THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody L. James, Appellate Panel Chairman, Commissioner

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

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

vs.

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

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# PETITION FOR REHEARING

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This is an appeal in a workers' compensation case. On June 15, 2016, this Court filed an opinion reversing the September 30, 2014 decision of the South Carolina Worker's Compensation Commission Appellate Panel that Appellant/Respondent's Estate was not entitled to benefits pursuant to S.C. Code Ann. §42-9-280 because Appellant/Respondent was not at maximum medical improvement ("MMI") prior to or at the time of his death. McMahan v. S.C. Dept. of Education, Op. No. 5415 (Ct.App. filed June 15, 2016). Respondents/Appellants hereby file this Petition for Rehearing pursuant to Rule 221, SCACR.

As grounds for this Petition, Respondents/Appellants would respectfully show that this Court may have overlooked or misapprehended three points. First, Respondents/Appellants

respectfully submit that this Court overlooked or misapprehended the law regarding whether a finding of MMI was dispositive for purposes of determining the Estate's entitlement to benefits pursuant to S.C. Code Ann. §42-9-280.

Second, Respondents/Appellants respectfully submit that the Court may have overlooked or misapprehended whether the Full Commission Appellate Panel's decision that Appellant/Respondent was not at MMI at the time of his death was supported by substantial evidence.

Third, Respondents/Appellants respectfully submit that the Court may have overlooked or misapprehended whether S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and whether such an award violated Respondents/Appellants rights to due process.

## ARGUMENT

### I. The Court overlooked or misapprehended the law regarding whether the dispositive question for the purpose of the Estate's entitlement to compensation pursuant to S.C. Code Ann. §42-9-280 was whether Appellant/Respondent reached maximum medcal improvement ("MMI") prior to his death.

In the June 15, 2016 opinion, this Court held, "As an initial matter, we disagree that the dispositive question for purposes of the Estate's entitlement to compensation under §42-9-280 is whether McMahan was at MMI prior to his death." The Court goes on to state that "although the parties, the Single Commissioner, and the Appellate Panel focused on MMI as the lynchpin in the Estate's ability to recover benefits pursuant to §42-9-280, we find this focus to be misplaced."

Respondents/Appellants would respectfully submit that this Court misapprehended or overlooked the law on this point, since the Supreme Court has made it clear that a fundamental

principle in workers compensation is that an award of permanent disability does not begin to accrue until an injured worker has reached MMI. Instead, this Court relies on the 2005 Court of Appeals holding in Bass v. Kenko Group, wherein the Court of Appeals held "It is true that when a Claimant receiving temporary benefits reaches MMI and is still disabled, temporary benefits are terminated and the Claimant is allowed permanent benefits . . . It does not follow, however, that a Claimant who has not reached MMI is precluded from an award of permanent benefits. 366 S.C. 450, 466-67, 622 S.E.2d 577, 585-86 (Ct. App. 2005). First, it is worth noting that the holding is Bass is distinctly different than this case, because in Bass the Commission's finding that Claimant was not at MMI due to his need for continued psychological care was not outcome determinative. Evidence of wage loss in Bass was already established pursuant to S.C. Code Ann. §42-9-20, and a finding of compensable psychological overlay had no bearing on the Claimant's permanency award.

Regardless of Bass, Respondent/Appellant would respectfully argue that the 2007 South Carolina Supreme Court decision in Curiel v. Environmental Sciences is the controlling law on the issue of when an injured worker is entitled to permanent disability benefits. The Supreme Court in Curiel states the fundamental principle of workers compensation benefits as follows:

> Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of MMI; post-MMI benefits may then be awarded either as permanent and total or partial disability, or as a percentage of impairment to a scheduled member.

655 S.E.2nd 482, 376 S.C. 23 (S.C. 2007). While the holding in Curiel applies to the termination of temporary benefits in favor of permanent benefits, the holding also makes clear that permanent benefits do not accrue until the time a claimant reaches MMI.

