THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
South Carolina Workers' Compensation Commission

WCC Case Nos. 0123790 and 0824046

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.

RECORD ON APPEAL
VOLUME I

RECEIVED
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SC Court of Appeals

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Marion
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 -CP- 33 -1048

Betty J. Floyd, et al
PLAINTIFF(S)

Ken Baker Used Cars, et al
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

A CERTIFIED COPY OF THIS ORIGINAL FILED IN THIS OFFICE
BOOK _____ PAGE _____
CLERK OF COURT, MARION COUNTY
SOUTH CAROLINA

J. R. Rhodes
Circuit Court Judge

2157
Judge Code

3-6-2012
Date

SCRCP Form 4C (10/2011)

THE STATE OF SOUTH CAROLINA COUNTY OF MARION Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation /South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Defendants.	IN THE COURT OF COMMON PLEAS TWELFTH CIRCUIT **CIVIL ACTION NO.: 2010-CP-33-1048** In Re: SCWCC File No's.: 0123790 & 0824046 ORDER

FILED
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BOOK ____ PAGE ____

DATE OF HEARING: September 8, 2011

PRESIDING JUDGE: The Honorable Thomas Russo

APPEARANCES: Steve Wukela, Jr. on behalf of Scottie Floyd and Scottie Floyd's mother as his personal representative;

Peter P. Leventis, IV and Mark D. Cauthen on behalf of Ken Baker Used Cars and South Carolina Property & Casualty Insurance Guaranty Association;

Edwin P. Martin, Jr. on behalf of Ken Baker Used Cars and AmGuard Insurance Company.

This matter came before the Court on an appeal from the South Carolina Workers' Compensation Commission's Appellate Panel. The alleged date of accident for this claim, September 13, 2001, was prior to the July 1, 2007 amendments to the Workers' Compensation Act, and therefore under S.C. Code Ann. §42-17-60 (Supp. 1990), the predecessor to §42-17-60 (Supp. 2008), the appeal in this matter is proper before the Circuit Court. The Claimant/Appellant makes his appeal from and Order of the Appellate Panel, affirming a Decision of the single Commissioner.

Of note, an alternate date of injury is alleged on September 5, 2008, the date of the Claimant/Appellants death, at which time the applicable statute for appellate review was directly to the Court of Appeals. (S.C. Code Ann. §42-17-60 (Supp. 2008)). The Claimant appealed Order of the appellate panel of the Workers' Compensation Commission to both the Circuit and Court of Appeals due to this procedural quandary. These joint appeals, for the 2001 and 2008 alleged dates of accident, have been consolidated and remanded for jurisdiction from the Court of Appeals (for the 2008 date of accident) to be heard before the Circuit Court.

STATEMENT OF THE CASE

The Claimant/Appellant, Scottie W. Floyd, suffered an admitted compensable injuries to his brain, head, nose and psyche, on September 13, 2001, while employed by Ken Baker Used Cars. At the time of the injury in 2001, Legion Insurance Company was the workers' compensation carrier for Defendant Employer. Legion was liquidated in 2003, at which point the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) became responsible for the claim through the Guaranty Association Act. (See Gen. S.C. Code Ann. Title 38, Chapter 31)

Scottie Floyd's compensable brain injury of September 13, 2001, affected his right frontal lobe, causing him to suffer from a seizure related disorder. (Comm. Bass Order, December 12, 2007, p. 9). He received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (Comm. Childs Order, at p. 4) The Claimant was required to take anticonvulsants to control his seizure disorder. In April of 2004, he was hospitalized due to suffering multiple seizures. The seizures in 2004 also caused compression fractures to his thoracic spine. The seizures which led to the compression fractures were alleged by the Claimant, and subsequently found by the Commission, to be caused by the Claimant's brain injury and as a part of his September 13, 2001 accident. As a result, the compression fractures were found to be a compensable part of the September 13, 2001, claim. (Comm. Bass Order, pp. 9-10). The Claimant received ongoing treatment for many years, including treatment at a supported living program in Texas from July 27, 2004 to June 1, 2006.

He made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Joe Floyd. (Consent Order, June 27, 2006). At the time of the Order of Commissioner Bass dated December 12, 2007, the Claimant had still not reached maximum medical improvement and no award of disability was ever made. (Bass Order, December 12, 2007, Finding of Fact No. 6). This finding was not appealed by the Claimant. The Appellant died on September 5, 2008, due to complications from his seizure disorder. (See Autopsy Report, p. 401). At the time of his death, the Claimant had been on a running award of weekly temporary total disability (TTD) benefits from the date of injury in September 2001 through the date of his death in September 2008.

Subsequent to the Claimant's death, his attorney filed several pleadings and hearing requests for recovery of additional benefits under multiple legal theories, including two separate

Forms 52 (Workers' Compensation Commission Complaint form for death related work injuries) as well as a new Form 50 (Workers' Compensation Complaint and hearing request form for Claimants). The decedent Claimant/Appellant asserted through counsel that whether or not the Claimant's September 5, 2008, death was casually related to the original 2001 injury, the Claimant's mother and personal representative, Betty Joe Floyd, is entitled to the balance of a lifetime award for a physical brain injury under S.C. Code Ann. §42-9-10(C). The amount of the "lifetime" award being premised on a calculation of the Scottie Floyd's life expectancy pursuant to S.C. Code Ann. § 19-1-150.[1]

Claimant's counsel has also made several alternative and contingent arguments as corollaries to that primary position at the original. If Claimant's mother is not entitled to the balance of a lifetime award (the hearing commissioner ruled she was not; and the full Commission affirmed), then, he asserts that the September 5, 2008 death was a work-related death, but that the death was not precipitated by the original 2001 injury. The Claimant alleges that the September 5, 2008, death was a new date of injury, for which the responsible carrier, on the date of death, would be liable to pay at least 500 weeks of benefits in association with a work-related death claim.

Lastly, Claimant's/Appellant's counsel also argues that Ms. Floyd would be entitled to a 500 week, or potentially more than the 500 week award, by virtue of the compensable injury to the Claimant's spine and brain. He argues that the Claimant would have been entitled to an

[1] In his prior brief to the Workers' Compensation Commission, the decedent Claimant used the figure "2681.64 weeks" being left in Scottie Floyd's life at the time of his death or approx. "51.57" years left to live. (See page 34 of Appellant's brief to the full Commission). Claimant'/Appellants' basis for this number (per §19-1-50) was that Scottie Floyd was "26 years old when he died." However, Mr. Floyd was born in August of 1975 according to his birth certificate, meaning he was 33 when he died. Under the current version of S.C. Code Ann. §19-1-150 (Supp. 2004) at age 33, a male would have only have 44.95 years left to live, or approximately 2337.4 weeks. However, Defendant/Appellant SCPCIGA further contend that the life expectancy of the Claimant would be even less than 2337.4 weeks, as the relevant mortality tables for this litigation would be those in place at the time of the Claimant's original injury in 2001. S.C. Code Ann. §19-1-150 was amended in 2004 to extend the life expectancies.

impairment rating of 50% or greater (under S.C. Code Ann. §42-9-30) to his back, as well as an impairment rating to the brain (S.C. Code of Regs. 67-1101) which would not be subject to any 500 week limitation pursuant to S.C. Code Ann. § 42-9-10 (C).

The Respondent Carrier, SCPCIGA, denied additional benefits were due to the deceased Claimant, or his personal representative, based on any of the theories advanced by the Claimant's counsel. The Respondent SCPCIGA's position is that the September 5, 2008 death resulted proximately from the September 13, 2001 injury by accident, which resulted in trauma to the brain and a seizure disorder that ultimately killed him. Therefore, it is a work-related death as provided under §42-9-290. However, Mr. Floyd did not die within the mandatory time period (six years) as prescribed by §42-9-290. Thus, there is no entitlement to further benefits pursuant to §42-9-290, and as interpreted by Gunnells v. Raybestos-Manhattan, Inc, 198 S.E.2d 535 (1973) (noting that if the death, proximately related to the original injury, does not occur within six years of the date of that injury and while total disability still persists, there is no right to additional benefits under the Act).

Secondly, Appellant asserts even presuming for the sake of argument that compression fractures to the Scottie Floyd's spine in 2004, which resulted from his seizure disorder, were not causally related to the September 13, 2001 injury – Floyd died from complications related to his brain injury and seizure disorder associated with the September 13, 2001 injury. There is no evidence anywhere in the record that Mr. Floyd died from spinal compression fractures that occurred in 2004. Moreover, the Claimant had previously filed a Form 50 in 2006 for his back injury/compression fractures citing "September 13, 2001" as the date of accident. The Appellant should be judicially estopped from now changing that position to argue the relevant date of accident for the spinal injury was in 2004.

The SCPCIGA further asserts that Appellant's alternative theory of a non-work related death does not entitle his mother, Betty Joe Floyd, to the balance of either a lifetime award for physical brain injury under §42-9-10, or a 500 week award under §42-9-30 (back injury) even if a non-work related death could be established. Defendants assert that Betty Joe Floyd was never a dependent of the Scottie Floyd, as required by §42-9-280, either presumptively (as a spouse or minor child §42-9-110) nor factually, as a person dependent on the Claimant for support during three months prior to the date of the accident. (§42-9-120).

Furthermore, there was no award made to Scottie Floyd under the Act covered by, "the second paragraph of §42-9-10," nor under "§42-9-30" as required in order for the award to survive under §42-9-280, (where there is a non-work-related death). The reason being, Mr. Floyd was never found at maximum medical improvement by the Commission prior to his death, nor had he been awarded any one of the following: (a) a 500 week award; (b) a lifetime award; nor (c) permanent partial disability under §42-9-30. Pursuant to the plain language of §42-9-280, and interpretations of this statute by South Carolina Courts in the cases of Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436; 405 S.E.2d 393 (1991); Stone v. Roadway Express, 367 S.C. 575; 627 S.E.2d 695 (2006) and Floyd v. C.B. Askins, 382 S.C. 84; 675 S.E.2d 450 (Ct. App. 2009), the ongoing TTD benefits of the Claimant would have abated upon his death. Such benefits would have abated whether pursuant to a lifetime award or otherwise, unless upon the 'non-work related' death of the Claimant both: (a) Betty Joe Floyd was a dependent; **and** (b) an award had been made to Scottie Floyd pursuant to § 42-9-30 or the second paragraph of § 42-9-10, *prior* to his death.

Notably, this case involves a "work related" death under §42-9-290 (as opposed to a non-work related death under §42-9-280), and more to the point, neither prong (a) nor (b) above was

met by the evidence of this case for a finding of any award that would have survived the Claimant under §42-9-280 had the death been found to be non-work related in the first instance.

The Claimant/Appellant also argued alternatively that the September 5, 2008 death is a new date of injury for a claim separate and distinct from the September 13, 2001 accident. The Respondent SCPCIGA denies liability based on this precarious legal assertion on three primary grounds. First, the SCPCIGA did not provide any workers' compensation coverage for the Defendant employer in September of 2008. Therefore, SCPCIGA would not be the proper carrier.

Secondly, even if the death does not relate back to the 2001 accident (as found by the hearing Commissioner, and affirmed by the appellate panel of the Worker's Compensation Commission), there is no evidence in the record that the Claimant's death in September of 2008 occurred in the course and scope of his employment with the Defendant Employer as defined and interpreted by S.C. Code Ann. §42-1-160. Therefore, the only way the death could have been compensable would be if it related back to the original September 13, 2001 injury – and was not affirmatively barred by the requirements of §42-9-290 for "work related" deaths.

Third, as a matter of public policy – as argued below – an "updated date of accident" for remote injuries (though still otherwise compensable) does not make sense in the scheme of coverage for workers' compensation.

On March 1, 2010, Commissioner Lyndon issued an order finding that the Claimant's personal representative, Betty Joe Floyd, was barred from benefits under the Act pursuant to §42-9-290 – in finding that Mr. Floyd's death was a work related death stemming from his resultant seizure conditions caused by his Sept. 13, 2001, head injury. Commissioner Lyndon also found there was no new date of injury subsequent to the Claimant's original injury of

September 13, 2001. The trial Commissioner further found, among other conclusions, that Mrs. Betty Jo Floyd was not a dependent of the Claimant as defined by the Workers' Compensation Act of South Carolina. Betty Joe Floyd, as personal representative of Scottie Floyd, appealed the ruling of Commissioner Lyndon to the full Commission. Briefs were filed by the parties and oral argument was taken in front of the appellate panel of the Commission on June 22, 2010. Subsequently, the appellate panel issued an Order fully affirming the single Commissioner's original Order.

Subsequent to that Order, and within the applicable time period, the Claimant appealed this case to both the Court of Appeals, and the Circuit Court of Marion County.[2] By consent of the parties and Order of the Court of Appeals, both appeals have been consolidated in this matter before the Twelfth Judicial Circuit Court in Marion County.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited to the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Electric, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted).

[2] It was a procedural necessity of the Claimant/Appellant to appeal to both courts, as statutory changes to the appellate procedure for challenging a ruling of the workers' compensation Commission, were enacted as of July 1, 2007, which changed the jurisdiction of an appeal of the full Commission's Orders from the circuit Court to the Court of Appeals. The complexity lay in the fact that the Claimant/Appellant is alleging two different dates of accident, one prior to July 1, 2007 (Sept. 13, 2001) and another after that date (Sept. 5, 2008).

A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (Houston v. Deloach & Deloach, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)). While an appellate court's review of factual findings in a workers' compensation case is governed and controlled by the substantial evidence rule, an appellate court may freely and absolutely review a trial court's decision concerning an issue of law. Where the Commission's decision is controlled by an error of law, the appellate review is plenary. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that 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) (reversed on other grounds (Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)).

Having fully considered the evidence presented in this case, including memoranda of law, briefs, and the arguments of counsel, I fully affirm the ruling of the Appellate Panel. The Court's specific findings of fact and conclusions of law are set forth below. The findings of fact are listed below, and affirmed as each is supported by substantial evidence in the record. The conclusions of law are affirmed consistent with the legal reasoning of the single Commissioner, as affirmed in full by the Appellate Panel of the Commission.

FINDINGS OF FACT

1. That Ken Baker Used Cars was the employer and SCPCIGA was the insured carrier (through Legion Insurance in Liquidation) on the date of injury by accident, September 13, 2001.

2. That the Claimant was not an employee of Ken Baker Used Cars on September 5, 2008, and had not been so employed for several years prior to September 5, 2008.

3. Pursuant to prior Orders of the Commission – even prior to the Order of Commissioner G. Bryan Lyndon which is the basis for this current appeal, the claimant, Scottie W. Floyd, sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while employed by Ken Baker Used Cars.

4. The claimant developed a seizure disorder as a result of the September 13, 2001 work-related injury to his head/brain. The claimant was prescribed medications to control his seizure disorder under the direction of Dr. Joseph Healy.

5. Pursuant to a prior order of the Commission, the claimant suffered compression fractures at multiple levels of his thoracic spine on or about April 10, 2004 due to seizure activity which in turn resulted from the claimant's brain injury. The compression fractures therefore arose from and were related to the claimant's compensable injuries of September 13, 2001 and did not constitute a new injury in 2004.

6. On September 5, 2008, the claimant died from "complications of a seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma." (Autopsy Report, APA pp. 396-401). The claimant's fatal seizure was a direct result of the claimant's original injury on September 13, 2001 and was therefore not a new injury by accident in 2008.

7. That the evidence in the record does not support a finding that Scottie Floyd committed suicide or willfully ceased taking his medications with the intention of taking his own life.

8. Based on the evidence in the record including the good faith dependency investigation completed by SCPCIGA and the testimony at the hearing, Betty Joe Floyd was not dependent for support upon her son, Scottie Floyd, at the time of injury on September 13, 2001 nor during the three month period prior to the date of injury in 2001.

9. That there was no other person, or persons, who were dependent upon the Claimant for support at the time of his injury on September 13, 2001, nor for the three month period prior to his injury.

10. That prior to the Claimant's death he had not reached maximum medical improvement for his multiple injuries associated with this claim, nor was such ever adjudicated, or requested for further adjudication before the SCWCC prior to his death. (See the unappealed prior Order of Commissioner J. Alan Bass, December 12, 2007).

11. That the Claimant was on a running award of weekly TTD benefits from the time of his injury on September 13, 2001 until the date of his death, but had never received an award of permanent disability under the Workers' Compensation Act for the injuries to his back or brain nor any other injury associated with this claim.

12. That the Defendants Legion in liquidation/SCPCIGA provided appropriate and necessary medical care, treatment and psychological treatment for the claimant's work-related injuries arising from his accident of September 13, 2001.

13. That the Claimant's death on September 5, 2008, did not occur within six years of the date of his compensable work-related accident, September 13, 2001, which accident proximately caused his death.

14. AmGuard Insurance Company is not a proper party to this claim because (a) there was no employer/employee relationship between Ken Baker Used Cars and the Claimant during AmGuard's period of coverage and (b) the Claimant did not suffer a new injury by accident on September 5, 2008.

15. That the Claimant's mother and Personal Representative, Betty Joe Floyd, is not entitled to benefits under the Workers' Compensation Act, because the claimant's death occurred more than six years after his original injury of September 13, 2001 and his death was proximately caused by complications that developed due to his injury of September 13, 2001.

CONCLUSIONS OF LAW

1. Under § 42-1-130, the deceased Claimant, Scottie W. Floyd, was a covered employee with Ken Baker Used Cars on the date of his accident of September 13, 2001, but was not a covered employee of Ken Baker Used Cars on the date of his death on September 5, 2008.

3. Under § 42-1-140, Ken Baker Used Cars, is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between Ken Baker Used Cars and Scottie W. Floyd on September 13, 2001, but no such employer/employee relationship existed between the Defendant Employer and the decedent Scottie Floyd on September 5, 2008.

5. Under § 42-1-160 and prior orders of the Commission, the claimant sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while

employed by Ken Baker Used Cars. The claimant subsequently developed a seizure disorder as a result of this work-related injury to his head/brain.

6. That under § 42-1-160 the Claimant did not suffer a work related accident arising out of and in the course of his employment with Ken Baker Used Cars, on September 5, 2008.

7. That pursuant to the doctrines of judicial estoppel and law of the case, the Claimant is not entitled to assert that the compensable injuries to his thoracic spine in April 2004 also constituted a "new" date of accident, separate and apart from his compensable September 13, 2001 accident.

It is clear that the Claimant previously alleged in his Form 50 filed in January, 2006 that the 2004 spinal injuries resulted from seizures due to the 2001 brain injury. Pursuant to the un-appealed order of December 12, 2007, the Claimant's spinal compression fractures were previously found to have been caused by seizure activity prompted by Claimant's brain injury. *See* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997), and prior Orders of the Workers' Compensation Commission regarding judicial estoppel.

8. That the case of Shuler v. Gregory Electric, 336 S.C. 435; 622 S.E.2d 569 (2005) is not applicable to the facts of this case. The Shuler court only addressed the compensability of an accident and not the appropriate date of accident. Furthermore, the cause of Claimant Shuler's death (a traffic fatality) was clearly a separate intervening cause from her initial compensable work injury (a hand injury).

9. That under § 42-9-110, 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.

10. That under § 42-9-110, there were no persons (according to the evidence in the case and the good faith dependency investigation of the Defendant SCPCIGA) who would have been presumptively dependent on the Claimant.

11. That under § 42-9-120 neither Betty Joe Floyd, nor any other person, qualified as a dependent of the claimant of any kind (wholly or partially) at the time of the accident or during the three months preceding the date of accident of September 13, 2001.

12. That under §42-9-290, the claimant's death from "complications of a seizure disorder" resulted proximately from the claimant's compensable head/brain injury that occurred on September 13, 2001.

13. That under §42-9-280, there is no evidence that the claimant's death occurred due to non-work related causes.

14. That pursuant to the requirements of S.C. Code Ann. §42-9-290 and as interpreted by Gunnells v. Raybestos-Manhattan, Inc., 198 S.E.2d 535 (1973), the claimant did not die while total disability persisted and within six years of the accident (September 13, 2001) which ultimately caused the claimant's death in September of 2008, almost seven years later.

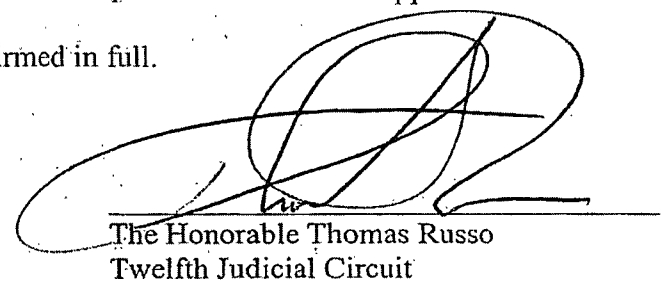
15. That because the claimant's death was work-related, pursuant to the express dictates of §42-9-290, which provides the exclusive mechanism for the applicability and payment of benefits for a work-related death under the Act, no award of permanent disability is available under § 42-9-10(C), § 42-9-30, or Reg. 67-1101 or any other provision of the Workers' Compensation Act.

16. That due to the Claimant's failure to meet the requirements of §42-9-290, and as interpreted by Gunnells, the Claimant's personal representative, Betty Joe Floyd, is barred from receiving further benefits under the Act.

ORDER

IT IS, THEREFORE ORDERED that the prior Order of the Appellate Panel of the Workers' Compensation Commission is affirmed in full.

AND IT IS SO ORDERED.



The Honorable Thomas Russo
Twelfth Judicial Circuit

January 4th, 2011
Marion, South Carolina

The South Carolina Court of Appeals

Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, Appellant,

Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation/South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Respondents.

Appellate Panel
Richland County
Trial Court Case No. 2001-WC-23-00790
2008-WC-24-00046

ORDER

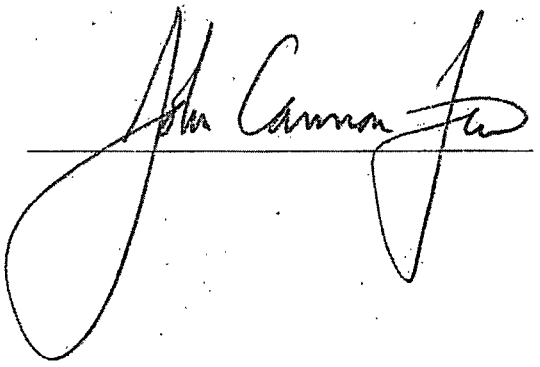
Appellant moves to consolidate this appeal with an identical appeal pending in the circuit court. Because section 42-17-60 of the South Carolina Code (Supp. 2010) requires appeals involving injuries that occur on or after July 1, 2007 to be filed in the court of appeals, confusion exists as to where this appeal should be filed.

This case initially arose out of a compensable brain injury which occurred on September 13, 2001. In 2004, claimant suffered another event triggered by the 2001 brain injury and in 2008, claimant died. This action was then instituted. One of Appellant's theories of the case is that claimant's 2008 death was a separate and distinct injury arising in and out of the course of his employment.[1]

[1] Appellant also concedes that a court may determine the injury occurred in 2001 or 2004.

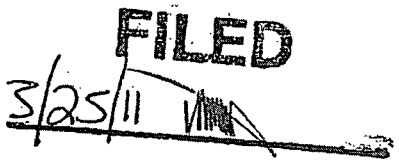
Despite this assertion, we find for the purposes of determining which court has jurisdiction of this appeal, we look to the 2001 injury, from which all subsequent events occurred. Accordingly, we deny Appellant's motion, and dismiss the appeal in order to allow the appeal to proceed in circuit court.

IT IS SO ORDERED.



Columbia, South Carolina

cc: Steve Wukela, Jr., Esquire
Edwin Pruitt Martin, Jr, Esquire
Mark D. Cauthen, Esquire
Peter P. Leventis, Esquire
Virginia Crocker, Judicial Director



DECISION AND ORDER
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
WCC FILE NO: 0123790 & 0824046

Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation /South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Defendants.	**ORDER**

HEARING: Held in on June 22, 2010 at the Workers' Compensation Commission in Columbia, SC.

APPEARANCES: The deceased Claimant, Scottie Floyd, and the Claimant's personal representative and mother, Betty Joe Floyd, were represented by Steve Wukela, Jr., Esquire of the Wukela Law Firm, 403 2nd Loop Rd., Florence, SC 29505-2815.

Defendants, Ken Baker Used Cars and Legion Insurance Company in Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, are represented by Mark D. Cauthen, Esquire and Peter P. Leventis, Esquire, both of McKay, Cauthen, Settana & Stubley, P.A.,

Post Office Box 7217, Columbia, South Carolina, 29202-7217.

Defendants Ken Baker Used Car through AmGuard Insurance Company, is represented by Edwin P. Martin, Jr., Esquire of Hedrick, Gardner, Kincheloe & Garofalo, LLP, P.O. Box 11267, Columbia, SC 29211.

PURPOSE: To determine issues set forth in the Form 30 appeal of the Claimant's personal representative and mother, Betty Joe Floyd.

OPINION: Commissioner Susan S. Barden
Commissioner David W. Huffstetler
Commissioner Derrick L. Williams

FILED: _____, 2010.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

The deceased Claimant, Scottie W. Floyd, suffered compensable injuries to his brain, head nose and psyche, on September 13, 2001 while employed by Ken Baker Used Cars. At the time of the injury in 2001, Legion Insurance Company was the workers' compensation carrier for Defendant Employer. Legion was liquidated in 2003, at which point the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) became responsible for the claim through the Guaranty Association Act.

Mr. Floyd's compensable brain injury of September 13, 2001 affected his right frontal lobe, causing him to suffer from a seizure related disorder. (Comm. Bass Order, December 12, 2007, p. 9). He received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (Childs order, p. 4) Mr. Floyd was required to take anticonvulsants to control his seizure disorder. In April of 2004, he was hospitalized due to suffering multiple seizures. The seizures also caused compression fractures of his thoracic spine

and renal failure. The 2004 seizures which led to the spinal compression fractures were found by the Commission to have been caused by the Claimant's brain injury. As a result, the compression fractures were found to be a compensable part of the September 13, 2001 claim. (Bass Order, pp. 9-10). Scottie Floyd received ongoing treatment for many years, including treatment at a supported living program in Texas from July 27, 2004 to June 1, 2006. He made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Joe Floyd, in June, 2006. At that time, Mr. Floyd moved into his mother's residence in Marion, S.C. where his mother cared for him upon his return from Texas. (Consent Order, June 27, 2006).

Pursuant to the Order of Commissioner Bass dated December 12, 2007, the Claimant had not reached maximum medical improvement at that point and no award of disability was ever made. (Bass Order, Finding of Fact No. 6). On September 5, 2008, the Claimant died due to complications from his seizure disorder. (Autopsy Report, APA, p. 401). The Claimant was on a running award of weekly temporary total disability benefits from the date of injury in September 2001 through the date of his death in September 2008.

Subsequent to Mr. Floyd's death, claimant's counsel filed several pleadings and hearing requests for additional benefits under multiple legal theories, including two separate Forms 52 as well as a Form 50. Claimant's counsel's position before the Single Commissioner, was essentially that, whether or not the Claimant's September 5, 2008 death was casually related to the original 2001 injury, the Claimant's mother, Betty Joe Floyd, should be entitled to the balance of a life time award for the physical brain injury. The amount of the "life time" award being premised on a calculation of the Claimant's life expectancy pursuant to S.C. Code Ann. § 19-1-150.

Claimant's counsel also made several alternative and contingent arguments as corollaries to that position. Including, but not limited to, the argument that if Claimant's mother was not entitled to the balance of a life time award, then, nonetheless, that the September 5, 2008 death was a work related death, but that the death was a new date of injury, for which the responsible carrier for Ken Baker Used Cars on that date (AmGuard Insurance Company) would be responsible for 500 weeks of benefits in association with the work related death claim.

Lastly, Claimant's counsel asserted that regardless of the right to any death benefits, Betty Jo Floyd should be entitled to a 500 week PTD, or potentially more than 500 week award, by virtue of the compensable injury to the Claimant's spine and brain. Arguing that the Claimant would have been entitled to an impairment rating of 50% or greater (under S.C. Code Ann. §42-9-30) as well as an impairment rating to the brain (S.C. Code of Reg. 67-1101) which would not be subject to any 500 week limitation pursuant to language in S.C. Code Ann. § 42-9-10 (C).

The Defendant SCPCIGA denied that additional benefits were due to the Claimant, or his personal representative, based on any of the theories advanced by Claimant's counsel. Defendant SCPCIGA argued that the September 5, 2008 death resulted proximately from the September 13, 2001 physical brain injury and the claimant's related seizure disorder and therefore, this case involved a work related death as provided under §42-9-290. However, Defendant maintained that the Claimant did not die within the mandatory time period (six years) as prescribed by §42-9-290, "while totally disability still continue[d]." Therefore, SCPCIGA asserted no further benefits are available pursuant to §42-9-290, and as interpreted by Gunnells v. Raybestos-Manhattan, Inc, 198 S.E.2d 535 (1973) (holding that if the death, proximately resulting from the original injury, does not occur within six years of the date of that injury *and* while total disability still persists, there is no right to additional benefits under the Act).

Secondly, Defendant SCPCIGA argued that, even assuming for the sake of argument that Claimant's 2004 spinal injuries, which resulted from his seizure disorder, were not causally related to the original September 13, 2001 injury – the Claimant died from complications related to his brain injury and seizure disorder associated with the September 13, 2001 injury. Further, that there was no evidence anywhere in the record that the Claimant died from compression factures of the spine. Moreover, the Claimant previously filed a Form 50 in 2006 for his back injury compression fractures citing September 13, 2001 as the date of accident. Defendants also contended that Claimant should be judicially estopped from now changing that position to assert the relevant date of accident for the spinal injury was in 2004.

Lastly, SCPCIGA asserted that Claimant's alternative theory of a non-work related death does not entitle the Claimant's mother to the balance of either a lifetime award for physical brain injury under §42-9-10, or a 500 week award under §42-9-30 (back injury) even if a non-work related death could be established. Defendants denied that Betty Joe Floyd was ever a dependent of the Claimant as required by §42-9-280, either presumptively (as a spouse or minor child per §42-9-110) nor factually, as a person dependent on the Claimant for support during three months prior to the date of the accident, pursuant to §42-9-120. Defendants also argued that even if the death was non-work related, all benefits would abate – whether pursuant to a life time award or otherwise, unless (a) Betty Joe Floyd was a dependent and (b) a prior award had been made to the Claimant pursuant to either § 42-9-30 or the second paragraph of § 42-9-10, *only*.

The Claimant also argued before the Single Commission that the September 5, 2008 death was a new date of accident for an injury separate and unrelated to the September 13, 2001 accident. The Defendant SCPCIGA denied liability based on this theory on three primary grounds. First, the SCPCIGA did not provide workers' compensation coverage for the

Defendant employer in September of 2008. Therefore, SCPCIGA would not be the proper carrier. Secondly, if the death does not relate back to the 2001 accident and injuries, there was no evidence in the record that the Claimant's death in September of 2008 occurred in the course and scope of his employment with the Defendant Employer. Third, as 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 when the employer no longer exists, and therefore no longer maintains workers' compensation coverage. Therefore, neither the defunct employer, non-existent carrier, nor the SCUEF would be required to cover such a claim (a non-existing employer could not be said to have been improperly without coverage on a date of injury during which that employer had been out of business for several years).

The Defendant carrier, AmGuard, which provided workers' compensation coverage for Ken Baker Used Cars on September 5, 2008, denied coverage for the Claimant's death as well during the Single Commission hearing. The two primary contentions of AmGuard can be summarized as follows. First, AmGuard maintained the position that all of the evidence in the record points to the fact that the Claimant's 2008 death stems directly from the September 13, 2001 injury. Therefore, the prior carrier, not AmGuard would be liable for all additional benefits due, if any. Secondly, AmGuard contended that the alternative legal theory of the Claimant, asserting that September 5, 2008 represents a new date of injury, and that such injury arose out of, and in the course of employment, is inaccurate. AmGuard pointed out that no employer/employee relationship existed between the Claimant and Ken Baker Used Cars during any coverage period of AmGuard.

Furthermore, AmGuard argued that Shuler v. Gregory Electric, 336 S.C. 435, 622 S.E.2d 569 (2005), cited by the Claimant, was readily distinguishable from the case of Scottie Floyd, and not applicable to the facts of this case. Among other reasons for these contentions, Defendant AmGuard argued that the Shuler court never adopted, indicated or addressed a "new date" of injury, only compensability of specific injuries by accident. Furthermore, the Shuler case dealt with a specific intervening event (a traffic accident) while the Claimant was being charged with a duty that, according to the Shuler court, arose out of an in the course of Claimant Shuler's employment (going to and from a workers' compensation medical appointment).

The Single Commission hearing was held on September 1, 2009 before Commissioner Lyndon who ruled in favor of the Defendants, noting in particular that this was as work related death per §42-9-290, but that the Claimant had not died with the requisite time period (six years) while permanent total disability persisted. Therefore, in accordance with this and other findings of the Single Commissioner, no further benefits were due under the Act. Commissioner Lyndon issued his order on March 1, 2010 consistent with the denial of all further benefits. Within the statutory period, the Claimant filed a Form 30 appealing the findings of Commissioner Lyndon on nineteen (19) separate grounds.

QUESTOINS PRESENTED
(PER CLAIMANT/APPELLANT'S FORM 30)

1. Did the Single Commissioner err in failing to find that Scottie Floyd sustained a death by accident on September 5, 2008 which arose out of and in the course of his employment with Ken Baker Used Cars?

2. Did the Single Commissioner err in failing to find that pursuant to §42-9-10(C) that the remainder of benefits due to Scottie Floyd must be paid to his mother, Betty Joe Floyd, irrespective of her age or dependency?

3. Did the Single Commissioner err in failing to find that at the time of Scottie Floyd's death on September 5, 2008 he had at least a 20% loss of use of his back?

4. Did the Single Commissioner err in failing to find that at the time of Scottie Floyd's death on September 5, 2008 he had at least 65% loss of use to the brain?

5. Did the Single Commissioner err in failing to find that subsequent injury and death sustained by Scottie Floyd on September 5, 2008 was aggravated by his pre-existing condition; name, permanent brain injury, pursuant to §42-9-35?

6. Did the Single Commissioner err in failing to find that Scottie Floyd's death on September 5, 2008 was the result of failure to take his anti-seizure medications for approximately one week?

7. Did the Single Commissioner err in failing to find that Scottie Floyd's death was the result of unsupervised withdrawal of his medications resulting in seizures and his accidental death on September 5, 2008 arose out of and in the course of his employment with Ken Baker Used Cars?

8. Did the Single Commissioner err in failing to find that on or about April 9, 2004 Scottie Floyd sustained an injury by accident arising out of and in the course of his employment when he suffered a seizure that resulted in injuries to his thoracic spine?

9. Did the Single Commissioner err in failing to find that Betty Joe Floyd, Scottie Floyd's mother, was a statutory dependent of Scottie Floyd and sole beneficiary to his workers' compensation benefits due him pursuant to §42-9-290 for the loss of use of his back and the loss of use of his brain pursuant to §§42-9-140 and 42-9-280?

10. Did the Single Commissioner err in failing to find that pursuant to §42-9-30 Scottie Floyd's mother was entitled to at least 20% of 300 weeks for Scottie Floyd's loss of use of his back at the time of his death?

11. Did the Single Commissioner err in failing to award Scottie Floyd's mother 85% of loss of the brain which entitled her to 85% of the balance of his life expectancy of 2681.64 week pursuant to §§42-9-30, 42-9-10 and Reg. 67-1101(C).

12. Did the Single Commissioner err in failing to find that Scottie Floyd sustained an additional injury and death arising out of and in the course of his employment with Ken Baker Used Cars on September 5, 2008?

13. Did the Single Commissioner err in failing to find that Scottie Floyd died four years after the April 9, 2004 accident involving injuries to his spine arising out of and in the course of his employment, and that his dependent mother is entitled to the balance of benefits due him pursuant to §42-9-290?

14. Did the Single Commissioner err in failing to find that Scottie Floyd's mother, Betty Joe Floyd, was not a dependent of Scottie Floyd at the time of his death by accident on September 5, 2008 arising out of and in the course of his employment?

15. Did the Single Commissioner err in failing to find that at the time of his death on September 5, 2008 Scottie Floyd's mother was dependent on Scottie Floyd for support because of her own disability and she was unable to support herself?

16. Did the Single Commissioner err in failing to find that Betty Joe Floyd, as Personal Representative of the Estate of Scottie Wayne Floyd, was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, [who] filed a Form 52 on WCC File No.: 0824046 asserting that on September 5, 2008, "Claimant was receiving medical care and treatment for a brain injury (WCC File No.: 0123790) when he suffered convulsions while alone because of the affects of medication or the unsupervised withdrawal of medication resulting in accidental seizures and accidental death." This claim was brought by the dependent mother for benefits pursuant to §42-9-290 – *Amount of Compensation for Death of Employee Due to Accident.*

17. Did the Single Commissioner err in failing to find that Betty Joe Floyd, as Personal Representative of the Estate of Scottie Wayne Floyd, was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, [who] filed a Form 52 on WCC File No.: 0123790 asserting that on September 13, 2001, "Claimant was receiving disability benefits pursuant to the Order of the Commission. He was entitled to a permanent award for total permanent disability as a result of a brain injury and back injury and entitled to lifetime benefits pursuant to §42-9-10 and §42-9-30(20) and Reg. 67-1102 'Brain' and §42-9-(19) (back) <u>when he died from causes other than the injury</u>." for a brain injury (WCC File No.: 0123790) This claim was brought by the dependent mother for benefits pursuant to §42-9-280 – *Payment of Unpaid Balance of Compensation when an Employee Dies.*

18. Did the Single Commissioner err in failing to find that Betty Joe Floyd, as Personal Representative of the Estate of Scottie Wayne Floyd, was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, [who] filed a Form 50 on WCC File No.: 0123790 asserting that on September 13, 2001 "Claimant has died with a total or partial loss of use of the brain under §42-9-30(20) and Reg. 67-1102 'Brain' as modified by §42-9-10 (paragraph 3) 2681.64 weeks AND Claimant has

died with total or partial loss of use of the back under §42-9-30(19); Therefore Claimant is entitled to a permanent award for loss of use of the brain and back pursuant to §42-9-30." This claim was brought by the dependent mother for benefits pursuant to §42-9-30 in that the Claimant is entitled to an award for permanency for loss of use of the brain as an organ and loss of use of the back.

19. **Did the Single Commissioner err in finding that because Scottie Floyd died more than six years after his original accidental injury of September 13, 2001, his mother was not entitled to benefits for injuries sustained in his April 9, 2004 accident or his September 5, 2008 accident which arose out of and in the course of his employment?**

EVIDENCE OF THE CASE

In addition to evidence in the record of the Commission's file and the proceedings before Commissioner Lyndon, Appellate briefs were requested and filed on behalf of each party for review by the Appellate Panel. This Commission Panel heard oral argument from counsel for each party on June 22, 2010. Pursuant to S.C. Code Ann. 42-17-50 (1985), we, the Appellate Panel, have reviewed the Order and weighed the evidence as presented at the initial hearing and considered all issues raised on appeal. After careful review in the instant case, the Appellate Panel herein determines that all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. We find that such Findings of Fact and Conclusions of Law are hereby included in this Order by reference, and by such reference, the requirements of Baldwin v. James River Corporation, 304 SC 485,405 SE2d 4, as well as Section 1-23-350 of the South Carolina Code of Laws have been met [See also D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW at 5-109 (1983): Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.]

FINDINGS OF FACT

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.

2. That notice of the hearing was timely and properly served upon all parties of interest.

3. That Claimant's request for a Full Commission review was filed in a timely manner.

4. That the Claimant's average weekly wage was $375.36, with a corresponding weekly compensation rate of $250.54.

5. That Ken Baker Used Cars was the employer and SCPCIGA was the insured carrier (through Legion Insurance in Liquidation) on the date of injury by accident, September 13, 2001.

6. That the Claimant was not an employee of Ken Baker Used Cars on September 5, 2008, and had not been so employed for several years prior to September 5, 2008.

7. Pursuant to prior orders of the Commission, the claimant, Scottie W. Floyd, sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while employed by Ken Baker Used Cars.

8. The claimant developed a seizure disorder as a result of the September 13, 2001 work-related injury to his head/brain. The claimant was prescribed medications to control his seizure disorder under the direction of Dr. Joseph Healy.

9. Pursuant to prior order of the Commission, the claimant suffered compression fractures at multiple levels of his thoracic spine on or about April 10, 2004 due to seizure activity which in turn resulted from the claimant's brain injury. The compression fractures therefore arose from and were related to the claimant's compensable injuries of September 13, 2001 and did not constitute a new injury in 2004.

10. On September 5, 2008, the claimant died from "complications of a seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt

head trauma." (Autopsy Report, APA pp. 396-401). The claimant's fatal seizure was a direct result of the claimant's original injury on September 13, 2001 and was therefore not a new injury by accident in 2008.

11. That the evidence in the record does not support a finding that Scottie Floyd committed suicide or willfully ceased taking his medications with the intention of taking his own life.

12. Based on the evidence in the record including the good faith dependency investigation completed by SCPCIGA and the testimony at the hearing, Betty Joe Floyd was not dependent for support upon her son, Scottie Floyd, at the time of injury on September 13, 2001 nor during the three month period prior to the date of injury in 2001.

13. That there was no other person, or persons, who were dependent upon the Claimant for support at the time of his injury on September 13, 2001, nor for the three month period prior to his injury.

14. That prior to the Claimant's death he had not reached maximum medical improvement for his multiple injuries associated with this claim.

15. That the Claimant was on a running award of weekly TTD benefits from the time of his injury on September 13, 2001 until the date of his death, but had never received an award of permanent disability under the Workers' Compensation Act for the injuries to his back or brain nor any other injury associated with this claim.

16. That the Defendants Legion in liquidation/SCPCIGA provided appropriate and necessary medical care, treatment and psychological treatment for the claimant's work-related injuries arising from his accident of September 13, 2001.

17. That the Claimant's death on September 5, 2008, did not occur within six years of the date of his compensable work-related accident, September 13, 2001, which accident proximately caused his death.

18. AmGuard Insurance Company is not a proper party to this claim because (a) there was no employer/employee relationship between Ken Baker Used Cars and the Claimant during

AmGuard's period of coverage and (b) the Claimant did not suffer a new injury by accident on September 5, 2008.

19. That the Claimant's mother and Personal Representative, Betty Joe Floyd, is not entitled to benefits under the Workers' Compensation Act, because the claimant's death occurred more than six years after his original injury of September 13, 2001 and his death was proximately caused by complications that developed due to his injury of September 13, 2001.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-50, it is the determination of the Appellate Panel that:

1. Under § 42-3-20 and § 42-3-180, this Commission has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, the deceased Claimant, Scottie W. Floyd, was a covered employee with Ken Baker Used Cars on the date of his accident of September 13, 2001, but was not a covered employee of Ken Baker Used Cars on the date of his death on September 5, 2008.

3. Under § 42-1-140, Ken Baker Used Cars, is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between Ken Baker Used Cars and Scottie W. Floyd on September 13, 2001, but not on September 5, 2008.

5. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

6. Under § 42-1-40 the claimant's average weekly wage is $375.36, with a corresponding compensation rate of $250.54.

7. Under § 42-15-20 the Employer, Ken Baker Used Cars was timely notified of the Claimant's death, and under § 42-15-40 the Claimant's work related death claim was timely filed with the Commission by a Form 52.

8. Under § 42-1-160 and prior orders of the Commission, the claimant sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while

employed by Ken Baker Used Cars. The claimant subsequently developed a seizure disorder as a result of this work-related injury to his head/brain.

9. That under § 42-1-160 the Claimant did not suffer a work related accident arising out of and in the course of his employment with Ken Baker Used Cars, on September 5, 2008.

10. That pursuant to the doctrines of judicial estoppel and law of the case, the Claimant is not entitled to assert that the compensable injuries to his thoracic spine in April 2004 also constituted a "new" date of accident, separate and apart from his compensable September 13, 2001 accident. The Claimant previously alleged in his Form 50 filed in January, 2006 that the 2004 spinal injuries resulted from seizures due to the 2001 brain injury. Pursuant to the un-appealed order of December 12, 2007, the Claimant's spinal compression fractures were previously found to have been caused by seizure activity prompted by Claimant's brain injury. See Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997), and prior Orders of this Commission.

11. That the case of Shuler v. Gregory Electric, 336 S.C. 435; 622 S.E.2d 569 (2005) is not applicable to the facts of this case. The Shuler court only addressed the compensability of an accident and not the appropriate date of accident. Furthermore, the cause of Claimant Shuler's death (a traffic fatality) was clearly a separate intervening cause from her initial compensable work injury (a hand injury).

12. That under § 42-9-110, 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.

13. That under § 42-9-110, there were no persons, according to the evidence in the case and the good faith dependency investigation of the Defendant SCPCIGA who would have been presumptively dependent on the Claimant.

14. That under § 42-9-120 neither Betty Joe Floyd, nor any other person, qualified as a dependent of the claimant of any kind (wholly or partially) at the time of the accident or during the three months preceding the date of accident of September 13, 2001.

15. That under § 42-9-60, despite the medical evidence showing that Scottie Floyd may not have been compliant with his medications in the time period leading up to September 5, 2008, the greater weight of the evidence does not establish that Mr. Floyd intentionally took his own life.

16. That under §42-9-290, the claimant's death from "complications of a seizure disorder" resulted proximately from the claimant's compensable head/brain injury that occurred on September 13, 2001.

17. That under §42-9-280, there is no evidence that the claimant's death occurred due to non-work related causes.

18. That pursuant to the requirements of § 42-9-290 and Gunnells v. Raybestos-Manhattan, Inc., 198 S.E.2d 535 (1973), the claimant did not die while total disability persisted *and* within six years of the accident (September 13, 2001) which ultimately caused the claimant's death in September of 2008, almost seven years later.

19. That because the claimant's death was work-related, pursuant to the express dictates of § 42-9-290 which provides the exclusive mechanism for the applicability and payment of benefits for a work-related death under the Act, no award of permanent disability is available under § 42-9-10(C), § 42-9-30, or Reg. 67-1101.

20. That due to the Claimant's failure to meet the requirements of § 42-9-290, and as interpreted by Gunnells, the Claimant's personal representative, Betty Joe Floyd, is barred from receiving benefits under the Act.

ORDER

IT IS, THEREFORE ORDERED that the Decision and Order of the Single Commissioner filed in the above matter is hereby affirmed in its entirety.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Derrick L. Williams, Commissioner

David W. Huffstetler, Commissioner

Susan S. Barden, Commissioner

12/3, 2010.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 3rd day of December, 2010

By Valerie D Adler

Administrative Assistant to the Commissioner

Steve Mikell Jr.
Mark D. Cauthen
Peter P. Leventis

THE STATE OF SOUTH CAROLINA COUNTY OF FLORENCE Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation /South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Defendants.	BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WCC FILE NO: 0123790 & 0824046 **DECISION & ORDER**

HEARING:

Held in on September 1, 2009 in Florence South Carolina.

APPEARANCES:

The deceased Claimant, Scottie Floyd, and the Claimant's personal representative and mother, Betty Joe Floyd, were represented by Mr. Steve Wukela, Jr., Esquire of the Wukela Law Firm, 403 2nd Loop Rd., Florence, SC 29505-2815.

Defendants, Ken Baker Used Cars and Legion Insurance Company in Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, are represented by Mark D. Cauthen, Esquire, of McKay, Cauthen, Settana & Stubley, P.A., Post Office Box 7217, Columbia, South Carolina, 29202-7217.

