THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Case No. 2010-CP-33-1048

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, ... Appellant,

v.

Ken Baker Used Cars, Employer, and Legion Insurance Company In liquidation c/o South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carriers, ... Respondents.

FINAL BRIEF OF APPELLANT

Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Court below err as a matter of law in its Ruling of Law No. 10 that pursuant to S.C. Code Ann. § 42-9-110 (Supp. 2009) Betty Joe Floyd, as a surviving parent, is not in the class of persons whom the Act deems to be conclusively wholly dependent for support on the deceased claimant, in complete derogation of S.C. Code Ann. § 42-9-140 (Supp. 2009), which provides, "(B) If the deceased employee leaves no dependents or nondependent children, the employer shall pay ... to his father and mother, irrespective of age or dependency?"

2. Did the Court below err as a matter of law in affirming the failure of the South Carolina Workers' Compensation Commission to find that the Claimant's death on September 5, 2008 arose out of and in the course of his employment on September 5, 2008 as a result of the accidental unsupervised withdrawal of medications for approximately a week resulting in seizures and his accidental death, entitling the deceased employee's mother to death benefits for Claimant's accidental death pursuant to S.C. Code Ann. § 42-9-290 (Supp. 2009)?

3. Did the Court below err in failing to rule that the South Carolina Workers' Compensation Commission erred as a matter of law in finding that the decedent's death on September 5, 2008 was the proximate result of the September 13, 2001 accident in view of the reliable, probative, and substantial evidence on the whole record?

4. Did the Court below err as a matter of law in affirming the South Carolina Workers' Compensation Commission's finding that the decedent Claimant's mother was not a dependent and not entitled to benefits the decedent Claimant would have received "had he lived" for loss of use of his back and brain pursuant to S.C. Code Ann. § 42-9-280 (Supp. 2009), S.C. Code Ann. § 42-9-30 (Supp. 2009) and 25A S.C. Code Ann. Regs. 67-1101(C) (Supp. 2009) against the substantial evidence in the record as a whole?

5. Did the Court below err as a matter of law in affirming the South Carolina Workers' Compensation Commission's failure to find that prior to Claimant's death on September 5, 2008 the Claimant had a permanent 20% loss of use of the back arising out of the compensable accident of April 9, 2004 and that pursuant to S.C. Code Ann. § 42-9-280 (Supp. 2009) the claimant's mother is entitled to the unpaid balance of compensation the deceased Claimant would have been entitled to had he lived, because his death was from any cause other than the April 9, 2004 injury in view of the reliable, probative, and substantial evidence on the whole record?

6. Did the Court below err as a matter of law in affirming the South Carolina Workers' Compensation Commission's failure to find that prior to Claimant's death on September 5, 2008 the Claimant had a permanent 85% loss of use of the

brain arising out of the admitted accident of September 13, 2001 and that pursuant to S.C. Code Ann. § 42-9-280 (Supp. 2009) the claimant's mother is entitled to the unpaid balance of compensation the deceased Claimant would have been entitled to had he lived, because his death was from any other cause than his September 13, 2001 injury in view of the reliable, probative, and substantial evidence on the whole record?

7. Did the Court below err as a matter of law in affirming the failure of the South Carolina Workers' Compensation Commission to award 2279.40 weeks of benefits for loss of use of brain to the decedent claimant's mother (85% of claimant's life expectancy of 2681.64 weeks) pursuant to S.C. Code Ann. § 42-9-30 (Supp. 2009), S.C. Code Ann. § 42-9-10 (Supp. 2009), and 25A S.C. Code Ann. Regs. 67-1101(C) (Supp. 2009)?

STATEMENT OF THE CASE

The deceased employee, Scottie Wayne Floyd, hereinafter referred to as "deceased Claimant," had work experience as an automotive parts puller, pulling parts off of cars. On September 13, 2001, while removing a control arm under tension off of a Mercedes, the control arm broke loose and struck the deceased Claimant across the left forehead, nose, and cheek, breaking his nose and causing a closed head injury.

The deceased Claimant was taken to Marion Medical Center Emergency Room and received stitches in his forehead and cursory x-rays, and was sent to Dr. Keith Stewart, his family physician. The deceased Claimant was nauseated for approximately two weeks after the accident. Over the next four months, Dr. Stewart treated the deceased Claimant conservatively for a concussion. Dr. Stewart then ordered a CT scan on January 9, 2002, which detected appearance consistent with infarct ... atypical post-traumatic fluid collection cannot be excluded. (APA #1, p. 16) (R. p. 1025)

During that period of time, the deceased Claimant experienced severe headaches to the point where on January 13, 2002 he took a pistol to McLeod Regional Medical Center Emergency Room demanding help to stop the pain. While at McLeod Regional

Medical Center Emergency Room, a CT Scan showed a decreased attenuation in the right frontal lobe and a fracture of the left frontoethmoidal complex. (APA #5, p. 42) (R. p. 1083)

The deceased Claimant was sent to Three Rivers Center for Behavioral Health for psychological evaluation. When he returned from Columbia, the deceased Claimant was referred to Dr. R. Joseph Healy, a neurologist who treated him conservatively for psychological and mood disorders and emotional outrages consistent with brain injury.

Betty Joe Floyd, decedent's mother, petitioned the South Carolina Workers' Compensation Commission to be appointed Guardian ad Litem for the deceased Claimant regarding his claim before the Commission. An Order was issued by the Commission on April 24, 2002 appointing her as his Guardian ad Litem. (R. p. 116)

The deceased Claimant had severe headaches, photophobia, and uncontrolled emotional rages. After twenty-five (25) months of conservative treatment and surgery on his nose, Dr. Healy recommended he be referred to Tangram Rehabilitation Facility. The Employer/Carrier contested the referral to Tangram. The deceased Claimant filed a Form 50, Request for Hearing, dated April 8, 2003, asserting that the deceased Claimant was totally and permanently disabled and entitled to lifetime benefits. (R. p. 134) The Employer/Carrier filed a Form 51 dated May 8, 2003, admitting a head injury but denying a brain injury and permanent disability. (R. p. 133) A hearing was held before Commissioner Childs on January 7, 2004 and an Order dated June 10, 2004 was issued (R. p. 96), which, among other things, found:

> 2. I find that the claimant sustained an injury to his brain, head, nose, and psyche on September 13, 2001 when while removing a control arm under tension off a Mercedes, a spring came loose and the control arm struck

> the claimant across the left forehead, nose and cheek, breaking his nose and causing a closed heard injury.
>
> (Order, Comm. Childs, 6/10/2004, p. 6) (R. p. 101)
>
> * * *
>
> 3. I find claimant has not reached maximum medical improvement and is in need of additional psychological treatment and behavioral modification, specifically at Tangram Premier in Texas.
>
> (Order, Comm. Childs, 6/10/2004, p. 9) (R. p. 103)
>
> * * *
>
> 4. I find that based on the fact that the claimant has not reached maximum medical improvement and is in need of treatment in Tangram Premier that the issue of the extent of the claimant's disability is held in abeyance.
>
> (Order, Comm. Childs, 6/10/2004, p. 10) (R. p. 105)

On April 9, 2004, between the time of the hearing before Commissioner Childs on January 7, 2004 and the Order of June 10, 2004, the deceased Claimant was admitted to McLeod Regional Medical Center as a result of severe epileptic seizures. He sustained three (3) compression fractures and an injury to his spine, which was a result of the brain injury and his noncompliance by not taking anti-seizure medications. The Carrier denied that an injury to the spine arose out of and in the course of his employment. Prior to the deceased Claimant being admitted to Tangram, Betty Joe Floyd petitioned the Marion County Probate Court to be appointed the Guardian of Scottie Floyd during his stay at Tangram. A Certificate of Appointment that Betty Joe Floyd was the duly qualified Guardian of Scottie Floyd was issued on July 14, 2004. (R. p. 112)

Finally on July 24, 2004, the deceased Claimant was admitted to Tangram/ResCare Premier in San Marco, Texas, where he stayed from July 27, 2004 until June 1, 2006.

