overturn a conclusion of the Workers’ Compensation Commission if that conclusion is “clearly erroneous in view of the

reliable, probative and substantial evidence on the whole record.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also, McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION ACT DOES NOT PROVIDE FOR A POSTHUMOUS DETERMINATION OF A CLAIMANT'S PERMANENT DISABILITY.

a. S.C. Code Ann. § 42-9-280 does not provide for a posthumous adjudication of a claimant's permanent disability.

The South Carolina Workers' Compensation Act does not provide for a posthumous determination of disability. As indicated by the South Carolina Supreme Court in Owens v. Herndon, “[t]he rights and liability of employee and employer under the Workmen’s Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy consideration as to what benefits should be conferred or obligations imposed are strictly for the legislature.” 252 S.C. 166, 167, 165 S.E.2d 696, 697 (1969). Since the workers’ compensation statutes provide an exclusive compensatory system in derogation of common law rights, courts must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities. Cox v. BellSouth, 356 S.C. 468, 589 S.E.2d 766 (Ct.App. 2003).

South Carolina Code § 42-9-280 provides the sole basis under the Act for a claimant’s estate’s or beneficiaries’ entitlement to a claimant’s disability award after the claimant dies from a non-work related reason. As written by the Legislature, S.C. Code Ann. § 42-9-280 only provides recovery of benefits when there has been a prior award of disability. This Statute, titled “Payment of unpaid balance of compensation when employee dies” states:

When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of Section 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.

S.C. Code Ann. § 42-9-280 (1976) (emphasis added).

The justification for this is clear. South Carolina Code Ann. § 42-9-280 was originally created in 1936 (§1231), and codified as written in 1976. At that time, the previous lump sum Statute, S.C. Code § 42-9-300 (1976) was in effect, and provided:

Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, ... be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission....

S.C. Code § 42-9-300 (1976) (emphasis added).

Thus, at the time § 42-9-280 was written into law, the usual disability award was paid on a weekly basis, and lump sum payments were only in “unusual cases.” Thus, with § 42-9-280, the Legislature addressed what to do with the remaining benefits if a claimant died while still receiving a weekly disability award. It is clear from the § 42-9-280’s title and language that it only applies to claimant’s who have been awarded disability by the Commission or through settlement, and have an “unpaid balance” of weekly benefits. **There is nothing in § 42-9-280 or the Act that provides for a claimant’s estate to posthumously litigate the extent of a deceased claimant’s disability before he died, and without that express provision by the Act, there is no legal basis for such an award.**

The Supreme Court, in Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), discussed the provisions of S.C. Code § 42-9-280, stating:

Professor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments. Larson's Workers' Compensation Law, (2000) §§ 89.01; 89.03. In construing a workers' compensation statute, the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996) (internal citation omitted), Section 42-9-280 specifically provides for the inheritability of two types of awards only.

Stone at 585, 627 S.E.2d at 700.

Since a claimant's rights to benefits under Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act, S.C. Code Ann. § 42-9-280 does not provide for a posthumous determination of permanent disability and Appellant/Respondent is not entitled to an award of permanent disability.

b. A posthumous award of permanent disability violates a defendant's right to due process.

The South Carolina Constitution provides that in procedures before administrative agencies, "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard...." Art. I, § 22 (2009 & Supp.2011). The South Carolina Supreme Court has explained:

"Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) **the right to introduce evidence**; and (4) **the right to confront and cross-examine witnesses**."

In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)) (emphasis added).

Administrative agencies are required to meet minimum standards of due process. S.C. Const. art. 1, § 3; Stono River Environmental Protection Ass'n v. South Carolina Dept. of Health & Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991). In cases where important decisions turn on questions of fact, due process **at least** requires an opportunity to present favorable witnesses and evidence. See, e.g., Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990); Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987).

A determination of a claimant's disability involves consideration a claimant's work history, education level, ability to return to work, pain complaints, etc. Defendants due process rights allow full discovery and the right to present and cross examine evidence on all of these issues, including obtaining independent medical evaluations of the claimant pursuant to S.C. Code § 42-15-80, deposing the claimant to discovery his work history, functional abilities, and education levels, and most importantly obtain a vocational evaluation of the claimant to determine his or her ability to return to work. Likewise, in order to determine the extent of disability, a Commissioner must be allowed to see and speak to the claimant and judge his or her credibility prior to making an award. Litigating disability after a claimant's death deprives Defendants due process rights to defend the claim.

In this case, Appellant/Respondent's estate argues that Appellant/Respondent has sustained a greater than 50% disability to the back, and therefore there is a rebuttable presumption that Appellant/Respondent was permanently and totally disabled. Clearly, Respondents/Appellants therefore should have the legal due process rights to attempt to rebut this presumption. However, since Appellant/Respondent is deceased, Respondents/Appellants were unable to obtain vocational testing of Appellant/Respondent, depose him to discover his work history, education level, or judge Appellant/Respondent's credibility, or in any way refute this presumption. This is an outcome not contemplated or allowed for under the Act, and therefore a posthumous adjudication of permanent disability is improper.