Defendants Ken Baker Used Car through AmGuard Insurance Company, is represented by Edwin P. Martin, Jr., Esquire of Hedrick, Gardner, Kincheloe & Garofalo, LLP, P.O. Box 11267, Columbia, SC 29211.

PURPOSE: To determine the issues set forth on the Forms 50, 51 and 52, 53 of the parties, and to determine the dependency, if any, of the deceased Claimant.

DECISION AND ORDER BY: The Honorable G. Bryan Lyndon, Commissioner.

FILED: March 1, 2010

STIPULATIONS

At the call of the case the parties agree to the following stipulations:

1. That the purpose of the hearing is to determine the issues set forth on the Forms 50, 51, 52 and 53 filed by the parties, to determine if the deceased Claimant left any dependents, and pursuant to Regulation 67-601 and 67-904.
2. That notice of this hearing was timely and properly served on all parties of interest.
3. All parties agreed to venue, as set, in Florence, SC for this hearing.
4. The Workers' Compensation Commission's file, with the exception of unstipulated medicals and self-serving declarations, was made part of the record.
5. That the Workers' Compensation Commission has the authority to hear and determine the contested issues in this case. Of note, however, the Defendants dispute that there was an employer/employee relationship on the date of death in September of 2008.
6. That notice of the Claimant's death was given to the employer in a timely manner.
7. That a claim for death benefits was filed against the Defendants within the statutory period under the Act.

APA SUBMISSIONS

PLAINTIFF'S EXHIBITS

[APA's 1-22 below were previously submitted into the record for the hearing in this case on January 7, 2004]

APA 1	Marion County Medical Center E.R.	9/13/01-5/14/03
APA 2	Dr. Keith Stewart, MD (Marion Medical Group)	9/18/01-1/10/02
APA 3	McLeod Regional Medical Center	1/13/02
APA 4	Attorney's Dictionary of Medicine (Selected Pages)	
APA 5	Dr. Charles Heath, MD (Three Rivers Behavioral Health)	1/14/02-1/22/02
APA 6	Dr. Ross Fulcher, MD, RNCS (Florence Counseling Ctr.)	1/24/02-4/15/02
APA 7	McLeod Psychiatric Association	2/11/02-12/4/03
APA 8	Vascular Diagnostics	3/5/02
APA 9	Dr. R. Joseph Healy, MD	3/5/02-10/28/03
APA 10	Seltzer Eye Associates, PC	3/12/02-7/9/03
APA 11	Dr. Grant Breazeale, MD	3/20/02-4/26/02
APA 12	Carolinas Hosp. Systems E.R., Inpatient and Diagnostics	4/5/02-4/10/03
APA 13	Dr. Howard Farrell, MD (Florence ENT & Facial Plastics)	5/20/02-11/13/02
APA 14	Dr. Dora Windsorova, PhD	6/4/02-12/12/02
APA 15	Dr. Timothy Malone, MD (Palmetto Baptist Medical Ctr.)	4/28/03-5/2/03
APA 16	Correspondence from Steve Wukela, Jr. to Dr. R. J. Healy	10/10/03
APA 17	Correspondence from Dr. R. J. Healy to Steve Wukela, Jr.	10/22/03
APA 18	Photographs	
APA 19	Deposition of Scottie W. Floyd	12/18/03

APA 20	Deposition of Dr. R. Joseph Healy, MD	1/05/03
APA 21	Income Summary and Records	
APA 22	Medical Summary	

[APA's 23-35 below were previously submitted into the record for the hearing in this case on February 16, 2007]

APA 23	Carolina Hospital Systems with Diagnostic Reports	9/25/03-9/8/05
APA 24	McLeod Regional Medical Center	7/16/04-7/21/04
APA 25	ResCare Premier (including CD Note Book Report)	7/1/04-12/6/05 10/1/05-6/4/06
APA 26	Dr. J. Wesley Wallis, MD	3/4/06
APA 27	Sasha Federer, PhD	5/5/05-2/1/07
APA 28	Carolinas Hospital Systems	11/3/06
APA 29	Dr. Walter J. Evans, MD	12/6/06
APA 30	Deposition of Dr. R. Joseph Healy, MD	3/15/04
APA 31	Deposition of Dr. R. Joseph Healy, MD	4/24/06
APA 32	Deposition of Dr. Sasha Federer, PhD	2/2/07
APA 33	Deposition of Betty Joe Floyd	2/7/07
APA 34	Deposition of Scottie W. Floyd	2/7/07
APA 35	Pee Dee Orthopaedic Associates, Dr. Rakesh Chokshi, MD	1/24/07

[APA's 36-51below were submitted into the record for the hearing on September 1, 2009]

APA 36	Dr. R. Joseph Healy, MD	6/10/08 – 9/2/08
APA 37	Forensic Autopsy Report – Medical Univ. of S.C.	9/6/08
APA 38	Toxicology Report of NMS Labs	9/16/08
APA 39	Birth Certificate of Scottie W. Floyd	8/4/75

APA 40	Obituary of Scottie W. Floyd	9/6/08
APA 41	Funeral Announcement for Scottie W. Floyd	9/11/08
APA 42	Certificate of Death for Scottie W. Floyd	10/02/08
APA 43	Birth Certificate of Betty J. Grainger, born 12/3/1952	10/02/08
APA 44	S.C. Driver's License of Betty Joe Floyd	12/15/03
APA 45	Marriage License of Thomas W. Floyd and Betty Grainger	5/30/69
APA 46	Obituary of Tom Floyd	4/15/00
APA 47	Deposition of Dr. Rakesh P. Chokshi, MD	3/12/07
APA 48	Deposition of Dr. Walter J. Evans, MD	3/13/07
APA 49	Deposition of Betty Joe Floyd	7/24/09
APA 50	Deposition of Dr. Sasha Federer, PhD	8/21/09
APA 51	Deposition of Dr. R. Joseph Healy, MD	8/25/09

DEFENDANTS' EXHIBITS

ON BEHALF OF KEN BAKER USED CARS AND THE SOUTH CAROLINA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION

APA's	This Defendant relies on the medical records of the APA submissions of the other parties as well as the following exhibits:
Exhibit 1	Dependency Investigation Report and attachments of Chris Tuten
Exhibit 2	Consent Order of Commissioner Bass dated 6/27/06
Exhibit 3	Order of Commissioner Bass dated 12/12/07
Exhibit 4	Deposition transcripts of Dr. Joseph Healy, MD
Exhibit 5	Deposition transcripts of Dr. Alexandra M. "Sasha" Federer, PhD
Exhibit 6	Deposition transcripts of Betty Joe Floyd

ON BEHALF OF KEN BAKER USED CARS AND AMGUARD INSURANCE

APA's This Defendant relies on the medical records of the APA submissions and exhibits of the other parties, and those previously submitted into the record.

STATEMENT OF THE CASE

The Claimant, Scottie W. Floyd, suffered compensable injuries to his brain, head nose and psyche, on September 13, 2001 while employed by Ken Baker Used Cars. At the time of the injury in 2001, Legion Insurance Company was the workers' compensation carrier for Defendant Employer. Legion was liquidated in 2003, at which point the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) became responsible for the claim through the Guaranty Association Act.

The Claimant's compensable brain injury of September 13, 2001 affected his right frontal lobe, causing him to suffer from a seizure related disorder. (Comm. Bass Order, December 12, 2007, p. 9). Claimant received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (Childs order, p. 4) The Claimant was required to take anticonvulsants to control his seizure disorder. In April of 2004, he was hospitalized due to suffering multiple seizures. The seizures also caused compression fractures of his thoracic spine and renal failure. The 2004 seizures which led to the spinal compression fractures were found by the Commission to have been caused by the Claimant's brain injury. As a result, the compression fractures were found to be a compensable part of the September 13, 2001 claim. (Bass Order, pp. 9-10). The Claimant received ongoing treatment for many years, including treatment at a supported living program in Texas from July 27, 2004 to June 1, 2006. Nonetheless, the Claimant made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Joe Floyd, whom the Claimant moved in with and cared for him upon his return from Texas. (Consent Order, June 27, 2006).

Pursuant to the Order of Commissioner Bass dated December 12, 2007, the Claimant had still not reached maximum medical improvement and no award of disability was ever made. (Bass Order, Finding of Fact No. 6). The Claimant died on September 5, 2008, due to complications from his seizure disorder. (Autopsy Report, APA, p. 401). The Claimant was on a running award of weekly temporary total disability (TTD) benefits from the date of injury in September 2001 through the date of his death in September 2008.

Subsequent to the Claimant's death, claimant's counsel filed several pleadings and hearing requests for recovery of additional benefits under multiple legal theories, including two separate Forms 52 as well as a Form 50. Claimant's counsel's position is essentially that, whether or not the Claimant's September 5, 2008 death was casually related to the original 2001 injury, the Claimant's surviving mother, Betty Joe Floyd, is entitled to the balance of a life time award for the physical brain injury. The amount of the "life time" award being premised on a calculation of the Claimant's life expectancy pursuant to S.C. Code Ann. § 19-1-150.

Claimant's counsel also makes several alternative and contingent arguments as corollaries to that position. If Claimant's mother is not entitled to the balance of a life time award, then he asserts that the September 5, 2008 death was a work related death, but that the death was a new date of injury, for which the responsible carrier for Ken Baker Used Cars on that date (AmGuard Insurance Company) would be liable to pay 500 weeks of benefits in association with the work related death claim.

Lastly, Claimant's counsel asserts, regardless of the right to any death benefits, that Mrs. Floyd would be entitled to a 500 week PTD, or potentially more than 500 week award by virtue of the compensable injury to the Claimant's spine and brain. He argues that the Claimant would have been entitled to an impairment rating of 50% or greater (under S.C. Code Ann. §42-9-30) as

well as an impairment rating to the brain (S.C. Code of Reg. 67-1101) which would not be subject to any 500 week limitation pursuant to language in S.C. Code Ann. § 42-9-10 (C).

The Defendant SCPCIGA denies additional benefits are due to the Claimant, or his personal representative, based on any of the theories advanced by Claimant's counsel. First, it is Defendants position that the September 5, 2008 death resulted proximately from the September 13, 2001 injury by accident, which resulted in trauma to the brain and a seizure disorder. Therefore, this case involves a work related death as provided under §42-9-290. However, the Claimant did not die within the mandatory time period (six years) as prescribed by §42-9-290 "while totally disability still continue[d]." Therefore, SCPCIGA asserts no further benefits are available pursuant to §42-9-290, and as interpreted by Gunnells v. Raybestos-Manhattan, Inc, 198 S.E.2d 535 (1973) (noting that if the death, proximately related to the original injury, does not occur within six years of the date of that injury *and* while total disability still persists, there is no right to additional benefits under the Act).

Secondly, Defendants assert that, even assuming for the sake of argument that Claimant's 2004 spinal injuries, which resulted from his seizure disorder, were not causally related to the September 13, 2001 injury – the Claimant died from complications related to his brain injury and seizure disorder associated with the September 13, 2001 injury. Defendants argue there is no evidence anywhere in the record that the Claimant died from compression factures of the spine. Moreover, the Claimant previously filed a Form 50 in 2006 for his back injury compression fractures citing September 13, 2001 as the date of accident. Defendants argue that Claimant should be judicially estopped from now changing that position to assert the relevant date of accident for the spinal injury was in 2004.

SCPCIGA further asserts that Claimant's alternative theory of a non-work related death does not entitle the Claimant's mother to the balance of either a lifetime award for physical brain injury under §42-9-10, or a 500 week award under §42-9-30 (back injury) even if a non-work related death could be established. Defendants assert that Betty Joe Floyd was never a dependent of the Claimant as required by §42-9-280, either presumptively (as a spouse or minor child per §42-9-110) nor factually, as a person dependent on the Claimant for support during three months prior to the date of the accident, pursuant to §42-9-120. Defendants also assert that even if the death was non-work related, all benefits would abate – whether pursuant to a life time award or otherwise, unless (a) Betty Joe Floyd was a dependent and (b) a prior award had been made to the Claimant pursuant to either § 42-9-30 or the second paragraph of § 42-9-10, *only*.

The Claimant also argues that the September 5, 2008 death is a new date of injury for a claim separate and unrelated to the September 13, 2001 accident. The Defendant SCPCIGA denies liability based on this theory on three primary grounds. First, the SCPCIGA did not provide any workers' compensation coverage for the Defendant employer in September of 2008. Therefore, SCPCIGA would not be the proper carrier. Secondly, if the death does not relate back to the 2001 accident and injuries, there is no evidence in the record that the Claimant's death in September of 2008 occurred in the course and scope of his employment with the Defendant Employer. Third, as 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. For instance, when the employer no longer exists, and therefore no longer maintains workers' compensation coverage, neither the defunct employer, non-existent carrier, nor the SCUEF would be required to cover the claim (a

non-existing employer could not be said to have been improperly without coverage on a date of injury, during which that employer had been closed for several years).

The Defendant carrier, AmGuard, which provided workers' compensation coverage for Ken Baker Used Cars on September 5, 2008, denies coverage for the Claimant's death as well. The two primary contentions of AmGuard can be summarized as follows. First, AmGuard's position is that all of the evidence in the record points to the fact that the Claimant's 2008 death stems directly from the September 13, 2001 injury. Therefore, the prior carrier, not AmGuard would be liable for any continued benefits. Secondly, AmGuard contends that the alternative legal theory of the Claimant, asserting that September 5, 2008 represents a new date of injury, and that such injury arose out of, and in the course of employment, is inaccurate. AmGuard points out that no employer/employee relationship existed between the Claimant and Ken Baker Used Cars during any coverage period of AmGuard. Furthermore, AmGuard contends that Shuler v. Gregory Electric, 336 S.C. 435, 622 S.E.2d 569 (2005), cited by the Claimant, is readily distinguishable from the case at bar for several reasons, and not even applicable to these facts. Among other reasons for these contentions, Defendant AmGuard points out that the Shuler court never adopts, indicates or addresses a "new date" of injury, only compensability of specific injuries by accident. Furthermore, the Shuler case dealt with a specific intervening event (a traffic accident) while the Claimant was being charged with a duty that, according to the Shuler court, arose out of an in the course of Claimant Shuler's employment (going to and from a workers' compensation medical appointment).

Upon conclusion of the hearing, all three parties were requested to submit legal memoranda, and replies if appropriate, in support of their respective positions. Each party did submit extensive legal briefs, which have been made part of the record in this case.

EVIDENCE OF THE CASE

On September 13, 2001, the claimant, Scottie Floyd sustained an admitted compensable accident, resulting in injuries to his brain, head, nose and psyche, when a control arm being removed under tension from a car struck the claimant's head. The claimant was diagnosed with decreased attenuation in the right frontal lobe and a fracture of the left frontoethmoidal complex. (See APA No. 5, p. 42). The claimant's medical treatment for his injuries included clinical diagnostic procedures, psychological evaluation, neuropsychological testing and conservative/pharmaceutical care under the direction of Dr. Joseph Healy, a neurologist, for headaches, photophobia, psychological and mood disorders, and emotional outrages consistent with a brain injury. For example, the Claimant once took a pistol into McLeod Regional Medical Center's Emergency room demanding treatment and relief from his pain.

Dr. Healy indicated that he was aware of the likelihood the claimant would develop a seizure disorder due to the location and severity of his injuries. The claimant's early pharmaceutical regimen included anti-convulsants (Topomax) as a prophylaxis against headaches. (APA, pp. 109, 117). The claimant began experiencing seizure activity due to his head injury by at least March of 2003. As a result, Dr. Healy modified his pharmaceutical regiment to include additional anti-convulsant medications. (APA, p. 117). The claimant was non-compliant with these medications from early on. In April of 2003 Dr. Healy noted that Mr. Floyd had, "stopped all of his medication," and was becoming increasingly aggressive. (APA, p. 128). Dr. Healy continued to monitor and modify the claimant's medications which included anti-convulsant medications as he deemed necessary.

On April 9, 2004, the claimant was hospitalized following multiple seizures secondary to noncompliance with his medications. (APA, pp. 211-217). He spent almost two weeks in the

hospital and was diagnosed with acute renal failure as well as compression fractures at multiple levels of his thoracic spine. (APA, pp. 211-217). The claimant's compression fractures were caused by the severity of his seizures, which he suffered from as a result of his brain injury. (Deposition of Dr. Evans, pp. 8-9, 10, Deposition of Dr. Chokshi, p. 8). Dr. Healy testified in his deposition that he spoke with Mr. Floyd following the April 9, 2004 hospitalization, and that he believed Mr. Floyd was aware that noncompliance with his anti-convulsant medications could have serious health implications, including death. (2009 Deposition of Dr. Healy, pp. 22-3).

The claimant's condition was such that he was institutionalized through inpatient care at a supported living facility in Texas, from July 27, 2004 to June 1, 2006. The Claimant made progress towards recovery while treating in Texas. Thereafter, he was released from inpatient care, and permitted to move back to South Carolina. The claimant moved in with his mother, Betty Joe Floyd, who agreed to be his caregiver. Per agreement of the parties, which did not include AmGuard Insurance at that time, and a prior Consent Order of the Commission, Mrs. Floyd was paid a $400.00 per week allowance for serving as her son's caregiver. This $400.00 per week was separate and apart from the ongoing TTD benefits which the claimant continued to receive at that time.

Dr. Healy resumed treatment of the claimant upon his return to South Carolina from Texas in 2006. Anti-convulsant medications continued to be a part of Mr. Floyd's prescribed regimen. On September 5, 2008, the claimant died from "complications of seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma." (Autopsy Report, APA, p.401) According to the autopsy and toxicology reports, there were no traces of anti-convulsant medication in the claimant's blood.

WORK RELATED DEATH

In an un-appealed prior Order of the Commission, the Claimant's seizures and resulting thoracic spinal injuries of 2004 have been found to relate to, and be caused by, the September 13, 2001 head injury. "In addition to the admitted injuries [to the brain, head, nose, and psyche] I find the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (Bass Order, December 12, 2007, Finding of Fact No. 5, p. 9). There is no medical evidence in the record indicating that the Claimant suffered from convulsing seizures prior to his compensable September 13, 2001 injury. In addition, there is no evidence in the record that the Claimant died from any cause other than complications resulting from his seizure disorder.

Claimant's counsel asserts, in part, that the cause of the Claimant's death was not from seizures, but rather from the Claimant's failure (whether inadvertent or intentional) to take his anti-seizure medication. This is effectively a 'distinction without a difference.' Arguing the Claimant died from failure to take his medication instead of his compensable seizure related condition, is akin to saying a person who dies from crashing into a telephone pole died from 'failure to apply the brakes,' and not from the auto accident.

Based on the entire record, to include the doctors' depositions, medical reports and autopsy of the Claimant, there is no evidence to indicate the Claimant died from anything other than complications related to his compensable medical conditions arising from the September 13, 2001 head injury. As a result, the availability of further benefits in this claim must be determined pursuant to S.C. Code Ann. § 42-9-290. Unlike a non-work related death, as provided for in § 42-9-280, the survivor of the Claimant need not be a next-of-kin dependant. (§ 42-9-140 specifically provides for inheritability of awards, after work related deaths, which are

made in accordance with § 42-9-290). The plain language of § 42-9-290, states in pertinent part as follows:

> If death results proximately from an accident and within two years of the accident or **while total disability still continues and within six years after the accident,** the employer shall pay or cause to be paid...[compensation benefits] for a period of 500 weeks from the date of injury.....
>
> S.C. Code Ann. § 42-9-290 (emphasis added)

Since the Claimant remained totally disabled until the day of his death, the death must have occurred within six years after the accident in order for the Claimant's mother to be entitled to benefits under §42-9-290. However, Scottie Floyd's death occurred on September 5, 2008, almost seven years after his injury by accident on September 13, 2001. As a result, §42-9-290 operates as a statutory bar to further benefits for the Claimant's mother/personal representative.

This provision has been interpreted by our Supreme Court in Gunnells v. Raybestos-Manhattan, Inc., 261 S.C. 106; 198 S.E2d 535 (1973). In Gunnells, the Claimant contracted asbestosis in 1961 and was out of work and continuously disabled until his death in 1969. Construing the predecessor statute of §42-9-290, the Court held that:

> By the terms of the statute, the right to such benefits is expressly limited to cases in which 'death results proximately from an accident and within two years thereafter or while total disability still continues and within six years after the accident . . .'
>
> This is not a statute of limitations, as in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), on which the circuit court mistakenly relied. Instead, 'the right of recovery is conditioned upon' satisfaction of the requisites of the statute by which the right was conferred. McWilliams v. Southern Bleachery & Print Works, 216 S.C. 121, 125, 57 S.E.2d 26, 27 (1949); Burton v. Peter W. Blum and Son, 270 N.C. 695, 155 S.E.2d 71 (1967). **The requirement of death within six years of the accident not having been met, the right asserted never vested in the claimant.**
>
> Gunnells at 110-1, 536.

As in Gunnells, Scottie Floyd died while total disability persisted, but not within six years after the date of the work related accident which proximately caused his death. Therefore, no benefits have vested or would be due to Betty Joe Floyd.

Claimant's counsel argues that despite the plain language of § 42-9-290, if applicable, the Claimant's mother should not be barred from additional benefits because there was a second date of accident in April 2004 (compression fractures of the thoracic spine). However, the 2004 thoracic compression fractures did not constitute a "new" date of injury. Despite the compensability of the 2004 spinal injuries, the proper date of accident for those injuries would be the September 13, 2001 accident to which the spinal injuries are directly related. The Claimant actually prevailed on this issue in a prior hearing, and listed in his Form 50 pleading for that hearing that the applicable date of accident for the spinal injuries was indeed September 13, 2001. As a result, the compression fractures were found to be a compensable part of the 2001 claim. (Bass Order, pp. 9-10).

Even if assuming there was a new injury in 2004, the death would still not be compensable under the express requirements of § 42-9-290. This Section provides the death is compensable when such death, "results proximately from an accident and within two years of the accident or while total disability still continues and within six years after the accident..." The 2004 injury was to the Claimant's thoracic spine. There is no evidence anywhere in the record that the Claimant's death was proximately caused by, or related to, the compression fractures he previously suffered to his spine. He died of a seizure related disorder proximately caused by his head injury in 2001.

DATE(S) OF ACCIDENT

The claimant alleges three different dates of accident occurred: (1) The original injury by accident on September 13, 2001; (2) The date of the Claimant's thoracic compression fractures, which resulted from his seizure disorder, occurring on or about April 10, 2004; and (3) The date the Claimant's death, due to his seizure disorder on September 5, 2008.

SCPCIGA asserts that the claimant should be estopped on two separate grounds from asserting that April 10, 2004 represents a new date of accident. The first ground is judicial estoppel. South Carolina officially recognized the validity of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. 327 S.C. at 251, 489 S.E.2d at 477. Essentially, stated:

> [a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.
>
> Hayne at 252, 477.

In this case, the Claimant previously alleged that the 2004 spinal injury resulted from seizures due to the 2001 brain injury. (See Form 50 of Steve Wukela for the Claimant, filed January 6, 2006, listing the date of injury as "9/13/2001"). Obviously that was the most beneficial position for the Claimant to take at the time, especially in the light of the fact that SCPCIGA did not have liability for workers' compensation coverage in 2004 for the Defendant Employer. Of note, the Claimant never asserted a claim for the resulting 2004 spinal injuries against the workers' compensation insurance carrier that covered the Defendant Employer in 2004. Further on that point, no 2004 claim number exists in association with this case.

Clearly, the SCPCIGA could have raised as an affirmative defense in the prior hearing the fact that it did not provide coverage for Ken Baker Used Cars in the year the 2004, should the Claimant have elected to assert the 2004 date of injury theory at that point in the litigation. The SCPCIGA as a defendant carrier would be materially prejudiced by the Claimant's 'updated' assertion of a 2004 date of injury at this point in the litigation. The Claimant's current position, that 2004 was a new and separate date of injury from the Sept. 13, 2001 accident, is diametrically opposed to the prior factual position of the claimant in previous proceedings during this same litigation. Therefore, the Claimant is judicially estopped from now asserting a contradictory position concerning the date of accident for the spinal compression fractures which took place in 2004.

The Claimant should also be estopped from asserting a 'new' date of accident in association with the 2004 spinal fractures on the ground of *res judicata* or under the doctrine of law of the case. That the compensability of 2004 spinal injuries proximately related to the 2001 date of accident is the un-appealed law of the case at this point in the litigation. The Claimant not only asserted in his January 6, 2006 Form 50 pleading that the spinal injury of 2004 was casually related to the September 2001 brain injury, but actually prevailed on that point. "In addition to the admitted injuries [the head, brain, nose and psyche], I find that the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (See Bass Order of December 12, 2007, Finding of Fact No. 5, pg. 9-10). In making this finding, Commissioner Bass was relying on the uncontroverted deposition testimony of Dr. Evans, Dr. Chokshi, and Dr. Healy.

For the same reasons that Commissioner Bass found that the Claimant's 2004 spinal fractures were from a seizure related disorder resulting from the 2001 date of accident, it

logically follows that the Claimant's 2008 date of death should also be found to be related to, and resulting from, the 2001 injury by accident. There is no evidence that the Claimant suffered from seizure disorders prior to his 2001 brain injury. The Claimant's seizure disorder was conclusively deemed by a prior, un-appealed, Order of the Commission to have been caused by the Claimant's brain injury in 2001. (See Bass Order of December 12, 2007). All of the evidence in the record points to the fact that the Claimant's seizure related disorder, and complications associated therewith, actually caused his death. (See APA p. 401, Autopsy of Scottie Floyd).

In an effort to bolster the theory that the Claimant's death on September 5, 2008 constitutes a new date of accident and a separate distinct injury, Claimant's counsel cites the case of Shuler v. Gregory, 366 S.C. 435; 622 S.E.2d 569 (2007). The claimant in that case, Shuler, was killed in an automobile accident after leaving a doctor's appointment for a workers' compensation related injury covered by the employer, Gregory Electric. The Court of Appeals deemed the traffic fatality to be within the Claimant's course and scope of employment and therefore compensable. The thrust of the Shuler opinion addressed whether or not Mrs. Shuler's traffic fatality after leaving the workers' compensation doctor's appointment would have been excluded from workers' compensation coverage under the "going and coming" rule. The Court of Appeals ultimately found that the traffic fatality was compensable. Nevertheless, the Shuler opinion is neither relevant, nor controlling, for several reasons.

While the Claimant offers this case to make the argument that September 5, 2008 was a separate and distinct date of accident, conspicuously missing from the Shuler opinion is *any* reference as to whether or not the Court, or the Commission, would need to find, or did find, an updated or new date of accident for the traffic fatality. That is, the case does not even reference,

address or discuss the primary issue for which claimant's counsel presents it. The only question answered in Shuler was compensability under the "going and coming" exclusion and the possibility of a 'deviation.'

Secondly, even if the Shuler court were to have found the traffic fatality to be a separate new date of injury from Shuler's original claim, Mr. Floyd's death is clearly distinguishable from Shuler's traffic fatality. The claimant Shuler was suffering from one condition (an admitted injury to her hand), and then killed by a distinct and completely unassociated intervening force – the traffic accident itself. Mr. Floyd, on the other hand, died from complications associated with his seizure disorder from his 2001 brain injury. (APA, p. 401). No distinct intervening accident took place in Scottie Floyd's death which could be reasonably argued to have broken the causal connection to Mr. Floyd's original injury in 2001. Furthermore, while the Shuler court found the Claimant to be tasked with an employment related assignment during the time of the traffic accident (going to and coming from a workers' compensation related doctor's appointment), Mr. Floyd was not. Mr. Floyd had not been employed with Ken Baker Used Cars since the original injury in 2001. Furthermore, he was at home when he died. Therefore, the only logical and factual date of accident for this entire claim is, was and remains September 13, 2001. The Claimant's attempt to argue additional dates of accident is without merit, and legally untenable.

DEPENDENCY

The Defendant SCPCIGA has conducted a good faith dependency investigation. The investigation was performed by investigator Chris Tuten, and that report, with attachments has been made a part of the record (Defendant SCPCIGA's Exhibit No. 1). The findings of his report indicate that the Claimant, Scottie Floyd, had no one who was wholly or partially dependent on him in association with this accident. This position is based on the definition of

dependency as provided for by the Workers' Act and corresponding case law, as well as the evidence and testimony provided at the September 1, 2009 hearing, including the good faith dependency investigation completed by the SCPCIGA. (See Defendant SCPCIGA's Exhibit No. 1).

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 purposes 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 (S.C. 320 S.C. 213, 464 S.E.2d 109 (1995).

There is no evidence in the record to indicate that the Claimant was married or ever had any children. Betty Joe Floyd, as the Claimant's mother, would not fall into the statutorily presumptive class of dependents provided for in § 42-9-110. In order to establish dependency on the Claimant, Betty Joe Floyd could only do so under a factual determination pursuant to § 42-9-120. This statute provides as follows:

> **In all other cases questions of dependency,** in whole or in part, **shall be determined in accordance with the facts as the facts may be at the time of the accident;** but no allowance shall be made for any payment in lieu of board and lodging or services and **no compensation shall be allowed unless dependency existed for a period of three months or more prior to the accident.**
>
> S.C. Code Ann. 42-9-120 (emphasis added).

The record is devoid of any information or evidence that would indicate Betty Joe Floyd was wholly or partially dependent on the Claimant at the time of the accident in September of 2001 or the preceding three months. According to Mrs. Floyd's own testimony during the hearing, the Claimant lived by himself at the time of the Accident and actually came to live with her in about 2002 or 2003 due to the severity of his injuries. (Hearing Trans. p. 34, lines 7-18). During the relevant period of time in this case, the three months prior to September 13, 2001, Betty Joe Floyd and the Claimant lived in separate residences and there is no evidence that Scottie Floyd provided any financial support or assistance to his mother.

Betty Joe Floyd did later leave her job to become a full time care giver to her son once he moved in with her after returning from Texas in 2006. However, this was subsequent to the 2001 accident, and Mrs. Floyd was paid approximately $400.00 per week by the Carrier, to care for Scottie Floyd. (Lyndon Hearing Transcript, p. 49, lines 16 - p. 50 line 17). This was not support or assistance provided by the claimant but instead was compensation paid by the Carrier for the claimant's care.

There is no evidence in the record that Betty Joe Floyd was ever a dependent of the Claimant during the relevant time prior to September 13, 2001. Furthermore, there is no indication that Betty Joe Floyd was dependent upon the Claimant during the alternative dates of accident asserted by Claimant's counsel in 2004 or 2008. Scottie Floyd was actually living with and dependent on Betty Joe Floyd, and not the other way around. Betty Joe Floyd was able to work and earn a wage, and chose to do so by caring for her son. .

INTENTIONAL DEATH

Of the several theories of the case presented in the alternative by Claimant's counsel, one is that the Claimant intentionally stopped taking his seizure medications, and that this failure to

take the medication is what led to his death on September 5, 2008. Claimant'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."

While I find this was a work related death, pursuant to § 42-9-290, the undersigned briefly addresses this issue because it was briefed by all parties. S.C. Code Ann. §42-9-60 states in part that, "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." The burden of proof for willful intent to injure or kill oneself is on the Defendants asserting such a defense. The Defendants have raised no such statement of the facts in this claim. The primary theory of the case of Defendant SCPCIGA is that this was an accidental work-related death under §42-9-290, and Defendant AmGuard Insurance firmly asserts that there was no employer/employee relationship for its covered insured on the date of death. It was primarily Claimant's counsel who raised the specter of a potential finding that the Claimant intentionally did not take his medication and intended to kill himself (See Hearing Trans. pp. 8-9).

The controlling case for such an analysis in South Carolina is Thompson ex rel. Harvey v. Cisson Const. Co. 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2007). Decedent Claimant, Thompson, suffered from compensable work related injuries which included psychological injury in the form of mental depression. Thompson committed suicide when he intentionally overdosed on sleeping pills. The Thompson court found in effect that, "the evidence fail[ed] 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..." Id at 179, 193.

There is no reliable, substantial evidence in the record which would support a finding that the claimant committed suicide. The claimant's treating physicians, Dr. Healy and Dr. Federer, were not able to render any opinion within a reasonable degree of medical certainty as to whether or not the claimant intentionally stopped taking medication which would then result in his death. (See Deposition of Dr. Healy, pp. 22-23; Deposition of Dr. Federer, pp. 26-28). However, if the Claimant were to have intentionally and willfully killed himself, there would be an express prohibition to any further benefits pursuant to Thompson and § 42-9-60 as outlined above. If on the other hand, the claimant was able to circumvent the suicide analysis in Thompson, by showing that his willful actions did not break the causal link between his compensable work related injury on September 13, 2001 and his death in September of 2008, his survivors would still be barred from additional benefits due to the § 42-9-290 analysis as outlined above. Additionally, the undersigned agrees with the argument of counsel for AmGuard that, in the event the claimant did commit suicide, any such act would have been a natural consequence of the claimant's brain injury and cannot be considered a new accident. As claimant's counsel notes in his own brief at page thirteen (13), "the [decedents] failure to take his medication as prescribed is a by-product of [decedents] physical injury rather than a conscious decision on his part." (Bass Order, 12/12/07, p. 11).

SURVIVABILITY OF BENEFITS NOT YET DETERMINED

Claimant's counsel also argues that, barring recovery under other theories, Claimant's Personal Representative would still be entitled to either: a lifetime award of benefits for the

balance of claimant's life expectancy pursuant to § 19-1-150, due to his physical brain injury under § 42-9-10(C); or, alternatively, an award for total loss of use of the brain pursuant to §42-9-30 and Reg. 67-1101 and/or an award for permanent and total disability for greater than 50% loss of use of the back pursuant to §42-9-30.

Under the South Carolina Workers' Compensation Act, when a Claimant dies, his survivors can only obtain further benefits pursuant to either § 42-9-290 (a work related death) or § 42-9-280 (a non-work related death). There is no evidence in the record that the Claimant suffered a non-work related death, other than, potentially suicide, addressed previously in this Order. Even if the claimant had died from non-work related causes, Betty Joe Floyd could not meet the requirements of §42-9-280 since she was not dependent for support upon her son in accordance with the Act. Secondly, no award of permanent disability for the injuries to Scottie Floyd's brain or back were ever made under §42-9-30 or 42-9-10. In fact, the claimant had never reached maximum medical improvement (See Order of Commissioner Bass, 12/12/07, p. 9) and he was still receiving medical treatment and temporary total disability benefits up to the date of his death. Thus, there is no legal or factual basis for an award under §42-9-30, 42-9-10 or Reg. 67-1101.

FINDINGS OF FACT

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.

2. That venue for the hearing is proper in Florence, South Carolina.

3. That notice of the hearing was timely and properly served upon all parties of interest.

4. That notice of the Claimant's death and a claim for benefits was made to the employer in a timely fashion pursuant to the Act.

5. That the Claimant's average weekly wage was $375.36, with a corresponding weekly compensation rate of $250.54.

6. That Ken Baker Used Cars was the employer and SCPCIGA was the Insured Carrier (through Legion Insurance in Liquidation) on the date of injury by accident, September 13, 2001.

7. That the Claimant was not an employee of Ken Baker Used Cars on September 5, 2008, and had not been so employed for several years prior to September 5, 2008.

8 Pursuant to prior orders of the Commission, the claimant, Scottie W. Floyd, sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while employed by Ken Baker Used Cars.

9. The claimant developed a seizure disorder as a result of the September 13, 2001 work-related injury to his head/brain. The claimant was prescribed medications to control his seizure disorder under the direction of Dr. Joseph Healy.

10. Pursuant to prior order of the Commission, the claimant suffered compression fractures at multiple levels of his thoracic spine on or about April 10, 2004 due to seizure activity which in turn resulted from the claimant's brain injury. The compression fractures therefore arose from and were related to the claimant's compensable injuries of September 13, 2001 and did not constitute a new injury in 2004.

11. On September 5, 2008, the claimant died from "complications of a seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma." (Autopsy Report, APA pp. 396-401). The claimant's fatal seizure was a direct result of the claimant's original injury on September 13, 2001 and was therefore not a new injury by accident in 2008.

12. That the evidence in the record does not support a finding that Scottie Floyd committed suicide or willfully ceased taking his medications with the intention of taking his own life.

13. Based on the evidence in the record including the good faith dependency investigation completed by SCPCIGA and the testimony at the hearing, Betty Joe Floyd was not dependent for support upon her son, Scottie Floyd, at the time of injury on September 13, 2001 nor during the three month period prior to the date of injury in 2001.

14. That there was no other person, or persons, who were dependent upon the Claimant for support at the time of his injury on September 13, 2001, nor for the three month period prior to his injury.

15. That prior to the Claimant's death he had not reached maximum medical improvement for his multiple injuries associated with this claim.

16. That the Claimant was on a running award of weekly TTD benefits from the time of his injury on September 13, 2001 until the date of his death, but had never received an award of permanent disability under the Workers' Compensation Act for the injuries to his back or brain nor any other injury associated with this claim.

17. That the Defendants Legion in liquidation/SCPCIGA provided appropriate and necessary medical care, treatment and psychological treatment for the claimant's work-related injuries arising from his accident of September 13, 2001.

18. That the claimant's death on September 5, 2008, did not occur within six years of the date of his compensable work-related accident, September 13, 2001, which accident proximately caused his death.

19. AmGuard Insurance Company is not a proper party to this claim because (a) there was no employer/employee relationship between Ken Baker Used Cars and the Claimant during AmGuard's period of coverage and (b) the Claimant did not suffer a new injury by accident on September 5, 2008.

20. That the Claimant's mother and Personal Representative, Betty Joe Floyd, is not entitled to benefits under the Workers' Compensation Act, because the claimant's death occurred more than six years after his original injury of September 13, 2001 and his death was proximately caused by complications that developed due to his injury of September 13, 2001.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-40, it is the determination of this Commissioner that:

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, Claimant, Scottie W. Floyd, was a covered employee with Ken Baker Used Cars on the date of his accident of September 13, 2001, but was not a covered employee of Ken Baker Used Cars on the date of his death on September 5, 2008.

3. Under § 42-1-140, Ken Baker Used Cars, is a covered employer.

4. Under § 42-1-150, there was an employer/employee relationship between Ken Baker Used Cars and Scottie W. Floyd on September 13, 2001, but not on September 5, 2008.

5. Under § 42-17-20, venue in Florence, South Carolina was proper and agreed upon by the parties.

6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

7. Under § 42-1-40 the claimant's average weekly wage is $375.36, with a corresponding compensation rate of $250.54.

8. Under § 42-15-20 the Employer, Ken Baker Used Cars was timely notified of the Claimant's death, and under § 42-15-40 the Claimant's work related death claim was timely filed with the Commission by a properly filed Form 52.

9. Under § 42-1-160 and prior orders of the Commission, the claimant sustained admitted, compensable injuries to his brain, head, nose and psyche on September 13, 2001 while employed by Ken Baker Used Cars. The claimant subsequently developed a seizure disorder as a result of this work-related injury to his head/brain.

10. That under § 42-1-160 the Claimant did not suffer a work related accident arising out of and in the course of his employment with Ken Baker Used Cars, on September 5, 2008.

11. That pursuant to the doctrines of judicial estoppel and law of the case, the Claimant is not entitled to assert that the compensable injuries to his thoracic spine in April 2004 also constituted a "new" date of accident, separate and apart from his compensable September 13, 2001 accident. See Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997), and prior Orders of this Commission.

12. That the case of Shuler v. Gregory Electric, 336 S.C. 435; 622 S.E.2d 569 (2005) is not applicable to the facts of this case. The Shuler court only addressed the compensability of an accident and not the appropriate date of accident. Furthermore, the cause of Claimant Shuler's death (a traffic fatality) was clearly a separate intervening cause from her initial compensable work injury (a hand injury).

13. That under § 42-9-110, 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.

14. That under § 42-9-110, there were no persons, according to the evidence in the case and the good faith dependency investigation of the Defendant SCPCIGA who would have been presumptively dependent on the Claimant.

15. That under § 42-9-120 neither Betty Joe Floyd, nor any other person, qualified as a dependent of the claimant of any kind (wholly or partially) at the time of the accident or during the three months preceding the date of accident of September 13, 2001.

16. That under § 42-9-60, despite the medical evidence showing that Scottie Floyd may not have been compliant with his medications in the time period leading up to September 5, 2008, the greater weight of the evidence does not indicate that Mr. Floyd intentionally took his own life.

17. That under §42-9-280, there is no evidence that the claimant's death occurred due to non-work related causes.

18. That under §42-9-290, the claimant's death from "complications of a seizure disorder" resulted proximately from the claimant's compensable head/brain injury that occurred on September 13, 2001.

19. That pursuant to the requirements of § 42-9-290 and Gunnells v. Raybestos-Manhattan, Inc., 198 S.E.2d 535 (1973), the claimant did not die while total disability persisted *and* within six years of the accident (September 13, 2001) which ultimately caused the claimant's death in September of 2008, almost seven years later.

20. That because the claimant's death was work-related, pursuant to the express dictates of § 42-9-290 which provides the exclusive mechanism for the applicability and payment of benefits for a work-related death under the Act, no award of permanent disability is available under § 42-9-10(C), § 42-9-30, or Reg. 67-1101.

21. That due to the Claimant's failure to meet the requirements of § 42-9-290, and as interpreted by Gunnells, the Claimant's personal representative, Betty Joe Floyd, is barred from receiving benefits under the Act.

ORDER

THEREFORE, in accordance with the findings and conclusions herein, the Claimant's personal representative, Betty Joe Floyd, is not entitled to benefits under the Workers' Compensation Act and the claim for benefits is hereby denied.

AND IT IS FURTHER ORDERED that, as there was no new date of injury after September 13, 2001, or at any time period while AmGuard was the carrier for Ken Baker Used Cars, AmGuard Insurance has no liability in this matter and is hereby dismissed from this case.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

3/1/2010

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 1st day of March, ~~200~~ 2010

By Linda Thomas
Administrative Assistant to the Commissioner

SW, Jr.
MDC
EPM

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0123790

Scottie Floyd, Employee,	Claimant,
	VS
Ken Baker used Cars, Employer, and Legion Insurance Company, in liquidation By SCPCGA, Carrier,	Defendants.
HEARING:	Held in Myrtle Beach, South Carolina on February 16, 2007.
APPEARANCES:	Claimant represented by Steve Wukela, Jr., Wukela Law Firm, Florence, SC
	Defendants represented by Mark D. Cauthen, McKay Cauthen Settana & Stubley, PA, Columbia, SC
PURPOSE OF HEARING:	To determine issues as set forth in Forms 50 and 51 and any other issues which may have timely come before the Commission.
DECISION AND ORDER:	By J. Alan Bass, Commissioner
FILED:	~~November~~ December 10, 2007

STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51 and any other issues which may timely come before the Commissioner;

2. Notice of the hearing was timely and properly served upon all parties of interest;

3. The claimant's average weekly wage is $375.36 and his compensation rate is $250.54 pursuant to Consent Order dated July 11, 2004.

4. Venue, set in Horry County, is proper.

5. The Commission file is made a part of this record with the exception of unstipulated medical and self-serving hearsay.

APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

Claimant's APAs

APAs	NAME OF PHYSICIAN	PRACTICE	REPORT DATES	PAGES
APAs in Bold Print previously submitted at hearing of January 7, 2004				
1	**Emergency Room**	**Marion County Medical Center**	**09/13/01 01/06/02 05/09/03 05/10/03 05/14/03**	**1-8 9-16 17-21 22-27 28-31**
2	**Keith Stewart, MD**	**Marion Medical Group**	**09/18/01-01/10/02**	**32-41**
3		**McLeod Regional Medical Center**	**01/13/02**	**41a-41u**
4	**Attorneys' Dictionary of Medicine and Word Finder**			**41v-41y**
5	**Charles Heath, MD**	**Three Rivers Center for Behavioral Health**	**01/14/02-01/22/02**	**42-53**
6	**Ross Fulcher, MS, RNCS**	**Florence Counseling Center**	**01/24/02-04/15/02**	**54-59**
7	**Eric Weinbaum, MD Renee Williams, LPC**	**McLeod Psychiatric Association**	**02/11/02-12/04/03**	**60-95**

8		Vascular Diagnostics	03/05/02	96-101
9	R. Joseph Healy, MD		03/05/02-10/28/03	102-138
10		Seltzer Eye Associates, PC	03/12/02-07/9/03	139-145
11	Grant Breazeale, MD		03/20/02-04/26/02	146-148
12	Emergency Room Inpatient & MRI CT Scan Outpatient Inpatient	Carolinas Hospital System	04/05/02 04/09/02-04/12/02 05/24/02 10/17/02 04/07/03-04/10/03	149-157 158-161 162 163-164 165
13	Howard Farrell, MD	Florence ENT & Facial Plastics	05/20/02-11/13/02	166-171
14	Dora Windsorova, PhD		06/4/02-12/12/02	172-183
15	Timothy Malone, MD	Palmetto Baptist Medical Center	04/28/03-05/02/03	184-191
16	Correspondence from Steve Wukela, Jr. to R. Joseph Healy, M.D.		10/10/03	192-193
17	Correspondence from R. Joseph Healy, MD to Steve Wukela, Jr.		10/22/03	194
18	Photographs			195-196
19	Deposition of Scottie W. Floyd		12/18/03	
20	Deposition of R. Joseph Healy, M.D.		01/05/03	
21	Income Summary and Records			197-206
22	Medical Summary			207-209
23		Carolinas Hospital System Hospitalization Hospitalization Radiology – Lumbar MRI – Lumar Spine MRI – Brain	 9/25/03 4/9/04-4/20/04 5/5/04 7/26/05 9/8/05	 210 211-222 223-224 225-226 227
24	Hospitalization	McLeod Regional Medical Center	7/16/04-7/21/04	228-276
25	ResCare Premier	(Notebook with 1700 pages front and back)	7/00/04-12/06/05 10/01/05-6/04/06	CD 277-296
26	J. Wesley Wallis, MD		03/04/06	297
27	Sasha Federer, Ph.D.		5/05/06-2/1/07	298-354
28	Emergency Room	Carolinas Hospital System	11/03/06	355-370
29	Walter James Evans, MD	Comprehensive Neurological Services P.C.	12/06/06	371-389
30	Deposition of R. Joseph Healy, MD		3/15/04	

31	Deposition of R. Joseph Healy, MD		4/24/06	
32	Deposition of Sasha Federer, Ph.D.		2/2/07	
33	Deposition of Betty Joe Floyd		2/7/07	
34	Deposition of Scottie Floyd		2/7/07	
35	Rakesh P. Chokshi, MD	Pee Dee Orthopaedic Assoc.	1/24/07	390-393

Defendant's APAs

APAs	NAME OF PHYSICIAN	REPORT DATES	PAGES
1	R. Joseph Healy, M.D.	03/05/02-10/10/06	1-24
2	Carolina Hospital Psychological Services	06/09/06-11/03/06	25-27
3	McLeod Regional Medical Center	07/16/04-07/19/04	28-34
4	McLeod Regional ER	01/13/02-02/15/02	35-49
5	McLeod Psychiatric Associates	02/11/02-07/12/04	50-55
6	Vascular Diagnostics	05/26/03	56-57
7	Progress Reports of Cynthia P. Grimley	12/18/05-01/19/07	58-93
8	Consent Order	06/27/06	94-99
9	Marion County Medical Center	11/06/95	100
10	Marion Medical Group	03/23/85-08/19/98	101-112
11	Pee Dee Orthopaedics	01/24/07	113-114
12	ResCare Premier	05/23/06-04/19/06	115-126
13	Comprehensive Neurological Services	12/06/06	127-130
14	Comprehensive Neurological Services	01/31/07-02/13/07	131-132

At the conclusion of the hearing on February 16, 2007, the parties requested that the record be left open for the taking of the depositions of Dr. Rakesh Chokshi and Dr. Walter James Evans. The undersigned agreed to leave the record open for thirty days. Dr. Chokshi's deposition was taken on March 12, 2007 and Dr. Evans' deposition was taken on March 13, 2007. These depositions were submitted to the Commission on March 15, 2007 by counsel for the defendants and the record was closed.