Approximately a year and a half after being admitted to Tangram, the deceased Claimant was returned to South Carolina on a trial basis for a one week period in March 2006. He was evaluated by Dr. Healy during that week and returned to Tangram/ResCare Premier.

The deceased Claimant was also having difficulty dealing with the pain in his spine as result of the second accident of April 9, 2004 and had difficulty taking his medications. The Employer took the position that the deceased Claimant was refusing medical treatment and "denied the claimant sustained an injury to the spine." The deceased Claimant filed a Form 50, Request for Hearing, dated January 6, 2006 (R. p. 132) asserting the Claimant was totally and permanently disabled arising out of his brain injury and subsequent spine injury and was entitled to lifetime benefits and lifetime medical. The Employer/Carrier filed a Form 51 dated February 3, 2006 (R. p. 131) admitting the injury on September 13, 2001 but did not agree that he was totally and permanently disabled and denied that he sustained an injury to his spine.

Depositions of Dr. Healy were taken on March 15, 2004 (R. p. 861), and again on April 24, 2006 (R. p. 822). As a result of the second deposition of Dr. Healy on April 24, 2006 , the parties agreed to a Consent Order signed by Commissioner Bass on June 27, 2006 (R. p. 85), requiring the Employer/Carrier to provide continuing medical care for the deceased Claimant when he returned to Florence on June 1, 2006. Among other things provided for in the Order was a weekly allowance of Four Hundred ($400.00) Dollars a week to be paid to Betty Joe Floyd, the deceased Claimant's mother and sole dependent, so that she could provide him a residence and be his caregiver and mentor in an effort to keep him from having to be re-institutionalized.

When the deceased Claimant returned home, he was significantly improved. However, over a period of a month or so, because of the nature of his brain injury, his condition deteriorated and his episodes of combativeness, unruliness, and threats increased. Dr. Healy, who had continued to treat the deceased Claimant, refused to continue to treat him because of his physical threats to Dr. Healy and his staff. Dr. Walter James Evans of Comprehensive Neurological Services, P.C., by agreement of the parties, commenced treatment of him. The deceased Claimant was unable to control his rage during this entire period of time. After a period of time, Dr. Evans also refused to continue treating the deceased Claimant. Dr. Sasha Federer, a neuro-psychologist, undertook the continuing psychological treatment of the deceased Claimant in an attempt to socialize the deceased Claimant in hopes that he would not have to be re-institutionalized, and his condition was stabilized under Dr. Federer's care.

A hearing was held before the Commission on February 16, 2007 based on the Form 50 that was filed January 6, 2006, approximately five and one-half years after deceased claimant's original brain injury of September 13, 2001 and two years and ten months after the second accident of April 9, 2004 which resulted in an injury to his spine.

Commissioner Alan Bass issued an Order dated December 12, 2007 (R. p. 69), which was unappealed and, among other things, determined that the deceased Claimant had a physical brain injury and spinal injury.

> 4. I find that the claimant sustained admitted injuries to brain, head, nose, and psyche.
>
> 5. In addition to admitted injuries, I find claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury, resulting in extensive pain in his spine requiring orthopaedic treatment.
>
> (Order, Comm. Bass, 12/12/07, p. 9) (R. p. 77)

Further, the unappealed Order determined,

> 7. The defendants contend that the claimant is refusing medical treatment by failing to comply with directions for taking his headache medication. The defendants are thus claiming that they are entitled to suspend all benefits – presumably including temporary total disability benefits until such time as claimant agrees to remain compliant with his medication.
>
> To the extent that claimant is not taking his headache medicine as prescribed, I find that such failure is not a refusal within the meaning of §42-15-60. A review of the complete medical record before me – as opposed to a selection of a few stray nuggets here and there – clearly establishes that the claimant's failure to take his medication as prescribed is a byproduct of the claimant's physical injury rather than a conscious decision on his part. There are numerous references to such in the deposition of Dr. Federer and Dr. Evans.
>
> Nor should the claimant's inability to comply with his medication schedule come as a surprise. Dr. Joanne McGee, neuropsychologist and clinical direct of ResCare Premier, opined in a letter dated January 3, 2005 that,
>
> > Due to problems with judgment and impulsivity, without supervision he [claimant] would have problems remembering when it is not necessary or more often than prescribed, or BEING NONCOMPLIANT WITH HIS PRESCRIBED MEDICAL REGIMEN. (Emphasis added) (APA #25, p. 401) (R. p. 1334)
>
> Dr. Healy testified in his deposition of April 24, 2006 that as a result of the claimant's injury to his brain,
>
> > ...We're not dealing with a normal brain, and the areas that are injured, as those types of areas of injuries mature, scar heal, it can sometimes change things and so I'm not sure that it's predictable. (Dep. Dr. Healy, p. 21, lines 8-12) (R. p. 842)
>
> (Order, Comm. Bass, 12/12/07, pp. 10-11) (R. p. 79)

Pursuant to the Order of Commissioner Bass dated December 12, 2007 (R. p. 69), the deceased Claimant had still not reached maximum medical improvement and no

award of permanent disability was ever made. Claimant continued his medical treatment with Dr. Federer.

On September 5, 2008, Betty Joe Floyd, Scottie's mother, went into the bedroom in an attempt to arouse him for supper, and discovered that he was deceased. An autopsy was performed on the deceased Claimant on September 6, 2008, which determined that the cause of death was, among other things, "Complications of seizure disorder..." (APA # 37, P. 396) (R. p. 1434)

On August 25, 2009, Dr. Healy, the neurologist, testified that the deceased Claimant's death was the result of his failure to take anti-seizure medications for approximately one week. Dr. Healy also testified that he was convinced that the deceased Claimant knew what the consequences could be.

> Q. Do you have an opinion as to whether or not he understood the certainty of the results of not taking the medication?
>
> MR. CAUTHEN: Objection as it calls for speculation again.
>
> A. I'm not sure that he knew that it could kill him, but he knew that it could land you in the hospital, that you could have compression fractures, almost lose your kidney function. He – I think he was well aware because I told him when that happened that he came close to dying then, so he was aware of what the consequences could be.
>
> (Dep. Healy, 8/25/09, p. 22, line 15 – p. 23, line 1)
> (R. pp. 431-432)

On May 30, 2009, the deceased Claimant's mother, Betty Joe Floyd, as Personal Representative of the Estate of Scottie Floyd and as dependent mother beneficiary, filed a Form 50 (R. p. 130) asserting that Scottie Floyd had died with and was entitled to a

permanent award for loss of use of the brain and back pursuant to S.C. Code Ann. § 42-9-30 (Supp. 2009). The Employer/Carrier filed a Form 51 denying the claim. (R. p. 129)

On May 30, 2009, the deceased Claimant's mother, Betty Joe Floyd, as Personal Representative of the Estate of Scottie Floyd and as dependent mother beneficiary, also filed a Form 52 (R. p. 128) asserting that Scottie Floyd was entitled to a permanent award for total and permanent disability as a result of a brain injury and back injury and entitled to lifetime benefits when he died from causes other than the injury. The Employer/Carrier filed a Form 53 (R. p. 124) denying benefits asserting that the deceased Claimant died from complications of a seizures disorder relating to his brain injury of September 13, 2001 for which he was receiving benefits and that the mother/personal representative is barred from receiving benefits because the death occurred more than six years after the accident, and that the mother was not dependent upon the deceased Claimant.