II. IN THE ALTERNATIVE, IF THE COURT DETERMINES THAT THE WORKERS' COMPENSATION ACT DOES ALLOW FOR A POSTHUMOUS ADJUDICATION OF PERMANENT DISABILITY, APPELLANT/RESPONDENT'S AWARD FOR BENEFITS WOULD ABATE

SINCE HE WAS PARAPLEGIC IN ACCORDANCE WITH S.C. CODE ANN. § 42-9-10(C).

In the alternative, if the Court determines that the Workers' Compensation Act does allow for posthumous adjudication of a claimant's disability, Appellant/Respondent's award would abate since he was a paraplegic as a result of his accident.

South Carolina Code Ann. § 42-9-280 only allows for awards to go to beneficiaries when they arise from § 42-9-10(B) (permanent and total statute due to loss of both hands, arms, shoulders, feet, legs, hips or vision, or any two thereof), or § 42-9-30 (scheduled member statute). Since S.C. Code Ann. § 42-9-280 makes no reference to § 42-9-10(3), any award for permanent and total disability to a claimant whose injuries result in paraplegia in accordance with S.C. Code Ann. § 42-9-10(C) would abate under the Act.

Since Appellant/Respondent was not able not provide any testimony in this claim, the Workers' Compensation Commission must look to the medical evidence to determine the extent of Appellant/Respondent's disability, and it is clear from this medical evidence that Appellant/Respondent sustained paraplegia as a result of his accident. Appellant/Respondent was specifically diagnosed at MUSC on June 16, 2011 with "T12 compression fracture with retroplulsion" and "paraplegia." (Appellant/Respondent's APA, p. 26). **There is a clear diagnosis by his treating physician of paraplegia, and no physician ever refutes this diagnosis.** Further, the medical evidence consistently shows that Appellant/Respondent remained wheel-chair bound throughout his treatment, with significant neurological problems consistent with paraplegia, including significant gait and walking problems, dysesthetic pain, and neurogenic bladder. In his February 27, 2013 note, Dr. Bolt states "every time that I saw [the Claimant] he was confined to a wheelchair." (Appellant/Respondent's APA p. 11).

In Dr. Bolt's February 27, 2013 note, after the claimant's death, he diagnosed the Appellant/Respondent with a "partial spinal cord injury/myelopathy" as a result of a "thoracic burst fracture with bony repulsion into the canal." (Appellant/Respondent APA p. 11). Dr. Bolt specifically diagnoses Appellant/Respondent with neurogenic bladder, dysesthetic pain, and a significant gait disorder. (Id.). Dr. Bolt further notes in his Form 14B Appellant/Respondent's "nature of injury" to be "T12 burst fracture w[ith] spinal cord injury." (Appellant/Respondent APA p. 1).

The strongest evidence for the finding of paraplegia, in addition to the diagnosis at MUSC, is the impairment rating relied upon by Appellant/Respondent's estate. In a normal back injury claim, without paraplegia, impairment is calculated by the Guides to Permanent Impairment under Chapter 17, "The Spine and Pelvis." (*Guides to the Evaluation of Permanent Impairment*, 6th Ed.). Spinal cord injury impairments involving paraplegia or incomplete paraplegia are calculated under Chapter 13, "The Central and Peripheral Nervous System." (Id.) Dr. Bolt indicates in his February 27, 2013 note that Appellant/Respondent's spinal cord injury results in a 44% whole person impairment alone, pursuant to Chapter 13 of the AMA Guides. (Appellant/Respondent's APA p. 11).

Appellant/Respondent's estate will no doubt argue that Dr. Bolt's diagnosis of "partial spinal cord injury" does not support an award of paraplegia. However, this case is directly on point with the Court of Appeals decision in Reed-Richards v. Clemson University, 371 S.C. 304, 638 S.E.2d 77 (Ct.App. 2006). In upholding a lifetime benefits award where the claimant was found to have partial paraplegia, the Reed-Richards Court held that **"the Commission and circuit court correctly interpreted the term 'paraplegic' to include a diagnosis of incomplete paraplegia."** Id. at 309, 638 S.E.2d at 80 (emphasis added). Further, the claimant's

condition in Reed-Richards is on point with Appellant/Respondent in this matter. The Court noted:

As a result of the accident, Reed-Richards has to use a walker, something she never needed before. She has also lost the ability to control her bowels; they empty at random times, forcing her to wear adult diapers and restricting her from going out in public because of odor problems. Her bladder condition originating from her 1973 accident has worsened, requiring her to catheterize herself more often than she had to in the past. Because of these problems, she is able to perform only menial tasks and cannot pursue additional vocational training.

Reed-Richards at 306, 638 S.E.2d at 78.