STATEMENT OF THE CASE

This is an admitted case. The claimant is 28 years of age and has work experience as an automotive parts puller, pulling parts off of cars. On September 13, 2001, while removing a control arm under tension off a Mercedes, when 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 head injury.

Claimant was taken to Marion Medical Center Emergency Room and received stitches in his forehead and cursory x-rays and was sent to Dr. Stewart, his family physician. Over the next four months Dr. Stewart treated claimant conservatively for concussion. Claimant was nauseated for approximately two weeks after the accident. 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, pg. 16) During that period of time claimant experienced severe headaches to the point that he took a pistol into the McLeod Regional Medical Center emergency room demanding help to stop the pain.

While at the 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, pg. 42) Claimant was sent to Three Rivers Center for Behavioral Health for psychological evaluation. When he returned from Columbia, claimant was referred to Dr. Healy, a neurologist who has been treating him conservatively for psychological and mood disorders and emotional outrages consistent with brain injury.

Claimant suffers from severe headaches, photophobia, and uncontrolled emotional rages. Dr. Healy recommended claimant be referred to ResCare Premier in Texas. The employer/carrier contested the referral to ResCare, which resulted in a hearing before Commissioner Childs on January 7, 2004 and an Order dated June 10, 2004 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 head injury. (Order, 6/10/04, p. 2)
>
> * * *
>
> 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, 6/10/04, p. 9)
>
> * * *
>
> 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, 6/10/04, p. 10)

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

Between the time of the hearing before Commissioner Childs of January 7, 2004 and the Order of June 10, 2004, the claimant was admitted to McLeod Regional Medical Center as a result of severe epileptic seizures and renal failure resulting from his brain injury. As a result of these horrendous epileptic seizures, the claimant sustained two compression fractures and injury to his spine which is a result of the brain injury. For whatever reason, the carrier denies an injury to the spine. They have been providing medical treatment which is not an admission of compensability. In addition to the APAs 1-22, which have already been submitted at a prior hearing, the claimant is submitting in addition to the medical records from ResCare Premier, by virtue of a CD, (APA #25, consisting of 1700 pages) and APAs #23-#34.

In any event, the claimant returned to South Carolina on a trial basis for a one week period in March 2006 where he was evaluated by Dr. Healy and returned to ResCare Premier. The deposition of Dr. Healy was taken March 15, 2004. As a result of the second deposition of Dr. Healy of April 24, 2006, the parties agreed to a Consent Order signed by Commissioner Bass on June 27, 2006 requiring the employer/carrier to provide continuing medical care for the claimant when he returned to Florence on June 1, 2006. Among other things provided for in the Order was a weekly allowance of $400.00 a week to be paid to the claimant's mother so that she could stay at home with the claimant as his caregiver.

When the claimant returned he was significantly improved. However, over a period of a month or so his condition deteriorated and his episodes of violence increased. Dr. Healy refused to continue to treat the claimant because of his violence. Dr. Evans of Comprehensive Neurological Services, P.C. by agreement of the parties commenced treatment of the claimant. The claimant was unable to control his rage during this entire period of time. Now Dr. Evans is refusing to treat the claimant. Dr. Federer, a neuro-psychologist, undertook the continuing psychological treatment of the claimant and the claimant's condition has stabilized. Claimant still needs treatment for his back injuries by Dr. Chokshi, an orthopaedic doctor, and for his brain injury by a neurologist.

Claimant asserts for the purposes of this hearing that his condition is permanent. He further asserts that his brain injury has resulted in him being permanently and totally disabled and that he will require close supervised medical attention and will need the continued use of a caregiver 24 hours a day. The claimant is informed and believes that he is entitled to lifetime disability benefits pursuant to § 42-9-10 arising out of his physical brain damage and injury to his spine, as well as lifetime medical benefits.

EVIDENCE OF THE CASE

In addition to the above APA Submissions and depositions, the claimant's mother, Betty Joe Floyd, testified as claimant's only witness. The defendants called Cynthia P. Grimley of Cynthia P. Grimley & Associates, LLEC, a vocational expert, who is the case manager for the claimant.

FINDINGS OF FACT

After hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals,

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Scottie Floyd being the claimant, Ken Baker Used Cars being the employer, and Legion Insurance Company in liquidation by South Carolina Property and Casualty Guaranty Association being the carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. I find that this claimant sustained an admitted compensable accident on September 13, 2001 while removing a control arm under tension off a Mercedes, when 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 head injury.

This finding is based upon the Order of Commissioner Childs dated June 10, 2004.

3. I find that the claimant's average weekly wage is $375.36 and his compensation rate is $250.54.

This finding is based upon the unappealed Consent Order of Commissioner Childs dated July 11, 2004 and stipulation of the parties at the commencement of the hearing.

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

This finding is based upon the stipulations of the parties and the Order of Commissioner Childs dated June 10, 2004,

> 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 head injury. (Order, 6/10/04, p. 6)

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.

This finding is based on the medical records and depositions of Dr. Walter Evans, Dr. Rakesh Chokshi, and Dr. Joseph Healy and the records from ResCare Premier.

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)

Dr. Evans testified in his deposition,

> Again, I had the opportunity to review a lot of medical records, including some of the neuropsychological testing that had been done, and that I felt that he had had a closed head injury with bilateral frontal contusions which had subsequently turned into encephalomalcia with persisting headaches, impulse control and seizures. He also had ongoing back pain due to thoracic compression fracture which was probably a complication of the seizure, and that he was having problems with snoring and daytime drowsiness, difficulty initiating and maintaining sleep, and I thought that he may very well have obstructive sleep apnea. (Dep. Dr. Evans, p. 8, line 21 – p. 9, line 9)

* * *

> ...I also wanted to refer him to a spine surgeon regarding the pain and the compression fractures to see if there was any other kind of treatment that could be offered for that other than just pain – using pain medicine. (Dep. Dr. Evans, p. 10, lines 3-8)

Dr. Chokshi relies on the medical record of Dr. Healy, the neurologist, to opine that to a reasonable degree of medical certainty claimant's complaints of back pain are the result of compression fractures to T3, T7, T8, and T9 arising out of the seizures that claimant suffered on April 10, 2004. (Dep. Dr. Chokshi, pp. 16-17) Dr. Chokshi testified that most likely the seizures were the source of the compression fractures in the claimant's thoracic spine. (Dep. Dr. Chokshi, pp. 23-24)

Dr. Joseph Healy in his deposition of April 24, 2006 testified that claimant had a seizure disorder secondary to his brain injury. (Dep. Dr. Healy, p. 4) In April 2004, claimant was admitted to the hospital with abreacto seizure and suffered compression fractures to the spine as a result of those seizures. (Dep. Dr. Healy, p. 5, lines 9-13)

6. I find claimant has not reached maximum medical improvement with respect to his spine injury according to Dr. Chokshi the authorized treating orthopaedist in that he is in need of rehabilitation of his spine to treat him for the pain which treatment should be under the supervision of Dr. Alexander, his physiatrist.

This finding is based on the medical records and deposition of Dr. Rakesh Chokshi. (Dep. Dr. Chokshi, p. 13, line 14 – p. 14, line 1)

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 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)

Dr. Healy testified 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)

8. With respect to his physical brain injury/and psych injury, I find Claimant has not reached maximum medical improvement.

Clearly, Mr. Floyd appears to be caught in classic "Catch-22" situation in that symptoms of his physical brain injury prompt noncompliance with prescribed medication. Failing to take

medication makes improvement of symptoms unlikely. At some point Dr. Federer may conclude that meaningful progress is unlikely. He's not yet reached that point, however.

Dr. Healy testified in his deposition,

> Well, there's a very definite physical injury to the brain, and because of that and because it's in kind of a behavioral area of the brain, that's why the bad behavior. That's why the rage, the lack of insight, the impulsivity, and so those are the behavioral manifestations of this physical injury to the brain. (Dep. Dr. Healy, p. 27, lines 2-8)
>
> * * *
>
> His behavioral problems and seizure disorder, back problems because of his compression fractures. I would say that those three medical problems are the substance of his permanency. (Dep. Dr. Healy, p. 28, lines 12-15)

RULINGS OF LAW

Accordingly, as provided in the Code of Laws of South Carolina, 1976, As Amended, § 42-17-40, it is the determination of this Commissioner:

1. Under § 42-1-130, the claimant was a covered employee at the time in question; and under § 42-1-140, the defendant-employer was a covered employer under the Act.

2. Under § 42-1-160, the claimant did sustain an injury by accident arising out of and in the course of his employment.

3. Under§ 42-15-60, the employer is required to furnish adequate and proper medical care.

4. Under § 42-9-10 and § 42-9-200, the claimant is entitled to temporary total benefits.

ORDER

IT IS, THEREFORE, ORDERED that the claimant has not reached maximum medical improvement with respect to his physical brain injury/psych injury nor with respect to his spine injury.

IT IS FURTHER ORDERED that the defendants shall continue to pay temporary total disability benefits to the claimant in the amount of $250.54 per week until further Order of this Commission.

IT IS FURTHER ORDERED that the defendants shall continue to provided medical and psychiatric treatment for the claimant with Dr. Sasha Federer and Dr. Rakesh Chokshi and any ancillary providers whom the claimant is referred to by these physicians.

No hearing costs are assessed in this instance.

S.C. WORKERS' COMPENSATION COMMISSION

J. ALAN BASS, COMMISSIONER

Columbia, S.C.

DATED: November _____, 2007

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage prepaid, in the United States mail addressed to the attorney or attorneys for said parties. JW MDC

This 12 day of December, 2007

By Mary Kennington Stalls

Administrative Assistant to the Commissioner

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Scottie Floyd, Claimant, vs. Ken Baker Used Cars, Employer, and Legion Insurance in liquidation through SCPCIGA, Carrier,	)	WCC FILE NO.: 0123790 CONSENT ORDER

This matter comes before the undersigned Commissioner at the request of both parties for postponement of the hearing scheduled for October 13, 2006 in Myrtle Beach.

The claimant was involved in a work-related accident on September 13, 2001 which resulted in a closed head injury. By Order dated June 10, 2004 Commissioner Childs previously determined that the claimant sustained injuries to his brain, head, nose and psyche arising from the work-related accident. In July 2004, the claimant was admitted to a supported-living program at ResCare Premier in San Marco, Texas and he continued as a resident of that program for approximately 2 years. In June 2006, the claimant was released from ResCare Premier and he returned to South Carolina to the custody of his mother/Guardian ad Litem, Betty Jo Floyd. Counsel for the parties entered into a Consent Order regarding the terms of the claimant's new residential placement as well as the provision for continued care and treatment of the claimant arising from the claimant's work-related injuries of September 13, 2001. This Order was approved by the Commission on June 27, 2006. In the Order, the defendants agreed to be

responsible for the claimant's continued medical treatment and care and the parties also agreed that Dr. Joseph Healy would serve as primary treating physician including prescription medication management. In the Order, the claimant also agreed to cooperate fully with all medical treatment, treatment plans and directives of Dr. Healy as well as other authorized health care providers. The claimant also agreed to comply with the dosing requirements for all medications prescribed by Dr. Healy or other authorized providers.

The claimant was initially compliant with medical treatment and the terms of the Consent Order. Subsequently however, claimant began to miss appointments and his condition began to deteriorate. The claimant began reporting increased frequency of headaches as well as sleep disturbance. Dr. Sasha Federer, the claimant's neuropsychologist, has reported that these problems in turn have led to agitation and irrational behavior on the part of the claimant. As a result, Dr. Healy has notified the parties that he will no longer be involved in the claimant's treatment. In addition, Dr. Federer has been unable to complete his neuropsychological evaluation due to missed appointments.

The parties request postponement of the hearing currently scheduled for October 13, 2006 to permit time for decision making as to the claimant's current placement, recommendations from medical professionals as to what treatment options are in the best interests of the claimant as well as time for the claimant's condition to be stabilized. Additionally it was Dr. Healy's opinion in his deposition on April 24, 2006 that the claimant has not yet reached maximum medical improvement.

Based on the above it appears that this case is premature for a hearing as to the extent of permanent disability and the parties therefore request that the hearing be postponed for an additional thirty (30) days with jurisdiction to be retained by the undersigned Commissioner.

IT IS THEREFORE ORDERED that, for good cause shown, the hearing scheduled for October 13, 2006 shall be postponed for a period of at least thirty (30) days with jurisdiction to be retained by the undersigned Commissioner.

AND IT SO ORDERED.

J. Alan Bass, Commissioner

Date: 10/8/06

WE MOVE AND CONSENT:

2 Oct 06

Steve Wukela, Jr.
Wukela Law Firm
Attorney for Claimant

Mark D. Cauthen
McKay, Cauthen, Settana & Stubley, P.A.
Attorneys for Defendants

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by mailing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 30 day of October, 2006

By Elaine M. Bass
Administrative Assistant to the Commissioner

SW 2PM MD

BEFORE THE SOUTH CAROLINA

WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 0123790

Scottie Floyd, Claimant, vs. Ken Baker Used Cars, Employer, and Legion Insurance in liquidation through SCPCIGA, Carrier,	**CONSENT ORDER**

This matter is before the undersigned Commissioner to approve an agreement between the parties herein with regard to the provisions of future care and treatment for the claimant arising from injuries sustained in an accident on September 13, 2001, as well a change in the claimant's residential placement.

By previous Order dated June 10, 2004, Commissioner Michelle Childs found that the claimant sustained injuries to his brain, head, nose and psyche on September 13, 2001 when a control arm from an automobile struck the claimant's head. At the time of the hearing held on January 7, 2004, Commissioner Childs found the claimant had not reached maximum medical improvement and was in need of additional medical treatment and behavioral modification to be

provided at Tangram Premier in Texas or a comparable facility as recommended by the claimant's treating physician, Dr. Joseph Healy. The hearing Commissioner further ordered that the defendants were responsible for all causally related medical and psychological treatment for the claimant's closed head injury.

On July 27, 2004, the claimant was admitted to a supported living program at Tangram Premier in San Marco, Texas, now known as ResCare Premier. As indicated by reports from ResCare Premier, the claimant has made steady progress in the supported living setting during his 22 month placement in the program, including improvements in control of his behavior/anger, improvements in judgment and increased independence. As a result, the claimant was able to progress to a less restrictive setting within the program. The reports of ResCare also indicate that the claimant has received appropriate medical treatment, medication management, and psychological treatment/counseling, all of which has been paid for by the defendants. In the most recent Outcome Goal Plan for the period of 1/1/06 to 3/31/06, the program director indicated that the claimant achieved 4 out of 7 objectives for the review period and narrowly missed achieving the remaining objectives.

The claimant and his mother, Betty Joe Floyd, who also serves as claimant's guardian and substitute decision maker, have requested, through claimant's counsel, that claimant be permitted to return to a non-institutional environment with the goal of living at home with Mrs. Floyd in Marion, South Carolina. In March, 2006, the claimant returned to South Carolina for a visit at his mothers home. This visit was successful, and on March 23, 2006, the claimant was evaluated by Dr. Joseph Healy who commented in his report that the claimant had "made a tremendous turn-around". Dr. Healy indicated that he did not see signs of anger or

impulsiveness as the claimant had previously exhibited and he noted that the claimant had good insight into his improvement. Dr. Healy's impression was that the claimant could likely make the transition to living at home with his mother in South Carolina. A copy of Dr. Healy's report from 3/23/06 is attached as Exhibit A. Subsequently, in his deposition on April 24, 2006, Dr. Healy agreed to resume responsibility as claimant's primary treating physician upon the claimant's return to South Carolina. Accordingly, ResCare Premier has scheduled June 1, 2006 for the claimant's discharge and the program director has indicated her belief that the claimant's current goals and objectives will be reached by that time. The defendant's have agreed to the provision of continued care and treatment for the claimant in his new environment,, consistent with their obligations under the Workers' Compensation Act. The parties desire that their agreement, as set forth herein, be made a Consent Order of the Commission.

1. The defendant's shall be responsible for the provision of continued medical care/treatment for the claimant's causally related injuries as shall be directed by Dr. Joseph Healy, the claimant's primary treating physician, with such medical referrals as Dr. Healy may deem necessary. In the event that Dr. Healy shall become unable or unwilling to continue serving as primary treating physician, the defendant shall choose another physician qualified to serve in this role.

2. The claimant shall cooperate fully with all medical treatment, treatment plans, restrictions and all directives of Dr. Healy as well as any other authorized health care provider and shall comply subject to the Workers' Compensation Act with all recommendations of any physician, psychologist, psychiatrist or other medical

provider authorized to provide services to the claimant herein. The claimant further agrees to comply with the dosing requirements for all medications prescribed by Dr. Healy or other authorized provider. The claimant additionally agrees to submit to and cooperate with any drug or alcohol testing recommended by any authorized medical provider.

3. The defendant's shall continue to pay the claimant temporary total disability benefits at the compensation rate of $250.24 until such time as defendants are permitted to stop temporary total disability payments by order of the Commission or agreement of the parties.

4. The parties agree that Cynthia P. Grimley shall provide case management services in connection with this claim and the parties further agree that she shall be authorized to communicate directly with the claimant, the claimant's care giver and with all medical service providers as to any matter relating to claimant's medical care or Ms. Grimley's duties as case manager. In the event that Cynthia Grimley shall become unable to continue serving as case manager, the defendant's shall appoint another case manager qualified to serve in this position. The case manager shall also provide copies of reports/assessments to claimant's counsel as well as defendant's counsel.

5. The defendants shall pay to the claimant an allowance of $400.00 per week for daily living assistance which shall be used by the claimant for engagement of a full-time care giver who shall be responsible for supervision of the claimant. The

selection of the care giver shall be made by the claimant and claimant's mother/guardian, Betty Joe Floyd, and such care giver shall be qualified to serve in such role. The care giver shall have responsibility for supervision of the claimant to the extent deemed necessary and appropriate by the care giver. In the event that the care giver shall be unable to fulfill their duties or if it should become necessary to replace the care giver on a permanent or temporary basis, the claimant and his mother/guardian, shall select a substitute care giver who shall be qualified to serve in this capacity. The claimant further agrees to cooperate and comply with all directives of his care giver. The defendants undertake no responsibility for direct supervision of the claimant or the care giver.

6. It is also agreed that either party may petition the Probate Court for the appointment of a conservator for the claimant if it is deemed in the claimant's best interest.

7. The parties further agree and acknowledge that all provisions for treatment, care, compensation and other benefits herein shall be provided strictly in accordance with the S.C. Workers' Compensation Act and Regulations and that neither the parties, their attorney's, representatives, physicians or medical providers undertake any special duty or obligation other than the responsibilities imposed by the Workers' Compensation Act.

8. All other issues shall be held in abeyance, including the issue of the extent of claimant's disability, with jurisdiction to be retained by the undersigned Commissioner.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the above-stated terms are hereby adopted and approved as an Order of the Workers' Compensation Commission.

AND IT IS SO ORDERED.

By: _____
J. Allan Bass, Commissioner

Date: 6/27/06

WE MOVE AND CONSENT:

_____
Steve Wukela, Jr.
Wukela Law Firm
Attorney for Claimant

_____
Betty Joe Floyd
Guardian ad litem for Scottie Wayne Floyd

_____
Mark D. Cauthen
McKay, Cauthen, Settana & Stubley, P.A.
Attorneys for Defendants

_____ 6-13-06
Scottie Wayne Floyd
Employee/Claimant

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.
This 27th day of June, 2006
By _____
Administrative Assistant to the Commissioner

SW, Jr
MDC

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Scottie Floyd, Claimant, vs. Ken Baker Used Cars, Employer, and Legion Insurance in liquidation through SCPCIGA, Carrier,	)	WCC FILE NO.: 0123790 CONSENT ORDER

The above-referenced matter is scheduled for a hearing before the undersigned Commissioner on April 27, 2006 in Myrtle Beach, SC. By previous order dated June 10, 2004, Commissioner Michelle Childs found that the claimant sustained injuries to his brain, head, nose and psyche on September 13, 2001 due to a work-related accident. Since that time, the defendants have provided compensation and medical benefits as well as rehabilitative care. The issues for determination at the hearing include whether the claimant is totally and permanently disabled from his injuries, as well as whether the claimant is entitled to lifetime compensation benefits and medical benefits.

Since July 27, 2004, the claimant has been placed in a rehabilitation program at ResCare Premier in San Marcos, Texas. As a result, the parties ability to monitor the claimant's progress has been limited primarily to quarterly reports provided by ResCare. On March 20, 2006, counsel for defendants received a CD disk containing 1700 pages of medical and progress

reports provided by ResCare Premier and designated as claimants APA submission number 23. The majority of these records had not previously been made available to either of the parties. Consequently, the parties require additional time for review of the new medical evidence and consideration of its impact on this case as well as additional discovery. The claimant was also reevaluated by Dr. Joseph Healy on March 23, 2006 and Dr. Healy's deposition is scheduled for April 24, 2006. Further, the defendants need additional time for consideration of an independent medical evaluation to be preformed in either Texas or South Carolina. The parties therefore request an additional 30 days for completion of discovery in this matter, with jurisdiction to be retained by the undersigned Commissioner.

IT IS THEREFORE ORDERED that, for good cause shown, the hearing scheduled for April 27, 2006 shall be postponed for a period of at least 30 days to be reset as soon thereafter as the Commissioner's schedule permits, with jurisdiction to be retained by the undersigned Commissioner.

AND IT IS SO ORDERED.

Date: _____ By: _____ 4/18/06
J. Alan Bass, Commissioner

I consent 11 Apr 06

(consent signatures on Page 3)

WE MOVE AND CONSENT:

11 Apr 06

Steven Wukela
Attorney for Claimant

Mark D. Cauthen
Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney for each party, or said parties.

This 11th day of April, 2006.

By E. Mason
Administrative Assistant to the Commissioner

SC
6NDC

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0123790

Scottie Floyd, Claimant, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation through the SC Property & Casualty Insurance Guaranty Association, Carrier.	)	CONSENT ORDER

A hearing was held before the undersigned Commissioner on June 10, 2004 in Darlington, South Carolina. An order was issued on June 10, 2004. In the order, there was a finding that the claimant's average weekly wage was Three Hundred and Forty Three Dollars and Fourteen Cents ($343.14) making a compensation rate of Two Hundred and Twenty Eight Dollars and Seventy Six Cents ($228.76). There was also a finding that the defendants were to make a lump sum payment of One Thousand, Seven Hundred and Sixty Six Dollars and Ninety Six Cents ($1,766.96), for an underpayment of temporary total compensation due to a change in the compensation rate.

Subsequent to the issuance of the order, counsel for the claimant and the defendants discovered a mathematical error in the calculation of the average weekly wage and compensation rate in the order. The parties have agreed to an average weekly wage of Three Hundred and Seventy Five Dollars and Thirty Six Cents ($375.36) and a compensation rate of Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24). The defendants have further agreed to start paying the claimant temporary total compensation at the rate of Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24) a week beginning July 1, 2004.

The claimant has also agreed to waive any entitlement to an underpayment of temporary total compensation due to the change in the compensation rate from Two Hundred and Eleven Dollars and Seventy Seven Cents ($211.77) to Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of June 10, 2004 be modified to change the average weekly wage to Three Hundred and Seventy Five Dollars and Thirty Six Cents ($375.36) and the compensation rate to Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24).

IT IS FURTHER ORDERED that the defendants will begin to pay the claimant temporary total compensation at the rate of Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24) a week beginning July 1, 2004 and will continue to pay the claimant until there is an agreement of the parties or an order of the Commission.

IT IS FURTHER ORDERED that the claimant has agreed to waive any entitlement to a payment for the underpayment of temporary total compensation due to the change in the compensation rate from Two Hundred and Eleven Dollars and Seventy Seven Cents ($211.77) to Two Hundred and Fifty Dollars and Twenty Four Cents ($250.24).

AND IT IS SO ORDERED.

By: _____
J. Michelle Childs
Commissioner

Date: 7-11-04

WE CONSENT:

_____
Steve Wukela, Jr.
Attorney for Claimant

_____
Edwin P. Martin, Jr.
Attorney for Defendants

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 20 day of July, 2004

By _____
Administrative Assistant to the Commissioner

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0123790

Scottie Floyd, Employee,

Claimant,

VS

Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, Carrier,

Defendants.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 10 day of June, 2004.

By Elaine M. Boyd
Administrative Assistant to the Commissioner

SW
EPM
EPM

HEARING:	Held in Darlington, South Carolina on January 7, 2004.
APPEARANCES:	Claimant represented by Steve Wukela, Jr., Wukela Law Firm, Florence, SC Defendants represented by Edwin P. Martin, Jr., McKay Cauthen Sattana Martin & Addison, PA, Columbia, SC
PURPOSE OF HEARING:	To determine issues as set forth in Forms 50 and 51 and any other issues which may have timely come before the Commission.
DECISION AND ORDER:	By J. Michelle Childs, Commissioner
FILED:	~~April~~ June 10, 2004

STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51 and any other issues which may timely come before the Commissioner;

2. Notice of the hearing was timely and properly served upon all parties of interest;

3. Venue, set in Darlington County, is proper.

4. The Commission file is made a part of this record with the exception of unstipulated medical and self-serving hearsay.

APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

APAs	NAME OF PHYSICIAN	PRACTICE	REPORT DATES	PAGES
1	Emergency Room	Marion County Medical Center	09/13/01 01/06/02 05/09/03 05/10/03 05/14/03	1-8 9-16 17-21 22-27 28-31
2	Keith Stewart, MD	Marion Medical Group	09/18/01-01/10/02	32-41
3		McLeod Regional Medical Center	01/13/02	41a-41u
4	Attorneys' Dictionary of Medicine and Word Finder			41v-41y
5	Charles Heath, MD	Three Rivers Center for Behavioral Health	01/14/02-01/22/02	42-53
6	Ross Fulcher, MS, RNCS	Florence Counseling Center	01/24/02-04/15/02	54-59
7	Eric Weinbaum, MD Renee Williams, LPC	McLeod Psychiatric Association	02/11/02-12/04/03	60-95
8		Vascular Diagnostics	03/05/02	96-101
9	R. Joseph Healy, MD, PA		03/05/02-10/28/03	102-138
10		Seltzer Eye Associates, PC	03/12/02-07/9/03	139-145
11	Grant Breazeale, MD		03/20/02-04/26/02	146-148
12	Emergency Room Inpatient & MRI	Carolinas Hospital System	04/05/02 04/09/02-04/12/02	149-157 158-161

	CT Scan Outpatient Inpatient		05/24/02 10/17/02 04/07/03-04/10/03	162 163-164 165
13	Howard Farrell, MD	Florence ENT & Facial Plastics	05/20/02-11/13/02	166-171
14	Dora Windsorova, PhD		06/4/02-12/12/02	172-183
15	Timothy Malone, MD	Palmetto Baptist Medical Center	04/28/03-05/02/03	184-191
16	Correspondence from Steve Wukela, Jr. to R. Joseph Healy, M.D.		10/10/03	192-193
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20	Deposition of R. Joseph Healy, M.D.		01/05/03	
21	Income Summary and Records			197-206
22	Medical Summary			207-209

In addition to the above APA Submissions, the defendant submitted an Exhibit that consisted of the payroll records of the claimant Scottie Floyd.

At the commencement of the hearing, counsel advised the court that the deposition of Dr. R. Joseph Healy, the authorized treating neurologist for the claimant, had been scheduled and the record was left open for the purpose of submitting that transcript.

STATEMENT OF THE CASE

The claimant is twenty-eight (28) years of age and has work experience as an automotive parts puller, pulling parts off cars. On September 13, 2001, 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 head injury.

The employer admits the claimant sustained an injury to his head but denies an injury to his brain. The employer is paying temporary total disability benefits to the claimant, albeit at a disputed amount. The employer also asserts it is providing appropriate medical care to the claimant and that

the claimant has reached maximum medical improvement.

After claimant's accident, claimant was taken to Marion Medical Center Emergency Room and received stitches in his forehead and cursory x-rays and was sent to Dr. Stewart, his family physician. Over the next four months Dr. Stewart treated claimant conservatively for a concussion. Claimant was nauseated for approximately two weeks after the accident. Dr. Stewart ordered a CT Scan on January 9, 2002, which detected "appearance consistent with infarct. . . . atypical post-traumatic fluid collection cannot be excluded." (APA 1, pg. 16) Claimant continued to experience severe headaches to the point where he took a pistol into the McLeod Regional Medical Center emergency room on January 13, 2002 demanding help to stop the pain. (APA #3)

While at the 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, pg. 42) Claimant was sent to Three Rivers Center for Behavioral Health in Columbia, SC for psychological evaluation. When he returned from Three Rivers Center, claimant was referred to Dr. Healy, a neurologist who has been treating him conservatively for psychological and mood disorders and emotional outrages consistent with a brain injury.

Claimant has severe headaches, photophobia, and uncontrolled emotional rages. After twenty-five (25) months of conservative treatment and surgery on his nose, Dr. Healy recommended claimant be referred to Tangram Premier, a rehabilitation facility in Texas. The employer has refused to provide that medical care. Claimant is informed and believes he is need of additional care to include treatment at Tangram Premier rehabilitation facility to deal with mood swings, severe rages, and headaches.

Claimant is informed and believes he is totally and permanently disabled and is entitled to lifetime disability benefits and lifetime medical benefits pursuant to §42-9-10.

Additionally, Claimant is informed and believes his average weekly wage has been miscomputed, that his correct average weekly wage is Four Hundred Fifty and 20/200 ($450.20) Dollars with a compensation rate of Three Hundred and 13/100 ($300.13) Dollars. Claimant has been shorted Eighty-eight and 36/100 ($88.36) Dollars per week for one hundred four (104) weeks and believe that he is entitled to a lump sum payment of Nine Thousand One Hundred Eighty-nine and 44/100 ($9,189.44) Dollars of the back temporary total benefits since the date of the hearing. (See APA No. 21)

On April 29, 2002, Betty Joe Floyd, mother of the claimant Scottie Floyd, was duly appointed Guardian ad Litem for the claimant.

EVIDENCE OF THE CASE

In addition to the above APA Submissions and depositions, the claimant and his mother Betty Joe Floyd testified. The defendants relied upon the above stipulated record, the deposition of Dr. Healy, which was subsequently submitted on April 1, 2004, and the pay records of the claimant (Defendants' Exhibit pages 2-30).

FINDINGS OF FACT

After hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals,

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Scottie Floyd being the claimant, Ken Baker Used Cars being the employer, and Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association being the carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

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 head injury.**

This finding of fact is based upon the voluminous medical records in this case and the deposition of Dr. Joseph Healy, the authorized treating neurologist. The emergency records of Marion County Medical Center of September 13, 2001 note that the claimant sustained "Laceration forehead no L.O.C. Nose appears deformed – bleeding." (APA #1, p. 1) Claimant was complaining of intense throbbing pain in his face where he had been hit by a heavy object. (APA #1, p. 2) The records reflect the claimant vomited on his way to x-ray. (APA #1, p. 3)

APA #18, p. 195 shows the condition of the claimant's head, face and eyes approximately three (3) weeks after the injury. Both of his eyes are blackened and blood shot and he testified that for several days after the accident his eyes were actually swollen shut.

Testimony of the claimant was that when he originally tried to go back to work that the pain in his head was extremely severe, notwithstanding the conservative treatment and care of the family doctor. Claimant finally prevailed upon the family doctor to order a cranial computed tomography at the Marion County Medical Center on January 9, 2002, which revealed "post-traumatic fluid collection." (APA #1, p. 16)

Claimant continued to have severe headaches, which he considered to be untreated. On January 13, 2002, claimant appeared at the McLeod Regional Medical Center in Florence with a severe headache, suicidal, deep depression, and carrying a pistol and demanded medical care. (APA #3, p. 41a) He was diagnosed by the treating physician at McLeod Regional Medical Center with

"postconcussion syndrome with headache and agitation closed head injury at work 9/13/02." (APA 3, p. 41i) The emergency room doctor also ordered a head (brain) CT Scan, which among other things revealed a "3.0 X 4.0 cm focus of decreased attenuation in the right fontal lobe extending to the periphery which may be sequela from infarct or hemorrhage probably related to the trauma four months ago by history." (APA #3, p. 41u) The scan also revealed a "fracture of the left frontoethmoidal complex." (APA #3, p. 41u)

Dr. D'Angelo, a neurologist who saw the claimant at the emergency room, opined that the claimant's headaches "may well have exacerbated his baseline problems and precipitated this event...and he [patient] states the 'only way I got a head CT at all was going to my doctor's office with a gun and showing my butt.'" (APA #3, p. 41s)

The claimant was then sent to Three Rivers Center for Behavioral Health in Columbia, SC. (APA #5) He was diagnosed with organic mood disorder, post head injury, headaches and noted to be a danger to self, "emotional behavioral conditions and complications requiring 24 hour medical nursing care." (APA #5, p. 42) Claimant's admission was legally mandated and he was found to have impaired mood and depression and cognitive impairment. (APA #5, p. 42) Claimant was discharged eight (8) days later with a fair prognosis. His final diagnosis was mood disorder, suspect organic personality disorder, status-post close-head injury with a history of headaches. (APA #5, p. 43)

Florence Counseling Services noted the claimant had problems with short-term memory, irritability, and impulsivity. (APA #6, p. 54) Dr. Eric Weinbaum with McLeod Psychiatric Associates noted claimant had "personality change due to traumatic brain injury." (APA #7, p. 60)

According to the testimony of the claimant and his mother, claimant has been living with his mother since the accident and she has been taking most of the responsibility in trying to control

claimant and his outbursts of anger. By April of 2002, his mother was reporting to McLeod Psychiatric Associates, "His headaches are much worse, since Dr. Healy prescribed his medications. He is angry to the point she is walking on eggshells around him, fearing what he might do." (APA # 7, p. 64) She was encouraged to get the claimant back to Dr. Healy.

Claimant had been referred to Dr. Healy by Marion County Medical Center after they had performed their CT Scan on January 6, 2002 four months after the accident. (Healy dep. p. 5) However, Dr. Healy did not see the claimant until February 6, 2002 after the claimant's encounter at McLeod Regional Medical Center emergency room and his hospitalization at Three Rivers Center. Dr. Healy opined after reviewing all the CT Scans and the MRI that he ordered on April 10, 2002 (APA # 12, p. 159) that the claimant had sustained a contusion to the frontal lobes of his brain in the accident of September 13, 2002 (Healy dep. p. 9) and that as a result of the frontal lobe lesions there has been an amplification of his baseline personality. (Healy dep. p. 11) Dr. Healy went on to note that the claimant now is a very unpredictable individual and "could be very dangerous not only to other people but to himself. And I don't think his behavior is predictable and he's just easily triggered." (Healy dep. p. 12, lines 9-13)

> Q. When we deposed Mr. Floyd, he said in the hearing that at some point that you thought that his rage might have been psychologically based as well as from the frontal lobe injury?
>
> A. Well I think it's a combination of both, and it's - - I think that his rage is organic meaning that it's a result of his brain injury, but I think the psychological properties are that this is a - - this is an amplification of his own personality. So it's based in psychology if that's sort of the science of behavior, but his brain, which is generating the behavior, is abnormal. But I believe that's (sic) it's organic, an organic rage reaction. (Healy dep. p. 12, line 22 – p. 13, line 9)

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 or a comparable facility in closer proximity to the claimant's home, which is to be determined within 10 days of the date of the Order herein.

Dr. Healy goes into great detail in his deposition to note that the behavioral problems that claimant has as above set out is an organic manifestation of his brain injury. (Healy dep. p. 15) The claimant develops rages during his periods of severe headaches and when he fixates on the nature of his injury and the length of time claimant feels he went untreated.

Claimant's mother Betty Joe Floyd has been attempting to insure the claimant gets to all of his medical appointments and is attempting to control his outbursts. Based on her testimony, the testimony of the claimant, and the testimony of Dr. Healy, it is apparent that the claimant needs an intensive period of psychological treatment and behavioral modification. According to a letter of October 22, 2003 from Dr. Healy to claimant's counsel, Dr. Healy has contacted the Admissions Coordinator at Tangram Premier in Texas and has determined that that facility is best suited for the claimant's needs. (APA # 17, p. 194)

> ... it would be in his best interests. (Healy dep. p. 21, line 20)
>
> * * *
>
> Q. So basically you would not be able to tell whether or not he's employable until he's able to modify his behavior?
>
> A. Yeah, he's definitely not employable now. He's made a little bit of progress but not enough to - - I think safety is the big issue. He's just unpredictable. (Healy dep. p. 24, lines 19-25)

Dr. Healy indicated he had some experience with Tangram Premier in the past and had recommended that facility over any facility he had no contact with. (Healy dep. p. 26). The Commissioner, however, wishes the Defendants to consider a facility closer to the Claimant's home since Dr. Healy has also recommended that the Claimant's mother participate in his treatment and therapy.

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, or a comparable facility in closer proximity to the Claimant's home, that the issue of the extent of the claimant's disability is held in abeyance.

5. I find that claimant's average weekly wage is Three Hundred Forty-three and 61/100 ($343.61) Dollars resulting in a compensation rate of Two Hundred Twenty-Eight and 76/100 ($228.76) Dollars.

The Commission files reflect that the employer submitted a Form 20 reporting the claimant had earned Nine Thousand Five Hundred One and 60/100 ($9501.60) Dollars between September 30, 2000 and June 30, 2001, resulting in an average weekly wage of One Hundred Eighty-two and 73/100 ($182.73) Dollars with a compensation rate of One Hundred Twenty-one and 83/100 ($121.83) Dollars. Subsequently, the employer recalculated the claimant's earnings and submitted a second Form 20 showing claimant had actually received wages of Sixteen Thousand Five Hundred Sixteen and 61/100 ($16,516.61) Dollars for the same time frame. It is pertinent to note that for the first and second quarters of that time frame the claimant had earned according to the employer's Form 20 Seven Thousand Two Hundred Seventy-four and 69/100 ($7,274.69) Dollars and that in the third and fourth quarters of that time frame claimant had earned Nine Thousand Two Hundred Forty-one and 92/100 ($9,241.92) Dollars, a twenty-seven (27%) percent increase.

A Form 15 was filed and reflects that on January 31, 2002 the employer made the first payment of temporary total disability benefits based on an onset of disability of January 14, 2002 at a compensation rate of Two Hundred Eleven and 77/100 ($211.77) Dollars. APA #21, pp. 197-198 is a compilation of the base pay income of the claimant for the 52-week period prior to

his accident, which does not reflect overtime during that period of time. Page 199 through 206 of that same APA submission is the employer's print out of the wages paid the claimant during that same period of time, which does reflect overtime entries paid.

The claimant asserts that for the weekly pay period ending May 4, 2001 the claimant received a significant pay raise that significantly increased his average weekly wage. During the 52-week period prior to the accident, claimant's base pay exclusive of overtime was Seventeen Thousand Two Hundred Sixty-six and 57/100 ($17,266.57) Dollars, which would result in an average weekly wage of Three Hundred Twenty-two and 15/100 ($322.15) Dollars with a compensation rate of Two Hundred Thirty-one and 07/100 ($231.07) Dollars. In the first 32 weeks of the 52-week pay period, claimant's base pay, exclusive of overtime, was Nine Thousand One Hundred Twenty-three and 46/100 ($9,123.46) Dollars, which would result in an average weekly wage of Two Hundred Eighty-five and 11/100 ($285.11) Dollars with a compensation rate of One Hundred Ninety and 07/100 ($190.07) Dollars. The last 20 weeks of the pay period beginning May 4, 2001, the claimant's base pay, exclusive of overtime, was Eight Thousand One Hundred Forty-three and 11/100 ($8,143.11) Dollars, which would result in an average weekly wage of Four Hundred Seven and 15/100 ($407.15) Dollars with a compensation rate of Two Hundred Seventy-one and 44/100 ($271.44) Dollars, which is a forty-three (43%) percent pay increase.

A review of the checks actually paid by the employer would indicate that basically in May 2001 the claimant's income went from a base pay of Two Hundred Eighty and NO/100 ($280.00) Dollars, exclusive of overtime, to a base pay of Four Hundred Ten and NO/100 ($410.00) Dollars, exclusive of overtime. Claimant's testimony is such that it appears that on or

about April 27, 2001 his job duties changed, his pay rate changed, and his enthusiasm for his job changed after a discussion with his employer and the employer gave him a significant raise.

Title 42-1-40 sets out the method by which the average weekly wage is to be computed, which states in part,

> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Based on the testimony of the claimant and the documents provided by the employer in their exhibit beginning on page 25 of that exhibit for the pay period ending May 4, 2001 the claimant earned Eight Thousand One Hundred Forty-three and 11/100 ($8,143.11) Dollars as his base pay. In addition to that he earned Eight Hundred Sixty and 98/100 ($860.98) Dollars in overtime pay, making his total income during that 20 week pay period from April 27, 2001 and ending September 13, 2001 to be Nine Thousand Four and 09/100 ($9,004.09) Dollars, resulting in an average weekly wage of Four Hundred Fifty and 20/100 ($450.20) Dollars with a compensation rate of Three Hundred and 13/100 ($300.13) Dollars.

Since the Claimant earned most of his overtime pay during a 20-week pay period, some of which would not have been included in the calculation of the average weekly wage and compensation rate given that it occurred during the last quarter, I find that the more fair calculation to both the Employer and the Claimant would be to calculate the average weekly wage based on the entire 252 days (payroll history of 1-5-01 through 9-7-01) that the Claimant worked, which includes overtime payments, resulting in an average weekly wage of $343.14 and a compensation rate of $228.76.

The employer has been paying temporary total disability benefits at the rate of Two Hundred Eleven and 77/100 ($211.77) Dollars and has been underpaying the claimant the amount of Sixteen and 99/100 ($16.99) Dollars per week.

6. **I find the employer, Ken Baker Used Cars, and the carrier, Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, shall be responsible for all causally related medical and psychological treatment for the closed head injury sustained by the claimant on September 13, 2001 while in the employ of Ken Baker Used Cars, to include but not limited to Marion County Medical Center, Marion Medical Group, McLeod Regional Medical Center, Three Rivers Center for Behavioral Health, Florence Counseling Center, McLeod Psychiatric Association, Vascular Diagnostics, Dr. R. Joseph Healy, Seltzer Eye Associates, Dr. Grant Breazeale, Carolinas Hospital System, Florence ENT & Facial Plastics, Dora Windsorova, Ph.D., and Palmetto Baptist Medical Center.**

This finding is based on the medical records and testimony.

RULINGS OF LAW

Accordingly, as provided in the Code of Laws of South Carolina, 1976, As Amended, §42-17-40, it is the determination of this Commissioner:

1. Under §42-1-130, the claimant was a covered employee at the time in question; and under §42-1-140, the defendant-employer was a covered employer under the Act.

2. Under §42-1-160, the claimant did sustain an injury by accident arising out of and in the course of his employment.

3. Under §42-15-60, the employer is required to furnish adequate and proper medical care, and the claimant has not reached maximum medical improvement.

4. Under §42-9-10 and §42-9-200, the claimant is entitled to temporary total benefits until further Order of the Commission.

5. Under §42-1-40, the method by which average weekly wage is to be computed is set out.

ORDER

IT IS, THEREFORE, ORDERED that the claimant Scottie Floyd did sustain an injury to his brain, head, nose and psyche arising out of and in the course of his employment with Ken Baker Used Cars on September 13, 2001 when while attempting to remove a control arm from a Mercedes a spring came loose and the control arm hit the claimant in the forehead, nose, and cheek breaking his nose and causing a closed head injury to his brain.

IT IS FURTHER ORDERED that the employer, Ken Baker Used Cars, and the carrier, Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, shall pay all causally related medical expenses related to claimant's injury, to include but not limited to, Marion County Medical Center, Marion Medical Group, McLeod Regional Medical Center, Three Rivers Center for Behavioral Health, Florence Counseling Center, McLeod Psychiatric Association, Vascular Diagnostics, Dr. R. Joseph Healy, Seltzer Eye Associates, Dr. Grant Breazeale, Carolinas Hospital System, Florence ENT & Facial Plastics, Dora Windsorova Ph.D., and Palmetto Baptist Medical Center.

IT IS FURTHER ORDERED that the employer, Ken Baker Used Cars, and the carrier, Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, are to continue providing treatment for claimant's injuries with Dr. Joseph Healy, the authorized treating physician to include his recommended treatment at Tangram Premier, or a comparable facility closer in proximity to the Claimant's home, if provided within 10 days of the date of this Order.

IT IS FURTHER ORDERED that the employer, Ken Baker Used Cars, and the carrier, Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, shall pay temporary total benefits to the claimant in the amount of Two Hundred Twenty-Eight and 76/100 ($228.76) Dollars based on the claimant's average weekly wage of Three Hundred Forty-Three and 14/100 ($343.14) Dollars commencing the date of the hearing January 7, 2004.

IT IS FURTHER ORDERED that the employer, Ken Baker Used Cars, and the carrier, Legion Insurance Company in liquidation through South Carolina Property & Casualty Insurance Guaranty Association, shall pay to the claimant the underpayment of back temporary total disability benefits in the amount of Sixteen and 99/100 ($16.99) Dollars per week, making a total lump sum underpayment at the time of the hearing on January 7, 2004 in the amount of One Thousand Seven Hundred Sixty-Six and 96/100 ($1,766.96) Dollars (104 weeks X $16.99) and continuing since January 7, 2004 at the incorrect rate of Two Hundred Eleven and 77/100 ($211.77) Dollars a week until the corrected compensation of Two Hundred Twenty-Eight and 76/100 ($228.76) Dollars commences.

IT IS FURTHER ORDERED that based on the fact that the claimant has not reached maximum medical improvement and is in need of treatment in Tangram Premier, or a comparable facility in closer proximity to the Claimant's home to be provided within 10 days of the date of the Order, that the issue of the extent of the claimant's disability is held in abeyance.

No hearing costs are assessed in this instance.

S.C. WORKERS' COMPENSATION COMMISSION

J. Michelle Childs

Columbia, SC

J. MICHELLE CHILDS, COMMISSIONER

DATED: April_____, 2004

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF MARION)

IN RE:)
)
SCOTTIE WAYNE FLOYD,) **ORDER**
PETITIONER) **FOR APPOINTMENT**
) **OF GUARDIAN AD LITEM**
)

Upon reading the verified Petition of Scottie Wayne Floyd requesting that a Guardian ad litem be appointed for him for the purposes of adjudicating a hearing regarding the appointment of a Guardian for Scottie Wayne Floyd, I find that John David Whisenhunt is a member in good standing with the South Carolina Bar and the petitioner Scottie Wayne Floyd agrees to the appointment of John David Whisenhunt as his Guardian ad litem for the purposes of this proceeding.

I find that Steve Wukela, Jr. is also a member in good standing with the South Carolina Bar and has been representing Scottie Floyd regarding his worker's compensation claim since February 2002 and that Mr. Wukela is in agreement with the appointment of John David Whisenhunt as Guardian ad Litem for Scottie Floyd.