On May 30, 2009, the deceased Claimant's mother, Betty Joe Floyd, as Personal Representative of the Estate of Scottie Floyd and as dependent mother beneficiary, also filed a Form 52 (R. p. 126) asserting that Scottie Floyd suffered convulsions resulting in accidental seizures and his accidental death on September 5, 2008, serving the carrier at the time of his initial injury of September 13, 2001 and the Employer's carrier at the time of Claimant's death on September 5, 2008. The Employer/Carriers filed Form 53s (R. pp. 123 and 127) denying that there was not an accident on September 5, 2008.

The matters were heard in a consolidated hearing before the Single Commissioner Lyndon on September 1, 2009, resulting in a consolidated Decision and Order dated March 1, 2010 (R. p. 39) basically denying all claims of the Claimant based on the September 13, 2001, April 9, 2004, or September 5, 2008 accidents.

A Form 30 was timely filed on March 12, 2010 by the Claimant. (R. p. 119) A hearing before the Appellate Panel of the South Carolina Workers' Compensation Commission occurred on June 22, 2010. The consolidated Order of the Appellate Panel was issued on December 3, 2010. (R. p. 23)

Because one of the numerous issues posed by the instant litigation is whether or not the Claimant's death on September 5, 2008 was, in and of itself, a separate accident arising out of and in the course of his employment with Ken Baker Used Cars, S.C. Code Ann. §42-17-60, as amended effective July 1, 2007, vested jurisdiction of that issue in the consolidated Order with the South Carolina Court of Appeals; whereas, the majority of the remaining issues in that consolidated Order based on accident dates of September 13, 2001 and April 9, 2004 were vested in the Circuit Court of Marion County. Therefore, because of the jurisdictional conflict timely identical Notices of Appeal of that consolidated Order were simultaneously filed by the Claimant as Appellant with the South Carolina Court of Appeals and the Circuit Court of Marion County on December 29, 2010.

The Appellant then moved before the South Carolina Court of Appeals for an Order of consolidation of the adjudication of these identical appeals to be heard before the South Carolina Court of Appeals pursuant to Rule 214, SCACR. (R. p. 282) The South Carolina Court of Appeals issued an Order dated March 25, 2011, as follows:

> Despite this assertion, we find for the purposes of determining which court has jurisdiction of this appeal, we look to the 2001 injury, from which all subsequent events occurred. Accordingly, we deny Appellant's motion, and dismiss the appeal in order to allow the appeal to proceed in circuit court.
>
> (Order, SC Court of Appeals, 3/25/11, R. p. 22)

The appeal before the Marion County Circuit Court was heard on September 8, 2011, resulting in an Order from the Honorable Thomas Russo dated January 4, 2011 (R. p. 6), which was served on the Appellant by the Marion County Clerk of Court on March 8, 2012. As a result of the perfected service of that Order, the Notice of Appeal to the South Carolina Court of Appeals was filed and served on March 14, 2012.

STANDARD OF REVIEW

> The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusion, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).
>
> The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. Frame, 357 S.C. at 527, 593 S.E.2d at 494; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see also Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. See Rodriquez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Gibson v. Spartanburg Sch. Dist. # 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); S.C. Code Ann. § 1-23-380(A)(6) (2005); see also Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is

affected by an error of law."); Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing decision of Workers' Compensation Commission, court of appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law). 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 the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Gibson, 338 S.C. at 517, 526 S.E.2d at 729; Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Frame, 357 S.C. at 528, 593 S.E.2d at 495; Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); Corbin, 351 S.C. at 618, 571 S.E.2d at 95; Muir, 336 S.C. at 282, 519 S.E.2d at 591. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Peidmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Frame, 357 S.C. at 528, 593 S.E.2d at 495. It is not within our province to reverse findings of the Appellate Panel which are supported by substantial evidence. Pratt, 357 S.C. at 622, 594 S.E.2d at 274-75; Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

(Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (2005))

ARGUMENTS

1. The Court below erred as a matter of law in its Ruling of Law No. 10 that pursuant to S.C. Code Ann. § 42-9-110 (Supp. 2009) Betty Joe Floyd, as a surviving parent, is not in the class of persons whom the Act deems to be conclusively wholly dependent for support on the deceased claimant, in complete derogation of S.C. Code Ann. § 42-9-140 (Supp. 2009), which provides, "(B) If the deceased employee leaves no dependents or nondependent children, the employer shall pay ... to his father and mother, irrespective of age or dependency?"

The South Carolina Workers' Compensation Commission determined that Betty Joe Floyd, the deceased Claimant's mother, must demonstrate that she was dependent upon the deceased employee in order to be entitled to benefits under the Act. The Commission specifically found that only two statutes provide for payment of benefits for a deceased employee.

> The South Carolina workers' compensation statutes only provide for two classes of persons that are deemed to be presumptively dependent on a deceased Claimant as a matter of law. S.C. Code Ann § 42-9-110 provides that, "[a] surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee." South Carolina courts have expanded this class of statutorily presumptive dependents to include illegitimate children of a deceased Claimant, but no further. Flemon v. Dickert-Keowee, Inc. (S.C. 1972) 259 S.C. 99, 190 S.E.2d 751. For purpose of receiving death benefits under the Workers' Compensation Law, one may be deemed wholly dependent either through a conclusive statutory presumption under § 42-9-110 or through a factual demonstration under § 42-9-120. Adams v. Texfi Industries (320 S.C. 213, 464 S.E.2d 109 (1995)).
>
> (Order, Comm. Lyndon, 03/01/2010, p. 20) (R. p. 58)

S.C. Code Ann. § 42-9-140 (Supp. 2009) specifically provides for payment when a deceased employee leaves no dependant or partial dependent. S.C. Code Ann. § 42-9-140(C) (Supp. 2009) provides, "...If no children survive the deceased employee, then the

remainder must be paid to his father and mother, irrespective of age or dependency." Assuming that the mother was not dependent upon the deceased employee, which we deny, even so she was entitled to benefits under the Act and finding otherwise is clear error.

2. The Court below err as a matter of law in affirming the failure of the South Carolina Workers' Compensation Commission to find that the Claimant's death on September 5, 2008 arose out of and in the course of his employment on September 5, 2008 as a result of the accidental unsupervised withdrawal of medications for approximately a week resulting in seizures and his accidental death, entitling the deceased employee's mother to death benefits for Claimant's accidental death pursuant to S.C. Code Ann. § 42-9-290 (Supp. 2009).

The Administrative Procedures Act ("APA") governs this Court's review of decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Court can reverse or modify the Commission's decision if the substantial rights of the appellants have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See S.C. Code Ann. § 1-23-380(A)(6)(d), (e)(Supp.1997).