The practical application of this Court's finding that all that is necessary for a decedent's Estate to recover benefits under §42-9-280 is that (1) an injury must only be covered by the §42-

9-10(2) or §42-9-30 and (2) the injured worker subsequently dies from an unrelated cause, would result in a myriad of cases wherein Commissioners were called upon and expected to make permanency awards based on speculation and surmise. If an injured worker broke his wrist and then died several days later from unrelated causes, prior to receiving sufficient medical treatment necessary to bring him to a point of MMI, his dependents would be entitled to an award of permanency to the upper extremity under this Court's application of the law. Absent a finding of maximum medical improvement, this would require a Commissioner speculate as to the claimant's level of permanent disability, since the claimant had not even reached a plateau that, in the authorized treating physician's opinion, no further medical care or treatment would tend to lessen the period of impairment.

## II. The Court may have overlooked or misapprehended whether the Full Commission Appellate Panel's decision that Appellant/Respondent was not at MMI at the time of his death was supported by substantial evidence.

The South Carolina Supreme Court has described MMI as the point when "a person has reached a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007). "Maximum medical improvement is a factual determination by the Commission." Id. "Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. Nat'l Health Care Center, 334 S.C. 333, 340 (1999).

A review of evidence in the record shows that after evaluating Appellant/Respondent for the

first time on April 23, 2012, Dr. Bolt recommended additional testing on the form of lab work for infections, thoracic and lumbar MRI's, and CT scans of the thoracic and lumbar spine. (R. p. 88). Dr. Bolt recommended that the Claimant be sent for pain management in Knoxville, since he refused to provide pain management, and he agreed to see Appellant/Respondent after image studies were done to if anything else was recommended from a surgical standpoint. (Id.). When Appellant/Respondent returned on May 11, 2012, Dr. Bolt noted Appellant/Respondent's continuing complaints of "extreme" mid low back pain and left lower extremity pain. (R. p. 91). Although the MRI scans didn't show any new neural pinches, Dr. Bolt requested EMG testing to rule out further radiculopathies, and stated "we will need to see him back following the EMG testing." (Id.). Appellant/Respondent died before any EMG testing was performed.

Clearly, when reviewed as a whole, the medical evidence unquestionably shows Appellant/Respondent was continuing to have significant issues with his back and left leg at the time of his final appointment with Dr. Bolt, and Dr. Bolt was continuing to recommend pain management treatment for his symptoms and additional diagnostics to determine their cause and whether additional interventional treatment was necessary. (R. p. 91). Respondents/Appellants would respectfully submit that this Court overlooked or misapprehended the argument on whether Appellant/Respondent was at MMI prior to his death, and whether the substantial evidence supported the Full Commission's finding that Claimant was not at MMI.

## III. The Court may have overlooked or misapprehended whether S. C. Code Ann. §42-9-280 provides for a posthumous award of disability benefits, and whether a posthumous award of permanent disability violated Respondents/Appellants rights to due process.

This Court holds that S.C. Code Ann. §42-9-280 plainly affords dependent survivors all benefits due to an injured claimant who suffered a physical loss when the claimant later dies

from unrelated causes. S. C. Code Ann. §42-9-280, titled "Payment of an 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 Statute is clear when viewed in its historical context. S.C. 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." With the creation of § 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. The selection of the word "balance" alone shows that General Assembly was directing what to do with the remainder of an unpaid award at the time of death, not an award yet to be adjudicated. 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. The Court of Appeals states in the Stone v.

Roadway Express, "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 specific statutory provision, heirs have no claim to unaccrued weekly payments*." 367 S.C. 575, 627 S.E.2d 695 (S.C. 2006).