IT IS THEREFORE ORDERED that John David Whisenhunt is hereby appointed Guardian ad Litem for Scottie Wayne Floyd for the purposes of this proceeding.

T. CARROLL ATKINSON,
JUDGE OF PROBATE

Marion, S. C.

July 14, 2004

FILED
JUL 14 2004
MARION COUNTY
PROBATE JUDGE

STATE OF SOUTH CAROLINA	)	
	)	IN THE PROBATE COURT
COUNTY OF MARION	)	
IN RE:	)	
	)	
SCOTTIE WAYNE FLOYD, PETITIONER	)	**PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM**
	)	

NOW COMES your Petitioner, Scottie Wayne Floyd, who would respectfully show unto the Court:

1. That Petitioner was injured in an industrial accident on or about September 13, 2001, with said injuries including a frontal lobe injury from a closed head injury.

2. That from and after the date of this injury, Petitioner has received extensive medical treatment pursuant to the Workers' Compensation Order of Commissioner J. Michelle Childs dated June 10, 2004.

3. It is anticipated now that Scottie Floyd will be admitted at Tangram, a rehabilitative facility, in Texas and according to policy and procedures at Tangram your petitioner needs to have a Guardian appointed for him pursuant to §62-5-310.

4. Your petitioner voluntarily agrees to the appointment of a Guardian for him and he understands a temporary hearing will be conducted on July 14, 2004 before this Honorable Court and that thirty (30) days after the appointment of the temporary Guardian he will not be physically able to attend the final hearing in Probate Court because he will be admitted at Tangram in Texas.

5. Your Petitioner understands he has employed the services of Steve Wukela, Jr. to represent him regarding his worker's compensation claim and Mr. Wukela has been representing

FILED
JUL 13
MARION COUNTY
PROBATE JUDGE

him since February 5, 2002 and Mr. Wukela has consented to the appointment of temporary guardian pursuant to §§ 62-5-309 and 62-5-310.

6. Both your petitioner Scottie Floyd and his attorney Steve Wukela, Jr. understand that pursuant to §62-5-309 it is not necessary to have a Guardian ad litem appointed for the purposes of the proceedings before the Probate Court, but that out of an abundance of caution your petitioner, Scottie Floyd, his attorney, Steve Wukela, Jr., and his mother, who is petitioning to be Guardian, all agree to the appointment of a Guardian ad litem for him for the purposes of this proceeding.

7. Your petitioner, Scottie Floyd, is informed and believes that John David Whisenhunt has been nominated to be appointed my Guardian ad litem for the purposes of this proceeding and that he is a member in good standing with the South Carolina Bar, and your petitioner requests that John David Whisenhunt be appointed Guardian ad litem for Scottie Floyd for the purposes of this proceeding.

8. Your petitioner, Scottie Floyd, waives all further notices involving this proceeding and any future hearings.

Scottie Floyd
SCOTTIE WAYNE FLOYD

Florence, SC
July 12, 2004

I agree to serve if appointed
Guardian ad litem

JOHN DAVID WHISENHUNT

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF MARION)

IN RE:)
)
SCOTTIE WAYNE FLOYD,) **VERIFICATION**
PETITIONER)
)

PERSONALLY APPEARED before me Scottie Wayne Floyd, who, after first being duly sworn, deposes and states that he has read the foregoing Petition; that he believes the allegations contained therein to be true to the best of his knowledge, except those matters and things stated on information and belief, and as to those matters and things he believes them to be true.

Scottie Floyd
SCOTTIE WAYNE FLOYD

SWORN to before me this 12th
day of July, 2004.

Donna Dority (L.S.)
Notary Public for S.C.
My Commission Expires: 4-30-13

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0123790

Betty Joe Floyd, Petitioner,	)	
IN THE MATTER OF:	)	
Scottie Wayne Floyd, Claimant,	)	
vs.	)	**ORDER OF APPOINTMENT OF GUARDIAN AD LITEM**
Ken Bakers' Used Cars, Employer,	)	
CompFirst, Carrier,	)	
Defendants.	)	

I have read and considered the foregoing Petition of Petitioner, Betty Joe Floyd, requesting that Betty Joe Floyd be appointed Guardian ad Litem on behalf of her son, Scottie Wayne Floyd, to represent his interests and find that she is the proper person to be appointed Guardian ad Litem in this regard.

IT IS THEREFORE ORDERED by and with the consent of Betty Joe Floyd, that Betty Joe Floyd be, and she is hereby, appointed Guardian ad Litem to represent the interests of Scottie Wayne Floyd.

COMMISSIONER
SC WORKERS' COMPENSATION COMMISSION

Columbia, South Carolina
4.24, 2002

E.H.
S.W.

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.
This 25 day of April, 2002.
By Michael D. Fellers
Administrative Assistant to the Commissioner

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0123790

Betty Joe Floyd,
Petitioner,

IN THE MATTER OF:

Scottie Wayne Floyd, Claimant,

vs.

Ken Bakers' Used Cars, Employer,

CompFirst, Carrier,

Defendants.

PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM

The Petitioner, Betty Joe Floyd, hereby petitions the Commission for the appointment of a Guardian ad Litem on behalf of Scottie Wayne Floyd, Social Security No. , as follows:

1. That Petitioner and Scottie Wayne Floyd are both citizens and residents of the County of Marion, State of South Carolina.

2. That Petitioner alleges that Scottie Wayne Floyd is the son of Betty Joe Floyd, and it is necessary that a Guardian ad Litem be appointed to represent Scottie Wayne Floyd's interests in this regard.

3. That Petitioner is the mother of Scottie Wayne Floyd, and alleges she is the proper person to serve as Guardian ad Litem on Scottie Wayne Floyd's behalf.

WHEREFORE, Petitioner prays that she be appointed Guardian ad Litem to represent Scottie Wayne Floyd's interests.

Betty Joe Floyd
BETTY JOE FLOYD

Florence, South Carolina
3-20-, 2002.

Witnesses:
Jan P. Bailey
Kathleen Sue Cox

SCWCC
MAR 25 2002
JUDICIAL

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0123790

Betty Joe Floyd, Petitioner,	)	
IN THE MATTER OF:	)	
Scottie WayneFloyd, Claimant,	)	
vs.	)	**PROBATE**
Ken Bakers' Used Cars, Employer,	)	
CompFirst, Carrier,	)	
Defendants.	)	

Personally appeared before me, Jean P. Bailey, and made oath that she saw the within named Petitioner sign, seal, and as her act and deed, deliver the within Petition For Appointment of a Guardian Ad Litem and that she with Kathleen Sue Cox witnessed the execution thereof.

Jean P Bailey

Sworn to before me this 20th day of March, 2002.

Kathleen Sue Cox
Notary Public for and in South Carolina.
My Commission Expires: 06-15-09

SCWCC
MAR 25 2002
JUDICIAL

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675

WCC File #: **0123790 /0824046**
Carrier File #:
Carrier Code #:
Employer FEIN #: **57-0858095**

Claimant's Name: Betty Joe Floyd as Personal Representative of Estate of Scottie Wayne Floyd, and as dependent mother beneficiary of Scottie Wayne Floyd, deceased

Address:

City: Marion State: SC Zip: 29571

Home Phone: (843) Work Phone: ( )

Preparer's Name: Steve Wukela, Jr.

Employer's Name: Ken Baker Used Cars

Address: 2066 N. Hwy. 501 By-Pass

City: Marion State: SC Zip: 29571

Carrier: **0123790** – Legion Insurance Co. c/o SC Insurance Guaranty Assoc.
0824046 - Legion Insurance Co. c/o SC Insurance Guaranty Assoc. AND Amguard Insurance Company

Preparer's Phone #: (843) 669 -5634

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 09/13/01, 04/09/04, & 09/05/08

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

(SEE ATTACHED PAGES 2, 3, & 4)

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to

Name

Mark D. Cauthen, Esquire, McKay, Cauthen, Settana & Stubley, PA, PO Box 7217, Columbia, SC 29202
Edwin P. Martin,Jr., Esquire, Hedrick, Gardner, Kincheloe & Garofalo, LLP, PO Box 11267, Columbia, SC 29221

Address

on the 12TH day of March, 2010 by ☐ first class mail ☐ personal service ☒ certified mail.

Preparer's Signature **STEVE WUKELA, JR.** Attorney for Claimant Title 12 Mar 10 Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

1. Did the Single Commissioner err in failing to find that Scottie Floyd sustained a death by accident on September 5, 2008 which arose out of and in the course of his employment with Ken Baker's Used Cars?

2. Did the Single Commissioner err in failing to find that pursuant to § 42-9-140(C) that the remainder of benefits due to Scottie Floyd must be paid to his mother, Betty Joe Floyd, irrespective of her age or dependency?

3. Did the Single Commissioner err in failing to find that at the time of Scottie Floyd's death on September 5, 2008 he had at least a 20% loss of use of his back?

4. Did the Single Commissioner err in failing to find at the time of Scottie Floyd's death on September 5, 2008 he had at least a 65% loss of use of the brain? (Healy Dep., 08/25/09, p. 18)

5. Did the Single Commissioner err in failing to find that the subsequent injury and death sustained by Scottie Floyd on September 5, 2008 was aggravated by his pre-existing condition; namely, permanent brain injury, pursuant to § 42-9-35?

6. Did the Single Commissioner err in failing to find that Scottie Floyd's death on September 5, 2008 was the result of failure to take his anti-seizure medications for approximately one week?

7. Did the Single Commissioner err in failing to find that Scottie Floyd's death was the result of unsupervised withdrawal of his medications resulting in seizures and his accidental death on September 5, 2009 arose out of and in the course of his employment with Ken Baker's Used Cars?

8. Did the Single Commissioner err in failing to find that on or about April 9, 2004 Scottie Floyd sustained an injury by accident arising out of and in the course of his employment when he suffered a seizure that resulted in injuries to his thoracic spine?

9. Did the Single Commissioner err in failing to find that Betty Joe Floyd, Scottie Floyd's mother, was a statutory dependent of Scottie Floyd and sole beneficiary to his worker's compensation benefits due him pursuant to § 42-9-290 for the loss of use of his back and the loss of use of his brain pursuant to § 42-9-140 and § 42-9-280?

10. Did the Single Commissioner err in failing to find that pursuant to § 42-9-30 Scottie Floyd's mother was entitled to at least 20% of 300 weeks for Scottie Floyd's loss of use of his back at the time of his death?

11. Did the Single Commissioner err in failing to award Scottie Floyd's mother 85% of loss of brain which entitled her to 85% of the balance of his life expectancy of 2681.64 weeks pursuant to § 42-9-30, § 42-9-10, and Reg. 67-1101(C)?

12. Did the Single Commissioner err in failing to find that Scottie Floyd sustained an additional injury and death arising out of and in the course of his employment with Ken Baker Used Cars on September 5, 2008?

13. Did the Single Commissioner err in failing to find that Scottie Floyd died four years after the April 9,2004 accident involving injuries to his spine arising out of and in the course of his employment and that his dependent mother is entitled to the balance of benefits due him pursuant to § 42-9-290?

14. Did the Single Commissioner err in failing to find that Scottie Floyd's mother, Betty Joe Floyd, was not a dependent of Scottie Floyd at the time of his death by accident on September 5, 2008 arising out of and in the course of his employment?

15. Did the Single Commissioner err in failing to find that at the time of his death on September 5, 2008 Scottie Floyd's mother was dependent upon Scottie Floyd for support because of her own disability and she was unable to support herself?

16. Did the Single Commissioner err in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0824046 asserting that on September 5, 2008 "Claimant was receiving medical care and treatment for a brain injury (WCC #0123790) when he suffered convulsions while alone because of the affects of medication or the unsupervised withdrawal of medication resulting in accident seizures and his accidental death." This claim was brought by the dependent mother for benefits pursuant to § 42-9-290 -*Amount of compensation for death of employee due to accident?*

17. Did the Single Commissioner err in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0123790 asserting that on September 13, 2001 "Claimant was receiving disability benefits pursuant to the Order of the Commission. He 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 pursuant to § 42-9-10 and § 42-9-30(20) and R.67-1102 'Brain' and § 42-9-30(19) (back) when he died from causes other than the injury." This claim was brought by the dependent mother for benefits pursuant to § 42-9-280 – *Payment of unpaid balance of compensation when employee dies?*

18. Did the Single Commissioner err in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 50 on WCC #0123790 asserting that on September 13, 2001 "Claimant has died with a total or partial loss of use of the brain under § 42-9-30(20) and R.67-1102 'Brain' as modified by § 42-9-10 (paragraph 3) 2681.64 weeks (51.57 X 52) AND Claimant has died with total or partial loss of use of the back under § 42-9-30(19); THEREFORE Claimant is entitled to a permanent award for loss of use of the brain and back pursuant to § 42-9-30." This claim was brought by the dependent mother for benefits pursuant to § 42-9-30 in that the Claimant is entitled to an award of permanency for loss of use of the brain as an organ and loss of use of the back?

19. Did the Single Commissioner err in finding that because Scottie Floyd died more than six years after his original accidental injury of September 13, 2001, his mother was not entitled to benefits for injuries sustained in his April 9, 2004 accident or his September 5, 2008 accident which arose out of and in the course of his employment?

Carolina Workers' Compensation Commission
P. Box 1715 • 1333 Main Street, Su. 500
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0824046
C. er File #
Carrier Code #
Employer FEIN

Scottie Floyd
Claimant's Name SSN

Address City Zip

Home Phone Work Phone

Ken Bakers Used Cars, LLC
Employer's Name

2066 N. Highway 501 By-Pass, Marion, SC 29571
Address City State Zip

AmGuard Insurance Company
Insurance Carrier

Edwin P. Martin, Jr. (803) 727-1200
Preparer's Name Phone #

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim due to the death of Scottie Floyd, respectfully shows:
Employee's Name

1. It is **denied** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are:
The claimant did not sustain injury by accident on 9/5/08 while working for Ken Baker Used Cars. The claimant has not worked since 2001, and AmGuard did not provided coverage for Ken Baker Used Cars at that time..
2. It is **denied** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
See No. 1.
3. It is **denied** that the relationship of employer and employee existed at the time in question. The reasons for denial are:
See Nos. 1-2.
4. It is **denied** that at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
See Nos. 1-3.
5. It is **denied** that notice of injury was given the employer. The reasons for denial are:
See Nos. 1-4.
6. It is **denied** that the employee was entitled to medical care as a result of injury. The reasons for denial are:
See Nos. 1-5.
7. It is **(denied)** that the employee lost compensable time from work and wages for the period(s) of:
See Nos. 1-6.
8. It is **(denied)** that the employee's death resulted proximately from accidental injury arising out of and in the course of employment on **09/05/08**. The reasons for denial are: See Nos. 1-7.
9. It is contended that an average weekly wage of $ c/r of $250.24 applics, according to attached accounting of employee's earnings as provided by law.
10. Further contentions or grounds of defense are: All applicable

I certify that I have served this document pursuant to R.67-212 by delivering a copy to See attached Certificate of Service
Name

Address

on the 11th day of June, 2009 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Preparer's Signature Attorney for the Employer/Carrier Title June 11, 2009 Date

Refer to R.67-205 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

h Carolina Workers' Compensation Comm_ion
12 Marion St.
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5675

WCC File #: 0123790
Carrier File #:
Carrier Code #: 1408
Employer FEIN #: 57-0858095

Claimant's Name: Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased SSN:

Address:

City: State: Zip:

Home Phone: ( ) Work Phone: ( )

Employer's Name: Ken Baker Used Cars and Body Shop

Address: 2066 N. Hwy 501 Bypass

City: Marion State: SC Zip: 29571

Insurance Carrier: Legion Ins. Co. in liquidation/SCPCIGA

Preparer's Name: Mark D. Cauthen, Esquire Law Firm: McKay, Cauthen, Settana & Stubley, PA Preparer's Phone #: (803) 256 - 4645

Complete each information blank. Specify clearly when contentions are admitted in part or denied in part. The employer-insurance carrier in answer to the claim due to the death of Scottie Floyd respectfully shows:

1. It is ☒ admitted in part ☐ denied that the employee sustained an injury on or about the date set forth in the application. It is admitted that the employee sustained injuries to his brain and back on or about 9/13/01; however, it is denied that the employee's mother/personal representative is entitled to benefits. See No. 10.

2. It is ☒ admitted ☐ denied that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:

3. It is ☒ admitted ☐ denied that the relationship of employer and employee existed at the time in question. The reasons for denial are:

4. It is ☒ admitted ☐ denied that at the time in question the employee was performing services arising out of and in the course of employment, on 9/13/01.

5. It is ☒ admitted ☐ denied that notice of injury was given the employer as specified in the application.

6. It is ☒ admitted ☐ denied that the employee was entitled to medical care as a result of the injury. All related medical expenses have been paid by Defendants.

7. It is ☒ admitted ☐ denied that the employee lost compensable time from work and wages for period(s) of: All compensable lost time has been paid by Defendants.

8. It is ☒ admitted in part ☐ denied that the employee's death resulted proximately from accidental injury arising out of and in the course of employment on 9/5/2008 (m/d/yyyy). It is admitted that the employee died from a work-related cause; however, it is denied that employee's mother/personal representative is entitled to benefits. See No. 10:

9. It is contended that an average weekly wage of $ Prior Order applies, according to the attached accounting of employee's earnings, as provided by law.

10. Further contentions or grounds of defense are: Defendants assert all special and affirmative defenses allowed by the Act, including but not limited to the defenses available under §42-9-60; 42-15-40; 42-15-60; 42-15-80; 42-17-90; 42-1-130; 42-9-210, 42-9-280, 42-9-290, 42-9-140, 42-9-110, 42-9-120 and 38-31-10 et. seq. Employee died from complications of a seizure disorder relating to a physical brain injury that occurred 9/13/01. Because the death was work-related, entitlement to death benefits is controlled by §42-9-290. Defendants assert that deceased employee's mother/personal representative is barred from receiving benefits per 42-290 as employee's death occurred more than six years after the accident while disability continued. Defendants also deny that employee's mother/personal representative was dependent upon the employee at any relevant time. Defendants further raise the defense of abatement of benefits for a non-work related death.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to Steve Wukela, Esquire, PO 13057, Florence, SC 29505 and Edwin P. Martin, Esquire PO Box 11267, Columbia, SC 29211

on the 29th day of June, 2009, by ☒ first class mail ☐ personal service ☐ certified mail.

Preparer's Signature		Title	Date
		Attorneys for Ken Baker Used Cars and Body Shop and Legion Ins. Co. in Liquidation/SCPCIGA	June 29, 2009

WCC Form # 53
Rev. **9/90**

53

Employer's Answer to Request for Hearing, Death Case

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723

WCC File #: _____
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased

Address: _____

City: _____ State: _____ Zip: _____

Home Phone: ( ) - Work Phone: ( ) -

Employer's Name: Ken Baker Used Cars and Body Shop

Address: 2066 N. Hwy. 501 By-Pass

City: Marion State: SC Zip: 29571

Insurance Carrier: Legion Insurance Co., c/o SC Insurance Guaranty Assoc. **AND** Amguard Insurance Company

Preparer's Name: Steve Wukela, Jr. Law Firm: Wukela Law Firm Preparer's Phone #: (843) 669 - 5634

Complete each information blank. To request a hearing, check Box 12b., indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7 and 8 and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

The claimant is Betty Joe Floyd as Personal Representative of Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased

1. The employee sustained an accidental injury to the brain on **09/05/2008** in Marion County, State of South Carolina.
2. Both the employee and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the employee was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 09/08/2008 in the following manner:
   Notified employer's counsel
☐ 6. Due to injury, the employee received medical examination and treatment which remains unpaid by the employer.
☐ 7. Due to injury, the employee lost compensable time from work and wages for the periods of:
☐ 8. The employee died on 09/05/2008 as a result of the accidental injury, and death compensation is claimed.
9. At the time of the injury, the employee was paid weekly wages of $375.36. The claimant demands an accounting of days worked and wages earned as provided by law.
10. Further grounds of claim:
    Claimant was receiving medical care and treatment for a brain injury (WCC #0123790) when he suffered convulsions while alone because of the affects of medication or the unsupervised withdrawal of medication resulting in accidental seizures and his accidental death.
11. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
☐ 12a. **I am filing a claim. I am not requesting a hearing at this time.**
☒ 12b. **I am requesting a hearing. A $25 fee is required.**

Signature of Claimant/Representative STEVE WUKELA, JR.

May 30, 2009
Date

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

South Carolina Workers' Compensation Commission
1612 Marion St.
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5675

WCC File #: 0824046
Carrier File #:
Carrier Code #: 1408
Employer FEIN #: 57-0858095

Claimant's Name: Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased SSN:

Address:

City: State: Zip:

Home Phone: ( ) Work Phone: ( ) -

Employer's Name: Ken Baker Used Cars and Body Shop

Address: 2066 N. Hwy 501 Bypass

City: Marion State: SC Zip: 29571

Insurance Carrier: Legion Ins. Co. in liquidation/SCPCIGA and AmGuard Ins. Co.

Preparer's Name: Mark D. Cauthen, Esquire Law Firm: McKay, Cauthen, Settana & Stubley, PA Preparer's Phone #: (803) 256 - 4645

Complete each information blank. Specify clearly when contentions are admitted in part or denied in part. The employer-insurance carrier in answer to the claim due to the death of Scottie Wayne Floyd respectfully shows:

1. It is ☐ admitted ☒ denied that the employee sustained an injury on or about the date set forth in the application. It is denied that claimant was employed or suffered an injury by accident on 9/5/08.

2. It is ☐ admitted ☒ denied that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
See No. 1.

3. It is ☐ admitted ☒ denied that the relationship of employer and employee existed at the time in question. The reasons for denial are:
See No. 1.

4. It is ☐ admitted ☒ denied that at the time in question the employee was performing services arising out of and in the course of employment.

5. It is ☐ admitted ☒ denied that notice of injury was given the employer as specified in the application.

6. It is ☐ admitted ☒ denied that the employee was entitled to medical care as a result of the injury, the "injury" listed being death.

7. It is ☐ admitted ☒ denied that the employee lost compensable time from work and wages for period(s) of:
See No. 1.

8. It is ☐ admitted ☒ denied that the employee's death resulted proximately from accidental injury arising out of and in the course of employment on 9/5/2008 (m/d/yyyy).

9. It is contended that an average weekly wage of $ Prior Order applies, according to the attached accounting of employee's earnings, as provided by law.

10. Further contentions or grounds of defense are: Defendants assert all special and affirmative defenses allowed by the Act, including but not limited to the defenses available under §42-9-60; 42-15-40; 42-15-60; 42-15-80; 42-17-90; 42-1-130; 42-9-160; 42-9-210; 42-9-290; 42-9-280; 42-9-140; 42-9-120, 42-9-110 and 38-31-10 et. seq. Defendants also raise the defense of abatement of further benefits.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to Steve Wukela, Esquire, PO 13057, Florence, SC 29505 and Edwin P. Martin, Esquire, PO Box 11367, Columbia, SC 29211.

on the 29th day of June, 2009, by ☒ first class mail ☐ personal service ☐ certified mail.

Mark D. Cauthen		Attorneys for Ken Baker Used Cars and Body Shop and Legion Ins. Co. in Liquidation/SCPCIGA		June 29, 2009
Preparer's Signature		Title		Date

South Carolina Workers' Compensation Co... ...ission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723

W... File #: **0123790**
Carrier File #:
Carrier Code #:
Employer FEIN #:

Claimant's Name: Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased

Address:

City: State: Zip:

Home Phone: ( ) - Work Phone: ( ) -

Employer's Name: Ken Baker Used Cars and Body Shop

Address: 2066 N. Hwy. 501 By-Pass

City: Marion State: SC Zip: 29571

Insurance Carrier: Legion Insurance Co.
c/o SC Insurance Guaranty Assoc.

Preparer's Name: Steve Wukela, Jr. Law Firm: Wukela Law Firm Preparer's Phone #: (843) 669 - 5634

Complete each information blank. To request a hearing, check Box 12b., indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7 and 8 and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

The claimant is Betty Joe Floyd as Personal Representative of Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased

1. The employee sustained an accidental injury to the brain and back on **09/13/2001** in Marion County, State of South Carolina.
2. Both the employee and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the employee was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 09/13/2001 in the following manner:
   Notified Cal Baker
- ☐ 6. Due to injury, the employee received medical examination and treatment which remains unpaid by the employer.
- ☐ 7. Due to injury, the employee lost compensable time from work and wages for the periods of:
- ☒ 8. The employee died on 09/05/2008 as a result of the accidental injury, and death compensation is claimed.
9. At the time of the injury, the employee was paid weekly wages of $375.36. The claimant demands an accounting of days worked and wages earned as provided by law.
10. Further grounds of claim:
    Claimant was receiving disability benefits pursuant to the Order of the Commission. He 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 pursuant to §42-9-10 and §42-9-30(30) and R67-1102 "Brain" and §42-9-30(19) when he died from causes other than the injury.
11. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 12a. **I am filing a claim. I am not requesting a hearing at this time.**
- ☒ 12b. **I am requesting a hearing. A $25 fee is required.**

Signature of Claimant/Representative STEVE WUKELA, JR.

May 30, 2009
Date

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

arolina Workers' Compensation Commission
. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0123790
Carri[illegible]File #
Carrier Code # 1408
Employer FEIN 57-0858095

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased
Claimant's Name SSN

Address City State Zip

Home Phone Work Phone

Ken Baker Used Cars and Body Shop
Employer's Name

2066 N. Hwy 501 Bypass, Marion, SC 29571
Address City State Zip

Legion Insurance Company in liquidation through SCPCIGA
Insurance Carrier

Mark D. Cauthen, Esquire (803) 256-4645
Preparer's Name Phone #

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is **admitted in part** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: It is admitted that the deceased employee sustained work-related injuries on 9/13/01; however, it is denied that decedent's personal representative is entitled to benefits from this claim. Claimant's remedy is limited to filing a Form 52 for death benefits under §42-9-290 or §42-9-280.
2. It is **admitted** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See No. 1.
3. It is **admitted** that the relationship of employer and employee existed at the time in question. The reasons for denial are: See No. 1.
4. It is **admitted** that at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: See No. 1.
5. It is **admitted** that notice of injury was given the employer. The reasons for denial are: See No. 1.
6. It is **denied** that the employee **(needs) (is entitled to additional)** medical care as a result of injury. The reasons for denial are: Not an issue per Form 50.
7. It is **denied** that the employee is entitled to temporary total disability for the period(s) of: Not an issue per Form 50.
8. It is **denied** that the employee is permanently disabled. The reasons for denial are: See No. 1 and 11.
9. It is **denied** that the employee has a serious disfigurement
10. It is contended that an average weekly wage of $ See Form 20. applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: All defenses available under §42-9-60; 42-15-20; 42-15-40; 42-15-60; 42-15-80; 42-17-90, 42-9-140, 42-9-210 and 38-31-10 et. seq. Code of Laws of South Carolina, 1976. Defendant/Carrier also reserve the right to amend this answer. Any and all defenses available to employer/carrier in workers' compensation cases, including but not limited to all affirmative defenses as set forth in Reg. 67.603. The Defendants also raise the defense of abatement of a non-work related death pursuant to 42-9-280, and death after six years while disability continued, as well as with no dependent, survivors, for a work-related death pursuant to 42-9-290, 42-9-110 and 42-9-120.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to Steve Wukela, Jr., Esquire, P.O. Box 13057 Florence, SC 29505 and Edwin P. Martin, Jr., Esquire, PO Box 11367, Columbia, SC 29211
Address

on the 29th day of June, 2009 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Mark D. Cauthen — Attorney for the Employer/Carrier — June 29, 2009
Preparer's Signature — Title — Date

Refer to R.67-205 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

South Carolina Workers' Compensation Commission
612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov

WCC File #: 0123790
Carrier File #:
Carrier Code #:
Employer FEIN #:

Claimant's Name: Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased.
SSN:
Address:
City: State: Zip:
Home Phone: Work Phone: ( ) -

Employer's Name: Ken Baker Used Cars and Body Shop
Address: 2066 N. Hwy. 501 By-Pass
City: Marion State: SC Zip: 29571
Insurance Carrier: Legion Insurance Co. c/o SC Insurance Guaranty Assn.

Preparer's Name: Steve Wukela, Jr. Law Firm: Wukela Law Firm Preparer's Phone #: (843) 669 - 5634

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds: **Date of Injury or Illness 09/13/2001**
☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to brain and back on 09/13/2001 (Month/Day/Year) in Marion County, State of South Carolina.
1b. Body part(s) affected are: brain and back

Briefly describe how the accident occurred. Claimant was removing parts from a Mercedes when a spring under tension broke loose and struck claimant in the face injuring his brain.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 09/13/2001 in the following manner:
Cal Baker was told

☐ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for:
☐ (b) additional medical examination and treatment for:

☐ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:

☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☐ (1) General Disability: ☐ Total ☐ Partial
☒ (2) Specific Disability: ☒ Total – brain and back injury ☒ Partial – brain and back injury
☐ (3) Wage Loss

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of $375.36, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
NONE

11a. Further grounds or unusual aspects of claim: Claimant has died with a total or partial loss of use of the brain under §42-9-30(30) and R67-1102 "Brain" as modified by §42-9-10 (paragraph 3) 2681.64 weeks (51.57 X 52) **AND** Claimant has died with total or partial loss of use of the back under §42-9-30(19); **THEREFORE** Claimant is entitled to a permanent award for loss of use of the brain and back pursuant to §42-9-30.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
See Attachment

11c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe:

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. **I am filing a claim. I am not requesting a hearing at this time.**
☒ 13b. **I am requesting a hearing. A $25 fee is required.**

14. Estimated time needed for hearing: 1 hour

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: STEVE WUKELA, JR. | Attorney for Claimant (Title) | steve@wukelalaw.com (Email) | May 30, 2009 (Date)

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC # 0123790
Carrier File #
Carrier Code # 1408
Employer FEIN 57-0858095

Scottie Floyd
Claimant's Name SSN

Address City State Zip

Home Phone Work Phone

Ken Baker Used Cars and Body Shop
Employer's Name

2066 N. Hwy 501 Bypass, Marion, SC 29571
Address City State Zip

Legion Insurance Company in liquidation through SCPCIGA
Insurance Carrier

Mark D. Cauthen, Esquire (803) 256-4645
Preparer's Name Phone #

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim, respectfully shows:

1: It is **(admitted in part)** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: It is admitted that the claimant sustained an injury at work on or about 9/13/01; however, it is denied that the claimant sustained injuries to the extent alleged in the Form 50 and denied that claimant sustained an injury to the spine.

2. It is **(admitted)** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:

3. It is **(admitted)** that the relationship of employer and employee existed at the time in question. The reasons for denial are:

4. It is **(admitted)** that at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:

5. It is **(admitted)** that notice of injury was given the employer. The reasons for denial are:

6. It is **(admitted)** that the employee **(needs) (is entitled to additional)** medical care as a result of injury. The reasons for denial are: Admit only that medical care is being provided.

7. It is **(admitted)** that the employee is entitled to temporary total disability for the period(s) of: Claimant is currently receiving temporarily total disability.

8. It is **(denied)** that the employee is permanently disabled. The reasons for denial are: The Employer/Carrier will require proof of permanent disability.

9. It is **(denied)** that the employee has a serious disfigurement

10. It is contended that an average weekly wage of $ See Form 20. applies, according to attached accounting of employee's earnings as provided by law.

11. Further contentions or grounds of defense are: All special and affirmative defenses allowed by the Act, including the defenses available under Sec. 42-9-60, 42-15-20, 42-15-40, 42-15-60, 42-15-80, 42-17-90, 42-90-210 and 38-31-10 et. seq.., Code of Laws of South Carolina1976. Defendant/Carrier also reserves the right to amend this Answer.
The Defendant/Carrier raises the defense enunciated in Cooper v. McDevitt & Street, regarding a material false statement made in a job application.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to Steve Wukela, Jr., Esquire, P.O. Box 13057
Name

Florence, SC 29505 and Janet Griggs, SC Workers' Compensation Commission P.O. Box 1715 Columbia, SC 29202
Address

on the 3rd day of February, 2006 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Mark D. Cauthen Attorney for the Employer/Carrier February 3, 2006
Preparer's Signature Title Date

Refer to R.67-205 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

South Carolina Workers' Compensation Commission

P.O. Box 1715 · 1612 Marion Street
Columbia, South Carolina 29202-1715

CC File # 0123790
Carrier File # 251-41-7003
Carrier Code #
Employer FEIN 57-0858095

Scottie Floyd
Claimant's Name SSN

Address City Zip

( ) ( )
Home Phone # Work Phone #

Ken Baker Used Cars and Body Shop
Employer's Name

2066 N Hwy 501 Bypass Marion, SC 29571
Address City State Zip

Legion Insurance Co./CompFirst
Insurance Carrier

Steve Wukela, Jr. (843) 669-5634
Preparer's Name Phone #

Complete each information blank. To request a hearing, check box 13 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

1 a. The claimant sustained an accidental injury to head, brain & spine (part of body hurt) on 09/13/01 (month day year) in Marion County, State of SC.

1 b. Describe briefly how the accident occurred Removing part off a Mercedes when the spring 12-18" long came loose & the spring loaded control arm hit claim in the face.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the employer on 09/13/01 (month day year) in the following manner: told Cal Baker

☒ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for
☒ (b) additional medical examination and treatment for Ongoing severe headaches, seizures, spinal injury.

☒ 7 Due to Injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: Request Order finding claimant totally & permanently disabled arising out of brain damage & subsequent spinal injury & entitled to lifetime benefits pursuant to 42-9-10 & life time medical.

☒ 8 Due to the Injury, the claimant has permanent disability of the following nature and extent: (check one)
☒ (1) General Disability: ☒ Total ☐ Partial
☒ (2) Specific Disability: ☒ Total ☐ Partial
Body part(s) affected are: Head, brain & spine

☐ 9 Due to the Injury, the claimant has a serious bodily disfigurement consisting of

10a. At the time of Injury, the claimant was paid weekly wages of $ 317.65; and demands accounting of days worked and wages earned as provided by law.

10 b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident.

11 a. Further grounds of claim: Request Order finding claimant totally & permanently disabled arising out of brain damage & subsequent spinal injury & entitled to lifetime benefits pursuant to 42-9-10 & life time medical.

11 b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. R. Joseph Healy, Carolina Hospital System

11 c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe:

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13 a. **I am filing a claim. I am not requesting a hearing at this time.**

☒ 13 b. **I am requesting a hearing.**

Signature of Claimant/Representative

6 Jan. 2006
Date

Refer to R.67-205. R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC Form # 50. Rev. Date 9/90

50 Employee's Notice of Claim and/or Request for Hearing.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WC File # 0123790
Carrier File #
Carrier Code # 1408
Employer FEIN 57-0858095

Scottie Floyd
Claimant's Name SSN

Address City State Zip

Home Phone Work Phone

Ken Baker Used Cars
Employer's Name

2066 N. Hwy 501 Bypass Marion SC 29571
Address City State Zip

COMPFIRST
Insurance Carrier

Edwin P. Martin, Jr., Esquire (803) 252-2232
Preparer's Name Phone #

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is **(admitted)** that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: The defendants admit an injury to the head but deny an injury to the brain.
2. It is **(admitted)** that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
3. It is **(admitted)** that the relationship of employer and employee existed at the time in question. The reasons for denial are:
4. It is **(admitted)** that at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
5. It is **(admitted)** that notice of injury was given the employer. The reasons for denial are:
6. It is **(admitted)** that the employee **(needs) (is entitled to additional)** medical care as a result of injury. The reasons for denial are: The claimant is being provided with medical care and has reached maximum medical improvement.
7. It is **(admitted)** that the employee is entitled to temporary total disability for the period(s) of: The claimant is currently receiving temporary total compensation
8. It is **(denied)** that the employee is permanently disabled. The reasons for denial are: Not verified by treating physician.
9. It is **(denied)** that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of $ 182.73 applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are:
defenses available under Sec. 42-9-60, 42-15-20, 42-15-40, 42-15-60, 42-15-80, 42-17-90, and 42-9-210, Code of Laws of South Carolina, 1976. Defendant/Carrier also reserves the right to amend this Answer. The Defendant/Carrier raises the defense enunciated in Cooper v. McDevitt & Street, regarding a material false statement made in a job application.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to Steve Wukela, Jr., Esquire
Name

P.O. Box 13057 403 2nd Loop Road Florence, SC 29505
Address

on the 08th day of May , 2003 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Edwin P. Martin, Jr., Esquire Attorney for Employer/Carrier May 8, 2003
Preparer's Signature Title Date

Refer to R.67-205 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

South Carolina Workers' Compensation Commission
P.O. Box 1715 · 1612 Marion Street
Columbia, South Carolina 29202-1715

CC File # 0123790
Carrier File # 251-41-7003
Carrier Code #
Employer FEIN 57-0858095

Scottie Floyd — Claimant's Name — SSN
Address — City — Zip
( ) — Home Phone #
( ) — Work Phone #

Ken Baker Used Cars and Body Shop — Employer's Name
2066 N. Hwy 501 Bypass Marion, SC 29571 — Address — City — State — Zip
Legion Insurance Co./CompFirst — Insurance Carrier

Steve Wukela, Jr. — Preparer's Name
(843) 669-5634 — Phone #

Complete each information blank. To request a hearing, check box 13 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

1 a. The claimant sustained an accidental injury to head and brain injury (part of body hurt) on 09/13/01 (month day year) in Marion County, State of SC.

1 b. Describe briefly how the accident occurred Removing part off a Mercedes when the spring 12-18" long came loose & the spring loaded control arm hit claim in the face.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the employer on 09/13/01 (month day year) in the following manner: told Cal Baker

☒ 6. Due to injury, the claimant is in need of (check one):
- ☐ (a) medical examination and treatment for
- ☒ (b) additional medical examination and treatment for Ongoing severe headaches and seizures

☒ 7 Due to Injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: lifetime benefits

☒ 8 Due to the Injury, the claimant has permanent disability of the following nature and extent: (check one)
☒ (1) General Disability: ☒ Total ☐ Partial
☒ (2) Specific Disability: ☒ Total ☐ Partial
Body part(s) affected are: brain

☐ 9 Due to the Injury, the claimant has a serious bodily disfigurement consisting of

10a. At the time of Injury, the claimant was paid weekly wages of $ 317.65; and demands accounting of days worked and wages earned as provided by law.

10 b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident.

11 a. Further grounds of claim: Claimant request lifetime medical and lifetime benefits, claimant is totally and permanently disable

11 b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. R. Joseph Healy, Carolina Hospital System

11 c. To the best of your knowledge, did you have any prior permanent disability? No
If yes, describe:

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13 a. **I am filing a claim. I am not requesting a hearing at this time.**

☒ 13 b. **I am requesting a hearing.**

Signature of Claimant/Representative

8 April, 2003
Date

Refer to R.67-205. R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC Form # 50. Rev. Date 9/90

50 **Employee's Notice of Claim and/or Request for Hearing.**

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

WCC FILE NO'S: 0123790 & 0824046

Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation /South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Defendants.	**BRIEF OF DEFENDANTS, KEN BAKER USED CARS AND LEGION INS. CO. IN LIQUIDATION/S. C. PROPERTY & CASUALTY INSURANCE GUARANTY ASSOC.**

STATEMENT OF THE CASE

The Claimant/Appellant, Scottie W. Floyd, suffered compensable injuries to his brain, head, nose and psyche, on September 13, 2001 while employed by Ken Baker Used Cars. At the time of the injury in 2001, Legion Insurance Company was the workers' compensation carrier for Defendant Employer. Legion was liquidated in 2003, at which point the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) became responsible for the claim through the Guaranty Association Act.

Scottie Floyd's compensable brain injury of September 13, 2001 affected his right frontal lobe, causing him to suffer from a seizure related disorder. (Comm. Bass Order, December 12, 2007, p. 9). He received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (Childs order, p. 4) The Claimant was required to take anticonvulsants to control his seizure disorder. In April of 2004, he was hospitalized due to suffering multiple seizures. The seizures also caused compression fractures to his thoracic spine and renal failure. The seizures which led to the compression fractures were caused by the Claimant's brain injury. As a result, the compression fractures were found to be a compensable part of the September 13, 2001 claim. (Bass Order, pp. 9-10). The Claimant received ongoing treatment for many years, including treatment at a supported living program in Texas from July 27, 2004 to June 1, 2006. He made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Joe Floyd. (Consent Order, June 27, 2006). At the time of the Order of Commissioner Bass dated December 12, 2007, the Claimant had still not reached maximum medical improvement and no award of disability was ever made. (Bass Order, December 12, 2007, Finding of Fact No. 6). The Appellant died on September 5, 2008, due to complications from his seizure disorder. (See Autopsy Report, p. 401). At the time of his death, he was on a running award of weekly temporary total disability benefits from the date of injury in September 2001 through the date of his death in September 2008.

Subsequent to the Claimant's death, his attorney filed several pleadings and hearing requests for recovery of additional benefits under multiple legal theories, including two separate Forms 52 as well as a new Form 50. He asserts that whether or not the Claimant's September 5, 2008 death was casually related to the original 2001 injury, the Claimant's mother and personal representative, Betty Joe Floyd, is entitled to the balance of a lifetime award for a physical brain

injury. The amount of the "lifetime" award being premised on a calculation of the Scottie Floyd's life expectancy pursuant to S.C. Code Ann. § 19-1-150.

Claimant's counsel also makes several alternative and contingent arguments as corollaries to that primary position at the hearing. If Claimant's mother is not entitled to the balance of a lifetime award (the hearing commissioner ruled she was not), then, he asserts that the September 5, 2008 death was a work-related death, but that the death was not precipitated by the original 2001 injury. The Claimant alleges that the September 5, 2008 death was a new date of injury, for which the responsible carrier would be liable to pay at least 500 weeks of benefits in association with a work-related death claim.

Lastly, Claimant's counsel also argues that Ms. Floyd would be entitled to a 500 week, or potentially more than 500 week award, by virtue of the compensable injury to the Claimant's spine and brain. He argues that the Claimant would have been entitled to an impairment rating of 50% or greater (under S.C. Code Ann. §42-9-30) to his back, as well as an impairment rating to the brain (S.C. Code of Regs. 67-1101) which would not be subject to any 500 week limitation pursuant to S.C. Code Ann. § 42-9-10 (C).

The Respondent Carrier, SCPCIGA, denied additional benefits were due to the deceased Claimant, or his personal representative, based on any of the theories advanced by the Claimant's counsel. The Respondent's position is that the September 5, 2008 death resulted proximately from the September 13, 2001 injury by accident, which resulted in trauma to the brain and a seizure disorder that ultimately killed him. Therefore, it is a work-related death as provided under §42-9-290. However, Mr. Floyd did not die within the mandatory time period (six years) as prescribed by §42-9-290. Thus, there is no entitlement to further benefits pursuant to §42-9-290, and as interpreted by Gunnells v. Raybestos-Manhattan, Inc, 198 S.E.2d 535 (1973) (noting

that if the death, proximately related to the original injury, does not occur within six years of the date of that injury and while total disability still persists, there is no right to additional benefits under the Act).

Secondly, even presuming for the sake of argument that compression fractures to the Scottie Floyd's spine in 2004, which resulted from his seizure disorder, were not causally related to the September 13, 2001 injury – Floyd died from complications related to his brain injury and seizure disorder associated with the September 13, 2001 injury. There is no evidence anywhere in the record that he died from spinal compression fractures. Moreover, the Claimant had previously filed a Form 50 in 2006 for his back injury/compression fractures citing September 13, 2001 as the date of accident. The Appellant should be judicially estopped from now changing that position to argue the relevant date of accident for the spinal injury was in 2004.

The SCPCIGA further asserts that Appellant's alternative theory of a non-work related death does not entitle his mother, Betty Joe Floyd to the balance of either a lifetime award for physical brain injury under §42-9-10, or a 500 week award under §42-9-30 (back injury) even if a non-work related death could be established. Defendants assert that Betty Joe Floyd was never a dependent of the Scottie Floyd, as required by §42-9-280, either presumptively (as a spouse or minor child §42-9-110) nor factually, as a person dependent on the Claimant for support during three months prior to the date of the accident. (§42-9-120).

Furthermore, there was no award made to Scottie Floyd under the Act covered by, "the second paragraph of §42-9-10," nor under "§42-9-30" as required in order for the award to survive under §42-9-280, (assuming a non-work-related death). The reason being, Mr. Floyd had not been found at MMI and had not received: (a) a 500 week award, (b) a lifetime award, nor (c) permanent partial disability under §42-9-30. Pursuant to the plain language of §42-9-280,

and interpretations of this statute by South Carolina Courts in the cases of Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436; 405 S.E.2d 393 (1991); Stone v. Roadway Express, 367 S.C. 575; 627 S.E.2d 695 (2006) and Floyd v. C.B. Askins, 382 S.C. 84; 675 S.E.2d 450 (Ct. App. 2009), the ongoing TTD benefits of the Claimant would have abated upon his death. Such benefits would have abated whether pursuant to a lifetime award or otherwise, unless: (a) Betty Joe Floyd was a dependent; **and** (b) an award had been made to Scottie Floyd pursuant to § 42-9-30 or the second paragraph of § 42-9-10, prior to his death.

The Claimant also argues that the September 5, 2008 death is a new date of injury for a claim separate and distinct from the September 13, 2001 accident. The Respondent SCPCIGA denies liability based on this precarious legal assertion on three primary grounds. First, the SCPCIGA did not provide any workers' compensation coverage for the Defendant employer in September of 2008. Therefore, SCPCIGA would not be the proper carrier.

Secondly, even if the death does not relate back to the 2001 accident (as found by the hearing Commissioner), there is no evidence in the record that the Claimant's death in September of 2008 occurred in the course and scope of his employment with the Defendant Employer. Third, as a matter of public policy – as argued below – an "updated date of accident" for remote injuries (though still otherwise compensable) does not make sense in the scheme of coverage for workers' compensation.

On March 1, 2010, Commissioner Lyndon issued an order finding that the Claimant's personal representative, Betty Joe Floyd, was barred from benefits under the Act pursuant to §42-9-290. Commissioner Lyndon also found there was no new date of injury subsequent to the Claimant's original injury of September 13, 2001. From that order, Betty Joe Floyd as personal representative of Scottie Floyd appeals to the Full Commission.

ARGUMENT

I. Work Related Death

A. Failure to Meet Requirements of §42-9-290

The hearing Commissioner found that the Claimant died on September 5, 2008 due to "complications of a seizure disorder" that resulted from the Claimant's compensable head/brain injury of September 13, 2001. However, because the Claimant's death did not occur within six years of the work-related accident as required by §42-9-290, the Commissioner ruled that Betty Joe Floyd was barred from receiving benefits under the Act. (Order of Hearing Commissioner, March 1, 2010, pp. 25, 26, 29) The hearing Commissioner's determination is clearly supported by substantial evidence in the record and applicable law. As a consequence of his work-related injury in 2001, Mr. Floyd suffered from a chronic seizure related disorder. About a year and a half after the original injury, Scottie Floyd had been placed on anticonvulsants to control the seizures he was experiencing as a result of his September 2001 head injury. (Depo. of Dr. Healy, March 25, 2003; See APA, p. 117). The report from the autopsy performed 9/6/08 described the cause of death as follows:

"It is the opinion of the prosectors that the decedent died as a result of complications of seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma". (APA, p.401)

In an unappealed prior Order of the Commission, the Claimant's seizures and resulting thoracic spinal injuries of 2004 have been found to relate to, and be caused by, the September 13, 2001 head injury. "In addition to the admitted injuries [to the brain, head, nose, and psyche] I find the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (Bass Order, December 12, 2007, Finding of Fact No. 5,

p. 9). There is no medical evidence in the record indicating that the Claimant suffered from convulsing seizures prior to his compensable September 13, 2001 injury. In addition, there is no evidence in the record that the Claimant died from any cause other than complications from his seizure disorder.