"The compensability of a particular event as an accident within the purview of the Workers' Compensation law is a question of law to be decided by the Courts, while the Commission's factual determination as to whether an accident occurred is conclusive if supported by competent evidence." Stokes v. First National Bank, 298 S.C. 13 (Ct. App. 1988) (citing Grayson v. Gulf Oil Co., 292 S.C. 528 (Ct. App. 1987)). Thus, when, as here, the facts establishing the occurrence of a particular event are undisputed, the question of whether the occurrence at such event is compensable as an injury by accident is a question of law to be reviewed de novo by the Court. See Shuler v. Gregory, 366 S.C. 435 (Ct. App. 2005); Hall v. Desert Aire, Inc., 376 S. C. 338 (Ct. App. 2007).

On February 1, 2008, the South Carolina Court of Appeals had determined that, among other things, pursuant to S.C. Code Ann. § 42-9-60 (Supp. 2009), "No compensation shall be payable if the injury or death was occasioned by intoxication of the employee or by willful intention of the employee to injure or kill himself or another." The Court of Appeals further found,

> The chain of causation Dr. Galvarino posited may have established that the aggravation of Harvey's psychiatric condition was compensable. Nevertheless, willful intention was the independent intervening variable that severed the causal relationship between the injury and the suicide. Without evidence negating willful intention, the only reasonable inference is that Harvey's suicide was the result of his willful intention.
>
> The Appellate Panel erred as a matter of law in apparently evaluating compensability for Harvey's suicide using the chain of causation test. The appropriate standard in this state is willful intent. Moreover, the decision that Harvey's suicide was compensable is clearly erroneous in view of substantial evidence in the record that Harvey's death was the result of his willful intention.
>
> (Thompson for Harvey v. Cisson Construction Co., 377 S.C. 137, 659 S.E.2d 171, (Certiorari Granted 6/24/2009), (Vacated by, Motion granted, 385 S.C. 451, 684 S.E.2d 756 (2009)

In the Thompson case the Claimant's death was the result of a massive overdose of medication, namely Oxycontin. In the instant case, Scottie Floyd's death was the result of not taking any prescription anti-seizure medications for over a week which resulted in convulsions and death. The Court of Appeals in Thompson concluded,

> After thorough review of the record, we conclude the evidence fails to establish that Harvey's psychiatric condition negated his willful intent to kill himself. Willful intention, as an independent intervening variable, broke the chain of causation between the work-related injury and suicide. Consequently, Harvey's suicide was not causally

> related to or a "natural consequence" flowing from his work-related injury.
>
> (Thompson for Harvey v. Cisson Construction Co., 377 S.C. 137, 659 S.E.2d 171, (Certiorari Granted 6/24/2009), (Vacated by, Motion granted, 385 S.C. 451, 684 S.E.2d 756 (2009)

The South Carolina Supreme Court granted certiorari on this Thompson decision on June 24, 2009, which by Motion Granted was vacated on October 8, 2009. The instant hearing before the Single Commissioner was on September 1, 2009 and the Single Commissioner found in his Order, the following:

> [C]laimant's counsel conceded during the hearing that if, "[the hearing Commissioner] determine[s] that the Claimant intentionally attempted to kill himself and was successful, then of course the Claimant is in a very hard position to try and convince the Supreme Court that suicide had become compensable in this state." (Hearing Transcript, p. 9, lines 11-16) Nonetheless, he continued onward to argue "in any event, we would still say it was compensable."
>
> (Order, Comm. Lyndon, 3/1/2010, p. 22) (R. p. 60)

Both counsel and the Single Commissioner were aware that the South Carolina Supreme Court had granted certiorari in the Thompson case. Claimant's counsel persisted, "in any event, we would still say it was compensable." On October 8, 2009, the South Carolina Supreme Court issued its Order vacating Thompson but did not issue a decision because the parties had withdrawn their appeal based on a settlement agreement which rendered the matter moot.

Commissioner Lyndon found, "There is no reliable, substantial evidence in the record which would support a finding that the claimant committed suicide." (Order, Comm. Lyndon, 3/1/2010, p. 23) (R. p. 61) The deceased Claimant asserts that there is

irrefutable evidence in the record that the Claimant's death was an accident and resulted from him not taking his anti-seizure medications for over a week. Dr. Healy testified in his deposition,

Q. What is your opinion as to what caused the death of Scottie Floyd after reviewing the autopsy?

A. It looked to me like he probably had a seizure.

Q. How do you arrive at that conclusion?

A. Well, he had pulmonary edema with no evidence of an acute MI, myocardial infarction, petechial hemorrhages.

Q. What are they?

A. Little microbleeds, pleural and epicardial little microbleeds, and then based on the toxicology which said that there was no antiepileptic medications in his blood, my impression is that he had a major motor seizure and died as a result of that.

Q. What's the significance of him not having any anti-seizure medication in his blood as far as the texicol – toxicology report is concerned?

A. Well, it might have indicated that he wasn't taking it.

Q. The medication that you were prescribing for him for seizures was what?

A. Keppra, which is levetiracetam and Depakote, valproic acid.

Q. All right. Was the toxicology report specific in testing for those medications?

A. Yes.

Q. And you have that toxicology report there?

A. Yes.

Q. And what does it show?

A. Well, for valproic acid that there was none detected.

Q. And it was specifically tested for, is that correct?

A. Yes.

Q. All right.

A. And for levetiracetam which is Keppra, there was none detected.

Q. If he had taken his medication as prescribed, do you have an opinion as to whether or not there would have been – that that would have been detected in the toxicology report?

A. Yes, it would have.

Q. Okay. Do you have an opinion to a reasonable degree of medical certainty that the cause of his death was his failure in taking that medication?

A. That's what seems to be most obvious conclusion.

Q. And is that to a reasonable degree of medical certainty?

A. Yes.

(Dep. Dr. Healy, 8/25/2009, p. 18, line 16 - p. 20, line 13)
(R. pp. 425-429)

* * *

Q. Let me rephrase the question. Let me rephrase the question. Given – given his impairment of the brain, do you have an opinion as to whether or not he could intend to die as a result of not taking his medication?

A. I know from a one time before when his levels got low and he had a seizure and suffered his compression fractures and ended up in the hospital that he was aware of the consequences of having a seizure. I think he ended up in the hospital. Kidney function was affected, and I believe he was here for about two weeks. So, I know he was aware of what could happen and the consequences of that. I know that after that, he said that that wouldn't be happening again, and I never did ever see him show any evidence of noncompliance with his medication after that, so my gut feeling is is that the most logical explanation for him having no medication to control seizures in his blood would have to be a volitional act or he ran out or something like that.

Q. His ability to exercise judgment in determining he was just going to disregard medical advice or disregard logical consequences of his act, was that ability to understand the magnitude of his actions impaired as a result of the injury to his brain?

A. No, that, that wasn't impaired, but he was very impulsive and, you know, if he got an idea that he was going to do something, then he would do it.

Q, Is that something he could control or is that part of his symptoms of his condition?

A. Well, it was part of the symptoms of his condition. He did – after he went to Tangram, he did have a little more control over that, but I'm just – I'm surprised that there was no seizure medicine in his blood and his – if it's known that he had the medication, then I would have to conclude to a reasonable degree of certainty that he didn't take it.

Q. Do you have an opinion as to whether or not he understood the certainty of the results of not taking that medication?

MR. CAUTHEN: Objection as it calls for speculation again.

A. I'm not sure that he knew that it could kill him, but he knew that it could land you in the hospital, that you could have compression fractures, almost lose your kidney function. He – I think he was well aware because I told him when that happened that he came close to dying then, so he was aware of what the consequences could be.

Q. When you saw him basically three days before he died, did he give you any indications at that time that he was giving up on himself or he was giving up on his condition?