In Reed-Richards, the claimant was able to walk with the assistance of a walker, whereas in this case, Appellant/Respondent was wheelchair bound. Both the claimant in Reed-Richards and Appellant/Respondent had neurogenic bladders, with need for cathertizations due to neurogenic bladders. Further, the Court in Reed-Richards noted the opinion of the treating physician, who stated that “[p]araplegia”, according to the International Standards of Neurologic Classification of Spinal Cord Injury, Revised Sixth Edition, dated 2000, is ‘impairment or loss of motor and/or sensory function in the thoracic, lumbar, or sacral segments of the spinal cord secondary to damage of neural elements within the spinal canal.’ This classification, relied upon in Reed-Richards to support a diagnosis of paraplegia, is completely consistent with Appellant/Respondent’s condition, and it supports the diagnosis of paraplegia by MUSC, and incomplete paraplegia described by Dr. Bolt.

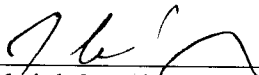
Had the issue of Appellant/Respondent’s permanent disability been litigated prior to his death, it is clear that he would have been found to be a paraplegic, since there is no medical evidence refuting this diagnosis. Therefore, any award to Appellant/Respondent’s estate for permanent and total disability would have been included lifetime benefits for paraplegia pursuant

S.C. Code § 42-9-10(C), and this award would have abated at his death pursuant to S.C. Code § 42-9-280.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the South Carolina Workers' Compensation Act does not allow for a posthumous determination of disability. The Workers Compensation Commission Full Appellate Panel's Decision that Appellant/Respondent was not entitled to compensation because he died prior to reaching MMI is clearly not erroneous in light of the substantial evidence in the record, but Respondents/Appellants request an Order containing additional findings of fact and conclusion of law that the South Carolina Workers' Compensation Act does not provide for a posthumous determination of disability. In the alternative, if the Court determines that the Workers' Compensation Act does allow for posthumous determination of permanent disability, Respondents/Appellants request an Order stating that Appellant/Respondent's award would abate as a result of him being paraplegic in accordance with S.C. Code § 42-9-10(C).

Respectfully Submitted,



J. Gabriel Coggion, Esquire
George Trask Miars, Jr., Esquire
Willson, Jones, Carter & Baxley
4500 Fort Jackson Blvd.
Columbia, SC 29209
(803) 227-2889
Attorneys for the Respondents

November 28, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody L. James, Appellate Panel Chairman, Commissioner

RECEIVED

DEC 01 2014

Appellate Case No.: 2014-002294
WCC File No.: 1106833

SC Court of Appeals

Timothy McMahan, (Employee/Claimant),Appellant/Respondent,

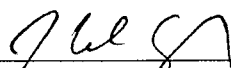
vs.

S.C. Department of Education - Transportation (Employer) and
State Accident Fund (Carrier), Respondents/Appellants.

PROOF OF SERVICE

The undersigned certifies that on the date indicated below he served counsel for Appellant/Respondent with a copy of the Respondents/Appellants Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail postage prepaid to the following addresses:

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843)769-7077
Attorney for Appellant/Respondent



J. Gabriel Coggiola, Esquire
George T. Miars, Jr., Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
Attorneys for Respondents/Appellants

November 28, 2014
Columbia, South Carolina

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

John Gabriel Coggiola
Direct (803) 227-2889
Fax (803) 782-2527
jgcoggiola@wjlaw.net

4500 Fort Jackson Boulevard
Columbia, SC 29209
www.wjcbllaw.net

November 28, 2014

(Via U.S. Mail)

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Timothy McMahan vs. S.C. Dept. of Education
Appellate Case No.: 2014-002294
WCC File No.: 1106833
DOI: 6/15/2011

RECEIVED
DEC 01 2014
SC Court of Appeals

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, please find enclosed for filing one copy of the Respondents/Appellants' Initial Brief and one copy of the Respondents/Appellants' Designation of Matter to be Included in the Record on Appeal, along with Proof of Service. I have also enclosed an extra copy of both the Respondents/Appellants' Initial Brief and Designation of Matter, which I would respectfully request that you stamp and return to my attention in the enclosed self-addressed stamped envelope.

By copy of this letter I am also serving a copy of the Respondents/Appellants' Initial Brief and Respondents/Appellants' Designation of Matter to be Included in the Record on Appeal to Kevin Smith, attorney for the Appellant/Respondent.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



John Gabriel Coggiola

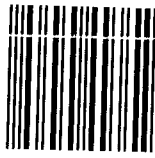
JGC/jgc

Enclosure(s)

cc: Mr. Kevin Smith



1000



29211

U.S. POSTAGE
PAID
COLUMBIA, SC
29205
NOV 28, 14
AMOUNT

\$2.45
00086444-17

Jenny Abbott Kitchings
olina Court of Appeals
9
29211

RECEIVED

DEC 01 2014

SC Court of Appeals