Claimant's counsel asserts, in part, that the cause of the Claimant's death was not from seizures, but rather from the Claimant's failure (whether inadvertent or intentional) to take his anti-seizure medication. This argument is immaterial and is effectively a 'distinction without a difference.' Arguing the Claimant died from failure to take his medication instead of his compensable seizure related condition, is akin to saying a person who dies from crashing into a telephone pole died from "failure to apply the brakes," and not the impact of the collision. Based on all the evidence in the record, to include the doctors' depositions, medical reports and autopsy of the Claimant, there is no meritorious argument that exists which indicates he died from anything other than complications related to his compensable medical conditions arising from the September 13, 2001 head injury.

As found by the hearing Commissioner, the Claimant's death unquestionably resulted from his original September 13, 2001 accident and resulting injuries to his brain. Therefore, the availability of further benefits in this claim must be determined pursuant to S.C. Code Ann. § 42-9-290 – work-related deaths. Unlike a non-work related death, as provided for in § 42-9-280, the survivors of the deceased Claimant need not be next-of-kin dependants. (§ 42-9-140 specifically provides for inheritability of awards, after work-related deaths, which are made in accordance with § 42-9-290). However, the Claimant's mother and personal representative, Betty Joe Floyd, is not entitled to further benefits under the Act, per the plain language of § 42-9-290. This statute states in pertinent part as follows:

> If death results proximately from an accident and within two years of the accident or **while total disability still continues and within six years after the accident,** the employer shall pay or cause to be paid. . .

S.C. Code Ann. § 42-9-290

Since the Claimant remained totally disabled until the time of his death, the death must have occurred within six years after the accident in order for the Appellant's mother to be entitled to further benefits under §42-9-290. However, Scottie Floyd's death occurred on September 5, 2008, almost seven years after his 2001 injury by accident. As a result, §42-9-290 operates as a statutory bar to further benefits for the Claimant's mother/personal representative.

This provision has been interpreted by our Supreme Court in Gunnells v. Raybestos-Manhattan, Inc., 261 S.C. 106; 198 S.E2d 535 (1973). In Gunnells, the Claimant contracted asbestosis in 1961 and was out of work and continuously disabled until his death in 1969. His widow sought death benefits. Construing the predecessor statute of §42-9-290, the Court held that:

> By the terms of the statute, the right to such benefits is expressly limited to cases in which 'death results proximately from an accident and within two years thereafter or while total disability still continues and within six years after the accident . . .'
> This is not a statute of limitations, as in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), on which the Circuit Court mistakenly relied. Instead, 'the right of recovery is conditioned upon' satisfaction of the requisites of the statute by which the right was conferred. McWilliams v. Southern Bleachery & Print Works, 216 S.C. 121, 125, 57 S.E.2d 26, 27 (1949); Burton v. Peter W. Blum and Son, 270 N.C. 695, 155 S.E.2d 71 (1967). **The requirement of death within six years of the accident not having been met, the right asserted never vested in the claimant.**

Gunnells at 110-1, 536 (emphasis added).

Just as in Gunnells, Scottie Floyd died while total disability persisted, but not within six years after the date of the work-related accident which proximately caused his death. Therefore, no benefits have vested or would be due to Betty Joe Floyd. The Appellant argues that despite

the plain language of § 42-9-290, the Claimant's mother should not be barred from benefits because there was a second date of accident in April 2004 (compression fractures of his thoracic spine). However, the hearing Commissioner correctly found that the 2004 thoracic compression fractures did not constitute a "new" date of injury. The April 2004 spine injury related to the 2001 injury by accident, and Claimant's counsel should be estopped from arguing otherwise by the doctrine of judicial estoppel as well as *res judicata*. (Addressed below in argument section I. B. "Date(s) of Accident"). However, even if we assume for the sake of argument that there was a new date of accident in 2004, the claim would still not be compensable under the express requirements of § 42-9-290. The 2004 injury was to the Claimant's thoracic spine. There is no evidence anywhere in the record that the Claimant's death was proximately caused by compression fractures of his spine – he died of a seizure related disorder proximately caused by his head injury in 2001. Under either factual scenario, the Claimant's mother/personal representative is not entitled to benefits under the Act for a work-related death.

B. Date(s) of Accident

The Claimant alleges three different dates of accident occurred: (1) The original injury by accident on September 13, 2001; (2) The date of the Claimant's thoracic compression fractures, which resulted from his seizure related disorder, on or about April 10, 2004; and (3) The date of the Claimant's death, due to a fatal seizure on September 5, 2008.

The primary reason Claimant's counsel argues the compression fractures of April 10, 2004 represent a new date of accident is because he realizes that a September 13, 2001 date of injury would clearly bar his client from further benefits under the Act – per §42-9-290 as outlined above. However, Commissioner Lyndon correctly determined that the doctrines of

judicial estoppel and law of the case bar the Claimant from now asserting that the 2004 thoracic spine injury constitutes a "new" date of accident. (Order, p. 28)

South Carolina officially recognized the validity of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. 327 S.C. at 251, 489 S.E.2d at 477. Essentially, stated:

> [a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.
>
> Hayne at 252, 477.

In this case, Scottie Floyd previously alleged that the 2004 spinal injury resulted from seizures due to the 2001 brain injury. (See Form 50 of Steve Wukela for the Claimant, filed January 6, 2006, listing the date of injury as "9/13/2001"). Obviously that was the most beneficial position for the Claimant to take at the time, especially in the light of the fact that SCPCIGA did not have liability for workers' compensation coverage in 2004 for the Defendant Employer. Of note, the Claimant never even asserted a claim for the resulting 2004 spinal injuries against the workers' compensation insurance carrier that covered the Defendant Employer in 2004.

Clearly, the SCPCIGA could have raised as an affirmative defense in the prior hearing in 2007 (determining compensability of the 2004 spinal injuries) the fact that SCPCIGA did not provide coverage for Ken Baker Used Cars in 2004. That is, had the Claimant asserted a "new" 2004 date of injury theory at that time. The SCPCIGA as a defendant carrier is materially prejudiced by the Appellant's 'updated' assertion of a 2004 date of injury at this point in the litigation. The Appellant's current position, that 2004 was a new and separate date of accident

from the Sept. 13, 2001 accident, is diametrically opposed to the prior factual position of the claimant in previous proceedings during this same litigation. Therefore, the Appellant should be judicially estopped from now asserting a contradictory position concerning the date of accident for the spinal compression injury.

The Claimant should also be estopped from asserting a 'new' date of accident in association with the 2004 compression fractures on the ground of *res judicata* or under the doctrine of law of the case. The compensability of 2004 spinal injuries as proximately related to the 2001 date of accident, is the un-appealed law of the case at this point in the litigation. The Claimant not only asserted in his January 6, 2006 Form 50 that the spinal compression fractures of 2004 were casually related to the September 2001 brain injury, but actually prevailed on that point. "In addition to the admitted injuries [the head, brain, nose and psyche], I find that the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (See Bass Order of December 12, 2007, Finding of Fact No. 5, pg. 9-10). In making this finding, Commissioner Bass was relying on the uncontroverted deposition testimony of Dr. Evans, Dr. Chokshi, and Dr. Healy. This order was not appealed by any party.

Claimant's counsel also argues that Scottie Floyd's death due to his fatal seizure on September 5, 2008 constitutes a third injury by accident. The Respondent SCPCIGA did not provide workers' compensation coverage for the defendant/employer in 2008 and therefore, could have no liability for an alleged injury by accident in 2008. Additionally, for the same reasons that Commissioner Bass found the Claimant's 2004 spinal fractures were from a seizure related disorder resulting from the 2001 accident, the Claimant's 2008 date of death should also be affirmed by the Appellate Panel as related to, and resulting from, the 2001 injury by accident.

The Claimant did not suffer from a seizure disorder prior to his 2001 brain injury. The Claimant's seizure disorder was conclusively deemed by a prior, unappealed, Commission Order to have been caused as a result of the Claimant's brain injury in 2001. (See Bass Order of December 12, 2007). All of the evidence in the record points to the fact that the Claimant's seizure related disorder, and complications associated therewith, actually caused his death. (See APA p. 401, the Autopsy of Scottie Floyd).

In an effort to bolster the theory that the Claimant's death on September 5, 2008 constitutes a new date of accident and a separate distinct injury, the Claimant's counsel cites the case of Shuler v. Gregory, 366 S.C. 435; 622 S.E.2d 569 (2007). The claimant, Shuler, was killed in an automobile accident after leaving a doctor's appointment for a workers' compensation related injury covered by the employer, Gregory Electric. The Court of Appeals deemed the traffic fatality to be within the Claimant's course and scope of employment and therefore compensable. The thrust of the Shuler opinion addressed whether or not Mrs. Shuler's traffic fatality after leaving the workers' compensation doctor's appointment would have been excluded from coverage under the "going and coming" rule. The Court of Appeals ultimately found that the traffic fatality was compensable. Nevertheless, the Shuler case is neither relevant, nor controlling, in the case at hand for a multitude of reasons.

First, Claimant's counsel offers this case to make the argument that September 5, 2008 was a separate and distinct date of accident. Conspicuously missing from the Shuler opinion is any reference whatsoever as to whether or not the Court, or the Commission, would need to find, or did find, an updated or new date of accident for the traffic fatality. That is, the case does not even reference, address or discuss the primary issue for which the Claimant presents it. The only

question answered in Shuler was compensability under the "going and coming" exclusion and the possibility of a 'deviation.'

Secondly, even if the Shuler Court were to have found the traffic fatality to be a separate new date of injury from Shuler's original claim, Mr. Floyd's death is clearly distinguishable from Shuler's traffic fatality. The claimant Shuler was suffering from one condition (an admitted injury to her hand), and then killed by a distinct and completely unassociated intervening force – the traffic accident itself. Mr. Floyd, on the other hand, died from complications associated with his seizure disorder from his 2001 brain injury. (APA p. 401). No distinct intervening accident took place in Scottie Floyd's death which could be reasonably argued to have broken the causal connection to Mr. Floyd's original injury in 2001.

Furthermore, as 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 improperly uninsured pursuant to the Act).

The hearing Commissioner was clearly correct in determining that the Claimant's death resulted proximately from his 2001 brain injury and that there was no subsequent injury by accident. The Claimant's attempt to argue additional/subsequent dates of accident is without merit, and legally untenable.

II. Non-Work Related Death

The medical evidence in this case clearly indicates that the Claimant's death on September 5, 2008 at his home was a result of the physical injury to his brain from the September 13, 2001 injury by accident. Nonetheless, counsel for the Claimant argues in the alternative that the Scottie Floyd died from "causes other than the injury" and that the Claimant's mother/personal representative should be entitled to benefits under §42-9-280. However, even if the Claimant died from causes other than the 2001 injury, which is clearly not the case, his personal representative would still not be entitled to benefits under §42-9-280.

S.C. Code Ann. §42-9-280 addresses non-work related deaths and the payment of the unpaid balance of compensation when an employee dies, in part:

> 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...

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

The Supreme Court of South Carolina has definitively addressed this statute in two different cases, as further explained below, Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436; 405 S.E.2d 393 (1991) and Stone v. Roadway Express, 367 S.C. 575; 627 S.E.2d 695 (2006). Both Covington and Stone independently upheld separate portions of the plain language of §42-9-280, which requires that, if a workers' compensation claimant dies from causes not related to the work injury itself then: (1) there must be a next of kin dependant in existence, *and* (2) the award of further benefits must have been made to the Claimant under either (a) the second paragraph of §42-9-10 or (b) a scheduled member injury under §42-9-30, in

order for the award to survive the death of the Claimant. Otherwise, the award abates and no further benefits are due.

If Scottie Floyd's death was not work-related, then Betty Joe Floyd is still not entitled to benefits under the Act. The reason being, Betty Joe Floyd is *neither* a next of kin dependent (as argued in Sec. II. B.) *nor* was there ever an award made to the Claimant pursuant to the second paragraph § 42-9-10 or § 42-9-30.

In Covington, the claimant suffered a compensable workers' compensation injury to her back. Prior to the final adjudication of Ms. Covington's workers' compensation claim, she died in a non-work related automobile accident. Covington had no next of kin dependent upon her for support. Ms. Covington's mother, Rosa Mae Montgomery, was substituted as the claimant in the workers' compensation case. Succinctly stated by the Covington Court, pursuant to the statutory requirement of § 42-9-280, "[h]ere, Montgomery, the mother, is not a next of kin dependent, nor is the injury work-related. This renders the claim non-compensable." Covington at 438, 394. Similarly, even if Scottie Floyd's death had been due to some non-work related cause, Betty Joe Floyd would still not be entitled to benefits under §42-9-280 because she was not dependent for support upon her son at the time of the 2001 injury (as correctly found by Commissioner Lyndon). In such situation, any benefits the Claimant's personal representative would have been entitled to under §42-9-280 (if the death had been non-work related) would abate pursuant to Covington.

In the case of Stone, the claimant, Walter R. Stone, suffered a compensable foot and back injury. Mr. Stone was ultimately found permanently totally disabled by a single Commissioner, in October of 1999 and awarded 500 weeks of benefits pursuant to § 42-9-10 (first paragraph). Subsequent to that ruling, Stone died of causes unrelated to his compensable work injuries, a

cancerous brain tumor, in December of 1999. Claimant Stone's surviving widow, was then substituted as the claimant and sought payment of the remaining benefits. Of note, Ms. Stone, as a surviving spouse, would have been deemed wholly dependent on the decedent, Walter Stone, by a conclusive statutory provision pursuant to S.C. Code Ann. § 42-9-110. Nonetheless, claimant Walter Stone's original 500 week award for benefits was made for a general disability pursuant to the *first* paragraph of § 42-9-10.

Despite the fact that Ms. Stone was the next of kin dependent of the deceased claimant, the Supreme Court still found that the award abated up Walter Stone's non-work related death and no further benefits were due. The reason for this finding is because Walter Stone's award of permanent benefits had been made pursuant to the first paragraph of § 42-9-10, (i.e. wage loss) and not the second paragraph, as expressly prescribed by § 42-9-280. The Stone Court reasoned as follows:

> The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of §42-9-10, should not.

Stone goes on to cite Larson's exhaustive treatise on workers' compensation:

> 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. []...[] Section 42-9-280 specifically provides for the inheritability of two types of awards only. We reverse the orders permitting respondent to receive unaccrued benefits. [Concluding that] Stone was awarded workers' compensation benefits pursuant to the first paragraph of § 42-9-10. Those benefits terminated upon his death from the tumor...
>
> Stone at 585-6, 700-1 (emphasis added)

The Claimant Scottie Floyd, was never found to have reached maximum medical improvement prior to his death on September 5, 2008. "I find the Claimant has not reached maximum medical improvement with respect to his spine injury..." (Bass Order, Dec. 12, 2007, Finding of Fact No. 6, p. 10). "With respect to the physical brain injury/and psych injury, **I find Claimant has not reached maximum medical improvement.**". (Bass Order, Dec. 12, 2007, Finding of Fact No. 8, p. 11) (emphasis added). This was an unappealed Order of the Commission. There was no pending Form 50 by the Claimant or Form 21 filed by the Carrier prior to the Claimant's death on September 8, 2008 requesting a determination of, or alleging, Scottie Floyd had attained MMI for **any** of his alleged injuries. Scottie Floyd was receiving an ongoing award of *temporary total disability* benefits under the Act at the time of his death. Thus, Scottie Floyd never received an award of permanent disability under § 42-9-30 nor under the second paragraph of § 42-9-10, as required by § 42-9-280.

Therefore, even assuming Betty Joe Floyd could satisfy the requirement of being a next of kin dependent of Scottie Floyd (see dependency arguments *infra*), the award would still abate, and any further benefits would cease pursuant to Covington, and or Stone as outline above.

A. Survivability of Benefits for Physical Brain Injury

Claimant's counsel makes several alternative arguments for Betty Joe Floyd's entitlement to further benefits for her son's unfortunate death, including the allegation that she is entitled to the balance of Mr. Floyd's lifetime benefits for a physical brain injury. Of significance in considering this argument, it is important to consider the fact that Scottie Floyd was never awarded lifetime benefits for permanent total disability due to a physical brain injury. In fact, the Claimant was never awarded permanent disability at all. Scottie Floyd had previously been found to have suffered a physical brain injury in this case, but had not reached MMI pursuant to

Commissioner Bass' 2007 order and was still receiving medical treatment and TTD benefits up to the date of his death.

Furthermore, even if Scottie Floyd had reached MMI for his compensable brain injury, and even if he had subsequently been awarded lifetime weekly benefits for the brain injury (which he had not) – such benefits would have been awarded pursuant to the *third* and fourth paragraphs of § 42-9-10. "(C) Notwithstanding the five-hundred-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...has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." § 42-9-10(C) (2007).

The determination of a deceased claimant's surviving representatives' entitlement to further benefits, for non-work related death under § 42-9-280, would be the same for a lifetime physical brain injury as it would have been for any other injury. The analysis would be analogous to Stone and Covington above. First, the survivor of the Claimant would have to show she was a next of kin dependent under the Act, as required by § 42-9-280. Commissioner Lyndon correctly found that Betty Joe Floyd was not a dependent under the Act. Second, the Claimant's surviving representative would have to show that the permanency award (none was ever made in this case) was pursuant to the *second paragraph* of § 42-9-10 or pursuant to § 42-9-30, (as required by §42-9-280 for non-work related deaths).

Even assuming a second hypothetical finding that Betty Joe Floyd was a dependent of her son, and assuming Scottie Floyd had been awarded lifetime indemnity benefits for his brain injury under § 42-9-10, this would still not satisfy the express dictates of § 42-9-280, because

such an award would have been made pursuant to third/fourth paragraphs, *not the second*, paragraph of § 42-9-10. Therefore, the award would abate, and no further benefits would be due.

The Court of Appeals of South Carolina has made this express determination in the case of Floyd v. C.B. Askins, 382 S.C. 84; 675 S.E.2d 450 (Ct. App. 2009). The claimant, Stanley D. Floyd (unrelated to the Claimant in this case) suffered a compensable physical brain injury during his employment with defendant employer, C.B. Askins. The parties to that case had previously stipulated that Stanley D. Floyd was permanently totally disabled pursuant to § 42-9-10 (no such finding, or stipulation, has been made in this case). After receiving 254 weeks of benefits, Stanley D. Floyd, died of conditions not related to his work injury (an abdominal aneurism). Stanley Floyd's wife, Harriet Floyd subsequently sought to obtain the balance of his lifetime benefits. **Dependency was not a question in that case**. Pursuant to § 42-9-110, Ms. Harriet Floyd would have been statutorily dependent on her deceased husband.

Of particular note, prior to the single Commissioner hearing in Stanley Floyd's claim regarding survivability of benefits, the workers' compensation Carrier for C.B. Askins, "acceded that Mrs. [Harriet] Floyd should receive the balance of five-hundred weeks of compensation." Floyd at 89, 452. No such concession has been made in the claim of Scottie Floyd by the Defendants. In denying the survivability of the balance of Stanley Floyd's lifetime compensation for a physical brain injury, the Court of Appeals used the exact same reasoning that was declared by the Supreme Court in Stone.

"In the present case, Claimant's injury was serious and catastrophic. However, his award was made pursuant to paragraph (C) of section 42-9-10. **Section 42-9-280 does not include awards made under paragraph (C) among those that survive a Claimant's death from an unrelated cause.**" Floyd at 89, 453 (emphasis added). The Court even went on to state that,

"[workers' compensation Claimants suffering catastrophic injuries like [Stanley Floyd's] may require specialized healthcare without the means to earn a wage. The award of compensation for a claimant's life expectancy seems to recognize this reality. If so, it is also logical benefits would terminate upon such a claimant's death from an unrelated cause." Floyd at 90, 453.

There is actually no basis anywhere in the Workers' Compensation Act for which the carrier for C.B. Askins was obligated to provide even the balance of the 500 week award upon the death of Stanley Floyd from unrelated causes. Clearly, pursuant to § 42-9-280, and the analysis in Stone and Covington, there would have been no entitlement to such. Nonetheless, the carrier in that claim previously agreed to pay the balance of the award to Stanley Floyd's widow, and therefore, the Court of Appeals had no need to analyze that issue:

> Based upon the precedent set forth in Stone and a plain reading of the relevant statutes, we find Mrs. Floyd is not entitled to the balance of her husband's lifetime benefits. Because the award of the balance of five-hundred weeks' compensation is not appealed, we affirm that finding as it is the law of the case.
>
> Floyd at 91, 454.

Similarly, no award can be made for any claim in this case under § 42-9-30, even if Scottie Floyd had died from non-work related causes. Betty Joe Floyd did not even meet the first requirement of § 42-9-280, in that she was not a dependent of her son in accordance with the Act. Secondly, no § 42-9-30 award was ever made to Scottie Floyd during his lifetime as he never attained MMI prior to his death. Moreover, a request for adjudication under § 42-9-30 was not even pending before the Commission at the time of his death on September 5, 2008.

This situation is synonymous to the example of Stone. In Stone the claimant suffered compensable back and leg injuries under the Act, but died without ever having a determination made as to permanent partial impairment, or permanent total impairment based on a § 42-9-30 scheduled member injury analysis (Stone having been awarded general disability under the first

paragraph of § 42-9-10). Counsel for the Claimant has pointed out that the brain is a scheduled body part under S.C. Code of Reg. 67-1101, per § 42-9-30, and that Mr. Floyd could have been entitled to an award for such a scheduled member injury. Nonetheless, no such award was *ever* made in this case. Only arbitrary conjecture is available to decide what, if any, degree of permanent impairment Scottie Floyd's back or brain would ultimately have had. The Defendants/Respondents obviously have limited ability to challenge any speculative posthumous ratings put forth by the Claimant, or any physician. The ability to obtain second opinions, FCE's, IME's, further diagnostics testing et cetera, is most obviously an impossibility after the Claimant's death.

Similarly, in Stone, where the claimant received a PTD award for a general disability resulting from his back and foot injuries, Mr. Stone *could* have likely been entitled to a scheduled member injury loss under § 42-9-30 to his back and/or leg. Regardless, the Supreme Court of this state found that claimant **Stone's award abated upon his non-work related death**. The fact that Scottie Floyd may have been entitled to an award under § 42-9-30 (had he lived) is of no consequence.

Therefore, despite multiple alternative theories of recovery by the Claimant, even if the death could be shown to be non-work related, no theory of recovery would entitle Betty Joe Floyd to further of benefits under the Act. The potentiality of an intentional injury or death, is no longer before the Commission for the reasons argued herein below at section II. C

B. Dependency

Among other findings, Commissioner Lyndon's Order of March 1, 2010 determined that Scottie Floyd's mother, Betty Joe Floyd was not a dependent under the Act. Defendants assert this finding is clearly supported by reliable, probative and substantial evidence in the record.

Scottie Floyd had no one who was wholly or partially dependent on him in association with this accident. This is based on the definition of dependency as provided for by the Act and corresponding case law, as well as the evidence and testimony provided at the hearing before Commissioner Lyndon on September 1, 2009, including the good faith dependency investigation performed by the SCPCIGA. (See Defendant SCPCIGA's Exhibit No. 1).

The appeal brief of Scottie Floyd makes reference to a Consent Order between the parties of June 1, 2006 and refers to Betty Joe Floyd as "Scottie's mother and sole dependent". (Appellant's brief at pp. 4-5). Nowhere does the Consent Order provide that Ms. Floyd was the "sole dependent" nor that she was dependent to any degree upon her son. To the contrary, Betty Joe Floyd was actually her son's guardian and it was Scottie Floyd who was dependent upon his mother, not the other way around.

The Workers' Compensation Act provides for only 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 purposes of receiving death benefits under the Workers' Compensation Act, 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 (S.C. 320 S.C. 213, 464 S.E.2d 109 (1995).

In the Appellant's brief, Claimant's counsel points out that §42-9-140(C) provides for payment of benefits regardless of age or dependency. While this is true, §42-9-140 does not

define or determine dependency, but only indicates that remaining benefits – if available – can be paid to non-dependents when the death is deemed **work-related** under §42-9-290. "Section 42-9-140, relating to an employee who dies without dependents, limits liability of the employer to those benefits enumerated in § 42-9-290, which addresses *work-related* injuries. Where the injury is work related, payment is made to certain designated survivors, irrespective of dependency." *Estate of Covington by Montgomery v. AT & T Nassau Metals Corp.*, 304 S.C. 436, 438, 405 S.E.2d 393, 394 (S.C.,1991). As found by Commissioner Lyndon, benefits for Betty Joe Floyd would already be barred in the first instance by the express language of §42-9-290, because the death was work related. Alternatively, if deemed a non-work related death, then a person attempting to receive additional benefits under the Act (if available) would have to show they were a dependent, as argued above.

There is no evidence in the record to indicate that Scottie Floyd was married or ever had any children. Betty Joe Floyd, as the Claimant's mother, would not fall into the statutorily presumptive class of dependents provided for in § 42-9-110, as found by Commissioner Lyndon. In order to establish dependency on the Claimant, Betty Joe Floyd could only do so under a factual determination pursuant to § 42-9-120. That statute provides as follows:

> **In all other cases questions of dependency**, in whole or in part, **shall be determined in accordance with the facts as the facts may be at the time of the accident**; but no allowance shall be made for any payment in lieu of board and lodging or services and **no compensation shall be allowed unless dependency existed for a period of three months or more prior to the accident.**
>
> S.C. Code Ann. 42-9-120 (emphasis added).

The record is devoid of any evidence that would indicate Betty Joe Floyd was wholly or partially dependent on the Claimant at the time of the accident in September of 2001 or the preceding three months. According to Betty Joe Floyd's own testimony during the hearing, the

Claimant lived by himself at the time of the accident in 2001 and actually came to live with her in about 2002 or 2003 due to the severity of his injuries. (Commissioner Lyndon Hearing Trans. p. 34, lines 7-18). During the relevant period of time in this case, three months prior to September 13, 2001, Betty Joe Floyd and the Claimant lived in separate residences and there is no evidence that Scottie Floyd provided any financial support or assistance to his mother.

Betty Joe Floyd did later leave her job to become a full time caregiver to her son once he moved in with her, **subsequent to the accident**, and she was paid approximately $400.00 per week by the Carrier for tending to her son. (Lyndon Hearing Trans. p. 49, lines 16 - p. 50 line 17). It is important to note that these monies, the $400.00 per week provided by the Carrier to Betty Joe Floyd, were effectively compensation for her job as a caregiver, not support payments from the Claimant. (See Consent Order of the parties dated June 1, 2006).

There is no evidence in the record that Betty Joe Floyd was ever dependent upon the Claimant during the relevant time period prior to September 13, 2001. Furthermore, there is no indication that Betty Joe Floyd was a dependent on the Claimant during the alternative dates of accident asserted by the Claimant's counsel in 2004 or 2008. Scottie Floyd was living with and dependent on Betty Joe Floyd, not the other way around. Ms. Floyd was able to work and earn a wage, and chose to do so by caring for her son. As Scottie Floyd was unable to care and provide for himself, the Carrier would have had to pay someone to care for Mr. Floyd after his 2001 injury – and his ultimate return to South Carolina post institutionalization. Therefore, the findings of the single Commissioner on this point should be affirmed.

C. Intentional Death or Suicide

The issue of suicide or intentional death is completely moot at this point, **and not before the Appellate Panel** on review. The reason this issue was addressed by Respondents previously,

was to argue that had the hearing Commissioner ruled the death a suicide, then under S.C. Code Ann. §42-9-60 and the interpretation thereto by the Court of Appeals in Thompson ex rel. Harvey v. Cisson Const. Co. 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2007) the Claimant would not be entitled to benefits under this theory either. Neither of the Defendants ever alleged that the Claimant committed suicide.

Most importantly on this point, Commissioner Lyndon specifically found "that the evidence in the record does not support a finding that Scottie Floyd committed Suicide or willfully ceased taking his medications with the intention of taking his own life." (Order of Commissioner Lyndon, Finding of Fact #12). This finding was not appealed by the Claimant and neither of the defendant carriers are contending that the death was a suicide. Therefore, this issue is not before the Appellate Panel. Despite this fact, Claimant's counsel goes on to belabor this argument involving suicide and intentional death in several pages of his appeal brief (See, for example, Brief of Appellant Scottie Floyd at pp. 7-13) Nonetheless, for the reasons stated in the hearing Commissioner's order at pp. 21-23, the Defendants deny that Ms. Floyd would be entitled to benefits even if the Claimant's death had been intentional. Again, however, it is not the position of the Respondents that Scottie Floyd's death was a suicide or intentional.

III. 500 Week Limitation

S.C. Code Ann. § 42-9-10(C) and (D) state in part that:

> (C) Notwithstanding the five hundred 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[,]...has suffered physical brain damage is not subject to the five hundred week limitation and shall receive the benefits for life.
>
> (D) Notwithstanding the provisions of Section 42-9-301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits.

If a Claimant is determined to be permanently totally disabled (PTD) by the Commission, and such permanent total disability is found to be predicated upon a work injury resulting in paraplegia, quadriplegia or a physical brain injury, the Claimant is entitled to weekly benefits for the entirety of his or her life – even if the Claimant lives beyond 500 weeks. Claimant's counsel asserts, in part, that the language in subsection (C) whereby it states "or elsewhere in this title," modifies any section in the Title in which the 500 week limitations applies. According to the Claimant/Appellant's theory of the case, included in that abrogation of the 500 week cap, would be § 42-9-290, covering work-related death, and § 42-9-280, covering non-work related deaths.

First and foremost, Scottie Floyd was on a running award of temporary weekly benefits at the time of his death – and had not been awarded lifetime PTD benefits (he had not yet been found to be at MMI by the Commission). It has never been ordered that Scottie Floyd, "shall receive benefits for life," pursuant to § 42-9-10(C). Further, this statute only applies to awards where a Claimant is deemed PTD. "The statute conditions the lifetime award of benefits upon a finding of total and permanent disability." Floyd 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009).

The condition of permanent total disability is significantly different from the condition of death. The legislature has expressly provided for death benefits in workers' compensation claims, whether the death stems either from work-related causes (§ 42-9-290) or non work-related causes (§ 42-9-280). Once the Claimant has died, his entitlement to "lifetime" benefits would also cease, and his entitlement to further benefits under the Act would be determined by the death statutes which explicitly provide for such. The pertinent question in connection with a claimant's death is whether or not the death was work-related. It is of no consequence at the

point of death whether the Claimant's speculative PTD might have been predicated on a brain injury. The differentiation between the two is illustrated by the follow hypothetical examples.

Two 30 year old Claimants, A and B are working side by side on a highway when run over and killed by a tractor trailer. Claimant A's head was crushed in the accident (clearly physically injuring his brain), Claimant B's head was unscathed but he died from internal bleeding. Under the legal reasoning of Appellant, claimant A's survivors would be entitled to "lifetime" weekly benefits for the balance of his life expectancy under § 19-1-150, while Claimant B's survivors would be entitled to 500 weeks of benefits pursuant to § 42-9-290. Defendants contend that in this example, both claimant's survivor's would be entitled to 500 weeks of benefits for a work-related death per §42-9-290 assuming all other requirements under the Act were met.

Conversely, consider if two 85 year old Claimant's, X and Y are working side by side on a balcony when it collapses. Both Claimants expire from the injuries. Claimant X's skull was severely fractured in the accident (physically injuring his brain), Claimant Y's head was unscathed but he died from internal bleeding. Under the arguments set forth by Appellant, Claimant X's survivors would be entitled only to "lifetime" weekly benefits for the balance of whatever his life expectancy is under § 19-1-150 (significantly less than 500 weeks), while Claimant Y's survivors would be entitled to 500 weeks of benefits pursuant to § 42-9-290. Again, no matter when claimants X and Y actually died, or how X and Y died (as long as it was work-related), the entitlement to benefits would actually be determined for both X's and Y's survivors under § 42-9-290, rather than the legal reasoning postulated by Claimant.

Lastly, the benefits provided for under §42-9-10(C) not only mention payment of benefits "for life" rather than for "death" (or even "the life expectancy of the Claimant,") but also come

with the explicit prohibition that such lifetime benefits cannot be paid in lump sum. (See § 42-9-10(D)). Despite the tragedy of Scottie Floyd's death, it would promote an absurd result at this time to attempt to award his benefits "for life," now that he has already passed away. The interpretation requested by Claimant's counsel, in conjunction with the unassailable and explicit language of §42-9-10 sub part (D) would mean Betty Joe Floyd would be receiving weekly benefits for the next 2600 plus weeks. A plain reading of the statutes in question clearly indicates that this was not the intent of the legislature - even had Scottie Floyd previously received a lifetime award under the third paragraph of § 42-9-10, which would nonetheless be subject to the qualifications of § 42-9-290 or § 42-9-280.

The Claimant/Appellant also argues that the amendments to S.C. Code Ann. 42-9-10(C), which took place after the promulgation of, 42-9-280 and 42-9-290, would mean that the 500 week limitations of these statutory sections are no longer in effect for brain injuries which occur after the date of the promulgation of 42-9-10(C). However, the opinion of the Court of Appeals in *Floyd*, supra, holds otherwise. The Court held that, "Based upon the precedent set forth in *Stone* and a plain reading of the relevant statutes, we find Mrs. Floyd is not entitled to the balance of her husband's lifetime benefits." *Floyd v. C.B. Askins & Co. Contractors*, 382 S.C. 84, 91, 675 S.E.2d 450, 454 (S.C.App., 2009). Of particular note; the claimant in *Floyd v. C.B. Askins*, also suffered from a physical brain injury, and had actually been awarded lifetime indemnity benefits under 42-9-10(C) (Supp. 2008)(The Claimant Floyd in the instance case never received such an award prior to his death). Nonetheless, under the clear statutory language of *Stone* and 42-9-280(Supp. 1985) the Court held that no further benefits were due, and the Court did not determine that the language of 42-9-10(C)(2008) in anyway superseded or invalidated the limitations of 42-9-280 (Supp. 1985).

CONCLUSION

For the forgoing reasons, the Respondents Ken Baker Used Cars and SCPCIGA request that the order of Commissioner Lyndon, be affirmed in full by the Appellate Panel.

Respectfully Submitted,

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June 1, 2010

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0824046

BETTY JOE FLOYD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTTIE WAYNE FLOYD AND AS DEPENDENT MOTHER BENEFICIARY OF SCOTTIE W. FLOYD, DECEASED, **Claimant,** **vs.** **KEN BAKERS USED CARS AND BODY SHOP,** **Employer,** **and** **LEGION INSURANCE CO. C/O SC INSURANCE GUARANTY ASSN.,** **Carrier,** **and** **AMGUARD INSURANCE COMPANY,** **Carrier.** **Defendants.**	**BRIEF OF KEN BAKER USED CARS AND BODY SHOP AND AMGUARD INSURANCE COMPANY TO THE FULL COMMISSION**

STATEMENT OF THE CASE

A hearing was held before Commissioner Bryan Lyndon on September 1, 2009. The deceased claimant, Scottie Floyd, sustained a compensable injury on September 13, 2001 to his brain, head, nose and psyche while employed at Ken Baker Used Cars. The claimant subsequently died on September 5, 2008 as a result of seizures resulting from his brain injury.

The deceased claimant's mother filed for a hearing on the September 13, 2001 claim as well as alleged a subsequent work injury occurring on September 5, 2008, the date of Mr.

Floyd's death. On March 1, 2010, Commissioner Lyndon issued an order finding that the claimant's personal representative, Betty Joe Floyd, was not entitled to any benefits under the South Carolina Workers' Compensation Act. Commissioner Lyndon further ordered that there was no new date of accident after September 13, 2001 or any other period while AmGuard was the carrier for Ken Baker Used Cars and that AmGuard Insurance has no liability and should be dismissed from the case. Ms. Floyd subsequently appealed the order of Commissioner Lyndon to the Full Commission.

ARGUMENTS

I.

The Hearing Commissioner was correct in finding that the claimant did not sustain a compensable injury by accident arising on September 5, 2008.

The Hearing Commissioner found that the deceased claimant developed a seizure disorder as a result of the September 13, 2001 work injury to the brain, and that the claimant was prescribed medication to control the seizure disorder. The Hearing Commissioner further found that Mr. Floyd died of complications from the seizure disorder and that the fatal seizures were a direct result of his original injury on September 13, 2001. Therefore, the Hearing Commissioner found that the deceased claimant did not sustain a new injury by accident on September 5, 2008.

In the appeal, the claimant contends that the deceased claimant sustained a compensable injury by accident which occurred on September 5, 2008, the day the deceased claimant died. They contend that the claimant's ceasing to take his anti-seizure medication for the brain injury rose to the level of an injury by accident arising out of and in the course of employment. Defendants Ken Baker Used Cars and AmGuard Insurance Company contend that the reliable, probative, and substantial evidence in the record fully supports the Hearing Commissioner's finding that the deceased claimant did not sustain a compensable injury by accident on September 5, 2008.

AmGuard was the Employer's workers' compensation insurance carrier when the Mr. Floyd suffered a seizure and died September 5, 2008. Mr. Floyd's theory of liability as concerns AmGuard is that Mr. Floyd sustained a "new" injury by accident on September 5, 2008, when he stopped taking his prescribed medications and suffered a seizure which resulted in his death.

The South Carolina Court of Appeals has found occasion to hold that when an employer authorizes an employee to seek medical attention for a prior work injury and the employee sustains additional injuries while fulfilling their obligation to submit to medical treatment, such additional injuries are causally related to the employment to be compensable. See Shuler v. Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (2005). Shuler involved an employee's fatal automobile accident while returning home from a medical visit. Id. In reaching its holding, the Shuler Court distinguished Ms. Shuler from the claimant in Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 175(1965)(holding that injuries sustained when claimant got in an accident in his own car on the way to a workers compensation hearing was not compensable). The Shuler court found that the "going and coming" rule did not act to bar recovery because Ms. Shuler's fatal injuries occurred while she was fulfilling her duty under workers' compensation law to submit to medical treatment for a previous compensable injury, and her injuries therefore arose out of and were sustained in the course of her employment. Id.

The holding in Shuler is not applicable in the instant case. First, unlike the claimant in Shuler, no employer-employee relationship existed between Mr. Floyd and Ken Baker at the time of Mr. Floyd's death. The deceased claimant last worked for the employer in 2001. Mr. Floyd never worked for Ken Baker Used Cars during the coverage period of AmGuard. Furthermore, unlike Mr. Floyd in Shuler, Mr. Floyd was not "fulfilling his obligations under workers' compensation" at the time of this death. To the contrary, Mr. Floyd's fatal seizure was precipitated by his *failure* to take his prescribed anti-seizure medication. It follows that Mr.

Floyd cannot be said to have been doing anything to further the interest of the employer or "fulfill his duty under workers' compensation" at the time of his death.

In citing to Shuler, the claimant seems to be arguing that Mr. Floyd was fulfilling his duty to submit to treatment at the time of his death, and thus was in the course and scope of his employment when he died from a seizure. Under this argument, the claimant would be in the course and scope of his employment every time he took his anti-seizure medication. This argument makes no sense and is illogical. Furthermore, the substantial evidence in the record establishes the claimant was not taking his seizure medication at the time of his death, and thus was not fulfilling any duty to submit to treatment, and thus would not have been within the course and scope of his employment at the time of his death.

Our Courts have found that the natural consequences flowing from a compensable injury, absent an intervening cause, are compensable. Mullinax v. Winn-Dixie Stores, Inc., 458 S.E.2d 76 (Ct. App. 1995). The death of Mr. Floyd was a natural consequence of the brain injury suffered as a result of the work injury and not a new accident. Mr. Floyd sustained a severe brain injury which eventually led to seizures. As a result of the seizures, Mr. Floyd was required to take anti-convulsive medications. The autopsy report and death certificate tells the whole story of this case. Mr. Floyd died from complications of a seizure disorder due to a cavitary lesion of the brain due to remote head trauma. His death was a natural consequence of a severe brain injury which occurred on September 13, 2001. Also, illustrative of this position is Commissioner Bass' order of December 12, 2007. In Finding of Fact Number 5, Commissioner Bass found that on April 9, 2004, Mr. Floyd suffered compression fracture injuries to his spine primarily due to seizure activity prompted by his brain injury. Importantly, Commissioner Bass did not find that Mr. Floyd sustained a separate or new injury by accident as a result of the April

10, 2004 seizure episode, but that the fractures were caused by seizures, which were related to the brain injury.

Furthermore, the medical evidence further establishes that the claimant's death was a natural consequence of his brain injury. Dr. Joanne McGee, a neuropsychologist at ResCare Premier, stated that the claimant's non-compliance with his medication would be due to problems with judgment and impulsivity. Dr. Sasha Federer, the claimant's treating psychologist, also testified in his deposition that the claimant had problems with compliance with his medication. Dr. Federer testified that the claimant's non-compliance was due to the work injury.

The April 9, 2004 and September 5, 2008 seizure episodes were virtually indistinguishable. On both occasions, Mr. Floyd stopped taking his anti-seizure medications, which led to seizures, which resulted in serious bodily damage in 2004, and to Mr. Floyd's death in 2008. Both of these instances were a natural consequence of the September 13, 2001 work injury to Mr. Floyd's brain, and neither event rises to the level of a new injury by accident.

Mr. Floyd knew he had to take anti-seizure medications so as to avoid seizures, and he failed to do so. As a result, he died of seizures which were caused by his brain injury. Whether or not Mr. Floyd intentionally stopped taking his anti-convulsant medication is immaterial to the ultimate issue of whether his fatal seizure was a direct result of his original injury, which has been clearly established. Because Mr. Floyd did not sustain an injury by accident occurring during the coverage of AmGuard, defendants Ken Baker Used Cars, LLC and AmGuard respectfully request that the order of the Hearing Commissioner be affirmed in total.

II.

The Hearing Commissioner was correct in finding that there was no substantial evidence to support a finding that the claimant committed suicide.

Section 42-9-60 provides that no compensation shall be payable if a death was caused by the willful intention of the claimant to kill himself. The burden of proving this defense is on the defendants. Neither defendant in this matter has alleged the suicide defense nor is there any substantial evidence in the record that the claimant committed suicide. If it was determined the claimant committed suicide, then no benefits would be payable to anyone.

The claimant contends that there is irrefutable evidence that the claimant's death was an accident resulting from his failure to take his medication. The claimant notes that Dr. Healy commented that Mr. Floyd was aware of the consequences that would result from failure to take the seizure medication. However, though Dr. Healy noted that he believed Mr. Floyd was aware of the various consequences of not taking the seizure medication as prescribed, Dr. Healy specifically stated, "I'm not sure he knew that it could kill him." (Dep. Dr. Healy, p. 22 – 23). Dr. Healy said he could only assume that Mr. Floyd knew how hazardous failure to take the medication could be because of the effects of the previous instance when Mr. Floyd stopped taking the medication. This is precisely the definition of "speculation." Dr. Healy stated that he could not specifically attest to whether or not Mr. Floyd was fully aware of the possibility that failure to take the seizure medication could, or would, cause death. Dr. Healy further testified that he did not have enough information to render an opinion within a reasonable degree of medical certainty as to whether or not the claimant's death was accidental.

Dr. Alexander Federer, Mr. Floyd's psychologist, also was unable to certainly attest to whether Mr. Floyd knew that stopping the medications could cause death. Dr. Federer stated in his deposition that Mr. Floyd knew that if he stopped taking the medication there was "a possibility that he may have a massive seizure." (Dep. Dr. Federer, p. 26). Dr. Federer said that

Mr. Floyd might stop taking the medication if he didn't feel that it was helping or if he felt despondent, but Dr. Federer could not say with certainly whether Mr. Floyd would consider not taking the medication as a means to kill himself. Dr. Federer offered the opinion that Mr. Floyd would have used a weapon to commit suicide should he have chosen to do so because Mr. Floyd had a particular fascination with weapons. (*Id.*, p. 27). Dr. Federer explained that he based this opinion on Mr. Floyd's description of numerous violent fantasies which always included some form of weapon. (*Id.*, pp. 27-28). Dr. Federer testified that he truly did not know if Mr. Floyd's discontinuing his medication would have been an attempt to commit suicide or just a rebellion against the use of medication.

Betty Jo Floyd testified that she monitored the medications of Mr. Floyd. She testified that Mr. Floyd did not stop taking his anti-seizure medications prior to Mr. Floyd's death. Ms. Floyd testified that she saw Mr. Floyd take the anti-seizure medications shortly before his death.

There is no conclusive evidence to show that Mr. Floyd had any intention of taking his life, or that he even had knowledge that death was a possible consequence of failure to take his medications. Every statement made on the subject has been put in terms of assumptions and speculations. Findings of fact made by the Commission must be based on reliable, substantial, and probative evidence, not mere speculation or supposition. The opinions offered on this issue are not enough for the Commission to make a finding that Mr. Floyd committed suicide in this case.

Moreover, defendants would assert the doctrine of res judicata bars the claimant from asserting that Mr. Floyd acted with conscious, willful intent to commit suicide in refusing to take his medications. In his unappealed order of December 12, 2007, Commissioner Bass expressly found that "[Mr. Floyd's] failure to take his medication as prescribed is a byproduct of [his] physical injury rather than a conscious decision on his part." (12/12/2007, p. 11) The

Commissioner's findings in this regard, being unappealed, are the law of the case and are not subject to claimant's challenge at this procedural juncture. Indeed, not only was the issue not subject to an appeal by the claimant, the referenced finding represented Commissioner Bass' agreement with the claimant's *own position* at the hearing giving rise to the Order.

In the alternative, should the evidence prove convincing that Mr. Floyd volitionally stopped taking his anti-seizure medication as a means of committing suicide, his actions were related and directly attributable to the initial injury and cannot be regarded as a "new" accident under the law. The evidence in the record shows that, as a result of the initial head injury, because of the location of the trauma, Mr. Floyd suffered from psychological and mood disorders. These disorders included emotional outrages, the lack of impulse control, and the inability to cope with his situation and his pain. These psychological disorders, which are directly attributable to the initial head injury, are the only factors that would have even arguably led to Mr. Floyd's attempt on his own life

Further, even if claimant can somehow convince the Commission that Mr. Floyd knowingly and willfully failed to take his medications, and did so knowing that failure to take his medications would cause serious massive seizures, the claim still fails, particularly as against AmGuard. A "suicide" sufficient to break the chain of causation within the meaning of the applicable case, statutory, and regulatory law, would require a finding that Mr. Floyd's death resulted from some mechanism <u>other than</u> his original injury. By way of example, had Mr. Floyd died from an intentional overdose of medications or self inflicted gunshot wound, then the causal connection to the original injury might arguably have been broken. That, however, is not the case here. Mr. Floyd's death was caused by a seizure, which was in turn caused by and flowed naturally from the original injury, a brain injury. Because Mr. Floyd's seizure disorder was unquestionably caused by the original injury; it simply defies rational thinking and dissolves

into circular logic to assert that a seizure would not "flow naturally" from the same injury that caused the seizure disorder. Because the evidence in the record does not establish a break in the chain of causation as relates to the original injury, defendants AmGuard and Ken Baker Auto Sales request that the Full Commission affirm the Hearing Commissioner's finding that there was no evidence in the record to support a finding that the claimant did not commit suicide.