A. No. No, he didn't. Actually, it looks like on that particular day he looked they were doing – doing pretty well.

Q. Do you have any idea how long it would take for any residue of the anti-seizure medication to be expelled from the, from the body? In other words, how long would he have had to gone without medication before there would be no residue in the body?

A. Well, that would probably take probably a week I would think, and the samples were collected the next – the following day after his death.

Q. And you're talking about the samples that were in the toxicology report?

A. Yes.

(Dep. Dr. Healy, 8/25/2009, p. 21, line 1 - p. 23, line 20)
(R. pp. 430-432)

* * *

Q. And do you have an opinion to a reasonable degree of medical certainty how long it had been since he had taken any medication of the anti-seizure type?

A. I would think it probably would have had to been a week or two if he hadn't taken any medication for there to be none on 9-6-08.

Q. Okay. Given his impulsive nature as a result of this injury, I believe Dr. Federer testified in his deposition that it was his opinion that if Scottie had meant to kill himself he probably would have used a gun because of the way he was fixated on weapons and things like that. Do you have a similar opinion?

A. My thought would be that since he lived at home that he wouldn't – he wouldn't do that to his mother and that he would pick a more passive way.

Q. Do you have an opinion to a reasonable degree of medical certainty that it was inevitable once he stopped taking the medication that he would eventually have a seizure?

A. He would.

(Dep. Dr. Healy, 8/25/2009, p. 25, line 2 - line 22)
(R. p. 434)

Previously, the unappealed Order of Commissioner Bass dated December 12, 2007, among other things, determined that the deceased Claimant had a physical brain injury and spinal injury.

4. I find that the claimant sustained admitted injuries to brain, head, nose, and psyche.

5. In addition to admitted injuries, I find claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury, resulting in extensive pain in his spine requiring orthopaedic treatment.

(Order, Comm. Bass, 12/12/07, p. 9) (R. p. 77)

Further, the unappealed Order determined,

> 7. The defendants contend that the claimant is refusing medical treatment by failing to comply with directions for taking his headache medication. The defendants are thus claiming that they are entitled to suspend all benefits – presumably including temporary total disability benefits until such time as claimant agrees to remain compliant with his medication.

To the extent that claimant is not taking his headache medicine as prescribed, I find that such failure is not a refusal within the meaning of §42-15-60. A review of the complete medical record before me – as opposed to a selection of a few stray nuggets here and there – clearly establishes that the claimant's failure to take his medication as prescribed is a byproduct of the claimant's physical injury rather than a conscious decision on his part. There are numerous references to such in the depositions of Dr. Federer and Dr. Evans.

Nor should the claimant's inability to comply with his medication schedule come as a surprise. Dr. Joanne McGee, neuropsychologist and clinical director of ResCare Premier, opined in a letter dated January 3, 2005 that,

> Due to problems with judgment and impulsivity, without supervision he [claimant] would have problems remembering when it is not necessary or more often than prescribed, or BEING NONCOMPLIANT WITH HIS PRESCRIBED MEDICAL REGIMEN. (Emphasis added) (APA #25, p. 401) (R. p. 1334)

Dr. Healy testified in his deposition of April 24, 2006 that as a result of the claimant's injury to his brain,

> ...We're not dealing with a normal brain, and the areas that are injured, as those types of areas of injuries mature, scar heal, it can sometimes change things and so I'm not sure that it's predictable. (Dep. Dr. Healy, p. 21, lines 8-12) (R. p. 842)

(Order, Comm. Bass, 12/12/07, pp. 10-11) (R. p. 79)

On September 5, 2008, Betty Joe Floyd, the deceased Claimant's mother, went into the bedroom in an attempt to arouse him for supper, and discovered that he was deceased. On August 25, 2009, Dr. Healy, the neurologist, testified that the deceased Claimant's death was the result of his failure to take anti-seizure medications for approximately one week. Dr. Healy also testified that he was convinced that the deceased Claimant knew what the consequences could be.

On November 7, 2005, the South Carolina Court of Appeals handed down its decision on Kenneth Shuler, Husband, Jason Brandon Shuler, Minor Child and William Bryant Shuler, Minor Child, Beneficiaries of Linda Shuler, Deceased Employee, vs. Gregory Electric, Employer and Comptrust AGC of South Carolina, 366 S.C. 435, 622 S.E.2d 569 (2005 S.C. App.) Mrs. Shuler died as a result of an automobile accident while returning home from a doctor's office where she received treatment for a previous compensable injury. The Single Commissioner awarded death benefits with a finding that the accident arose out of and in the course of her employment. There was no issue discussed by the Court as to whether or not the deceased employee Shuler caused the accident or was the victim of someone else's negligence. The only issue before the Court was whether or not the Claimant was performing duties for the employer that were required under the Act when she was accidentally killed; hence, a protracted discussion involving the going and coming rule.

Suffice it to say, that if the claimant had died as a result of medical malpractice arising out of and in the course of her employment, pharmaceutical neglect arising out of and in the course of her employment, or negligent administration of medication arising out of and in the course of her employment, all of these would have been subsumed under

the doctrine that the claimant sustained an injury by accident associated with her employment and would have been considered a separate accident arising out of and in the course of her employment. The causal relationship with the prior accidental injury does not mean that the accidental death by automobile collision has to be medically related to the hand injury she sustained originally. The arising out of and in the course of her employment requirement means that the claimant must have been doing something related to her employment to come within the penumbra of the Workers' Compensation Act.

If the Employer had called her before she reached her doctor's appointment and had asked her to perform a task, such as bring a light bulb to the employer, and she had performed that task and in the process had sustained a fatal automobile accident, clearly that accident was a separate accident arising out of and in the course of her employment. Likewise, as found in Shuler, the fact that she was required by her employer to submit to medical treatment meant that when she had a fatal automobile accident complying with that condition of her employment, the death by a separate accident arose out of and in the course of her employment and her death need not be causally related to the hand injury itself.

The Court went into great detail discussing the fact that there is a difference between "causally related death" and "death arising out of and in the course of employment."

> Here, Shuler's fatal accident occurred while she was fulfilling her duty to submit to treatment for a previous compensable injury. Thus, her subsequent injures arose out of and were in the scope of her employment. (Emphasis added)
>
> * * *

> CONCLUSION
>
> Based on the foregoing, we find Shuler's death resulted from an accident arising from and in the course of her employment. The going and coming rule does not preclude her from receiving benefits, and there is substantial evidence Shuler did not deviate from her route home. Accordingly, the award of benefits is
>
> AFFIRMED.
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> (Shuler v Gregory Electric (2005 S.C. App.), 366 S.C. 435, 622 S.E.2d 569)

The Employer contends that it would have been impossible for the deceased Claimant to have sustained an injury by accident while in the employ of Ken Baker Used Cars on February 5, 2008 because the deceased Claimant had not been "physically" working for the Employer since his original accident on September 13, 2001. The Employer asserts that,

> [A]s a matter of public policy, a finding by the Commission of a "new" date of accident, well into the future after a remote date of injury, would be a confusing practice that could work a potential hardship on Claimants. Consider, if the Employer in this case had gone out of business in 2003, hypothetically. Under the legal arguments of the Claimant, a 2004 date of injury or 2008 death claim which were not related to the 2001 original injury would not be properly insurable by Employer (no longer existing), the carrier (a defunct employer would not continue to carry workers' compensation insurance), nor the South Carolina Uninsured Employer's Fund, (a non-existing employer could not be deemed to be improperly uninsured pursuant to the Act.)
>
> (Post Trial Memorandum of Defendants, Ken Baker Used Cars and Legions Ins. Co. dated 10/16/2009, p. 5)
>
> (R. p. 215)

There is nothing in the Workers' Compensation statute that requires a finding that the claimant was "physically" working for the employer at the time of an accident in order for the injury to be found to be arising out of and in the course of his employment.