This Court further held that a posthumous award of permanent disability did not violate Respondents/Appellants rights to due process to conduct full discovery, to present and cross examine witnesses, and to introduce evidence. In support of their position, this Court found that, based on a review of the record, Respondents/Appellants never deposed any witnesses who would have had knowledge of the Respondents/Appellants condition, and the only witness the Respondents/Appellants were unable to depose or require to testify prior to the hearing before the Single Commissioner was the deceased worker himself. The court went on to state that if even if Appellant/Respondent was living at the time of his hearing, his testimony would not be dispositive on the contested medial issues presented to the Single Commissioner.

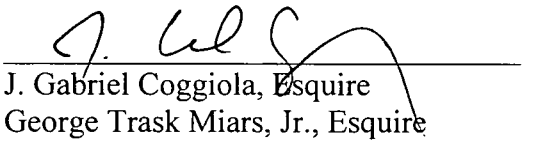
Respondents/Appellants would respectfully submit that this Court overlooked or misapprehended the Respondents/Appellants argument that the due process rights were limited to their rights at a hearing before the Single Commissioner. In cases where important decisions turn on questions of fact, due process **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).

Prior to a hearing on permanency, it is common practice in workers' compensation for both claimants and defendants to obtain independent expert medical evaluations of an injured worker after they have been released at MMI by their authorized treating physician, and

vocational evaluations with experts to evaluate and project a claimant's ability to return to work in a different capacity. The South Carolina Workers Compensation Act even provides a separate statute requiring an injured worker to submit himself to an independent examination so long as he claims compensation. (*see* S. C. Code Ann. §42-9-80). Respondents/Appellants would respectfully submit that their rights (1) to obtain favorable medical evidence pursuant to S. C. Code § 42-15-80, (2) to have the Single Commissioner hear and weigh the credibility of the Claimant's testimony, and (3) to seek vocational expert opinions, were all negatively impacted and Respondents/Appellants were deprived by due process by the posthumous award of permanent and total disability.

## CONCLUSION:

Respondents/Appellants respectfully submit that this Court's decision overlooked or misapprehended (1) the principle that a finding of MMI was dispositive for purposes of determining the Estate's entitlement to benefits pursuant to S.C. Code Ann. §42-9-280, (2) the fact that the substantial evidence supported the Commission's finding that Claimant was not at MMI at the time of his death, and (3) that S.C. Code Ann. §42-8-280 allows for a posthumous award of disability and such an award violated Respondents/Appellants rights to due process. The Full Commission examined the evidence in the record, and they found the evidence did not support a finding that Appellant/Respondent was at MMI at the time of his death. Further, the language of S.C. Code Ann. §42-9-280 makes it clear that the statute deals with an unpaid balance of an award, and not a speculative award based on surmise made prior to an injured worker ever reaching MMI. In light of these arguments, Respondents/Appellants would request that this Court grant their Motion for Rehearing.



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June 30, 2016

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**PROOF OF SERVICE**

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Respondents/Appellants, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Rehearing** by mailing copies of the same by United States Mail with frist clasee postgae prepaid the following addresses:

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June 30, 2016



**Via Hand Delivery**
The Honorable Jenny Abbott Kitchings
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P.O. Box 11629
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Re: Timothy McMahan vs. S.C. Dept. of Education
WCC File No.: 1106833 DOI: 6/15/2011
Carrier: State Accident Fund - Claim No.: 2011-001842
WJC&B File No.: 0385.00902
**Appellate Case No.: 2014-002294**

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the Respondents/Appellants' **Petition for Rehearing** in the above referenced matter. Also enclosed, please find a check in the amount of twenty-five and 00/100 dollars ($25.00) for the filing fee.

By copy of this letter and enclosure to Kevin Smith, counsel of record for the Appellant/Respondent, we are serving him with a copy of our **Petition for Rehearing** as indicated by the enclosed Proof of Service.

Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

J. Gabriel Coggiola

JGC
Enclosure(s)

cc: Mr. Kevin Smith, Esquire
Will Hawthorne, State Accident Fund (via email)