CONCLUSION

The reliable, probative and substantial evidence in the record clearly supports the Hearing Commissioner's finding that the claimant did not sustain an injury by accident on September 5, 2008. The claimant was required to take medication for seizures related to his brain injury, and the claimant did not take his medications. The cause of the claimant's death was seizure disorder related to a brain injury, and thus his death was a natural consequence of the work injury which occurred on September 13, 2001.

Furthermore, the reliable, probative and substantial evidence in the record clearly does not support any finding the claimant sustained that the claimant committed suicide. Any finding regarding suicide would be pure speculation on behalf of the Commission. The reliable, probative and substantial evidence in the record clearly supports a finding that the claimant's fatal seizure was a direct result of the claimant's original injury on September 13, 2001 and there was no new injury by accident on September 5, 2008. The defendants Ken Baker Used Cars and AmGuard Insurance Company request that the Full Commission affirm the order of the Single Commissioner.

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Dated: May 19, 2010

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0123790 & 0824046

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, VS. Ken Baker Used Cars and Body Shop, Employer, And Legion Insurance Co. c/o SC Insurance Guaranty Assn., Carrier, And Amguard Insurance Company, Carrier, Defendants.	**BRIEF OF CLAIMANT/APPELLANT**

STATEMENT OF THE CASE

The deceased employee, Scottie Wayne Floyd, hereinafter referred to as "Scottie," 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 Scottie across the left forehead, nose, and cheek, breaking his nose and causing a closed head injury.

Scottie 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. Over the next four months, Dr. Stewart treated Scottie conservatively for a concussion. Scottie was nauseated for approximately two weeks after the accident. 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).

During that period of time, Scottie experienced severe headaches to the point wherein 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). Scottie was sent to Three Rivers Center for Behavioral Health for psychological evaluation. When he returned from Columbia, Scottie 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.

Scottie had severe headaches, photophobia, and uncontrolled emotional rages. Dr. Healy recommended he be referred to Tangram Rehabilitation Facility. The Employer/Carrier contested the referral to Tangram, which resulted in a hearing before Commissioner Childs on January 7, 2004 and an Order dated June 10, 2004, 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, 6/10/2004, p. 6)

* * *

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, 6/10/2004, p. 9)

* * *

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, 6/10/2004, p. 10)

On April 9, 2004, between the time of the hearing before Commissioner Childs on January 7, 2004 and the Order of June 10, 2004, Scottie was admitted to McLeod Regional Medical Center as a result of severe epileptic seizures. He sustained three (3) compression fractures and injury to his spine, which was a result of the brain injury and his noncompliance in not taking anti-seizure medications. The carrier denied that an injury to the spine arose out of and in the course of his employment. Finally on July 24, 2004, Scottie 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 later, Scottie 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. Depositions of Dr. Healy were taken on March 15, 2004 and again on April 24, 2006. 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, requiring the Employer/Carrier to provide continuing medical care for Scottie 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, Scottie '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 Scottie 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 Scottie, 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. Scottie was unable to control his rage during this entire period of time. After a period of time, Dr. Evans also refused to continue treating Scottie. Dr. Sasha Federer, a neuro-psychologist, undertook the continuing psychological treatment of Scottie in an attempt to socialize Scottie in hopes that he would not have to be re-institutionalized, and his condition was stabilized.

After Scottie returned to his mother's residence on June 1, 2006, a hearing was conducted before the Commission on February 16, 2007, 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 resulting in an injury to his spine. The employer took the position that Scottie was refusing medical treatment and "denied the claimant sustained an injury to the spine."

An unappealed Order dated December 12, 2007, among other things, determined that Scottie 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, 12/12/07, p. 9)

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)

Dr. Healy testified in his deposition of April 24, 206 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)

(Order, 12/12/07, pp. 10-11)

Scottie 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.

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 dead. On August 25, 2009, Dr. Healy, the neurologist, testified that Scottie'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 Scottie 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)

The matter was heard before the Single Commissioner on September 1, 2009, resulting in a Decision and Order dated March 1, 2010 basically denying all claims of the Claimant. A Form 30 was timely filed on March 12, 2010 by the Claimant.

ARGUMENTS

1. The Single Commissioner erred in failing to find that Scottie Floyd sustained a death by accident on September 5, 2008 which arose out of and in the course of his employment at Ken Baker's used Cars.

On February 1, 2008 the South Carolina Court of Appeals had determined that, among other things, pursuant to § 42-9-60, "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)

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)

The South Carolina Supreme Court granted certiorari on this decision on June 24, 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, 3/1/2010, p. 22)

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.

The Single Commissioner on page 23 in his Order found, "There is no reliable, substantial evidence in the record which would support a finding that the claimant committed suicide." The 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.

> 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 to p. 20, line 13)

* * *

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 advise 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 to p. 23, line 20)

* * *

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 to line 22)

Previously, an unappealed Order dated December 12, 2007, among other things, determined that Scottie 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, 12/12/07, p. 9)

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)

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)

(Order, 12/12/07, pp. 10-11)

Scottie 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.

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 dead. On August 25, 2009, Dr. Healy, the neurologist, testified that Scottie'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 Scottie 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.
>
> (Shuler v Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (2005 S.C. App.)

The Employer contends that it would have been impossible for Scottie to have sustained an injury by accident while in the employ of Ken Baker Used Cars on February 5, 2008 because Scottie 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)

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.

> As noted by the circuit court, a repetitive trauma injury such as carpal tunnel syndrome is compensable under workers' compensation law. Bass v. Isochem, 365 S.C. 454, 474, 617 S.E.2d 369, 380 (Ct. App. 2005). Furthermore, it is clear that a claimant must give notice of his injuries "when the employee becomes disabled and could discover with reasonable diligence his condition is compensable." Id. At 481, 617 S.E.2d at 383. (Emphasis added)

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.

2. The Single Commissioner erred in failing to find that pursuant to §42-9-140(C) that the remainder of benefits due to Scottie Floyd must be paid to his mother, Betty Joe Floyd, irrespective of her age or dependency.

The Single Commissioner determined that Betty Joe Floyd, Scottie's mother, must demonstrate that she was dependent upon the deceased employee in order to be entitled to benefits under the Act. The Single Commissioner 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)

Title 42-9-140 specifically provides for payment when a deceased employee leaves no dependant or partial dependent. Title 42-9-140(C) 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.

3. The Single Commissioner erred in failing to find that at the time of Scottie Floyd's death on September 5, 2008 he had at least a 20% loss of use of his back.

The Single Commissioner found that as a matter of law Scottie 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. 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)
>
> (Order, Comm. Bass, 12/12/07, p. 9)

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)

In his deposition of August 25, 2009, Dr. Healy, the authorized treating physician, testified that he had last seen Scottie 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) He testified at that time that Scottie'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.
>
> (Dep. Dr. Healy, 08/25/09, p. 14, line 17 – p. 15, line 1)

The Single Commissioner, notwithstanding the fact that there is no medical testimony to contradict Scottie's permanent impairment of at least 15% to the whole person, failed to make a finding of permanency and award benefits pursuant to § 42-9-30 (19), effective March 28, 1988, or § 42-9-30(21), effective July 1, 2007.

4. The Single Commissioner erred in failing to find at the time of Scottie Floyd's death on September 5, 2008 he had a least an 85% loss of use of the brain. (Healy Dep., 08/25/09, p. 18)

The brain as an organ is rated pursuant to § 42-9-30(20) (effective 3/28/1988) and § 42-9-30(22) (effective 7/1/2007) and by Regulation 67-1101 "Brain" (effective 04/24/92). Dr. Healy,

the authorized treating physician, testified in his deposition of August 25, 2009 that Scottie 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)

Scottie 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 Scottie 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 § 42-9-30(20). Scottie was entitled to an award for the loss of use of that organ. Whether that loss of use is based on R67-1101 "Brain" 25-250 weeks or whether it is based on §42-9-10(C) 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.

5. The Single Commissioner erred in failing to find that the subsequent injury and death sustained by Scottie Floyd on September 5, 2008 was aggravated by his pre-existing condition; namely, permanent brain injury, pursuant to § 42-9-35.

This exception is not abandoned but is argued below.

6. The Single Commissioner erred in failing to find that Scottie Floyd's death on September 5, 2008 was the result of failure to take his anti-seizure medications for approximately one week.

The undisputed medical testimony is relying on the toxicology report is that Scottie had not taken his prescribed anti-seizure medications for at least a week prior to his death as a result of seizures. The autopsy is clear that Scottie died as a result of seizures. The toxicology report is clear that Scottie had no residual anti-seizure medication in his system at the time he died.

The authorized treating physician opined that Scottie'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.

Scottie 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. Scottie's death was not the natural consequence of his brain injury. It was the natural consequence of him failing to take his medications.

This conclusion is not based on speculation or surmise. It is based on historical facts that Scottie 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 Scottie would have had these seizures if he had been on medication. There is no testimony, medical or otherwise, to support that conclusion.

7. The Single Commissioner erred in failing to find that Scottie Floyd's death was the result of unsupervised withdrawal of his medications resulting in seizures and his accidental death on September 5, 2009 arose out of and in the course of his employment with Ken Baker's Used Cars.

This exception is not abandoned but is argued above.

8. The Single Commissioner erred in failing to find that on or about April 9, 2004 Scottie Floyd sustained an injury by accident arising out of and in the course of his employment when he suffered a seizure that resulted in injuries to his thoracic spine.

This exception is not abandoned but is argued above.

9. The Single Commissioner erred in failing to find that Betty Joe Floyd, Scottie Floyd's mother, was a statutory dependent of Scottie Floyd and sole beneficiary to his worker's compensation benefits due him pursuant to § 42-9-290 for the loss of use of his back and the loss of use of his brain pursuant to § 42-9-140 and § 42-9-280.

This exception is not abandoned but is argued above.

10. The Single Commissioner erred in failing to find that pursuant to § 42-9-30 Scottie Floyd's mother was entitled to at least 20% of 300 weeks for Scottie Floyd's loss of use of his back at the time of his death.

This exception is not abandoned but is argued above.

11. The Single Commissioner erred in failing to award Scottie Floyd's mother 85% of loss of brain which entitled her to 85% of the balance of his life expectancy of 2681.64 weeks pursuant to § 42-9-30, § 42-9-10, and Reg. 67-1101(C).

A review of the South Carolina Workers' Compensation statute, S. C. Code Ann. § 42-1-10, *et seq.*, (1985) reveals that the "five hundred week" limitation is specifically mentioned in § 42-9-10 and § 42-9-30(20). In § 42-9-10 above set out it is first established and subsequently expanded. In § 42-9-30(20) the 500 week limitation is again declared involving instances of total or partial loss of or loss of use of numerous body members not covered under §§ 42-9-10, 42-9-20, or 42-9-30.

It is of particular note that the brain was not listed as a scheduled body part under § 42-9-30. However, the Legislature pursuant to the authority granted the Commission in § 42-9-30(20) authorized the Commission to adopt additional body parts as scheduled members.

> ... The Commission shall by regulations 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 such ratios on accepted medical standards and such ratios shall determine the benefits payable under this section. (S. C. Code Ann. § 42-9-30(20) (1985))

Pursuant to the authority of § 42-9-30(20), the Commission adopted 25A S. C. Code Ann., Regulation 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 § 42-9-10 the brain is now subject to the expansion of lifetime benefits in § 42-9-10 "or elsewhere in this title."

At the very least the brain, for the purposes of the application of § 42-9-280, is an injury covered by both the second paragraph of § 42-9-10 and § 42-9-30 by the application of § 42-9-30(20) and Regulation 67-1101 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) (1985)) In the instant case, Scottie was 26 years of age when he died. Pursuant to § 19-1-150 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 § 42-9-170 involving cases where an employee who receives an injury under § 42-9-30 or the second paragraph of § 42-9-10 sustained another permanent injury in the same employment. In S. C. Code Ann. § 42-9-170 (1985), 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 § 42-9-10.

Interestingly in the case presently before the Commission, if Scottie's death had resulted or been causally connected to his permanent brain injury, § 42-9-290 which provides for a death benefit for the claimant's dependents has a limitation of 500 weeks, which is also subject to the expansive language of the 1984 amendment of § 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 § 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)

12. The Single Commissioner erred in failing to find that Scottie Floyd sustained an additional injury and death arising out of and in the course of his employment with Ken Baker Used Cars on September 5, 2008.

This exception is not abandoned but is argued above.

13. The Single Commissioner erred in failing to find that Scottie Floyd died four years after the April 9, 2004 accident involving injuries to his spine arising out of and in the course of his employment and that his dependent mother is entitled to the balance of benefits due him pursuant to § 42-9-290.

This exception is not abandoned but is argued above.

14. The Single Commissioner erred in failing to find that Scottie Floyd's mother, Betty Joe Floyd, was a dependent of Scottie Floyd at the time of his death by accident on September 5, 2008 arising out of and in the course of his employment.

Q. [B]cfore 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 check?

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

(Tr. p. 37, lines 3-25)

* * *

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.

(Tr. p. 39, line 13 – p. 40, line 12)

* * *

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.

(Tr. p. 40, line 24 – p. 41, line 9)

15. The Single Commissioner erred in failing to find that at the time of his death on September 5, 2008 Scottie Floyd's mother was dependent upon Scottie Floyd for support because of her own disability and she was unable to support herself.

This exception is not abandoned but is argued above.

16. The Single Commissioner erred in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0824046 asserting that on September 5, 2008 "Claimant was receiving medical care and treatment for a brain injury (WCC #0123790) when he suffered convulsions while alone because of the affects of medication or the unsupervised withdrawal of medication resulting in accident seizures and his accidental death." This claim was brought by the dependent mother for benefits pursuant to § 42-9-290 *-Amount of compensation for death of employee due to accident.*

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, hereinafter referred to as "the mother," asserts that Scottie's death on September 5, 2008 constituted a death by accident arising out of and in the course of his employment. This is the third of three accidents he sustained while in the employ of Ken Baker Used Cars. The first accident occurred on September 13, 2001, while removing a control arm under tension off of a Mercedes, the control arm broke loose and struck Scottie across the left forehead, nose, and cheek, breaking his nose and causing severe pain and a closed head injury. This accident was found to be compensable by Order of the Commission dated June 10, 2004.

As a result of pain and seizures caused by this September 13, 2001 accident, Scottie was required to take medications both for pain and for seizures. He also suffered from poor judgment and irrational and hostile rages.

On April 9, 2004, Scottie sustained a second accident when he for a period of time was not compliant and refusing to take his medications which resulted in a life threatening episode of

seizures of such severity that he nearly suffered kidney failure and sustained three compression fractures of his spine at T3, T7, T8, and T9. This accident was also determined to be compensable and the Employer was required to pay medical benefits and provide treatment for the resulting spinal injuries by Order of the Commission dated December 12, 2007. This Order was not appealed.

After the second accident on July 27, 2004, Claimant was transferred from under the supervision of his mother, Betty Joe Floyd, to Tangram/ResCare Premier, an institution for brain damaged individuals, for a period of twenty-two (22) months. On June 27, 2006, the Employer and Scottie entered into a Consent Order in which, among other things, Scottie agreed to live with his mother provided she was paid Four Hundred ($400.00) Dollars per week to care for him and provide 24-hour supervision.

Thereafter, on February 16, 2007, a hearing was conducted wherein Scottie attempted to get an award of permanency as to his brain injury and as to his back injury, and the Employer attempted to stop benefits because Scottie was non-compliant with his medical treatment and intermittently not taking his medications and was threatening his physicians and psychologist with lethal physical violence. On December 12, 2007, an Order was issued finding that Scottie had not reached maximum medical improvement for treatment of his brain injury of September 13, 2001 nor his back injury of April 9, 2004. The Order did, however, determine that Scottie was not intentionally being noncompliant with his medications or medical treatment,

> 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. (emphasis added)
>
> (Order, 12/12/2007, p. 11)

That Order was not appealed.

Scottie died on September 5, 2008. After reviewing the autopsy report and toxicology reports regarding Scottie's death, the authorized treating neurologist, Dr. Joseph Healy, opined in his deposition of August 25, 2009 that Scottie against medical advice had clearly, knowing the consequences, ceased taking his anti-seizure medications for at least a week resulting in fatal seizures on September 5, 2008.

A. At the time of Scottie's original injury, the Employer, Ken Baker Used Cars was insured by the carrier Legion Insurance Company, represented by Mark D. Cauthen. At the time of Scottie's death, the Employer was insured by Amguard Insurance Company, represented by Edwin P. Martin, Jr. The Employer and both insurance carriers assert that at the time of Scottie's death on September 5, 2008, Scottie was not an employee of Ken Baker Used Cars and that his death as a result of seizures did not arise out of and in the course of his employment.

The mother asserts that the medical treatment that Scottie was undergoing and the Order requiring him to leave Tangram/ResCare Premier and reside with his mother under her supervision and permitting him to self-medicate were pursuant to the Consent Order issued by the Commission on June 27, 2006.

The case of Shuler v. Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005), stands for the proposition that if a claimant dies as a result of an automobile accident while seeking medical treatment for an injury that did arise out of and in the

course of his employment, then his death in complying with the employer's instructions for medical treatment arose out of and in the course of his employment also.

Scottie at the time of his death was taking medications for seizures from the September 13, 2001 accident and pain medication for the April 9, 2004 accident. The Commissioner below found that his death was accidental and not suicide, then clearly Scottie's dependent mother is entitled to the death benefits under § 42-9-290.

B. The Employer asserts that the mother is barred from receiving death benefits arising out of Scottie's injuries because his original injury occurred more than six (6) years before his death pursuant to § 42-9-290. The mother asserts that although Scottie died more than six (6) years after the September 13, 2001 accident, he died only four (4) years after the April 9, 2004 accident, which is clearly a compensable accident as a matter of the law of this case pursuant to the unappealed Order of December 12, 2007.

In any event, the mother asserts that the actual accident from which Scottie died was the September 5, 2008 accident, when he accidentally, non-intentionally died because of non-compliant taking of his medications. It was certainly an accident in allowing Scottie's mother, a layman, to oversee his medications when she had no medical experience considering the history of Scottie's non-compliance involving his medications.

Additionally, the mother asserts that since Scottie was totally disabled pursuant to § 42-9-10,

> Notwithstanding the five hundred 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 the benefits for life, (emphasis added),

the six (6) year statute of limitation set out in § 42-9-290 does not apply because that portion "and within six years after the accident" has been modified by the "or elsewhere in this title" provision in § 42-9-10 as it applies to brain damaged claimants.

C. Notwithstanding whether or not the Commission finds that Scottie was an employee of Ken Baker Used Cars at the time of his death on September 5, 2009 or finds that he is barred because his death did not occur within six years of the 2001 accident; the Employer asserts that the mother is barred from recovery under § 42-9-290 because Scottie's death was the result of suicide, which interrupted the causal chain between the accident that arose out of and in the course of his employment whether it was the 2001 or 2004 or 2008 accident and Scottie's death. The Employer is relying on § 42-9-60, which states,

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

Our Court of Appeals has determined in Harvey v. Cisson Construction Co., 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008) (cert. pending), that death caused by suicide cannot as a matter of law be causally the result of a compensable injury. Therefore, the employer argues Scottie died from a cause other than his injury. The case of Harvey specifically held,

> If Harvey's death is to be compensable at all, it must be the result of spontaneous or uncontrollable impulse, or lapse of conscious volition negating his willful intention. (Harvey v. Cisson Construction Co., 377 S.C. at 175, 659 S.E.2d 171 (Ct. App. 2008)

Further, the Employer asserts that the Court of Appeals has specifically ruled,

> The Workers' Compensation Act provides that "[n]o compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." S.C. Code Ann. § 42-9-60 (Supp. 2006). Cisson contends this provision bars an award of death benefits as a matter of law, because Harvey's suicide was a result of his willful intention to kill himself. We agree the strict construction of section 42-9-60 bars compensation for death that results from "the willful intention" of an employee "to injure or kill himself." (Harvey at p. 156)
>
> * * *
>
> II. Applicable Standard I Claims Involving Suicide.
>
> The determinative factor in this case is the standard by which compensability for suicide is evaluated. The precedent extant reveals a judicial brouhaha of bewilderment and bafflement as to the proper rule in regard to the issue of suicide. The cognoscenti of workers' compensation jurisprudence conceived two expository rules: "willful intent" and "chain of causation." In South Carolina, we reject the "chain of causation" test and adhere to the "willful intent" standard.
>
> A. Willful Intent Test
>
> Compensability for suicide ultimately turns on the issue of proximate cause versus independent intervening cause. 2 Arthur Larson &; Lex Larson, *Larson's Workers' Compensation Law*, § 38.01 (2000). "The basic legal question seems to be agreed upon by almost all authorities: was the act of suicide an intervening cause breaking the chain of causation between the initial injury and the death?" *Id.* If the decedent's death was the result of "willful intent" to take his life, then "willful intent" breaks the chain of causation between the injury and death. Consequently, the decedent's death cannot be said to arise out of the employment. *Id.*
>
> (Harvey, at p. 165)
>
> * * *
>
> As we held in *Mullinax*, natural consequences flowing from a compensable injury are only compensable absent an independent intervening cause. 318 S.C. at 436, 458 S.E.2d at 79. Yet, suicide, by definition, is an act of willful intention. Suicide is an unnatural consequence of work related depression because it injects the willful intention of the employee into the calculation. The employee's willful intention to kill himself is the independent intervening cause that severs the link with the compensable injury.

> Moreover, while suicide resulting from depression is foreseeable, it is not a natural consequence of depression. Conceptually, the notion of natural consequence connotes the inevitability of a result beyond the employee's control.
>
> CONCLUSION
>
> We rule, as a matter of law, that the plain language of section 42-9-60 bars compensation for Harvey's death resulting from his willful intention to kill himself." The test in South Carolina for evaluating compensability is whether the employee's suicide was the result of "willful intent." Unless substantial evidence supports a finding that "willful intent" is negated by spontaneous, impulsive, or instinctive conduct, without deliberate or formed intention, or without conscious volition to produce death, the statutory bar to workers' compensation benefits applies.
>
> 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.
>
> Accordingly, the order of the circuit court is AFFIRMED.
>
> (Harvey at p. 178)

The mother asserts that Scottie's death was the result of, "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." (Order, 12/12/2007, p. 11)

D. The Employer finally raises as a defense the fact that even if Scottie's death was determined not to be suicide or at the very least to have been causally related and arising out of his previous two injuries, that the mother is barred from recovery because she was not dependent upon Scottie at the time of the original injury of September 13, 2001.

The mother asserts that notwithstanding whether she was dependent upon Scottie 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 she was living at home with her son, 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.
>
> (Tr. p. 41, line 21 – p. 42, line 1)

The mother further asserts that there are no other individuals that were dependent upon Scottie for support. The Employer's own dependency investigation reveals that Scottie was not married and had no children. The mother further asserts that § 42-9-140 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)

17. The Single Commissioner erred in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0123790 asserting that on September 13, 2001 "Claimant was receiving disability benefits pursuant to the Order of the Commission. He 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 pursuant to § 42-9-10 and § 42-9-30(20) and R.67-1102 'Brain' and § 42-9-30(19) (back) when he died from causes other than the injury." This claim was brought by the dependent mother for benefits pursuant to § 42-9-280 – *Payment of unpaid balance of compensation when employee dies.*

The mother asserts that if the Commission determines that Scottie's death was the result of suicide which broke the causal relationship between his accidents and his death such that she

would not be entitled to benefits under § 42-9-290, then as a matter of law Scottie's "death was from causes other than his injury." Therefore, since his suicide broke the causal chain between the injury and his death, the next of kin dependent is entitled to the balance of his award had he lived pursuant to § 42-9-280:

> Payment of unpaid balance of compensation when employee dies.
>
> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this Title and the dependents of such employee are awarded compensation thereof, all right to unpaid compensation provided by this section shall cease and determine. (emphasis added) (SC Code Ann. § 42-9-280, As Amended)

It is clear that at the time of his death Scottie had sustained at least two physical injuries to his body. He had sustained three compression fractures to his spine, to which Dr. Healy testified on August 25, 2009 had resulted in at least a 15% permanent impairment to the spine pursuant to § 42-9-30(19). (Healy Dep., 8/25/09, pp. 14-15)

Dr. Healy further testified that in addition to his permanent psychological injuries for which he was being treated by Dr. Sasha Federer involving his judgment and ability to control his rages and deal with his pain, Scottie also sustained a permanent physical injury to the brain as an organ; namely, the frontal lobe of the brain where executive functions are performed. The physical injury to the brain as an organ resulted in a eighty-five (85%) percent permanent impairment to the brain pursuant to § 42-9-30(20) and R. 67-1102 "Brain."

> Q. All right. And are you – do you have an opinion to a reasonable degree of medical certainty that that physical

injury to the brain was permanent when you saw him on September the 2nd of '08?

A. It was.

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 injuries that Scottie had as a result of his head injury and one was an impairment of 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. 15, line 23 – p. 18, line 11)

18. The Single Commissioner erred in failing to find that Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd was entitled to benefits as a dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 50 on WCC #0123790 asserting that on September 13, 2001 "Claimant has died with a total or partial loss of use of the brain under § 42-9-30(20) and R.67-1102 'Brain' as modified by § 42-9-10 (paragraph 3) 2681.64 weeks (51.57 X 52) AND Claimant has died with total or partial loss of use of the back under § 42-9-30(19); THEREFORE Claimant is entitled to a permanent award for loss of use of the brain and back pursuant to § 42-9-30." This claim was brought by the dependent mother for benefits pursuant to § 42-9-30 in that the Claimant is entitled to an award of permanency for loss of use of the brain as an organ and loss of use of the back.

This exception is not abandoned but is argued above.

19. The Single Commissioner erred in finding that because Scottie Floyd died more than six years after his original accidental injury of September 13, 2001, his mother was not entitled to benefits for injuries sustained in his April 9, 2004 accident or his September 5, 2008 accident which arose out of and in the course of his employment.

This exception is not abandoned but is argued above.

CONCLUSION

Claimant respectfully submits that the Order of the Single Commissioner dated March 1, 2010 be vacated and that the Commission issue its Order awarding 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 § 42-9-30, and at least 60 weeks of benefits for at least a 20% loss of use of the back pursuant to 42-9-30;

Or in the alternative;

That the Commission issue its Order awarding 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 42-9-30(19) and 250 weeks for total loss of use of the brain pursuant to 42-9-30(20) and R.67-1101 "Brain";

Or in the alternative:

That the Commission 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 § 42-9-290.

Respectfully submitted,

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May 5, 2010

THE STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Betty Joe Floyd as Personal Representative of the Estate of Scottie W. Floyd, deceased, Employee, vs. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation /South Carolina Property & Casualty Insurance Guaranty Association, Carrier, and AmGuard Insurance Company, Carrier, Defendants.	BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WCC FILE NO: 0123790 & 0824046 **POST TRIAL MEMORANDUM OF DEFENDANTS, KEN BAKER USED CARS AND LEGION INS. CO. IN LIQUIDATION THROUTH THE SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION**

STATEMENT OF THE CASE

The Claimant, Scottie W. Floyd, suffered compensable injuries to his brain, head, nose and psyche, on September 13, 2001 while employed by Ken Baker Used Cars. At the time of the injury in 2001, Legion Insurance Company was the workers' compensation carrier for Defendant Employer. Legion was liquidated in 2003, at which point the South Carolina Property & Casualty Insurance Guaranty Association (SCPCIGA) became responsible for the claim through the Guaranty Association Act.

The Claimant's compensable brain injury of September 13, 2001 affected his right frontal lobe, causing him to suffer from a seizure related disorder. (Comm. Bass Order, December 12,

2007, p. 9). Claimant received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (Childs order, p. 4) The Claimant was required to take anticonvulsants to control his seizure disorder. In April of 2004, he was hospitalized due to suffering multiple seizures. The seizures also caused compression fractures to his thoracic spine and renal failure. The seizures which led to the compression fractures were caused by the Claimant's brain injury. As a result, the compression fractures were found to be a compensable part of the September 13, 2001 claim. (Bass Order, pp. 9-10). The Claimant received ongoing treatment for many years, including treatment at a supported living program in Texas from July 27, 2004 to June 1, 2006. Nonetheless, the Claimant made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Jo Floyd. (Consent Order, June 27, 2006). As of the Order dated December 12, 2007, the Claimant had still not reached maximum medical improvement and no award of disability was ever made. (Bass Order, December 12, 2007, Finding of Fact No. 6). The Claimant died on September 5, 2008, due to complications from his seizure disorder. (See Autopsy Report, p. 401). The Claimant was on a running award of weekly temporary total disability (TTD) benefits from the date of injury in September 2001 through the date of his death in September 2008.

Subsequent to the Claimant's death, his attorney filed several pleadings and hearing requests for recovery of additional benefits under multiple legal theories, including two separate Forms 52 as well as a new Form 50. Claimant's counsel's position is essentially that whether or not the Claimant's September 5, 2008 death was casually related to the original 2001 injury, the Claimant's surviving mother, Betty Jo Floyd, is entitled to the balance of a life time award for a physical brain injury. The amount of the "life time" award being premised on a calculation of the Claimant's life expectancy pursuant to S.C. Code Ann. § 19-1-150.

Claimant's counsel also makes several alternative and contingent arguments as corollaries to that primary position. If Claimant's mother is not entitled to the balance of a life time award, then he asserts that the September 5, 2008 death was a work related death, but that the death was not precipitated by the original 2001 injury. Thereby meaning that the September 5, 2008 death was a new date of injury, for which the responsible carrier would be liable to pay 500 weeks of benefits in association with the work related death claim.

Lastly, Claimant's counsel asserts that Ms. Floyd would be entitled to a 500 week, or potentially more than 500 week award, by virtue of the compensable injury to the Claimant's spine and brain. He argues that the Claimant would have been entitled to an impairment rating of 50% or greater (under S.C. Code Ann. §42-9-30) as well as an impairment rating to the brain (S.C. Code of Regs. 67-1101) which would not be subject to any 500 week limitation pursuant to language in S.C. Code Ann. § 42-9-10 (C).

The Defendant Carrier SCPCIGA denies additional benefits are due to the Claimant, or his personal representative, based on any of the theories advanced by Claimant's counsel. First, it is Defendants position that the September 5, 2008 death resulted proximately from the September 13, 2001 injury by accident, which resulted in trauma to the brain and a seizure disorder. Therefore, it is a work related death as provided under §42-9-290. However, the Claimant did not die within the mandatory time period (six years) as prescribed by §42-9-290. Therefore, no entitlement to further benefits are due pursuant to §42-9-290, and as interpreted by Gunnells v. Raybestos-Manhattan, Inc, 198 S.E.2d 535 (1973) (noting that if the death, proximately related to the original injury, does not occur within six years of the date of that injury and while total disability still persists, there is no right to additional benefits under the Act).

Secondly, even presuming for the sake of argument that compression factures to the Claimant's spine in 2004, which resulted from his seizure disorder, were not causally related to the September 13, 2001 injury – the Claimant died from complications related to his brain injury and seizure disorder associated with the September 13, 2001 injury. There is no evidence anywhere in the record that the Claimant died from spinal compression factures. Moreover, the Claimant previously filed a Form 50 in 2006 for his back injury/compression fractures citing September 13, 2001 as the date of accident. The Claimant should be judicially estopped from now changing that position to indicate the relevant date of accident for the spinal injury was in 2004.

SCPCIGA further asserts that Claimant's theory of a non-work related death does not entitle the Claimant's mother to the balance of either a life time award for physical brain injury under §42-9-10, or a 500 week award under §42-9-30 (back injury) even if a non-work related death could be established. Defendants assert that Betty Jo Floyd was never a dependent of the Claimant as required by §42-9-280, either presumptively (as a spouse or minor child §42-9-110) nor factually, as a person dependent on the Claimant for support during three months prior to the date of the accident. (§42-9-120).

Furthermore, under the facts of this case there is no entitlement to the unpaid balance of an award made to the Claimant under the Act covered by, "the second paragraph of §42-9-10," nor under §42-9-30. The reason being that the Claimant had not been found to have reached MMI and had not been awarded a 500 week, a lifetime, nor permanent partial disability under §42-9-10 nor §42-9-30. Pursuant to the plain language of §42-9-280, and interpretations of this statute by South Carolina courts in the cases of Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436; 405 S.E.2d 393 (1991); Stone v. Roadway Express, 367 S.C. 575; 627

S.E.2d 695 (2006) and Floyd v. C.B. Askins, 382 S.C. 84; 675 S.E.2d 450 (Ct. App. 2009), Defendants assert that the continuing TTD benefits of the Claimant would abate – whether pursuant to a lifetime award or otherwise, unless (a) Betty Jo Floyd was a dependent and (b) a prior award had been made to the Claimant pursuant to § 42-9-30 or the second paragraph of § 42-9-10.

The Claimant's final argument is that the September 5, 2008 death is a new date of injury for a claim separate and unrelated to the September 13, 2001 accident. The Defendants deny liability based on this precarious legal assertion on three primary grounds. First, the SCPCIGA did not provide any workers' compensation coverage for the Defendant employer in September of 2008. Therefore, SCPCIGA would not be the proper carrier.

Secondly, even if the death does not relate back to the 2001 accident (which it clearly does), there is no evidence in the record that the Claimant's death in September of 2008 occurred in the course and scope of his employment with the Defendant Employer.

Third, as 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). Therefore, SCPCIGA contends that the Claimant, nor his personal

representative, are entitled to further benefits under the Act under any theory asserted by Claimant's counsel.

ARGUMENT

I. Work Related Death

A. Failure to Meet Requirements of §42-9-290

The Claimant suffered a "work related death" on September 5, 2008. The reason this death was work related is because it was proximately caused by, and directly associated with, the work injuries Scottie Floyd sustained by blunt trauma to his head on September 13, 2001. As a consequence of his work related injury in 2001, Mr. Floyd subsequently suffered from chronic seizure related disorders. About a year and a half after the original injury, Scottie Floyd had been placed on anticonvulsants to control the seizures he was experiencing as a result of his September 2001 head injury. (Depo. of Dr. Healy, March 25, 2003; See APA, p. 117). The report from the autopsy performed 9/6/08 described the cause of death as follows:

"It is the opinion of the prosectors that the decedent died as a result of complications of seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma". (APA, p.401)

In an unappealed prior Order of the Commission, the Claimant's seizures and resulting thoracic spinal injuries of 2004 have been found to relate to, and be caused by, the September 13, 2001 head injury. "In addition to the admitted injuries [to the brain, head, nose, and psyche] I find the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (Bass Order, December 12, 2007, Finding of Fact No. 5, p. 9).

There is no medical evidence in the record indicating that the Claimant suffered from convulsing seizures prior to his compensable September 13, 2001 injury. In addition, there is no evidence in the record that the Claimant died from any cause other than complications from his seizure disorder.

Claimant's counsel asserts, in part, that the cause of the Claimant's death was not from seizures, but rather from the Claimant's failure (whether inadvertent or intentional) to take his anti-seizure medication. This is immaterial and effectively is a 'distinction without a difference.' Arguing the Claimant died from failure to take his medication instead of his compensable seizure related condition, is akin to saying a person who dies from crashing into a telephone pole died from "failure to apply the brakes," and not from the auto accident. Based on all the evidence in the record, to include the doctors' depositions, medical reports and autopsy of the Claimant, there is no meritorious argument that exists which indicates he died from anything other than complications related to his compensable medical conditions arising from the September 13, 2001 head injury.

The Claimant's death unquestionably resulted from his original September 13, 2001 injuries. As a result, the availability of further benefits in this claim must be determined pursuant to S.C. Code Ann. § 42-9-290. Unlike a non-work related death, as provided for in § 42-9-280, the survivor of the Claimant need not be a next-of-kin dependant. (§ 42-9-140 specifically provides for inheritability of awards, after work related deaths, which are made in accordance with § 42-9-290). However, the Claimant's mother and personal representative, Betty Jo Floyd, is not entitled to further benefits under the Act, per the plain language of § 42-9-290. This statute states in pertinent part as follows:

> If death results proximately from an accident and within two years of the accident or **while total disability still continues and within six years after the accident,** the employer shall pay or cause to be paid...
>
> S.C. Code Ann. § 42-9-290

Since the Claimant remained totally disabled until the time of his death, the death must have occurred within six years after the accident in order for the Claimant's mother to be entitled to benefits under §42-9-290. However, Scottie Floyd's death occurred on September 5, 2008, almost seven years after his injury by accident on September 13, 2001. As a result, §42-9-290 operates as a statutory bar to further benefits for the Claimant's mother/personal representative.

This provision has been interpreted by our Supreme Court in Gunnells v. Raybestos-Manhattan, Inc., 261 S.C. 106; 198 S.E2d 535 (1973). In Gunnells, the Claimant contracted asbestosis in 1961 and was out of work and continuously disabled until his death in 1969. His widow sought death benefits. Construing the predecessor statute of §42-9-290, the Court held that:

> By the terms of the statute, the right to such benefits is expressly limited to cases in which 'death results proximately from an accident and within two years thereafter or while total disability still continues and within six years after the accident . . .'
> This is not a statute of limitations, as in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962), on which the circuit court mistakenly relied. Instead, 'the right of recovery is conditioned upon' satisfaction of the requisites of the statute by which the right was conferred. McWilliams v. Southern Bleachery & Print Works, 216 S.C. 121, 125, 57 S.E.2d 26, 27 (1949); Burton v. Peter W. Blum and Son, 270 N.C. 695, 155 S.E.2d 71 (1967). **The requirement of death within six years of the accident not having been met, the right asserted never vested in the claimant.**
>
> Gunnells at 110-1, 536.

Just as in Gunnells, Scottie Floyd died while total disability persisted, but not within six years after the date of the work related accident which proximately caused his death. Therefore, no benefits have vested or would be due to Betty Jo Floyd.

The Claimant's counsel asserts that despite the plain language of § 42-9-290, if applicable, the Claimant's mother should not be barred from additional benefits because there was a second date of accident in April 2004 (compression fractures of his thoracic spine).

In response to this line of argument, the SCPCIGA first asserts that the 2004 thoracic compression fractures did not constitute a "new" date of injury. The April 2004 spine injury relate to the 2001 injury by accident, and the Claimant's attorney should be estopped from making such an argument by judicial estoppel as well as *res judicata*. (Addressed below in argument section I. B. "Date(s) of Accident"). However, even if we assume for the sake of argument that there was a new injury in 2004, the claim would still not be compensable under the express requirements of § 42-9-290. The 2004 injury was to the Claimant's thoracic spine. There is no evidence anywhere in the record which indicates that the Claimant's death was proximately caused by compression fractures to his spine – he died of seizure related disorder proximately caused by his head injury in 2001. Under either factual scenario, the Claimant's mother/personal representative is not entitled to any further benefits under the Act for a work related death.

B. Date(s) of Accident

Claimant's counsel alleges three different dates of accident occurred: (1) The original injury by accident on September 13, 2001; (2) The date of the Claimant's thoracic compression fractures, which resulted from his seizure related disorder, occurring on or about April 10, 2004; and (3) The date of the Claimant's death, due to his seizure relate disorder on September 5, 2008.

The primary reason Claimant's counsel argues that the compression fractures of April 10, 2004 represented a new date of accident is because he realizes that a September 13, 2001 date of injury would clearly bar his client from further benefits under the Act – per §42-9-290 as

outlined above. There are several reasons why the compression fractures on April 10, 2004 should not be determined to be a separate date of accident from the 2001 head injury.

Claimant's counsel should be estopped on two separate grounds from asserting that April 10, 2004 represents is a new date of accident than the original September 13, 2001 claim. The first ground is judicial estoppel. South Carolina officially recognized the validity of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. 327 S.C. at 251, 489 S.E.2d at 477. Essentially, stated:

> [a]lthough parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.
>
> Hayne at 252, 477.

In this case, the Claimant previously alleged that the 2004 spinal injury resulted from seizures due to the 2001 brain injury. (See the Form 50 of Attorney Steve Wukela for the Claimant, filed January 6, 2006, listing the date of injury as "9/13/2001"). Obviously that was the most beneficial position for the Claimant to take at the time, especially in the light of the fact that SCPCIGA did not have liability for workers' compensation coverage in 2004 for the Defendant Employer. Of note, the Claimant never even asserted a claim for the resulting 2004 spinal injuries against the workers' compensation insurance carrier that covered the Defendant Employer in 2004.

Clearly, the SCPCIGA could have raised as an affirmative defense in the prior hearing the fact that it did not provide coverage for Ken Baker Used Cars in the year the 2004. That is, had the Claimant asserted a "new" date of injury theory at that time. The SCPCIGA as a defendant carrier is materially prejudiced by the Claimant's 'updated' assertion of a 2004 date of

injury at this point in the litigation. The Claimant's current position, that 2004 was a new and separate date of injury from the Sept. 13, 2001 accident, is diametrically opposed to the prior factual position of the claimant in previous proceedings during this same litigation. Therefore, the Claimant should be judicially estopped from now asserting a contradictory position concerning the date of accident for the spinal compression injury which took place in 2004.

The Claimant should also be estopped from asserting a 'new' date of accident in association with the 2004 spinal fractures on the ground of *res judicata* or under the doctrine of law of the case. The compensability of 2004 spinal injuries as proximately related to the 2001 date of accident is the unappealed law of the case at this point in the litigation. The Claimant not only asserted in his January 6, 2006 Form 50 pleading that the spinal compression fractures of 2004 were casually related to the September 2001 brain injury, but actually prevailed on that point. "In addition to the admitted injuries [the head, brain, nose and psyche], I find that the Claimant suffered compression fracture injuries to his spine, primarily due to seizure activity prompted by his brain injury..." (See Bass Order of December 12, 2007, Finding of Fact No. 5, pg. 9-10). In making this finding, Commissioner Bass was relying on the uncontroverted deposition testimony of Dr. Evans, Dr. Chokshi, and Dr. Healy.

For the same reasons that Commissioner Bass found that the Claimant's 2004 spinal fractures were from a seizure related disorder resulting from the 2001 date of accident, the Claimant's 2008 date of death should also be found to be related to, and resulting from, the 2001 injury by accident. If the Commission were to find that the Claimant's death on September 5, 2008 were a "new" date of accident, unassociated and not causally related to the 2001 injury, SCPCIGA would have no potential liability for the claim. The SCPCIGA did not cover the defendant employer for workers' compensation in the year 2008. Nonetheless, SCPCIGA

realizes this legal or factual theory which has been presented by the Claimant is completely untenable and without merit.

The Claimant did not suffer from seizure disorders prior to his 2001 brain injury. The Claimant's seizure disorder was conclusively deemed by a prior, unappealed, Commission Order to have been caused as a result of the Claimant's brain injury in 2001. (See Bass Order of December 12, 2007). All of the evidence in the record points to the fact that the Claimant's seizure related disorder, and complications associated therewith, actually caused his death. (See APA p. 401, the Autopsy of Scottie Floyd).

In an effort to bolster the theory that the Claimant's death on September 5, 2008 constitutes a new date of accident and a separate distinct injury, the Claimant's attorney cites to the case of Shuler v. Gregory, 366 S.C. 435; 622 S.E.2d 569 (2007). The claimant, Shuler, was killed in an automobile accident after leaving a doctor's appointment for a workers' compensation related injury covered by the employer, Gregory Electric. The Court of Appeals deemed the traffic fatality to be within the Claimant's course and scope of employment and therefore compensable. The thrust of the Shuler opinion addressed whether or not Mrs. Shuler's traffic fatality after leaving the workers' compensation doctor's appointment would have been excluded from workers' compensation coverage under the "going and coming" rule. The Court of Appeals ultimately found that the traffic fatality was compensable. Nevertheless, the Shuler case is neither relevant, nor controlling, to the case at hand for a multitude of reasons.

First, Claimant's counsel offers this case to make the argument that September 5, 2008 was a separate and distinct date of accident. Conspicuously missing from the Shuler opinion is any reference whatsoever as to whether or not the Court, or the Commission, would need to find, or did find, an updated or new date of accident for the traffic fatality. That is, the case does not

even reference, address or discuss the primary issue for which Mr. Floyd's attorney presents it. The only question answered in Shuler was compensability under the "going and coming" exclusion and the possibility of a 'deviation.'

Secondly, even if the Shuler court were to have found the traffic fatality to be a separate new date of injury from Shuler's original claim, Mr. Floyd's death is clearly distinguishable from Shuler's traffic fatality. The claimant Shuler was suffering from one condition (an admitted injury to her hand), and then killed by a distinct and completely unassociated intervening force – the traffic accident itself. Mr. Floyd, on the other hand, died from complications associated with his seizure disorder from his 2001 brain injury. (APA p. 401). No distinct intervening accident took place in Scottie Floyd's death which could be reasonably argued to have broken the causal connection to Mr. Floyd's original injury in 2001.

Therefore, the only logical and factual date of accident for this entire claim is, was and remains September 13, 2001. The Claimant's attempt to argue additional dates of accident is without merit, and legally untenable.

II. Non-Work Related Death

The medical evidence in this case clearly indicates that the Claimant's death on September 5, 2008 at his home was a result of the physical injury to his brain from the September 13, 2001 injury by accident. Nonetheless, Claimant's counsel argues in the alternative that the Claimant died from "causes other than the injury" and that the Claimant's mother/personal representative should be entitled to benefits under §42-9-280. However, even if the Claimant died from causes other than the 2001 injury, which is clearly not the case, his personal representative would still not be entitled to benefits under §42-9-280.

S.C. Code Ann. §42-9-280 addresses non-work related deaths and the payment of the unpaid balance of compensation when an employee dies, in part:

> 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...

S.C. Code Ann. §42-9-280

The Supreme Court of South Carolina has definitely addressed this statute in two different cases, as further explained below, Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436; 405 S.E.2d 393 (1991) and Stone v. Roadway Express, 367 S.C. 575; 627 S.E.2d 695 (2006). Both Covington and Stone independently upheld separate portions of the plain language of §42-9-280, which essentially requires that, if a workers' compensation claimant dies from causes not related to the work injury itself then (1) there must be a next of kin dependant in existence, *and* (2) the award of further benefits must have been made to the Claimant under either (a) the second paragraph of §42-9-10 or (b) a scheduled member injury under §42-9-30, in order for the award to survive the death of the Claimant. Otherwise, the award abates and no further benefits are due.

If Scottie Floyd's death was not work related, then Betty Jo Floyd is not entitled to further benefits on two separate grounds. Betty Jo Floyd is *neither* a next of kin dependent (as argued in Sec. II. B. of this memorandum) *nor* was there ever an award made to the Claimant pursuant to the second paragraph § 42-9-10 or § 42-9-30.

In Covington, the claimant suffered a compensable workers' compensation injury to her back. Prior to the final adjudication of Ms. Covington's workers' compensation claim, she died in a non-work related automobile accident. Covington had no next of kin dependent upon her for

support. Ms. Covington's mother, Rosa Mae Montgomery, was substituted as the claimant in the workers' compensation case. Succinctly stated by the Covington court, pursuant to the statutory requirement of § 42-9-280, "[h]ere, Montgomery, the mother, is not a next of kin dependent, nor is the injury work related. This renders the claim non-compensable." Covington at 438, 394. Similarly, even if Scottie Floyd's death was non-work related, and Ms. Betty Jo Floyd is determined not to have been dependent upon him pursuant to the Act – then no further evaluation is necessary and the entitlement to further benefits ceased upon Mr. Floyd's death.