> In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999), the court of appeals examined the notice requirement as it applies to a claimant with an occupational disease:
>
> Bard avers the Circuit Court erred in refusing to reverse the Commission's decision that Muir gave timely notice of his claim pursuant to S.C. Code Ann. § 42-15-20 (1985).
>
> § 42-15-20 requires an injured employee to "immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident." Generally, the injury is not compensable unless notice is given within ninety days. Id. With an occupational disease, the "accident" occurs when the employee becomes disabled and could, through reasonable diligence, discover that his condition is compensable. Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987); Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985). In occupational disease cases, compensability accrues at the time of death or disability. See Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960).
>
> (Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (2005))

The existence or non-existence of the employer as a result of the employer going out of business, going into bankruptcy, or the employer dying has no effect as a matter of public policy on a judicial determination of whether or not an accident arose out of and in the course of employment.

3. The Court below erred in failing to rule that the South Carolina Workers' Compensation Commission erred as a matter of law in finding that the decedent's death on September 5, 2008 was the proximate result of the September 13, 2001 accident in view of the reliable, probative, and substantial evidence on the whole record.

The Claimant's death was the proximate result of significant seizures. The autopsy of the Claimant (APA #37) (R. p. 1434) and the testimony of Dr. Healy, the neurologist, clearly demonstrate that the Claimant had pulmonary edema with no evidence of an acute MI, myocardial infarction, petechial hemorrhages.

A. It looked to me like he probably had a seizure.

Q. How do you arrive at that conclusion?

A. Well, he had pulmonary edema with no evidence of an acute MI, myocardial infarction, petechial hemorrhages.

Q. What are they?

A. Little microbleeds, pleural and epicardial little microbleeds, and then based on the toxicology which said that there was no antiepileptic medications in his blood, my impression is that he had a major motor seizure and died as a result of that.

(Dep. Dr. Healy, 8/25/2009, p. 18, line 16 to p. 19, line 3)
(R. pp. 425-428)

Dr. Healy further testified that as a result of the autopsy, the toxicology report and his prior treatment of the Claimant, the cause of the Claimant's death was his failure to take his medication.

Q. If he had taken his medication as prescribed, do you have an opinion as to whether or not there would have been – that that would have been detected in the toxicology report?

A. Yes, it would have.

Q. Okay. Do you have an opinion to a reasonable degree of medical certainty that the cause of his death was his failure in taking that medication?

A. That's what seems to be most obvious conclusion.

Q. And is that to a reasonable degree of medical certainty?

A. Yes.

(Dep. Dr. Healy, 8/25/2009, p. 20, line 2 to line 13)
(R. p. 429)

There is no credible, factual dispute when viewing the reliable, probative, and substantial evidence on the whole record that the Claimant's death was the proximate

result of the deceased Claimant not being properly supervised in the taking of his medication. Any finding that the deceased Claimant would have had fatal seizures even had he taken his medication would be entirely speculative and would require a complete disregard of the toxicology reports and would be a result of an abuse of discretion by the Finder of Fact.

The undisputed medical testimony, relying on the toxicology report (APA #38) (R. p. 1440), is that the deceased Claimant had not taken his prescribed anti-seizure medications for at least a week prior to his death which resulted in fatal seizures. The autopsy is clear that the Claimant died as a result of seizures. The toxicology report is clear that the deceased Claimant had no residual anti-seizure medication in his system at the time he died.

The authorized treating physician opined that the deceased Claimant's death was the result of going "cold turkey" off his medications and that he had been off his medications for at least a week for there to be no residual medications in his system per the toxicology reports.

The deceased Claimant had an injured brain. He required as a result of that injury medications and supervision. His judgment was flawed. That is why he required supervision. The workers' compensation system is based on a no-fault system of adjudication. The deceased Claimant's death was not the natural consequence of his brain injury. It was the natural consequence of his not being properly supervised in the taking of his medications.

This conclusion is not based on speculation or surmise. It is based on historical facts that the deceased Claimant in the past had undergone seizures for not taking his

medications when he had gone "cold turkey" off his medications for over a week, the natural result being severe seizures. It would be surmise and speculation not based on any medical testimony that the deceased Claimant would have had these seizures if he had been on medication. There is no testimony, medical or otherwise, to support that conclusion.

4. The Court below erred as a matter of law in affirming the South Carolina Workers' Compensation Commission's finding that the decedent Claimant's mother was not a dependent and not entitled to benefits the decedent Claimant would have received "had he lived" for loss of use of his back and brain pursuant to S.C. Code Ann. § 42-9-280 (Supp. 2009), S.C. Code Ann. § 42-9-30 (Supp. 2009), and 25A S.C. Code Ann. Regs. 67-1101(C) (Supp. 2009)against the substantial evidence in the record as a whole.

Betty Joe Floyd testified at the hearing on September 1, 2009, as follows:

Q. [B]efore he went to Texas from the time he started receiving checks, okay, when he first started getting the checks, to when he went to Tangram, there was a period of how long there – between the time he got his checks and the time they sent him off to Tangram?

A. It could have been about six or eight months.

Q. All right. During that six or eight months, he was receiving checks?

A. Yes, sir.

Q. And he was living with you?

A. Yes, sir.

Q. And he was giving you the checks?

A. Yes, sir.

Q. All right. What did you use the money for?

A. To buy games that he wanted. I would buy his cigarettes out of it, something to eat if he wanted when I would go out.

Q. Did he help pay for the electricity?

A. Yes, sir.

Q. What else did he help pay for?

A. He paid the house payment. He paid for groceries and stuff like that.

(Hearing Tr. 09/01/09, p. 37, lines 3-25) (R. p. 386)

* * *

Q. Okay. Now, after that accident, did he continue to give you money?

A. Yes, sir.

Q. All right. And did you continue to use that money to help you with your expenses at home?

A. Yes, sir.

Q. Okay. Now, he stayed out in Tangram for how long?

A. Nineteen months.

Q. Okay. And did you maintain the house for him while he was gone?

A. Yes, sir.

Q. Did you keep a room for him while he was gone?

A. Yes, sir.

Q. And that is what that money was being use for?

A. Yes, sir.

Q. All right. Now, let me go back. I don't want to confuse you now, but let's go back. Before he left for Tangram, before he left, was anybody but him giving you any money or helping you at all with the household?

A. No, sir.

(Hearing Tr. 09/01/09, p. 39, line 13 – p. 40, line 12)
(R. pp. 388-389)

* * *

Q. And you were being paid by who to take care of him?

A. The Workers' Comp people.

Q. Okay. Now, during that period of time, did you also maintain a room for Scottie?

A. Yes, sir.

Q. And did he also help pay for the groceries and help pay for the house payments and the other things that are a part of your household?

A. Yes, sir.

Q. And you depended on him for that?

A. Yes, sir.

(Hearing Tr. 09/01/09, p. 40, line 24 – p. 41, line 9)
(R. pp. 389-390)

The mother asserts that notwithstanding whether she was dependent upon the deceased Claimant for support at the time of his original injury of September 13, 2001, there is adequate testimony in the record to demonstrate that she was dependent upon him at the time of the second injury of April 9, 2004. She testified that at that point in time the deceased Claimant was living in her home with her, she was unemployed because she was taking care of him, and she was unable to be employed because of her own disability.

Q. Okay. And during that period of time that he was gone, did you yourself have a workers' compensation injury?

A. Yes, sir.

Q. And what was injured on you?

A. My lower back.

(Hearing Tr. 09/01/09, p. 41, line 21 – p. 42, line 1)
(R. pp. 390-391)

The mother further asserts that there are no other individuals that were dependent upon the deceased Claimant for support. The Employer's own dependency investigation (Defendants' Exhibit #1) (R. p. 612) reveals that the deceased Claimant was not married and had no children. The mother further asserts that S.C. Code Ann. § 42-9-140 (Supp. 2009) provides,

(B) If the deceased employee leaves no dependents or nondependent children, the employer shall pay the

> commuted amounts provided for in Section 42-9-290 for whole dependents, less burial expenses which must be deducted from those commuted amounts, to his father and mother, irrespective of age or dependency. (Emphasis added)

5. The Court below erred as a matter of law in affirming the South Carolina Workers' Compensation Commission's failure to find that prior to Claimant's death on September 5, 2008 the Claimant had a permanent 20% loss of use of the back arising out of the compensable accident of April 9, 2004 and that pursuant to S.C. Code Ann. § 42-9-280 (Supp. 2009) the deceased Claimant's mother is entitled to the unpaid balance of compensation the Claimant would have been entitled to had he lived, because his death was from any cause other than the April 9, 2004 injury in view of the reliable, probative, and substantial evidence on the whole record.

The Commission found that as a matter of law the deceased Claimant sustained a compensable injury to his spine in 2004 relying upon the Finding of Fact #5 of Commissioner Bass in his Order of December 12, 2007. (R. p. 69) Commissioner Bass found in that Order that as of the hearing on February 16, 2007,

> The claimant sustained this compression fracture resulting from severe seizures which required hospitalization on April 10, 2004. The seizures arose from his brain injury according to Dr. Healy and Dr. Evans and were of such a severe nature as to actually compress the vertebrae at Levels T3, T7, T8, and T9. (Dep. Dr. Chokshi, p. 8, lines 15-17) (R. p. 586)
>
> (Order, Comm. Bass, 12/12/07, p. 9) (R. p. 77)

Commissioner Bass also found in Finding of Fact #6 that the claimant had not reached maximum medical improvement with respect to his spinal injuries. (Order, Comm. Bass, 12/12/07, p. 10) (R. p. 78)

In his deposition of August 25, 2009, Dr. Healy, the authorized treating physician, testified that he had last seen the deceased Claimant on September 2, 2008, three days before he died, and that he had been making his regular appointments up until that day.

(Dep. Dr. Healy, 08/25/09, p. 13) (R. p. 422) He testified at that time that the deceased Claimant's back injury was permanent and he had a 15% whole person impairment as a result.

> Q. Okay. The last time you saw him, were you of the impression that his – had you arrived at any impression that his back problem from these compression fractures was permanent?
>
> A. That was a permanent problem.
>
> Q. Okay. And are you today still of the opinion that at least by September the 2nd of '08 when you last saw him, he had a permanent impairment to his spine of a 15 percent whole person impairment?
>
> A. He did.
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> (Dep. Dr. Healy, 08/25/09, p. 14, line 17–p. 15, line 1)
> (R. pp. 423-424)

6. The Court below erred as a matter of law in affirming the South Carolina Workers' Compensation Commission's failure to find that prior to Claimant's death on September 5, 2008 the Claimant had a permanent 85% loss of use of the brain arising out of the admitted accident of September 13, 2001 and that pursuant to S.C. Code Ann. § 42-9-280 the Claimant's mother is entitled to the unpaid balance of compensation the deceased Claimant would have been entitled to had he lived, because his death was from any other cause than his September 13, 2001 injury in view of the reliable, probative, and substantial evidence on the whole record.

The brain as an organ is rated pursuant to S.C. Code Ann. § 42-9-30(20) (effective 3/28/1988) and S.C. Code Ann. § 42-9-30(22) (effective 7/1/2007) and by 25A Regs. 67-1101 "Brain" (effective 04/24/92). Dr. Healy, the authorized treating physician, testified in his deposition of August 25, 2009 that the deceased Claimant had sustained a permanent 85% loss of use of the brain.

> Q. All right. Now, the more difficult issue. Do you have an opinion or can you through access of the AMA Guides arrive at an opinion as to what percentage of loss of use of the brain he had sustained as a result of that injury to his brain?

A. Can I look at the –

Q. Yeah, that's why this is out. Now, were you – I just brought in the 5th Edition of the AMA Guide, unless you've got some other edition you want to rely upon, that's what I believe we would like to have the rating from. Now, I don't – I just opened it that part which is at 13.3. If there's another part in the book that, that is more adaptable to rating the brain as an organ, please use your professional expertise and point that out to us?

A. Okay. Well, I would say that there were two, two types of injures that Scottie had as a result of his head injury and one was an impairment to his mental status which produced a behavioral disorder in which he was impulsive and that his interpersonal relationships were impaired. Impulsivity was a problem. Judgment was a problem. And so that is an injury of the brain with a behavioral consequence which I believe would be rated on page 325 of this volume, American Medical Association Guide to Impairment, Volume – the 5th Edition. Page 325, I believe that would put him in Class 3, which is in the 30 to 69 percent range, but my feeling is is that he would have been in the higher – the next level up which is the most severe level. It says, "Severe limitation of all daily activities requiring dependence on another person." I don't think that Scottie needed another person, but he was pretty close to that. So in my estimation on this impairment between 30 and 69 percent, he's in the upper range there and if I had to say, I would say he's above 55 percent and that's on the behavioral disorder. The other disorder was due to proximal events.

Q. What is that?

A. That's the seizure. And I would say that page 314 of the same edition that he's in Class 3 and that he would have had a 30 percent impairment to the whole person because of this seizure disorder and the range is 30 to 49 and I would probably put him at the lower limit because he was controlled on his medication.

Q. Now, if we're asking for an impairment rating as to the brain as an organ, do we add these two together

or what do we do to come up with an impairment to the brain as an organ?

A. I would think that they would be added together.

Q. So that's roughly 85 percent loss of use of the brain?

A. Yes.

Q. Okay. And is that to a reasonable degree of medical certainty?

A. It is.

(Healy Dep. 8/25/09, p. 16, line 3 – p. 18, line 11)
(R. pp. 425-427)

The deceased Claimant had sustained an injury to his brain. He had to go through substantial treatment, to include being institutionalized from July 27, 2004 to June 1, 2006. He had gone through substantial psychological counseling through Dr. Sasha Federer. He continued to have problems with judgment, dealing with life, and needed supervision, which the Employer was providing him outside of an institution by allowing his mother to supervise him and paying her $400.00 per week.

There is no question the deceased Claimant had functional loss of brain due to damage of the frontal lobe. There is no question that the brain is an organ, and that the damage to the organ was permanent, and that he had sustained an 85% impairment to that organ pursuant to S.C. Code Ann. § 42-9-30(20) (Supp. 2009). The deceased Claimant was entitled to an award for the loss of use of that organ. Whether that loss of use is based on 25A S.C. Code Ann. Regs. 67-1101 "Brain" 25-250 weeks or whether it is based on S.C. Code Ann. §42-9-10(C) (Supp. 2009) for his life expectancy of 2681.64 weeks will be discussed herein below. However, it is clear the Single Commissioner erred in failing to make an award of the degree of the loss of use of the brain pursuant to § 42-9-30.