In Stone the claimant, Walter R. Stone, suffered a compensable foot and back injury. Mr. Stone was ultimately found permanently totally disabled by a single Commissioner, in October of 1999 and awarded 500 weeks of benefits pursuant to § 42-9-10. Subsequent to that, Walter Stone died of causes unrelated to his compensable work injuries, a cancerous brain tumor, in December of 1999. Claimant Stone's surviving widow, Bonnie L. Stone was then substituted as the claimant and sought payment of the remaining benefits. Of note, Bonnie L. Stone, as a surviving spouse, would have been deemed wholly dependent on the decedent, Walter Stone, by a conclusive statutory presumption pursuant to S.C. Code Ann. § 42-9-110. Nonetheless, claimant Walter Stone's original 500 week award for benefits was made for a general disability pursuant to the *first* paragraph of § 42-9-10.

Despite the fact that Bonnie Stone was the next of kin dependent of the deceased claimant, the Supreme Court still found that the award abated up Walter Stone's non-work related death and no further benefits were due. The reason for this finding is because Walter Stone's award of permanent benefits had been made pursuant to the first paragraph of § 42-9-10, (i.e. wage loss) and not the second paragraph, as expressly prescribed by § 42-9-280. The Stone Court reason as follows:

> The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of §42-9-10, should not.
>
> Stone goes on to cite Larson's exhaustive treatise on workers' compensation:
>
> 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. []...[] Section 42-9-280 specifically provides for the inheritability of two types of awards only. We reverse the orders permitting respondent to receive unaccrued benefits. [Concluding that] Stone was awarded workers' compensation benefits pursuant to the first paragraph of § 42-9-10. Those benefits terminated upon his death from the tumor...
>
> Stone at 585-6, 700-1 (emphasis added)

The Claimant Scottie Floyd, was never found to have reached maximum medical improvement prior to his death on September 5, 2008. "I find the Claimant has not reached maximum medical improvement with respect to his spine injury..." (Bass Order, Dec. 12, 2007, Finding of Fact No. 6, p. 10). "With respect to the physical brain injury/and psych injury, I find Claimant has not reached maximum medical improvement." (Bass Order, Dec. 12, 2007, Finding of Fact No. 8, p. 11). This was an unappealed Order of the Commission. There was no pending Form 50 by the Claimant or Form 21 filed by the Carrier prior to the Claimant's death on September 8, 2008 requesting a determination of, or alleging, Scottie Floyd had attained MMI for any of his injuries. Scottie Floyd was receiving an ongoing award of *temporary total disability* benefits under the Act at the time of his death. Thus, Scottie Floyd never received an award of permanent disability under § 42-9-30 nor under the second paragraph of § 42-9-10, as required by § 42-9-280.

Therefore, even if Betty Jo Floyd could satisfy the requirement of being a next of kin dependent of Scottie Floyd (see infra), the award would still abate, and any further benefits would cease pursuant to Covington, and or Stone as outline above.

A. Survivability of Physical Brain Injury "Award"

Claimant's counsel makes several alternative arguments for Betty Jo Floyd's entitlement to further benefits for her son's unfortunate death, including the allegation that she is entitled to the balance of Mr. Floyd's lifetime benefits for a physical brain injury. Of significance in considering this argument, it is most important to consider the fact that Scottie Floyd was never awarded lifetime benefits for permanent total disability due to a physical brain injury. In fact, the Claimant was never awarded permanent disability at all. Scottie Floyd had previously been found to have suffered a physical brain injury in this case, but had never reached MMI pursuant to Commissioner Bass' 2004 order and was still receiving medical treatment and TTD benefits up to the date of his death.

Furthermore, even if Scottie Floyd had reached MMI for his compensable brain injury, and even if he had subsequently been awarded life time weekly benefits for the brain injury (he had not) – such benefit would have been awarded pursuant to the *fourth* paragraph of § 42-9-10. "(C) Notwithstanding the five-hundred-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...has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." § 42-9-10(C) (2007).

The determination of a deceased claimant's surviving representatives' entitlement to further benefits, for non-work related death under § 42-9-280, would be the same for a life time physical brain injury as it would have been for any other injury. The analysis would be

analogous to Stone and Covington above. First, the survivor of the Claimant would have to show she was a next of kin dependent under the Act, as prescribed by § 42-9-280. SCPCIGA asserts that Betty Jo Floyd was not a dependent under the Act. Second, the Claimant's surviving representative would have to show that the permanency award (none was ever made in this case) was made pursuant to the *second paragraph* of § 42-9-10 or § 42-9-30.

Assuming a hypothetical finding that Betty Jo Floyd was a dependent of her son, and assuming Scottie Floyd had been awarded lifetime indemnity benefits for his brain injury under § 42-9-10, this would still not satisfy the express dictates of § 42-9-280, because such an award would have been made pursuant to fourth, *not the second*, paragraph of § 42-9-10. Therefore, the award would abate, and no further benefits would be due.

The Court of Appeals of South Carolina has made this express determination in the case of Floyd v. C.B. Askins, 382 S.C. 84; 675 S.E.2d 450 (Ct. App. 2009). The claimant, Stanley D. Floyd (unrelated to the Claimant in this case) suffered a compensable physical brain injury during his employment with defendant employer, C.B. Askins. The parties to that case had previously stipulated that Stanley D. Floyd was permanently totally disabled pursuant to § 42-9-10 (no such finding, or stipulation, has been made in this case). After receiving 254 weeks of benefits, Stanley D. Floyd, died of conditions not related to his work injury (an abdominal aneurism). Stanley Floyd's wife, Harriet A. Floyd, subsequently sought to obtain the balance of the Mr. Stanley Floyd's lifetime award. Dependency was not a question in that case. Pursuant to § 42-9-110, Harriet Floyd would have been statutorily dependent on her deceased husband.

Of particular note, prior to the single Commissioner hearing in Stanley Floyd's claim regarding survivability of benefits, the workers' compensation Carrier for C.B. Askins, "acceded that Mrs. [Harriet] Floyd should receive the balance of five-hundred weeks of compensation."

Floyd at 89, 452. No such concession has been made in the claim of Scottie Floyd by the Defendants. In denying the survivability of the balance Stanley Floyd's lifetime compensation for a physical brain injury, the Court of Appeals used the exact same reasoning that was declared by the Supreme Court in Stone.

"In the present case, Claimant's injury was serious and catastrophic. However, his award was made pursuant to paragraph (C) of section 42-9-10. Section 42-9-280 does not include awards made under paragraph (C) among those that survive a Claimant's death from an unrelated cause." Floyd at 89, 453. The court even went on to opine that, "[workers' compensation Claimants suffering catastrophic injuries like [Stanley Floyd's] may require specialized healthcare without the means to earn a wage. The award of compensation for a claimant's life expectancy seems to recognize this reality. If so, it is also logical benefits would terminate upon such a claimant's death from an unrelated cause." Floyd at 90, 453.

There is actually no basis anywhere in the workers' compensation Act for which the carrier for C.B. Askins was obligated to provide even the balance of the 500 week award upon the death of Stanley Floyd from unrelated causes. Clearly, pursuant to § 42-9-280, and the analysis in Stone and Covington, there would have been no entitlement to such. Nonetheless, the carrier in that claim previously agreed to pay the balance of the award to Stanley Floyd's widow, and therefore, the Court of Appeals had no need to reach such a determination:

> Based upon the precedent set forth in Stone and a plain reading of the relevant statutes, we find Mrs. Floyd is not entitled to the balance of her husband's lifetime benefits. Because the award of the balance of five-hundred weeks' compensation is not appealed, we affirm that finding as it is the law of the case.
>
> Floyd at 91, 454.

Similarly, no award can be made for any claim in this case under § 42-9-30, even if Scottie Floyd had died from non-work related causes. SCPCIGA's position as outlined in the

following argument section is that Betty Jo Floyd did not even meet the first requirement of § 42-9-280, in that she was not a dependent of her son in accordance with the Act. Secondly, no § 42-9-30 award was ever made to Scottie Floyd during his lifetime as he never attained MMI prior to his death. A request for adjudication under § 42-9-30 was not even pending before the Commission at the time of his death on September 5, 2008. It would take complete speculation and sheer surmise to even attempt make such an award at this point in time.

This situation is synonymous to the example of Stone, where the claimant suffered compensable back and leg injuries under the Act, but died without ever having a determination made as to permanent partial impairment, or permanent total impairment based on a § 42-9-30 scheduled member injury analysis (Stone having been awarded general disability under the first paragraph of § 42-9-10). Counsel for the Claimant has pointed out that the brain is a scheduled body part under S.C. Code of Reg. 67-1101, pursuant to § 42-9-30, and that Mr. Floyd could have been entitled to an award for such a scheduled member injury. Nonetheless, no such award was *ever* made in this case, and upon the death of Scottie Floyd prior to attaining MMI. Only arbitrary conjecture is available to decide what, if any, degree of permanent impairment Scottie Floyd's back or brain would ultimately have had.

Similarly, in Stone, where the claimant received a PTD award for general disability resulting from his back and foot injuries, Mr. Stone *could* have likely been entitled to a scheduled member injury loss under § 42-9-30 to his back and/or leg. Regardless, the Supreme Court of this state found that claimant Stone's award abated upon his non-work related death. The fact that Scottie Floyd might have been entitled to an award under § 42-9-30 is of no consequence.

Therefore, despite multiple alternative theories of recovery by the Claimant, even if the death could be shown to be non-work related, no theory of recovery would entitle Betty Jo Floyd to further of benefits under the Act. The potentiality of an intentional injury or death, is addressed further herein at argument section II. C

B. Dependency

The Defendant SCPCIGA asserts that the Claimant, Scottie Floyd, had no one who was wholly or partially dependent on him in association with this accident. This position is based on the definition of dependency as provided for by the Act and corresponding case law, as well as the evidence and testimony provided at the hearing before Commissioner Lyndon on September 1, 2009, including the good faith dependency investigation performed by the SCPCIGA. (See Defendant SCPCIGA's Exhibit No. 1).

The Workers' Compensation Act provides for only 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 purposes of receiving death benefits under the Workers' Compensation Act, 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 (S.C. 320 S.C. 213, 464 S.E.2d 109 (1995).

There is no evidence in the record to indicate that Scottie Floyd was married or ever had any children. Betty Jo Floyd, as the Claimant's mother, would not fall into the statutorily

presumptive class of dependents provided for in § 42-9-110. In order to establish dependency on the Claimant, Betty Jo Floyd could only do so under a factual determination pursuant to § 42-9-120. This statute provides as follows:

> **In all other cases questions of dependency**, in whole or in part, **shall be determined in accordance with the facts as the facts may be at the time of the accident**; but no allowance shall be made for any payment in lieu of board and lodging or services and **no compensation shall be allowed unless dependency existed for a period of three months or more prior to the accident**.
>
> S.C. Code Ann. 42-9-120 (emphasis added).

The record is devoid of any evidence that would indicate Betty Jo Floyd was wholly or partially dependent on the Claimant at the time of the accident in September of 2001 or the preceding three months. According to Betty Jo Floyd's own testimony during the hearing, the Claimant lived by himself at the time of the accident in 2001 and actually came to live with her in about 2002 or 2003 due to the severity of his injuries. (Commissioner Lyndon Hearing Trans. p. 34, lines 7-18). During the relevant period of time in this case, three months prior to September 13, 2001, Betty Jo Floyd and the Claimant lived in separate residences and there is no evidence that Scottie Floyd provided any financial support or assistance to his mother.

Betty Jo Floyd did later leave her job to become a full time care giver to her son once he moved in with her, subsequent to the accident, and she was paid approximately $400.00 per week by the Carrier for tending to her son. (Lyndon Hearing Trans. p. 49, lines 16 - p. 50 line 17). It is important to note that these monies, the $400.00 per week provided by the Carrier to Betty Jo Floyd, were effectively compensation for her role as a care giver to the injured Claimant.

Therefore, there is no evidence in the record to find that Betty Jo Floyd was ever dependent upon Claimant during the relevant time period prior to September 13, 2001.

Furthermore, there is no indication that Betty Jo Floyd was a dependent on the Claimant during the alternative dates of accident asserted by the Claimant's counsel in 2004 or 2008. Scottie Floyd was living with and dependent on Betty Jo Floyd, not the other way around. Betty Jo Floyd was able to work and earn a wage, and chose to do so by caring for her son. As Scottie Floyd was unable to care and provide for himself, the Carrier would have had to pay someone to care for Mr. Floyd after his 2001 injury.

C. Intentional Death

Of several theories presented in the alternative by the Claimant's attorney, one is that the Claimant intentionally stopped taking his seizure medications, and that this failure to take the medication is what led to his death on September 5, 2008. Claimant'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." (Lyndon Hearing Trans. p. 9, lines 11-16). Nonetheless, he continued onward to argue, "in any event, we would still say it was compensable."

Should it be found that the Claimant intentionally stopped taking his medicine, despite knowing the serious consequences of potential deadly consequences of doing so, Defendants would argue that further benefits would be barred under any circumstance pursuant to S.C. Code Ann. §42-9-60 stating in part that, "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." The burden of proof for willful intent to injure or kill oneself is on the Defendants asserting such a defense. The Defendants have raised no such statement of the facts in this claim. Oddly enough, however, intermixed in the sheer polyglot of alternative

legal theories of death asserted by Claimant's counsel (See specifically between pages 8-9 of the hearing transcript), the specter of a potential finding that the Claimant intentionally did not take his medication and purposefully killed himself has been raised.

The controlling case for such an analysis in South Carolina would be Thompson ex rel. Harvey v. Cisson Const. Co. 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2007). Decedent Claimant, Thompson, suffered from compensable work related injuries which included psychological injury in the form of mental depression. Thompson committed suicide when he intentionally overdosed on sleeping pills. The Thompson court found in effect that, "the evidence fail[ed] 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..." Id at 179, 193. Therefore, if a finding of willful harm or suicide were predicated on the evidence of this case, Defendants assert the Claimant's death would still be non-compensable under §42-9-60 and in Thompson.

Alternatively, even if the suicide or willful harm were not deemed to bar this claim under §42-9-60 as interpreted by Thompson, the Claimant's survivors would still be barred from receiving additional benefits under the work related death analysis in argument section "I," or non work related death analysis in argument section "II," as outlined above.

III. 500 Week Limitation

S.C. Code Ann. § 42-9-10(C) and (D) state in part that:

> (C) Notwithstanding the five hundred 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[,]...has suffered physical brain damage is not subject to the five hundred week limitation and shall receive the benefits for life.

(D) Notwithstanding the provisions of Section 42-9-301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits.

If a person is determined to be permanently totally disabled (PTD) by the Commission, and such permanent total disability is found to be predicated upon a work injury resulting in paraplegia, quadriplegia or a physical brain injury, the person is entitled to weekly benefits for the entirety of his or her life – even if the Claimant lives beyond 500 weeks. Claimant's counsel asserts, in part, that the language in subsection (C) whereby it states "or elsewhere in this title," modifies any section in the Title in which the 500 week limitations applies. According to Claimant's counsel, included in that abrogation of the 500 week cap, would be § 42-9-290, covering work related death, and § 42-9-280, covering non-work related deaths.

First and foremost, Scottie Floyd was on a running award of temporary weekly benefits at the time of his death. It has never been ordered that Scottie Floyd, "shall receive benefits for life," pursuant to § 42-9-10(C). Further, this statute only applies to awards where a Claimant is deemed PTD. "The statute conditions the lifetime award of benefits upon a finding of total and permanent disability." Floyd 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009).

PTD is clearly significantly different than death. The legislature has expressly provided for death benefits in workers' compensation claims whether the death stems either from work related causes (§ 42-9-290) or non work related causes (§ 42-9-280). Once the Claimant has died, his entitlement to "life time" benefits would also cease, and his entitlement to further benefits under the Act would be determined by the death statutes which explicitly provide for such. The pertinent question in connection with a claimant's death is whether or not the death was work related. It is of no consequence at the point of death whether the Claimant's PTD

might have been predicated on a brain injury. The differentiation between the two is illustrated by the following examples.

Two 30 year old Claimants, A and B are working side by side on a highway when run over and killed by a tractor trailer. Claimant A's head was crushed in the accident (clearly injuring his brain), Claimant B's head was unscathed but died from internal bleeding. Under the legal reasoning of Betty Jo Floyd, Claimant A's survivors would be entitled to "life time" weekly benefits for the balance of whatever his life expectancy is under § 19-1-150, while Claimant B's survivors would be entitled to 500 weeks of benefits pursuant to § 42-9-290. Defendants contend that in this example, both Claimant's survivor's would be entitled to 500 weeks of benefits for a work related death per §42-9-290 assuming the other requirements were met.

Conversely, consider if two 85 year old Claimant's, A and B are working side by side on a balcony when it collapses. Both Claimants expire from the injuries. Claimant A's skull was severely fractured in the accident (clearly injuring his brain), Claimant B's head was unscathed but died from internal bleeding. Under the arguments set forth by Betty Jo Floyd, Claimant A's survivors would be entitled only to "life time" weekly benefits for the balance of whatever his life expectancy is under § 19-1-150 (significantly less than 500 weeks), while Claimant B's survivors would be entitled to 500 weeks of benefits pursuant to § 42-9-290. Again, no matter when the Claimant died, or how the Claimant died, the entitlement to benefits would actually be determined for both under § 42-9-290 rather than the legal reasoning postulated by Claimant.

Lastly, the benefits provided for under §42-9-10(C) not only mention payment of benefits "for life" rather than for "death" or even "the life expectancy of the Claimant," but also come with the explicit prohibition that such life time benefits cannot be paid in lump sum. (See § 42-9-10(D)). Despite the tragedy of Scottie Floyd's death, it would provoke an absurd result at this

time to try an award his benefits "for life," now that he has already passed away. The interpretation requested by the Claimant's counsel, in conjunction with the unassailable and explicit language of sub part (D) would mean Betty Jo Floyd would be receiving weekly benefits for the next 2600 plus weeks. A plain reading of the statutes in question clearly indicate that this was not the intent of the legislature even had Scottie Floyd previously received a lifetime award under the third paragraph of § 42-9-10, which would nonetheless be subject to the qualifications of § 42-9-290 or § 42-9-280.

CONCLUSION

For the forgoing reasons, the claims for additional benefits in this matter should be denied and Defendant SCPCIGA should be found to have no further responsibility for this claim.

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October 16, 2009

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
W.C.C. FILE No.: 0824046

Scottie Floyd (deceased), Claimant, vs. Ken Bakers Used Cars, LLC, Employer, Legion Insurance Company in Liquidation Through SC Property & Casualty Ins. Guaranty Associates, and Amguard Insurance Company, Carriers.	**REPLY BRIEF OF AMGUARD**

ARGUMENTS

The defendant Amguard Insurance Company takes the position that the claimant's death was not the result of a "new" injury by accident, but that it was a naturally flowing consequence of the original work injury. Amguard previously submitted a brief discussing its position in that regard and that brief is adopted herein as if restated verbatim.

The claimant discusses in her brief the possibility of Mr. Floyd's death being the result of suicide, and makes arguments about the availability of benefits if that were found to be the case. Amguard takes the position that there can be no finding of suicide made in this case as such a finding would be purely speculative.

The claimant notes that Dr. Healy commented that Mr. Floyd was aware of the consequences that would result from failure to take the seizure medication. The claimant draws the conclusion that Mr. Floyd's knowledge of the consequences showed intent to bring about such consequences, and thus his death was the result of suicide.

However, though Dr. Healy noted that he believed Mr. Floyd was aware of the various consequences of not taking the seizure medication as prescribed, Dr. Healy specifically stated, "I'm not sure he knew that it could kill him." (Dep. Dr. Healy, p. 22 – 23). Dr. Healy said he could only assume that Mr. Floyd knew how hazardous failure to take the medication could be because of the effects of the previous instance when Mr. Floyd stopped taking the medication. This is precisely the definition of "speculation." Dr. Healy stated that he could not specifically attest to whether or not Mr. Floyd was fully aware of the possibility that failure to take the seizure medication could, or would, cause death. Dr. Healy further testified that he did not have enough information to render an opinion within a reasonable degree of medical certainty as to whether or not the claimant's death was accidental.

Dr. Alexander Federer, Mr. Floyd's psychologist, also was unable to certainly attest to whether Mr. Floyd knew that stopping the medications could cause death. Dr. Federer stated in his deposition that Mr. Floyd knew that if he stopped taking the medication there was "a possibility that he may have a massive seizure." (Dep. Dr. Federer, p. 26). Dr. Federer said that Mr. Floyd might stop taking the medication if he didn't feel that it was helping or if he felt despondent, but Dr. Federer could not say with certainly whether Mr. Floyd would consider not taking the medication as a means to kill himself. Dr. Federer offered the opinion that Mr. Floyd would have used a weapon to commit suicide should he have chosen to do so because Mr. Floyd had a particular fascination with weapons. (*Id.*, p. 27). Dr. Federer explained that he based this opinion on Mr. Floyd's description of numerous violent fantasies which always included some form of weapon. (*Id.*, pp. 27-28). Dr. Federer testified that he truly did not know if Mr. Floyd's discontinuing his medication would have been an attempt to commit suicide or just a rebellion against the use of medication.

Betty Jo Floyd testified that she monitored the medications of Mr. Floyd. She testified that Mr. Floyd did not stop taking his anti-seizure medications prior to Mr. Floyd's death. Ms. Floyd testified that she saw Mr. Floyd take the anti-seizure medications shortly before his death.

There is no conclusive evidence to show that Mr. Floyd had any intention of taking his life, or that he even had knowledge that death was a possible consequence of failure to take his medications. Every statement made on the subject has been put in terms of assumptions and speculations. Findings of fact made by the Commission must be based on reliable, substantial, and probative evidence, not mere speculation or supposition. The opinions offered on this issue are not enough for the Commission to make a finding that Mr. Floyd committed suicide in this case.

Moreover, defendants would assert the doctrine of res judicata bars the claimant from asserting that Mr. Floyd acted with conscious, willful intent to commit suicide in refusing to take his medications. In his unappealed order of December 12, 2007, Commissioner Bass expressly found that "[Mr. Floyd's] failure to take his medication as prescribed is a byproduct of [his] physical injury rather than a conscious decision on his part." (12/12/2007, p. 11) The Commissioner's findings in this regard, being unappealed, are the law of the case and are not subject to claimant's challenge at this procedural juncture. Indeed, not only was the issue not subject to an appeal by the claimant, the referenced finding represented Commissioner Bass' agreement with the claimant's *own position* at the hearing giving rise to the Order.

In the alternative, should the evidence prove convincing that Mr. Floyd volitionally stopped taking his anti-seizure medication as a means of committing suicide, his actions were related and directly attributable to the initial injury and cannot be regarded as a "new" accident under the law. The evidence in the record shows that, as a result of the initial head injury, because of the location of the trauma, Mr. Floyd suffered from psychological and mood

disorders. These disorders included emotional outrages, the lack of impulse control, and the inability to cope with his situation and his pain. These psychological disorders, which are directly attributable to the initial head injury, are the only factors that would have even arguably led to Mr. Floyd's attempt on his own life. Again, as the claimant notes in her brief at page 13, "the [decedent's] failure to take his medication as prescribed is a byproduct of [decedent's] physical injury rather than a conscious decision on his part." (12/12/2007, p. 11).

Further, even if claimant can somehow convince the Commission that Mr. Floyd knowingly and willfully failed to take his medications, and did so knowing that failure to take his medications would cause serious massive seizures, the claim still fails, particularly as against AmGuard. A "suicide" sufficient to break the chain of causation within the meaning of the applicable case, statutory, and regulatory law, would require a finding that Mr. Floyd's death resulted from some mechanism other than his original injury. By way of example, had Mr. Floyd died from an intentional overdose of medications or self inflicted gunshot wound, then the causal connection to the original injury might arguably have been broken. That, however, is not the case here. Mr. Floyd's death was caused by a seizure, which was in turn caused by and flowed naturally from the original injury, a brain injury. Because Mr. Floyd's seizure disorder was unquestionably caused by the original injury; it simply defies rational thinking and dissolves into circular logic to assert that a seizure would not "flow naturally" from the same injury that caused the seizure disorder. Because the evidence in the record does not establish a break in the chain of causation as relates to the original injury, the claimant cannot establish entitlement to recover from AmGuard since AmGuard was not the insurer at the time of the original injury.

CONCLUSION

There is no reliable, probative, and substantial evidence in the record which would support a finding that the claimant committed suicide. His treating physicians were not able to

render any opinion within a reasonable degree of medical certainty as to whether or not the claimant intentionally stopped taking medication which would then result in his death. Furthermore, Ms. Floyd testified that Mr. Floyd did not stop taking his anti-seizure medication. Any finding that the claimant committed suicide would be pure speculation and conjuncture and there is no evidence to support such a finding.

In the event that the Commission finds that the claimant committed suicide, Amguard contends that any suicide would have been a natural consequence of the claimant's brain injury, and cannot be considered a new accident. Lastly, the defendants also contend that the doctrine of *res judicata* bars the claimant from asserting Mr. Floyd acted with a conscious, willful intent to commit suicide.

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October 16, 2009

SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0824046

SCOTTIE FLOYD, **Claimant,** **vs.** **KEN BAKERS USED CARS, LLC,** **Employer,** **and** **LEGION INSURANCE COMPANY IN LIQUIDATION THROUGH SC PROPERTY & CASUALTY INS. GUARANTY ASSOCIATION, AND AMGUARD INSURANCE COMPANY,** **Carriers.**	**SINGLE COMMISSION BRIEF OF DEFENDANT AMGUARD INSURANCE COMPANY**

STATEMENT OF THE CASE

The facts of this case, although tragic, are largely uncontested. On September 13, 2001, Scottie Floyd sustained an admitted compensable accident resulting in injuries to his brain, head, nose, and psyche when a control arm being removed under tension struck the Mr. Floyd's head. Mr. Floyd was diagnosed with decreased attenuation in the right frontal lobe and a fracture of the left frontoethmoidal complex. Mr. Floyd's medical treatment for his injuries included, inter alia, clinical diagnostic procedures, psychological evaluation, neuropsychological testing, and conservative/pharmaceutical care under the direction of Dr. Healy, a neurologist, for headaches, psychological and mood disorders, and emotional outrages consistent with brain injury. Although early diagnostic testing showed no evidence of epileptic form activity, Dr. Healy indicated he was aware of the likelihood that Mr. Floyd would develop a seizure disorder due to

the location and severity of his injuries, and the Mr. Floyd's early pharmaceutical regimen included anti-convulsants (Topomax) as a prophylaxis against headaches. (Dr. Healy, August 7, 2002; APA at 109, 117)

Mr. Floyd began experiencing seizure activity due to his head injury by at least March of 2003. As a result, Dr. Healy modified his pharmaceutical regimen to include additional anti-convulsants. (Dr. Healy, March 25, 2003; APA at 117) Mr. Floyd was almost immediately noncompliant with his medications. In April of 2003, Dr. Healy noted the Mr. Floyd had "stopped all of his medication" and was becoming increasingly aggressive.(Dr. Healy, April 28, 2003; APA 128) Dr. Healy continued to monitor and modify Mr. Floyd's medications, including anti-convulsants, as he deemed necessary.

On April 9, 2004, Mr. Floyd was hospitalized following multiple seizures secondary to noncompliance with his medications. (APA at 211-217) He spent almost two weeks in the hospital and was diagnosed with acute renal failure as well as compression fractures at multiple levels of the thoracic spine. (Id.) Mr. Floyd's compression fractures were caused by the severity of his seizures which in turn resulted from his brain injury.(Deposition of Dr. Evans, 8-9, 10; Dr. Chokshi, 8) Dr. Healy testified in deposition that he spoke with Mr. Floyd following the April 9, 2004 hospitalization and that Mr. Floyd was aware that noncompliance with his medications could have serious health repercussions, including Mr. Floyd's death. (Healy 2009 dep. 22-23)

Mr. Floyd received in-patient care at a supported living program in Texas from July 27, 2004 through June 1, 2006. Thereafter, he was allowed to return to South Carolina to live with his mother. The parties agreed to a $400.00 per week allowance to be paid to the Mr. Floyd's mother in exchange for her serving as his caregiver. Dr. Healy resumed treatment of the Mr. Floyd upon his return. Anti-convulsants continued to be a part of the Mr. Floyd's prescribed pharmaceutical regimen.

On September 5, 2008, Mr. Floyd died from "complications of a seizure disorder that resulted from a cavitary lesion of the right front cerebrum due to remote blunt head trauma." (September 6, 2008 Autopsy Report – APA at 401). According to the autopsy and toxicology reports, there were no traces of anti-convulsant medication in the Mr. Floyd's blood, and no pills in the gastrointestinal tract lumen. However, Betty Jo Floyd, the decedent's mother, testified that she observed the decedent take the anti-convulsant medications shortly before his death.

The seizure resulting in Mr. Floyd's death was precipitated by his noncompliance with his anti-convulsant medications, as illustrated by the results of the postmortem toxicology screen. Dr. Healy, Mr. Floyd's treating neurologist, also opined the Mr. Floyd suffered from a seizure disorder that required him to take anti-convulsant medications. Mr. Floyd died from a major motor seizure which was precipitated by his failure to take his anti-convulsant medications.

ARGUMENTS

I.

Mr. Floyd's death did not result from a compensable "new" injury by accident arising out of and in the course and scope of his employment with Ken Baker's, nor from compensable aggravation of the original injury during AmGuard's period of coverage.

AmGuard was the Employer's workers' compensation insurance carrier when the Mr. Floyd suffered a seizure and died September 5, 2008. Mr. Floyd's theory of liability as concerns AmGuard is that Mr. Floyd sustained a "new" injury by accident on September 5, 2008, when he stopped taking his prescribed medications and suffered a seizure which resulted in his death. In this regard, Mr. Floyd's attorney attempts to analogize the circumstances of Mr. Floyd's death in the instant case to a factual scenario where a worker's compensation claimant is fatally injured in a car accident while traveling to a pharmacy to obtain medication for a prior work-related injury.

Mr. Floyd's attorney asserts that the Mr. Floyd's death in the instant case was somehow a compensable "new" injury in the same way the hypothetical claimant's fatal auto collision would arguably be compensable. This position is untenable.

The South Carolina Court of Appeals has found occasion to hold that when an employer authorizes an employee to seek medical attention for a prior work injury and the employee sustains additional injuries while fulfilling their obligation to submit to medical treatment, such additional injuries are causally related to the employment to be compensable. See Shuler v. Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (2005). Shuler involved an employee's fatal automobile accident while returning home from a medical visit. Id. In reaching its holding, the Shuler Court distinguished Ms. Shuler from the claimant in Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 175(1965)(holding that injuries sustained when claimant got in an accident in his own car on the way to a workers compensation hearing was not compensable). The Shuler court found that the "going and coming" rule did not act to bar recovery because Ms. Shuler's fatal injuries occurred while she was fulfilling her duty under workers' compensation law to submit to medical treatment for a previous compensable injury, and her injuries therefore arose out of and were sustained in the course of her employment. Id. Notably, however, the South Carolina Supreme Court has neither addressed this particular issue on certiorari nor retreated from its holdings in cases applying the "going and coming" rule to disallow such awards.

The holding in Shuler is not applicable in the instant case. First, unlike the claimant in Shuler, no employer-employee relationship existed between Mr. Floyd and Ken Baker at the time of Mr. Floyd's death. Mr. Floyd never worked for Ken Baker Used Cars during the coverage period of AmGuard. Furthermore, unlike Mr. Floyd in Shuler, Mr. Floyd was not "fulfilling his obligations under workers' compensation" at the time of this death. To the

contrary, Mr. Floyd's fatal seizure was precipitated by his *failure* to take his prescribed anti-convulsant medication. It follows that Mr. Floyd cannot be said to have been doing anything to further the interest of the employer or "fulfill his duty under workers' compensation" at the time of his death.

Moreover, the record clearly establishes that Mr. Floyd's death did not result from an aggravation of his original injury by medical care necessitated by the original injury. To the contrary, the record establishes that the anti-seizure medications were an effective means of *preventing* the seizures that resulted from Mr. Floyd's original injury, at least during the time periods when Mr. Floyd was compliant with taking his medications. The result of Mr. Floyd's failure to take the anti-convulsant medications was that there was no medical barrier to prevent the seizures caused by his original injury. Thus, Mr. Floyd's fatal seizure in 2008 was not due to an aggravation of his original injury; rather, the seizure was a direct result of the original injury.

The death of Mr. Floyd was a natural consequence of the brain injury suffered as a result of the work injury and not a new accident. Mr. Floyd sustained a severe brain injury which eventually led to seizures. As a result of the seizures, Mr. Floyd was required to take anti-convulsive medications. The autopsy report and death certificate tells the whole story of this case. Mr. Floyd died from complications of a seizure disorder due to a cavitary lesion of the brain due to remote head trauma. His death was a natural consequence of a severe brain injury which occurred on September 13, 2001. Also, illustrative of this position is Commissioner Bass' order of December 12, 2007. In Finding of Fact Number 5, Commissioner Bass found that on April 9, 2004, Mr. Floyd suffered compression fracture injuries to his spine primarily due to seizure activity prompted by his brain injury. Importantly, Commissioner Bass did not find that

Mr. Floyd sustained a separate or new injury by accident as a result of the April 10, 2004 seizure episode, but that the fractures were caused by seizures, which were related to the brain injury.

The April 9, 2004 and September 5, 2008 seizure episodes were virtually indistinguishable. On both occasions, Mr. Floyd stopped taking his anti-convulsant medications, which led to seizures, which resulted in serious bodily damage in 2004, and to Mr. Floyd's death in 2008. Both of these instances were a natural consequence of the September 13, 2001 work injury to Mr. Floyd's brain, and neither event rises to the level of a new injury by accident.

Mr. Floyd knew he had to take anti-convulsant medications so as to avoid seizures, and he failed to do so. As a result, he died of seizures which were caused by his brain injury. Whether or not Mr. Floyd intentionally stopped taking his anti-convulsant medication is immaterial to the ultimate issue of whether his fatal seizure was a direct result of his original injury, which has been clearly established. Because Mr. Floyd did not sustain an injury by accident occurring during the coverage of AmGuard, defendants Ken Baker Used Cars, LLC and AmGuard respectfully request that this claim be denied.

II.

Application of South Carolina Code Ann. §42-9-290 bars recovery under the facts and circumstances of this case inasmuch as Mr. Floyd's death was proximately caused by complications stemming from Mr. Floyd's original injury in September of 2001 and Mr. Floyd's death occurred more than 6 years after the date of the applicable injury by accident.

South Carolina Code Ann. § 42-9-290 governs entitlement to workers' compensation death benefits in cases where death results from a work-related accident. Where an employee's death follows a period of total disability and results proximately from a compensable injury by accident, South Carolina Code Ann. § 42-9-290 limits the time period during which recovery of death benefits may be had to "within six years after the accident."

The facts and circumstances of this case meet the criteria for barring a claim of death benefits under § 42-9-290. Mr. Floyd's death was due to a major motor seizure which was proximately caused by the Mr. Floyd's original work-related accidental injury in 2001. Mr. Floyd sustained a brain injury in the form of a cerebral cavitous lesion as a direct result of being hit on the head by a control arm on September 13, 2001. According to Dr. Healy, the severity and location of Mr. Floyd's brain injury caused him to be particularly susceptible to the onset of epileptic or seizure activity.(APA. 117) Unfortunately, the Mr. Floyd did, in fact, develop a seizure disorder as a consequence of original trauma to his brain and was required to take anti-convulsant medications to control the condition.

Mr. Floyd was aware of the seriousness of his condition and Dr. Healy admonished him regarding the importance of taking his anti-convulsant medications in order to avoid the onset of seizures. Nonetheless, Mr. Floyd was at times noncompliant with some or all of his medications. Dr. Healy's office note of April 28, 2003 indicates the Mr. Floyd had "stopped all of his medications." In 2004, the Mr. Floyd again became noncompliant with his anticonvulsant medications and suffered a series of seizures, spinal compression fractures, and acute renal failure. Mr. Floyd's treating physicians agreed that the compression fractures as well as Mr. Floyd's renal failure were a direct result of the seizures. Mr. Floyd survived the 2004 incident but spent more than a week in the hospital receiving treatment for injuries resulting from the seizure.

Mr. Floyd lived for seven years following his injury. On September 5, 2008, Mr. Floyd died from "complications of a seizure disorder (due to) cerebral cavitary lesion (due to) remote head trauma." (September 6, 2008 Autopsy Report – APA at 396). Because Mr. Floyd's death occurred more than six years after his original injury, and his death was proximately caused by

complications that developed due to his original injury, § 42-9-290 operates to bar recovery by his mother/personal representative.

CONCLUSION

For all of the foregoing reasons, the claim against AmGuard should be denied and AmGuard should be dismissed from the action as a party-defendant.

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BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, vs. Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Co. c/o SC Insurance Guaranty Assn., Carrier, Defendants.	WCC FILE NO. 0123790
AND Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, vs. Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Co. c/o SC Insurance Guaranty Assn. **AND** Amguard Insurance Company, Carrier, Defendants.	**POST-TRIAL BRIEF OF CLAIMANT (SEPTEMBER 30, 2009)** WCC FILE NO. 0824046

STATEMENT OF THE CASE

The deceased employee, Scottie Wayne Floyd, hereinafter referred to as "Scottie," 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 Scottie across the left forehead, nose, and cheek, breaking his nose and causing a closed head injury.

Scottie 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. Over the next four months, Dr. Stewart treated Scottie conservatively for a concussion. Scottie was nauseated for approximately two weeks after the accident. 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).

During that period of time, Scottie experienced severe headaches to the point wherein 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). Scottie was sent to Three Rivers Center for Behavioral Health for psychological evaluation. When he returned from Columbia, Scottie 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.

Scottie had severe headaches, photophobia, and uncontrolled emotional rages. Dr. Healy recommended he be referred to Tangram Rehabilitation Facility. The Employer/Carrier contested

the referral to Tangram, which resulted in a hearing before Commissioner Childs on January 7, 2004 and an Order dated June 10, 2004, 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.
>
> * * *
>
> 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.
>
> * * *
>
> 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.

On April 9, 2004, between the time of the hearing before Commissioner Childs on January 7, 2004 and the Order of June 10, 2004, Scottie was admitted to McLeod Regional Medical Center as a result of severe epileptic seizures. He sustained three (3) compression fractures and injury to his spine, which was a result of the brain injury and his noncompliance in not taking anti-seizure medications. The carrier denied that an injury to the spine arose out of and in the course of his employment. Finally on July 24, 2004, Scottie 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 later, Scottie 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. Depositions of Dr. Healy were taken on March 15, 2004 and again on April 24, 2006. 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, requiring the Employer/Carrier to provide continuing medical care for Scottie 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, Scottie '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 Scottie 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 Scottie, 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. Scottie was unable to control his rage during this entire period of time. After a period of time, Dr. Evans also refused to continue treating Scottie. Dr. Sasha Federer, a neuro-psychologist, undertook the continuing psychological treatment of Scottie in an attempt to socialize Scottie in hopes that he would not have to be re-institutionalized, and his condition was stabilized. Scottie still needed treatment for his back injuries by Dr. Rakesh Chokshi, an orthopaedic doctor, and for his brain injury by a neurologist.

After Scottie returned to his mother's residence on June 1, 2006, a hearing was conducted before the Commission on February 16, 2007, 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 resulting in an injury to his spine. The employer took the position that Scottie was refusing medical treatment and "denied the claimant sustained an injury to the spine."

An unappealed Order dated December 12, 2007, among other things, determined that Scottie had a physical brain injury and spinal injury from which he had not reached maximum medical improvement.

> 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, 12/12/07, p. 9)

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)

Dr. Healy testified in his deposition of April 24, 206 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)

(Order, 12/12/07, pp. 10-11)

Scottie 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.

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 dead. On August 25, 2009, Dr. Healy, the neurologist, testified that Scottie'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 Scottie 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)

ISSUES

I. **Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0824046 asserting that on September 5, 2008 "Claimant was receiving medical care and treatment for a brain injury (WCC #0123790) when he suffered convulsions while alone because of the affects of medication or the unsupervised withdrawal of medication resulting in accident seizures and his accidental death." This claim was brought by the dependent mother for benefits pursuant to § 42-9-290 -*Amount of compensation for death of employee due to accident.***

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, hereinafter referred to as "the mother," asserts that Scottie's death on September 5, 2008 constituted a death by accident arising out of and in the course of his employment. This is the third of three accidents he sustained while in the employ of Ken Baker Used Cars. The first accident occurred on September 13, 2001, while removing a control arm under tension off of a Mercedes, the control arm broke loose and struck Scottie across the left forehead, nose, and cheek, breaking his nose and causing severe pain and a closed head injury. This accident was found to be compensable by Order of the Commission dated June 10, 2004.

As a result of pain and seizures caused by this September 13, 2001 accident, Scottie was required to take medications both for pain and for seizures. He also suffered from poor judgment and irrational and hostile rages.

On April 9, 2004, Scottie sustained a second accident when he for a period of time was not compliant and refusing to take his medications which resulted in a life threatening episode of seizures of such severity that he nearly suffered kidney failure and sustained three compression fractures of his spine at T3, T7, T8, and T9. This accident was also determined to be

compensable and the Employer was required to pay medical benefits and provide treatment for the resulting spinal injuries by Order of the Commission dated December 12, 2007. This Order was not appealed.

After the second accident on July 27, 2004, Claimant was transferred from under the supervision of his mother, Betty Joe Floyd, to Tangram/ResCare Premier, an institution for brain damaged individuals, for a period of twenty-two (22) months. On June 27, 2006, the Employer and Scottie entered into a Consent Order in which, among other things, Scottie agreed to live with his mother provided she was paid Four Hundred ($400.00) Dollars per week to care for him and provide 24-hour supervision.

Thereafter, on February 16, 2007, a hearing was conducted wherein Scottie attempted to get an award of permanency as to his brain injury and as to his back injury, and the Employer attempted to stop benefits because Scottie was non-compliant with his medical treatment and intermittently not taking his medications and was threatening his physicians and psychologist with lethal physical violence. On December 12, 2007, an Order was issued finding that Scottie had not reached maximum medical improvement for treatment of his brain injury of September 13, 2001 nor his back injury of April 9, 2004. The Order did, however, determine that Scottie was not intentionally being noncompliant with his medications or medical treatment,

> 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. (emphasis added)
>
> (Order, 12/12/2007, p. 11)

That Order was not appealed.

Scottie died on September 5, 2008. After reviewing the autopsy report and toxicology reports regarding Scottie's death, the authorized treating neurologist, Dr. Joseph Healy, opined in his deposition of August 25, 2009 that Scottie against medical advice had clearly, knowing the consequences, ceased taking his anti-seizure medications for at least a week resulting in fatal seizures on September 5, 2008.

A. At the time of Scottie's original injury, the Employer, Ken Baker Used Cars was insured by the carrier Legion Insurance Company, represented by Mark D. Cauthen. At the time of Scottie's death, the Employer was insured by Amguard Insurance Company, represented by Edwin P. Martin, Jr. The Employer and both insurance carriers assert that at the time of Scottie's death on September 5, 2008, Scottie was not an employee of Ken Baker Used Cars and that his death as a result of seizures did not arise out of and in the course of his employment.

The mother asserts that the medical treatment that Scottie was undergoing and the Order requiring him to leave Tangram/ResCare Premier and reside with his mother under her supervision and permitting him to self-medicate were pursuant to the Consent Order issued by the Commission on June 27, 2006.

The case of Shuler v. Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005), stands for the proposition that if a claimant dies as a result of an automobile accident while seeking medical treatment for an injury that did arise out of and in the course of his employment, then his death in complying with the employer's instructions for medical treatment arose out of and in the course of his employment also.

Scottie at the time of his death was taking medications for seizures from the September 13, 2001 accident and pain medication for the April 9, 2004 accident. If the

Commission finds that his death was accidental and not suicide, then clearly Scottie's dependent mother is entitled to the death benefits under § 42-9-290.

B. The Employer asserts that the mother is barred from receiving death benefits arising out of Scottie's injuries because his original injury occurred more than six (6) years before his death pursuant to § 42-9-290. The mother asserts that although Scottie died more than six (6) years after the September 13, 2001 accident, he died only four (4) years after the April 9, 2004 accident, which is clearly a compensable accident as a matter of the law of this case pursuant to the unappealed Order of December 12, 2007.

In any event, the mother asserts that the actual accident from which Scottie died was the September 5, 2008 accident, when he accidentally, non-intentionally died because of non-compliant taking of his medications. It was certainly an accident in allowing Scottie's mother, a layman, to oversee his medications when she had no medical experience considering the history of Scottie's non-compliance involving his medications.

Additionally, the mother asserts that since Scottie was totally disabled pursuant to § 42-9-10,

> Notwithstanding the five hundred 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 the benefits for life, (emphasis added),

the six (6) year statute of limitation set out in § 42-9-290 does not apply because that portion "and within six years after the accident" has been modified by the "or elsewhere in this title" provision in § 42-9-10 as it applies to brain damaged claimants.

C. Notwithstanding whether or not the Commission finds that Scottie was an employee of Ken Baker Used Cars at the time of his death on September 5, 2009 or finds that he is barred because his death did not occur within six years of the 2001 accident, the Employer asserts that the mother is barred from recovery under § 42-9-290 because Scottie's death was the result of suicide, which interrupted the causal chain between the accident that arose out of and in the course of his employment whether it was the 2001 or 2004 or 2008 accident and Scottie's death. The Employer is relying on § 42-9-60, which states,

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

Our Court of Appeals has determined in Harvey v. Cisson Construction Co., 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008) (cert. pending), that death caused by suicide cannot as a matter of law be causally the result of a compensable injury. Therefore, the employer argues Scottie died from a cause other than his injury. The case of Harvey specifically held,

> If Harvey's death is to be compensable at all, it must be the result of spontaneous or uncontrollable impulse, or lapse of conscious volition negating his willful intention. (Harvey v. Cisson Construction Co., 377 S.C. at 175, 659 S.E.2d 171 (Ct. App. 2008)

Further, the Employer asserts that the Court of Appeals has specifically ruled,

> The Workers' Compensation Act provides that "[n]o compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." S.C. Code Ann. § 42-9-60 (Supp. 2006). Cisson contends this provision bars an award of death benefits as a matter of law, because Harvey's

suicide was a result of his willful intention to kill himself. We agree the strict construction of section 42-9-60 bars compensation for death that results from "the willful intention" of an employee "to injure or kill himself." (Harvey at p. 156)

* * *

II. Applicable Standard I Claims Involving Suicide.

The determinative factor in this case is the standard by which compensability for suicide is evaluated. The precedent extant reveals a judicial brouhaha of bewilderment and bafflement as to the proper rule in regard to the issue of suicide. The cognoscenti of workers' compensation jurisprudence conceived two expository rules: "willful intent" and "chain of causation." In South Carolina, we reject the "chain of causation" test and adhere to the "willful intent" standard.

A. Willful Intent Test

Compensability for suicide ultimately turns on the issue of proximate cause versus independent intervening cause. 2 Arthur Larson &; Lex Larson, *Larson's Workers' Compensation Law*, § 38.01 (2000). "The basic legal question seems to be agreed upon by almost all authorities: was the act of suicide an intervening cause breaking the chain of causation between the initial injury and the death?" *Id.* If the decedent's death was the result of "willful intent" to take his life, then "willful intent" breaks the chain of causation between the injury and death. Consequently, the decedent's death cannot be said to arise out of the employment. *Id.*

(Harvey, at p. 165)

* * *

As we held in *Mullinax*, natural consequences flowing from a compensable injury are only compensable absent an independent intervening cause. 318 S.C. at 436, 458 S.E.2d at 79. Yet, suicide, by definition, is an act of willful intention. Suicide is an unnatural consequence of work related depression because it injects the willful intention of the employee into the calculation. The employee's willful intention to kill himself is the independent intervening cause that severs the link with the compensable injury.