7. The Court below erred as a matter of law in affirming the failure of the South Carolina Workers' Compensation Commission to award 2279.40 weeks of benefits for loss of use of brain to the deceased Claimant's mother (85% of deceased Claimant's life expectancy of 2681.64 weeks) pursuant to S.C. Code Ann. § 42-9-30 (Supp. 2009), S.C. Code Ann. § 42-9-10 (Supp. 2009), and 25A S.C. Code Ann. Regs. 67-1101(C) (Supp. 2009).

S.C. Code Ann. § 42-9-10(A) (Supp. 2009) provides, "In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C)." 25A S.C. Code Ann. Regs. 67-1101 (Supp. 2009) provides that "Brain" 25-250 weeks. However, § 42-9-10(C) provides "Notwithstanding the five-hundred-week limitations prescribed in this section or elsewhere in this title" ... "physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." (Emphasis added)

It is of particular note that the brain is not listed as a scheduled body part under S.C. Code Ann. § 42-9-30 (Supp. 2009). However, the Legislature, pursuant to the authority granted the Commission in § 42-9-30(22) (Supp. 2009), authorized the Commission to adopt additional body parts as scheduled members.

> ... The Commission, by regulation, shall prescribe the ratio which the partial loss or loss or partial loss of use of a particular member, organ, or body part bears to the whole man, basing these ratios on accepted medical standards and these ratios determine the benefits payable under this subsection. (S.C. Code Ann. § 42-9-30(22) (Supp. 2009))

Pursuant to the authority of S.C. Code Ann. § 42-9-30(20) (Supp. 2009), the Commission adopted Regs. 67-1101 (1989) which, among other things, listed the brain as an additional § 42-9-30 scheduled body part and provided that partial loss or loss of use of the brain entitled the claimant to between 25 to 250 weeks. Therefore, the brain is a listed body part under § 42-9-30. Pursuant to the 1984 amendment of S.C. Code Ann.

§ 42-9-10 (Supp. 2009) the brain is now subject to the expansion of lifetime benefits in § 42-9-10 "or elsewhere in this title."

At the very least, for the purposes of the application of S.C. Code Ann. § 42-9-280 (Supp. 2009), the brain is an injury covered by both the second paragraph of S.C. Code Ann. § 42-9-10 (Supp. 2009) and S.C. Code Ann. § 42-9-30 by the application of S.C. Code Ann. § 42-9-30(20) (Supp. 2009) and 25A S.C. Code Ann. Regs. 67-1101 (Supp. 2009) and entitling the dependents of the deceased wage earner to be paid the unpaid balance of the lifetime award of the deceased claimant "had he lived." (S.C. Code Ann. § 42-9-280 (Supp. 2009)) In the instant case, the deceased Claimant was 26 years of age when he died. Pursuant to S.C. Code Ann. § 19-1-150 (Supp. 2009), he had a life expectancy of 51.57 years which equates to 2681.64 weeks of benefits.

The 500 week limitation is next set out in S.C. Code Ann. § 42-9-170 (Supp. 2009) involving cases where an employee receives an injury under S.C. Code Ann. § 42-9-30 or the second paragraph of S.C. Code Ann. § 42-9-10 after sustaining another permanent injury in the same employment. In S.C. Code Ann. § 42-9-170, the employee is initially limited to a total award for both injuries not to exceed 500 weeks. That 500 week limitation, pursuant to the expansive language of the 1984 amendment, is now also increased to a lifetime award under the "or elsewhere in this title" expansion of the third paragraph of S.C. Code Ann. § 42-9-10 (Supp. 2009).

Interestingly in the case presently before the Court, if the deceased Claimant's death had resulted or been causally connected to his permanent brain injury, S.C. Code Ann. § 42-9-290 (Supp. 2009) provides for a death benefit for the claimant's dependents which has a limitation of 500 weeks and is also subject to the expansive language of the

1984 amendment of S.C. Code Ann. § 42-9-10, "or elsewhere in this title." Clearly, if the causally related death resulted from the affects of the permanent brain injury, the 500 week limitation would not apply.

Obviously, the Legislature intended an expansive reading of the above cited 1984 amendment with the distinction that, "...In no case may the period covered by compensation exceed 500 weeks except as hereinafter provided," and that,

> Notwithstanding the 500 week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five hundred week limitation and shall receive benefits for life. (S.C. Code Ann. § 42-9-10 (1985)) (Emphasis added)

Therefore, it was the intention of the Legislature that the dependents of claimants in such catastrophic injuries who died from another cause other than the injuries pursuant to S.C. Code Ann. § 42-9-280 would also be entitled to,

> ...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 (1985)) (Emphasis added)

CONCLUSION

Claimant respectfully submits that the Order of the Court below dated January 4, 2012 (R. p. 5) be vacated and that the Court below award Betty Joe Floyd, as dependent mother of the deceased claimant Scottie Floyd, 2681.64 weeks of benefits at the claimant's compensation rate of $250.54 on the date of his death September 5, 2008 for 85% loss of use of the brain pursuant to S.C. Code Ann. § 42-9-30 (Supp. 2009), and at least 60 weeks of benefits for at least a 20% loss of use of the back pursuant to S.C. Code Ann. § 42-9-30 (Supp. 2009);

Or in the alternative;

That the Court below award Betty Joe Floyd, as dependent mother of the deceased claimant Scottie Floyd, 500 weeks for greater than 50% loss of use of the back pursuant to S.C. Code Ann. § 42-9-30(19) (Supp. 2009) and 250 weeks for total loss of use of the brain pursuant to S.C. Code Ann. § 42-9-30(20) (Supp. 2009) and 25A S.C. Code Ann. Regs. 67-1101 (Supp. 2009), "Brain";

Or in the alternative:

That the Court below award Betty Joe Floyd, as dependent mother of the deceased claimant Scottie Floyd, 500 weeks for the accidental death of Scottie Floyd on September 5, 2008 pursuant to S.C. Code Ann. § 42-9-290 (Supp. 2009).

Respectfully submitted,

Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Appellant
S. C. Bar #6244

September 26, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

Case No. 2010-CP-33-1048

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, ... Appellant,

v.

Ken Baker Used Cars, Employer, and Legion Insurance Company In liquidation c/o South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carriers, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

September 26, 2012

Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Appellant

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Thomas Russo, Circuit Court Judge

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Betty Joe Floyd as Personal Representative of the Estate of
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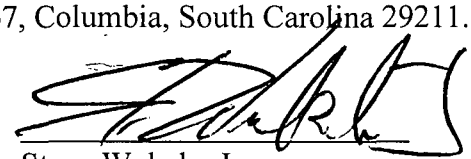
Guaranty Association and Amguard Insurance Company, Carriers, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on the Employer, Ken Baker Used Cars, and the Carriers, Legion Insurance Company in Liquidation c/o South Carolina Property & Casualty Guaranty Association and Amguard Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on September 26, 2012 addressed to their attorneys of record respectively Mark D. Cauthen, Esquire and Peter P. Leventis, Esquire, of McKay, Cauthen, Settana & Stubley, P.A., Post Office Box 7217, Columbia, South Carolina 29202, and Edwin P. Martin, Jr., Esquire, Hedrick, Gardner, Kincheloe & Garofalo, LLP, Post Office Box 11267, Columbia, South Carolina 29211.



September 26, 2012

Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Appellant
South Carolina Bar No. 6244