Moreover, while suicide resulting from depression is foreseeable, it is not a natural consequence of depression. Conceptually, the notion of natural consequence connotes the inevitability of a result beyond the employee's control.

CONCLUSION

We rule, as a matter of law, that the plain language of section 42-9-60 bars compensation for Harvey's death resulting from his willful

> intention to kill himself." The test in South Carolina for evaluating compensability is whether the employee's suicide was the result of "willful intent." Unless substantial evidence supports a finding that "willful intent" is negated by spontaneous, impulsive, or instinctive conduct, without deliberate or formed intention, or without conscious volition to produce death, the statutory bar to workers' compensation benefits applies.
>
> 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.
>
> Accordingly, the order of the circuit court is AFFIRMED.
>
> (Harvey at p. 178)

The mother asserts that Scottie's death was the result of, "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." (Order, 12/12/2007, p. 11)

D. The Employer finally raises as a defense the fact that even if Scottie's death was determined not to be suicide or at the very least to have been causally related and arising out of his previous two injuries, that the mother is barred from recovery because she was not dependent upon Scottie at the time of the original injury of September 13, 2001.

The mother asserts that notwithstanding whether she was dependent upon Scottie 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 she was living at home with her son, she was unemployed because she was taking care of him, and she was unable to be employed because of her own disability.

The mother further asserts that there are no other individuals that were dependent upon Scottie for support. The Employer's own dependency investigation reveals that Scottie was not married and had no children. The mother further asserts that § 42-9-140 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.

II. **Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 52 on WCC #0123790 asserting that on September 13, 2001 "Claimant was receiving disability benefits pursuant to the Order of the Commission. He 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 pursuant to § 42-9-10 and § 42-9-30(20) and R.67-1102 'Brain' and § 42-9-30(19) (back) when he died from causes other than the injury." This claim was brought by the dependent mother for benefits pursuant to § 42-9-280 – *Payment of unpaid balance of compensation when employee dies.***

The mother asserts that if the Commission determines that Scottie's death was the result of suicide which broke the causal relationship between his accidents and his death such that she would not be entitled to benefits under § 42-9-290, then as a matter of law Scottie's "death was from causes other than his injury." Therefore, since his suicide broke the causal chain between the injury and his death, the next of kin dependent is entitled to the balance of his award had he lived pursuant to § 42-9-280.

> Payment of unpaid balance of compensation when employee dies.
>
> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for

> which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this Title and the dependents of such employee are awarded compensation thereof, all right to unpaid compensation provided by this section shall cease and determine. (emphasis added) (SC Code Ann. § 42-9-280, As Amended)

It is clear that at the time of his death Scottie had sustained at least two physical injuries to his body. He had sustained three compression fractures to his spine, to which Dr. Healy testified on August 25, 2009 had resulted in at least a 15% permanent impairment to the spine pursuant to § 42-9-30(19). (Healy Dep., 8/25/09, pp. 14-15)

Dr. Healy further testified that in addition to his permanent psychological injuries for which he was being treated by Dr. Sasha Federer involving his judgment and ability to control his rages and deal with his pain, Scottie also sustained a permanent physical injury to the brain as an organ; namely, the frontal lobe of the brain where executive functions are performed. The physical injury to the brain as an organ resulted in a eighty-five (85%) percent permanent impairment to the brain pursuant to § 42-9-30(20) and R. 67-1102 "Brain."

> Q. All right. And are you – do you have an opinion to a reasonable degree of medical certainty that that physical injury to the brain was permanent when you saw him on September the 2nd of '08?
>
> A. It was.
>
> 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 injuries that Scottie had as a result of his head injury and one was an impairment of 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 Mmedical 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. 15, line 23 – p. 18, line 11)

III. **Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, filed a Form 50 on WCC #0123790 asserting that on September 13, 2001 "Claimant has died with a total or partial loss of use of the brain under § 42-9-30(20) and R.67-1102 'Brain' as modified by § 42-9-10 (paragraph 3) 2681.64 weeks (51.57 X 52) AND Claimant has died with total or partial loss of use of the back under § 42-9-30(19); THEREFORE Claimant is entitled to a permanent award for loss of use of the brain and back pursuant to § 42-9-30." This claim was brought by the dependent mother for benefits pursuant to § 42-9-30 in that the Claimant is entitled to an award of permanency for loss of use of the brain as an organ and loss of use of the back.**

If the Commission determines that as a matter of law the Claimant's willful intent to commit suicide breaks the chain of causation between the injury and his death, then pursuant to § 42-9-280, when an employee,

> ... 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. (emphasis added)

It is clear that at the time of his death, Scottie suffered a permanent fifteen (15%) percent permanent impairment to the spine under § 42-9-30(19) (pre 7/1/07 amendment) and an eighty-five (85%) percent permanent impairment to the brain as an organ pursuant to § 42-9-30(20) and R. 67-1102 "Brain" (pre 7/1/07 amendment).

A. As to the back –

The mother asserts that Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), as applied in Floyd v. C. B. Askins, 382 S.C. 84, 675 S.E.2d 450 (SC Ct. App. 2009) (Cert. pending), requires the South Carolina Workers' Compensation Commission

and the employee to make an election whether the permanent award is based on diminished earning capacity under § 42-9-10 or 42-9-20 or the award is for loss of use of a scheduled member under § 42-9-30. A permanent award based on lost earning capacity terminates upon the death of the employee. However, if the employee is entitled to an award for a scheduled member pursuant to § 42-9-30, the award survives the death of the employee.

It is clear in this case based on the length of Scottie's disability and treatment that he had reached maximum medical improvement as to the spine and that he had at least a 15% impairment, that he had not been able to work, and that he had limited education and work experience. He was 33 years of age at his death and his ability to be retrained was severely limited; therefore, a determination by the Single Commissioner that Scottie's back injury resulted in a greater than 50% loss of use of the back would certainly be justified pursuant to § 42-9-30(19) (pre 7/1/07 amendment).

B. As to the brain –

The mother asserts that § 42-9-30(20) as applied to R. 67-1102 "Brain" establishes a minimum award for damage to the brain of 25 weeks. There is no question pursuant to the depositions of all the physicians that treated Scottie that he had been receiving intensive and in some cases institutionalized treatment due to his brain injury for seven years, Scottie had greater than a minimum injury to his brain. Dr. Healy opined that Scottie had an eighty-five (85%) percent physical impairment to the brain as an organ that affected his judgment, his ability to control his emotions, and was painful.

An award of total loss of the brain would require a permanent award of 250 weeks. That award for loss of use of the brain would clearly survive the death of the employee pursuant to § 42-9-280.

C. The mother asserts that the 250 limitation upon the total physical loss of use of the brain is inadequate. Section 42-9-10 provides 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 ... who has suffered physical brain damage is not subject to the 500 week limitation and shall receive benefits for life. (emphasis added)

R. 67-1102 "Brain" limitation of 250 weeks for loss of use of the brain under § 42-9-30(20) must yield to that mandate. If Scottie receives an award for his brain injury based on diminished earning capacity, Floyd v. C.B. Askins, 382 S.C. 84, 675 S.E.2d 450 (SC Ct. App. 2009)(Cert. pending) requires the award to terminate upon his death. Floyd is presently pending a decision on a Petition for Certiorari. However, the South Carolina Court of Appeals specifically draws a distinction between awards based on diminished earning capacity which terminate upon the death of the employee and awards made under § 42-9-30 and the second paragraph of § 42-9-10.

> Section 42-9-10(A), at issue in Stone, focuses on situations in which a claimant's "incapacity for work resulting from an injury is total." Likewise, paragraph (C) seems to focus on a claimant's inability to earn a wage as opposed to a physical loss. The statute conditions the lifetime award of benefits upon a finding of total and permanent disability. See § 42-9-10(C) ("[A]ny 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 ... shall receive benefits for life")
>
> Floyd v. C. B. Askins, 382 S.C. 84, 675 S.E.2d 450 (SC Ct. App. 2009)

Scottie was twenty-six (26) years of age at the time of his injury and pursuant to § 19-1-150 his life expectancy was 51.57 years or 2681.64 weeks. Therefore, R. 67-1102 "Brain" by application of 42-9-10 removes the 250 week limitation and replaces it with Scottie's life expectancy of 2681.64 weeks.

A review of the South Carolina Workers' Compensation statute, S. C. Code Ann. § 42-1-10, *et seq.*, (1985) reveals that the "five hundred week" limitation is specifically mentioned in § 42-9-10 and § 42-9-30(20). In § 42-9-10 above set out it is first established and subsequently expanded. In § 42-9-30(20) the 500 week limitation is again declared involving instances of total or partial loss of or loss of use of numerous body members not covered under §§ 42-9-10, 42-9-20, or 42-9-30.

It is of particular note that the brain was not listed as a scheduled body part under § 42-9-30. However, the Legislature pursuant to the authority granted the Commission in § 42-9-30(20) authorized the Commission to adopt additional body parts as scheduled members.

> ... The Commission shall by regulations 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 such ratios on accepted medical standards and such ratios shall determine the benefits payable under this section. (S. C. Code Ann. § 42-9-30(20) (1985))

Pursuant to the authority of § 42-9-30(20), the Commission adopted 25A S. C. Code Ann., Regulation 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 § 42-9-10 the brain is now subject to the expansion of lifetime benefits in § 42-9-10 "or elsewhere in this title."

At the very least the brain, for the purposes of the application of § 42-9-280, is an injury covered by both the second paragraph of § 42-9-10 and § 42-9-30 by the application of § 42-9-30(20) and Regulation 67-1101 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) (1985))

The 500 week limitation is next set out in § 42-9-170 involving cases where an employee who receives an injury under § 42-9-30 or the second paragraph of § 42-9-10 sustained another permanent injury in the same employment. In S. C. Code Ann. § 42-9-170 (1985), 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 § 42-9-10.

Interestingly in the case presently before the Court, if the claimant's death had resulted or been causally connected to his permanent brain injury, § 42-9-290 which provides for a death benefit for the claimant's dependents has a limitation of 500 weeks, which is also subject to the expansive language of the 1984 amendment of § 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 § 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 moves that the Commission issue its Order awarding 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 subject to a credit for temporary total disability benefits paid by the employer to the date of his death on September 5, 2008 for total loss of use of the brain;

Or in the alternative;

That the Commission issue its Order awarding 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 42-9-30(19) and 250 weeks for total loss of use of the brain pursuant to 42-9-30(20) and R.67-1102 "Brain";

Or in the alternative:

That the Commission 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.

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF MARION)
)
Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd,)
Plaintiff(s))
)
vs.)
)
Ken Baker Used Cars, et al.)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP - 33 - 1648

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BOOK ____ PAGE ____

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☒ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** December 29, 2010

STEVE WUKELA, JR.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA COUNTY OF MARION	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO. 2010-CP-_____
Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, Claimant/Appellant, VS 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, Defendants/Respondents.	WCC Case Nos. 0123790 and 0824046 NOTICE OF APPEAL OF ORDER DATED DECEMBER 3, 2010 FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FILED
BOOK PAGE
DEC 29 P 2:15

TO: MARK D. CAUTHEN, ESQUIRE, AND PETER P. LEVENTIS, ESQUIRE, ATTORNEYS FOR DEFENDANTS/RESPONDENTS LEGION INSURANCE CO. IN LIQUIDATION C/O SOUTH CAROLINA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION; AND

EDWIN P. MARTIN, JR., ESQUIRE, ATTORNEY FOR DEFENDANT/ RESPONDENT AMGUARD INSURANCE COMPANY;

AND THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

YOU WILL PLEASE TAKE NOTICE that pursuant to *S. C. Code Ann.*. § 42-17-60 (1976) Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, through her attorney, Steve Wukela, Jr., does hereby appeal to the Court of Common Pleas of Marion County, South Carolina, from the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated December 3, 2010 on the following grounds, to-wit:

1. Did the Commission err in its Ruling of Law No. 12 that pursuant to § 42-9-110 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 § 42-9-140, 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 Commission err as a matter of law in failing 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 § 42-9-290?

3. Did the Commission err 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 Commission err as a matter of law in 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 § 42-9-280, § 42-9-30 and Reg. 67-1101(C) against the substantial evidence in the record as a whole?

5. Did the Commission err in failing 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 § 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 cause other than the April 9, 2004 injury in view of the reliable, probative, and substantial evidence on the whole record?

6. Did the Commission err in failing 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 § 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?

7. Did the Commission err as a matter of law in failing 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 § 42-9-30, 42-9-10, and R. 67-1101(C)?

WHEREFORE, Claimant/Appellant respectfully asserts that the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated December 3, 2010 be vacated and that this Court issue its Order awarding 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 § 42-9-30, and at least 60 weeks of benefits for at least a 20% loss of use of the back pursuant to § 42-9-30;

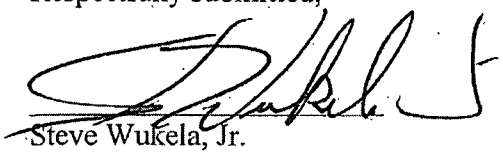
Or in the alternative;

That this Court issue its Order awarding Betty Joe Floyd, as dependent mother of the deceased Claimant Scottie Floyd, 500 weeks of benefits for greater than 50% loss of use of the back pursuant to § 42-9-30(19) and 250 weeks of benefits for total loss of use of the brain pursuant to § 42-9-30(20) and R.67-1101 "Brain";

Or in the alternative:

That this Court award Betty Joe Floyd, as dependent mother of the deceased Claimant Scottie Floyd, 500 weeks of benefits for the accidental death of Scottie Floyd on September 5, 2008 pursuant to § 42-9-290.

Respectfully submitted,



Steve Wukela, Jr.
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(803) 669-5634
Attorney for Claimant/Appellant

December 19, 2010

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MARION COUNTY

South Carolina Workers' Compensation Commission

WCC Case Nos. 0123790 and 0824046

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.

NOTICE OF APPEAL

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, appeals the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated December 3, 2010. Appellant received written notice of entry of this Decision and Order on December 6, 2010.

December 29, 2010

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

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DEC 30 2010
SC Court of Appeals

Other Counsel of Record:

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Peter P. Leventis, Esquire
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In liquidation c/o South Carolina Property &
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(803) 256-4645

Edwin P. Martin, Jr., Esquire
Hedrick, Gardner, Kincheloe & Garofalo, LLP
Post Office Box 11267
Columbia, South Carolina 29211
Attorney for Respondent Amguard Insurance Company
(803) 727-1200

GROUNDS FOR APPEAL

The Appellant appeals the Decision and Order of the South Carolina Workers' Compensation Commission dated December 3, 2010 on the following grounds:

1. Did the Commission err in its Ruling of Law No. 12 that pursuant to § 42-9-110 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 § 42-9-140, 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 Commission err as a matter of law in failing 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 § 42-9-290?

3. Did the Commission err 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 Commission err as a matter of law in 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 § 42-9-280, § 42-9-30 and Reg. 67-1101(C) against the substantial evidence in the record as a whole?

5. Did the Commission err in failing 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 § 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 cause other than the April 9, 2004 injury in view of the reliable, probative, and substantial evidence on the whole record?

6. Did the Commission err in failing 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 § 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?

7. Did the Commission err as a matter of law in failing 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 § 42-9-30, 42-9-10, and R. 67-1101(C)?

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM MARION COUNTY

South Carolina Workers' Compensation Commission

WCC Case Nos. 0123790 and 0824046

RECEIVED
FEB 16 2011
SC Court of Appeals

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.

MOTION FOR CONSOLIDATION OF APPEALS
PURSUANT TO RULE 214, SCACR

February 15, 2011

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

The instant matter was commenced before the South Carolina Workers' Compensation Commission by the filing on May 30, 2009 of a Form 50 – *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie Wayne Floyd, deceased vs. Ken Baker Used Cars and Body Shop, Employer and Legion Insurance Company % SC Insurance Guaranty Associates, Carrier, WCC File #0123790,* alleging an accident on September 13, 2001; a Form 52 – *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependant mother beneficiary of Scottie W. Floyd, deceased vs. Ken Baker Used Cars and Body Shop, Employer and Legion Insurance Company % SC Insurance Guaranty Association, Carrier, WCC File #012379,* alleging an accident on September 13, 2001; and a Form 52 – *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependant mother beneficiary of Scottie W. Floyd, deceased vs. Ken Baker Used Cars and Body Shop, Employer and Legion Insurance Company % SC Insurance Guaranty Association and Amguard Insurance Company, Carriers, WCC File #0824046,* alleging an accident on September 5, 2008. These matters were heard by the Single Commissioner on September 1, 2009 at a consolidated hearing. The Single Commissioner issued a consolidated Order on March 1, 2010 affecting all the above claims.

Pursuant to S.C. Code Ann. §42-17-50, the Claimant made timely application for review, Form 30, of all matters in the Order of the Single Commissioner dated March 1, 2010. After proper hearing, the Appellate Panel of the South Carolina Workers' Compensation Commission issued its Decision and Order basically affirming in its entirety the Order of the Single Commissioner as to all matters on December 3, 2010.

By way of further explanation, the Claimant sustained a brain injury on September 13, 2001 while in the employ of the Defendant, Ken Baker Used Cars, who at that time was insured by Legion Insurance Company. Ultimately, Legion Insurance Company became insolvent and South Carolina Property & Casualty Insurance assumed responsibility of the claim. After numerous hearings and numerous Orders affecting the Claimant's entitlement to benefits under the Act and medical treatment, the Claimant alleged he sustained a second accident resulting in injuries to his thoracic spine on April 9, 2004 arising out of and in the course of his employment, which also resulted in Orders of the Commission. On September 5, 2008, the Claimant died as the result of a third accident.

Numerous issues have arisen as to what claims the Claimant, the estate of the Claimant, and/or the Claimant's mother has to benefits under the Act. At the time of the Claimant's death on September 5, 2008, the Employer was insured by Amguard Insurance Company.

One of the numerous other 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. Pursuant to S.C. Code Ann. §42-17-60, as amended, effective July 1, 2007, and **Clinton vs. Pee Dee Regional Transportation**, 375 S.C. 60, 650 S.E. 2d 464 (2007), if the Claimant is correct and the Claimant's death on September 5, 2008 is considered a separate accident arising out of and in the course of his employment with Ken Baker Used Cars, then the jurisdiction for that appeal of denial of benefits is to the South Carolina Court of Appeals, and Amguard Insurance Company is an appropriate party to the litigation.

However, there are numerous other issues that are raised on appeal surrounding the cause of the Claimant's death on September 5, 2008 that would have to resolved based on whether the date of September 5, 2008 is considered a separate accident involving a separate insurance carrier or if September 13, 2001 or April 9, 2004 are the jurisdictional accident dates; in which case, the Court of Common Pleas in Marion County which would have jurisdiction of the appeal.

Out of an abundance of caution the Claimant, Betty J. Floyd, your Appellant, has filed identical appeals in the South Carolina Court of Appeals: *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee v. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation % South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carriers, Case Number: 2010181588* and in the Court of Common Pleas in Marion County: *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee v. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation % South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carrier, Civil Action Number 2010-CP-33-1048*.

The Appellant asserts that the interest of the parties and judicial economy would best be served by this Court having exclusive jurisdiction over these combined appeals pursuant to Rule 214, SCACR, notwithstanding the fact that the original accident of September 13, 2001 would require the adjudication of that matter in the Court of

Common Pleas in Marion County and from thence any appeal to the South Carolina Court of Appeals.

THEREFORE, your Appellant, Betty J. Floyd, hereby moves pursuant to Rule 214, SCACR, that the South Carolina Court of Appeals case: *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee v. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation % South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carriers, Case Number: 2010181588* and the Court of Common Pleas in Marion County case: *Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee v. Ken Baker Used Cars, Employer, and Legion Insurance Company in liquidation % South Carolina Property & Casualty Insurance Guaranty Association and Amguard Insurance Company, Carrier, Civil Action Number 2010-CP-33-1048,* be consolidated into one appeal to be heard by the South Carolina Court of Appeals because the same Order and the same question is involved in two separate appeals in different cases and consolidation would serve the interest of judicial economy and prevent inconsistent orders.

Respectfully submitted:

February 15, 2011

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

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.

NOTICE OF APPEAL

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased employee, appeals the Order of the Honorable Thomas Russo dated January 4, 2012, which was filed February 17, 2012, entered on March 8, 2012, and served on Appellant on March 12, 2012. Appellant received written notice of entry of this Order on March 13, 2012.

March 19, 2012

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Attorney for Appellant

Other Counsel of Record:

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Peter P. Leventis, Esquire
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In liquidation c/o South Carolina Property &
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(803) 256-4645

Edwin P. Martin, Jr., Esquire
Hedrick, Gardner, Kincheloe & Garofalo, LLP
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Columbia, South Carolina 29211
Attorney for Respondent Amguard Insurance Company
(803) 727-1200

GROUNDS FOR APPEAL

The Appellant appeals the Order of the Honorable Thomas Russo dated January 4, 2012, filed on February 17, 2012, and served on the Appellant on March 13, 2012, on the following grounds:

1. Did the Court below err as a matter of law in its Ruling of Law No. 10 that pursuant to § 42-9-110 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 § 42-9-140, 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 § 42-9-290?

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 § 42-9-280, § 42-9-30 and Reg. 67-1101(C) 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 § 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 cause other than the April 9, 2004 injury in view of the reliable, probative, and substantial evidence on the whole record?

GROUNDS FOR APPEAL

The Appellant appeals the Order of the Honorable Thomas Russo dated January 4, 2012, filed on February 17, 2012, and served on the Appellant on March 13, 2012, on the following grounds:

1. Did the Court below err as a matter of law in its Ruling of Law No. 10 that pursuant to § 42-9-110 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 § 42-9-140, 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 § 42-9-290?

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 § 42-9-280, § 42-9-30 and Reg. 67-1101(C) 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 § 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 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 § 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?

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 § 42-9-30, 42-9-10, and R. 67-1101(C)?

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION)	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,	
Plaintiff,	Transcript of Record
vs.	Hearing
Ken Baker Used Cars, Employer, and Legion Insurance Company in Liquidation c/o South Carolina Property and Casualty Guaranty Association and Amguard Insurance Company,	September 8, 2011
Defendants.	

B E F O R E :

Honorable Thomas Russo
Marion County Courthouse
Marion, South Carolina

A P P E A R A N C E S:

Steve Wukela, Jr., Esquire
Attorney for Plaintiff

Edwin Pruitt Martin, Jr., Esquire
Attorney for Amguard Insurance Company

Mark Cauthen, Esquire
Attorney for South Carolina Property and Casualty Guaranty Association

Grace L. Hurley, CVR-CM
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

THE COURT: We are now here on civil action 2010-CP-33-1048, and it's an appeal from a Workers' Comp hearing; is that correct?

MR. WUKELA: Yes, sir.

THE COURT: All right, Mr. Wukela.

MR. WUKELA: Your Honor, you have got our briefs. We also prepared what we call a record on appeal before the circuit court. It's consisting of the two volumes back and forth, just to give you some procedural history on this case, which are of course is reviewed in the briefs. You've got two different sets of briefs from the Respondents and the reason for that is we've got two different dates of accident at least in this case and there are two different insurance companies, depending on which date of accident. The initial accident was on September 13th, 2001. Just briefly, the Claimant was under a Mercedes-Benz taking apart the suspension and something sprang loose and banged him right on the frontal area of the forehead, broke his nose and caused brain damage and that happened September 13th, 2001. He died on September 5th, 2008, and we contend that's a, that's really a third accident but it is a separate accident from the accident of September 13th of '01. Because of that you've got two different insurance companies, and the first insurance company went bankrupt. So, the Guaranty Fund is representing them and that's what Mr. Cauthen is here for, and the other insurance

company was the insurance company for this same employer on September 5th, 2008. Now, because of the differences in the dates and the change in the statute, the statute was changed on July the 1st of 2007. Prior to that, appeals from the appellate panel would be before this court. After that date appeals go to the Court of Appeals. So, when we filed our appeals we filed it both in this court and in the Court of Appeals and there were - there was a motion - I made a motion before the Court of Appeals to have them consolidate both these cases and hear them in the Court of Appeals, which I thought was manifestly economical and would reduce a lot of printing costs and time. They, of course, didn't agree with that. They said, "No, do it all at the circuit court, see us on the time, on the next go around." So, that's what they've done. They've dismissed the case, then it was appealed up here and told us to come down here to hear both these cases and that might be what part of the problem is because Mr. Cauthen's case was the one that was on appeal to the Court of Appeals and I don't know whether they got the order from the Court of Appeals or not but that's why we're all here now.

THE COURT: Okay, all right, sir.

MR. WUKELA: The, the - I know Your Honor is familiar with the Workers' Compensation statute and I'd ask the Court's indulgence to be very basic in my understanding of what the issues before the Court are.

THE COURT: Yes, sir.

MR. WUKELA: I'm going to hand up to the Court copies of the pertinent statutes that I - that I want to make reference to ---

THE COURT: Thank you, sir.

MR. WUKELA: --- just to save us from having to go through the books. The first statute is 42-9-10. The easiest way for me to explain the difference between 42-9-10 and 42-9-30 is that 42-9-10 according to the Stone case is a statute involving diminished earning capacity, either total, partial - well, 49-20 is partial, total or permanent, partial and temporary. Those are the phrases that will continually come up. When a person becomes disabled and it's total we assume it's temporary and so he draws his benefits under 42-9-10 because of diminished earning capacity. If he's able to do some amount of work but it's still temporary it's 42-9-20 which he gets part of his income. This case involved an application in the initial state of 42-9-10. He was temporarily totally disabled because of a brain injury and a broken nose.

The next statute that comes up is 42-9-30. Now, this is really a parts statute. You get paid for loss of a body part. A man loses his arm, that's 220 weeks or he can go back to his same job doing his same functions and making as much or more than he was before the accident. He still gets compensated

for the loss of the arm in addition to whatever medical treatment he had in temporary benefits while he was healing under 42-9-10. The Stone case, which appears in the briefs, it involves a back injury. Now, a back injury is unique under our statute. As a matter of a fact you'll see there's two copies of 42-9-30 because the statute changed in July of 2007. The back can be seen as diminished earning capacity. Until 1972 if you had a back injury and you had a disk removed and you were able to go back to work and you did not have a diminished earning capacity that was the end of your case. The fact that you had a functional loss to your spine did not amount to anything. Unlike the arm, which was a listed member, schedule member, your back, prior to 1972 was not a listed member. Therefore, unless you could show diminished earning capacity that was the end of your case. Okay, 1972 they amended the statute and put the back in a special category of listed members and basically what the special category was this, if you had an injury to your back and the AMA guides found that you had a partial disability permanent then you would get a percentage of 300 weeks in addition to the temporary benefits for the loss of the back. If it was 50 percent or more impairment in the - in the - disability in the minds of the commission then you got total disability, which was 500 weeks, lifetime, well, 500 weeks which is the cap at that time and lifetime benefits as far as medical was

concerned. The peculiar part about that statute was this, if the commission awarded you a permanent partial disability under 42-9-30 as a listed member and you died, your beneficiaries would take the balance of that award. On the other hand, if they found you to be disabled under 42-9-10 because of diminished earning capacity and you died they took nothing on the theory that you didn't have any more diminished earning capacity because you were dead. So, that's the difference between the loss of use and diminished earning capacity and Stone goes into great detail setting out the differences. If the award in Stone had been for 50 percent or greater loss of use of the back then his beneficiaries would have taken it but that's not the way the case was styled. The award was for diminished earning capacity under 42-9-10 and when he died he no longer had diminished earning capacity and they didn't take it. I don't think it's a - well, it wouldn't make any difference what I think. That's the law. The same thing happens anytime an individual who is injured has a death while they're still in convalescence. If there is no award made then we've got a problem. If there is an award made and he's no longer in convalescence, it's a permanent impairment, then his family takes. The question happens, well, what happens if we know the guy has a permanent impairment, say you've got a fellow who has a loss of leg, okay, we know a leg is 195 weeks but he also had a shoulder injury. The doctor

said, "You're healed as far as your leg is concerned, you're at maximum medical improvement, but your shoulder you haven't reached maximum medical improvement. So, you're still drawing temporary benefits," and in the interim while his shoulder is being healed he dies. Well, we take the position that he had a permanent loss of the leg and his heirs under 42-9-30 ought to take that as if he had lived and that's the phraseology in our statute which I'll get to in a moment.

There is case law and I'm going to hand up to you a rendition out of Larson's which is basically the treatise that the court looks at when dealing with Workers' Compensation, award or claim, and it's 89.06, death benefits, death before stabilization of injury. Our statute says and I'm referring now to 42-9-280 in that packet, payment of unpaid balance of compensation when employee dies, 42-9-280, "When an employee receives or is entitled to compensation under this title for an injury covered by the second paragraph of 42-9-10," and that involves a loss of both legs, blindness and things like that, "or 42-9-30," which is the scheduled members, "and he dies from any cause other 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 compensation the employee would have been entitled to had he lived." Now, there are those who say well that only means if you had an award, say he had been

awarded 30 percent to the leg and he was receiving weekly checks, it was a permanent award and he died that his heirs would pick up on those permanent checks. Well, it says if he receives or is entitled to and that falls into the second category where a guy we know has got a permanent impairment and we can determine the extent of that disability. How do you determine that? You determine that by taking the doctor's deposition. One case the doctor says, "Yes, he's got a total loss of the leg or 90 percent loss of the leg, the last time I saw him and that's permanent." So, we got a permanent award as far as being able to prove it to the commission and they'll make a decision on the - whether or not that's credible testimony. On the other hand, if the doctor says, "Geez, your guy had a back injury, the day I last saw him I would say it was 40 percent but I had every reason to think that he would improve over time and I can't tell you to any reasonable degree of medical certainty where he would have been had he lived through treatment." Well, then there's a failure of proof, but if there is proof of the disability from the testimony of the doctors then an award can be given even after he dies, even if he hadn't reached maximum medical improvement before he died if the testimony is of such character and quality that it could be relied upon when given significant weight.

In this case that you have before you, my client in April

9th of 2004, that would have been about three years after his original accident, we were in the process of trying to get him committed to put a tender description of what we were doing. He was rebellious. He had fits of rage. He was hard to control. This is all the result of his brain injury. He had frontal lobe damage which controls people's judgment and the ability to control their urges. He had rages, and we were in the process of having him sent out to Texas for what they call behavior modification. Eventually he did go to Texas. He spent about two years out there institutionalized. One of the problems he had during that period of time was he stopped taking his medication. He had medication he was supposed to take for seizures. For whatever reason, he decided not to take those medications. He almost died. He had severe seizures. He wound up in the emergency room and intensive care for four or five days. He almost lost his kidneys. His spasms were so great that he fractured two of his thoracic vertebra. That's the kind of contractions he was under. That became a permanent impairment later on down the road. At the time he died the undisputed medical testimony was, I believe it's 25 percent permanent loss of use of the back because of that problem with his seizures. He was also at the time he died the victim of a permanent brain injury and there's testimony that at the time he died he had a permanent I believe it was a total of 85 percent permanent impairment to

the brain. The brain is a peculiar issue just like the back is a peculiar issue. There are two ways you can get compensated for your brain. In the old law you could get compensated for your brain as an organ and there are regulations that we've cited in our brief and I think - I can't remember whether it's 320 weeks or 300 weeks that you get for a partial loss of the brain. So, if you've got 85 percent loss of the brain then it's 85 percent of 300 weeks under the regs. That was a permanent injury. You could also go the other way and say, well, we're talking about diminished earning capacity and our statute provides under 42-9-10 that if you have total paralysis, partial paralysis, and when they mean paralysis they mean quadriplegic, partial, what's the other one, when your legs don't work or your arms don't work or brain damage, physical brain damage, that the 500-week limitation for benefits and we have a overall, overall cap of temporary benefits and total benefits of 500 weeks. All right, that doesn't apply if it's quadriplegic, paraplegic, brain damage. In those cases you get lifetime benefits and you can apply for a partial payment, a partial lump-sum payment but not a total lump sum payment. The issue becomes, well, what happens if you were making an award for a partial payment, that award is based on the guy's life expectancy; and so, if he wanted to buy a new house and he had reasons for it or modify his house and he had reasons for it he could apply

to the commission and get a partial lump-sum payment based on not 500 weeks but whatever his life expectancy was, 293 weeks, 2930 weeks, whatever his age computes to on our - on mortuary tables. There is another case, Stanley Floyd, I had the benefit or the privilege of representing Stanley Floyd. Stanley Floyd had a brain damage. Stanley Floyd was adjudicated by the commission as being permanently and totally disabled which meant in my opinion that he was entitled to lifetime benefits and if he died that his heirs would get the balance of his lifetime benefits which meant the balance of the 2000 whatever weeks. That went up on appeal, and it went to the Appeals Courts and the Appeals Court said, "No, when we talk about life under our 42-9-10 the modifications we made when we gave benefit, lifetime benefits to brain damage cases, we're talking about actual life, not life expectancy and that's the law." Cert was denied and that, there's no question that's the law in this state and they used the same logic that they used involving the back case, if it's an award under the regulation, if it's an award under the schedule, yeah, the heirs take the balance, but if it's diminished earning capacity, when he dies he no longer has an earning capacity, so it's ended, but you still have the brain as an organ under the regulations. So, the commission has the authority to award the partial loss of use of the brain under the regulation. The question is is it 300 weeks or is it the

balance of the life expectancy. We don't know that answer. So, that's one of the things that's before the court and was before the commission. The commission took the position, I believe, although I don't think they were specific, that life means actual life, not anticipated life, going back to the first Floyd case. You are now at the situation where the Claimant applied for benefits for the back injury before he - after he was sent to - after he got back from Tangram he applied for an award, a permanent award. Permanent award was for the brain, the 42-9-10 total permanent disability and for the back. The ruling by the commissioner at that time was, "He hasn't received maximum medical improvement, he's still under counseling, he was getting some benefit from taking drugs, he was being monitored, he had two or three different neurosurgeons and a neuropsychologist. I don't think he's reached maximum medical improvement as far as making the determination that he's totally permanently disabled." So, that, that was the end of that. The commission didn't say at that time that, no, he doesn't have a permanent impairment to his back or he doesn't have a permanent impairment to his brain. What they were addressing themselves to was the diminished earning capacity portion of the statute. That's where it lay.

The first issue obviously is whether or not that second period of hospitalization when he was in seizure in April the

9th of '04 was a second accident. In September the 5th of '08 the same thing happened. He stopped taking his medication. He had seizures and this time he died at his house in his bed. How do we know? Well, they have - obviously you have a death. The corner has an autopsy. They do a toxicology report. He did not die of any drug overdose. There is a case we've made some reference to tangentially, it really doesn't apply here, but the issue about whether suicide is a compensable event depends on whether it's an accident or not. As in - the question becomes can a diseased mind design the necessary intention to commit suicide or is suicide a product of the injury. In any event, the commission found that he did not commit suicide which is good because that's another statute we don't have to worry about right now because there is a statute that prohibits getting benefits if you commit suicide. We take the position we know because the toxicology report that he had not taken his anti-seizure medications for over a week. That's undisputed medically. The neurologist that was treating him, Dr. Healy, read the, read the autopsy. There's no question that he died as a result of seizures. The proximate cause of his death was the fact that he wasn't taking his medication. We know this to a scientific certainty, to a reasonable degree of medical certainty because there were no traces of any of these medications in his blood on the day he died. That's undisputed. So, the medical there

is if you - you've got testimony in the record, undisputed testimony in the record that he was required to take this medication, that if he didn't take the medication he would have seizures. He didn't take the medication because of the toxicology report and within a week he died, no question. The question is is that an accident? Okay, if it - if his death is the result of his original injury he must die within six years. I don't know why the six-year statute is there. I - at one point in time we had a six-year tort statute, but in any event, the two operative statutes at this point are 42-9-280 and 42-9-290. 280 says when he dies from any other cause than the injury for which he was entitled to compensation benefits payment of the unpaid balance of compensation shall be paid to his next of kin dependant upon him for support. 42-9-290 says if death results from an accident within two years of the accident or while total disability still continues within six years after that accident the employer shall pay or cause to be paid, subject, however, to the provisions of the other sections of this title in one of the methods provided in this chapter to dependents of the employee wholly dependent upon his earnings for support at the time of the accident. Later on in 42-9-140 - all right, that's 42-140 actually, let me look, right, 42-9-140 we talk about dependency and the role of parents. Be that as it may, if the accident we're looking at starts on September 13th of '01,

obviously it's been more than six years and that's the end of the case. If September 5th of '08 is a separate accident then we're entitled to payment, his mother is entitled to payment. What happened on September the 5th of '08 we contend is a new accident. How can we say that? There is a case involving a lady who had an injury to either, I believe it was a hand injury. She was out of work. She was drawing temporary total disability benefits. She had not reached maximum medical improvement and there was no assignment at that time of permanent impairment. As a matter of a fact that issue was not even argued in that case. She was going to the doctor for treatment for her injury. She was involved in an automobile accident. She died. The issue before the commission at that time was did her death arise out of and in the course of her employment. Obviously, her operation of the car did not injure her hand. That's not what got hurt. That's not what killed her. It was a separate traumatic event to her body that caused her death. The employer takes the position at that time that, "That accident has nothing to do with her employment with us." It did not and the operative language then is not cause. The operative language then is not causally related to the previous accident. The operative language then is arising out of and in the course of employment to be a new accident and the significance of this was the employer required the Claimant to make that medical

appointment. She was required by her terms of employment, and the court specifically found that that accident arose out of and in the course of her employment, and therefore, her death did. It would have been the same if the employer had told her, "Go from here, from your house and pick up some parts at the parts store and bring it into the office." She was on a mission for her employer. The going and coming rule didn't apply because she was on a mission from her employer and that mission in her case was to get medical treatment. She was following her instructions of her employer, the automobile accident death, although it didn't have anything to do with the hand and it really didn't make any difference whether she caused it or not, the court doesn't address it, the only issue then did it arise out of and in the course of her employment. The question is, well, suppose she'd been drawing disability benefits for six years, over six years and the same accident happened, would she have been entitled to death benefits for a new accident arising out of the course of employment. The court doesn't tell us. This Court is going to make that decision for us. The argument is very succinct. The Claimant did not intentionally kill himself. That's undisputed. That's the law of the case. So, that doesn't - it's not an intentional act we're looking at. What we're looking at is a Claimant who does not take his medication. We've got another case where the Claimant overdosed and died of suicide. In

that case we make reference to in our briefs I believe Judge Anderson in that case found that that case was not compensable because suicide by definition is an intentional act. That went up on appeal from his ruling at the Appeals Court to the circuit court to the Supreme Court on cert and the parties resolved the dispute before the court ruled but it's interesting to note that the Supreme Court vacated even after the settlement. When it came time to dismiss their appeal that was pending before the court the court vacated the Court of Appeals' decision. That doesn't mean they don't agree with it. It just means it ain't the law right yet. They may agree with it, they may not, but that matter hasn't been decided by South Carolina and that's a tangential area because all these cases, all this change has happened since September 13th of '01. So, we're seeing how the Workers' Compensation system is changing over time. There's no question in this case that the Claimant's death was because he did not take his medication and as a result he died.

Now, before the appellate panel I gave the following example. If a soldier is in a plane and he jumps out of the plane as a paratrooper and he falls to the ground and he opens his parachute and it's defective and he dies, what caused his death? Well, they would argue he jumped out of the plane, that was the cause of his death, and I would argue, no, the cause of his death was the parachute didn't work. Now, what

is the parachute in this case that didn't work? The administration of his drugs. When he was in Tangram they were administered to him. When he came here his mother was assigned the duties to administer his medications for him. As a matter of a fact, she was paid $400 a week to - so that they wouldn't have to institutionalize him. There is no question that those drugs were not administered to him. There's no question he doesn't have the requisite intent to have meant to kill himself. He should have been taking his medication. He should have been made to take his medication. He was at one time made to take his medication. That's what caused his death, the failure to have him take his medication. That failure was an accident, may have been tortuous accident but in this case we're limited to Workers' Compensation. Imagine that we were in a hospital setting and the nurses had forgot to administer his drugs and he died. There's no question what we would be saying, that's a separate accident and that's what we're arguing in this case that on September 5th, 2008, he died of an accident. The medications were not properly administered and the proximate cause of his death was the failure to take those medications as prescribed. He was required to take that medication arising out of and in the course of his employment. That's the operative phrase, not causation, not jumping out of a plane, driving to that doctor's office. That was arising out of in the course of his

employment and that constituted a separate accident.

Now, there are other issues before the Court, whether or not the Claimant's mother was a dependent at the time of the Claimant's death. In September 13th, 2001, he was not living in the household. He was living on his own, earning his own living when he had the original accident. She was not a dependent of his on September 13th, '01.

By the time we get to July the 27th of '04 when he goes to Tangram his mother is disabled, she's unable to work and she's using money that he was getting by the week while he was in Tangram to maintain the household. She relied upon that and that's in the record. By September the 5th of '08 she was dependent upon it. He was the only wage earner in the house. She was getting those checks because of him and he was helping with his own temporary total checks. So, we would argue that she was a dependent. If the award is made under death by accident and he had no dependents, 42-9-140, Sub B, if the deceased employee leaves no dependents or nondependent children the employer shall pay the commute amounts provided under Section 42-9-290, that's death by accident arising out of the course of employment for whole dependents, less burial expenses which must be deducted from the commuted amounts to his father and mother irrespective of age or dependency. So, if it's a death from a new accident on September 5th of '08 she gets 500 weeks for his death pursuant to the statute whether

she's dependent upon him or not because he has no other dependents and she is his mother.

There's another set of issues. If you find that 42 - if you find that the accident on September the 5th of '08 is not a new accident then she could still take under 42-9-280 when an employee receives or is entitled to compensation for this title for injury covered by the second paragraph of 42-9-10 or 42-9-30 and dies from other cause than the injury for which he was entitled to compensation payment, payment of the unpaid balance of compensation shall be made to the next of kin dependent upon him for support, in lieu of compensation the employee would have been entitled to had he lived. That goes back to where we came in, the guy with the leg injury but still being treated for the shoulder, we know what the rating was when he died. The doctors have - at, you know, consistent, no question what his impairment was, there's no debate about that. He's got an 85 percent impairment to the brain as an organ. He's got a, I believe, a 25 percent impairment to the spine which he's entitled to. They argue that she's not a dependent. That's a factual issue. We think that factually that she is a dependent but that's, that's an issue that's got to be decided on a factual basis. The - if the, if this Court finds that she was not a dependent as a matter of law but she was a dependent as a matter of law then what does she get paid? Well, obviously, she gets paid

whatever 25 percent of 300 - what, 25 percent of 300 weeks for the back and 85 percent of - let me just look at the regulation for that.

THE COURT: Of the brain?

MR. WUKELA: Yes, sir. The brain is, let me see, the brain is 25-250. What that means in my interpretation of the partial loss of use regulation 67-11-01 is a minimum of 25 weeks, no more than 250 weeks for loss of the brain which we had 85 percent it would be 85 percent of 250 weeks, unless the statute was amended again, and if you go back to 42-9-10, Sub C, 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 compensable injury to a, yeah, paraplegic, quadriplegic or who has suffered physical brain damage is not subject to the 500 week limitation and shall receive benefits for life and that's when we came in with Mr. Stanley Floyd. There's no question that if what he's being compensated for is diminished earning capacity his life ended that award but this provision for 250 week limitation of the regulation we take the position has been amended by 42-9-10 to a lifetime award. Wherever you see brain in this statute or in this body of the statutes you have to use the life expectancy except if you're talking about the diminished earning capacity. Why is that? It goes back to the Stone case. If all you're looking to is diminished

earning capacity, when you died that stops, but if what you're looking to is those schedules or this regulation then it's a lifetime expectancy award and that's our argument for that.

There is a footnote in one of the briefs talking about what the life expectancy is of this Claimant when he died, should you get to this part of the argument. When we calculated the life expectancy we calculated as of September 13th of '01 with a date of birth of August of 1975. That's obviously a longer life expectancy, but then again the employer gets credit for payments made during that period of time. In their footnote they say he wasn't 26 when he died, he was 33, in which case they've calculated based on his age at the time of death on September 5th of '08. They're probably right if you find an accident on September the 5th of '08, but if there is a finding of September the 5th of '08 and the lower life expectancy applies then they don't get credit for payments made from September 13th of '01 through September 5th of '08, but that's just a technicality depending on whether you use the date of - his age at the time the first accident or the time that we allege is the last accident. I believe I have covered everything that I need to cover. The rest has been adequately briefed I believe and I'll yield the floor to the attorneys for the Respondents.

THE COURT: Thank you, Mr. Wukela. Yes, sir.

MR. CAUTHEN: May it please the Court, Mark Cauthen.

Your Honor, I represent one of the two insurance carriers here today, the South Carolina Property and Casualty Guaranty Association that took over responsibility for this claim when the original carrier, Legion, was liquidated back in 2003 and my clients have coverage for the original date of injury in 2001 when Mr. Floyd was injured. Edwin Martin who separately represents Amguard Insurance is here for the alleged 2008 subsequent, alleged subsequent injury. I would like to agree with Mr. Wukela that there are a lot of issues in our briefs and our briefs are if - our briefs are substantial because there were a lot of issues in this case that just have to be briefed. There's no chance that - I am not going to try to address, you'll be happy to know, all of that. I think we'd be here for a long time. There's no need for me to. I want to try to get to the point really of what I believe are the critical issues in this case and why the commission ruled in our favor and why that was affirmed by the full commission and why I believe it should be affirmed by you, but we do - we would rely on any issues that we don't address here today, we would rely on our briefs, and those have been, those have been handed up.

THE COURT: Now, Mr. Cauthen, let me - I'm going to double-check, I've got Mr. Wukela's, I have Mr. Martin's. I don't think I have one.

MR. CAUTHEN: I e-mailed a copy, Your Honor, last week,

but anticipating that might happen I brought an extra copy.

THE COURT: Okay. Oh, wait a minute, it may be in this folder. You know what, let's see, Mr. Cauthen, I think I do have it. I do - was it 33 pages?

MR. CAUTHEN: Yes, sir.

THE COURT: Yeah, I do have it.

MR. CAUTHEN: Okay, you do?

THE COURT: I do, uh-huh. I apologize. I do have it right here.

MR. CAUTHEN: Your Honor, Your Honor, I also understand that the commission, this, this file is voluminous and it's been going on for many years. This case has been going on for many, many years. The - because of the size of it Steve requested that the commission deliver their file to you and I understand that has been done.

THE COURT: Yeah, it's over here.

MR. CAUTHEN: Okay, so, just that you do have the commission's file.

Your Honor, I do want to try to cut to the chase and simplify this a little bit with you if I can. Because the Claimant in this case is the personal representative and the mother of the deceased employee, Betty Joe Floyd, there are only two ways that she can recover benefits for his death in this particular case. I differ with Mr. Wukela's argument on what impairments he had prior to his death, what admitted

physical injuries he had and so forth. Mr. Floyd, unfortunately, is no longer with us. He cannot recover himself for any impairment that he had which was not previously adjudicated by the commission, that there was never a finding of MMI before his death, maximum medical improvement. There was never an award of disability. He can't recover for anything, only his personal representative and next of kin dependent or next of kin, his mother, Ms. Floyd, can recover, and there's only two statutes under which she can do that. Have you already been provided with a copy of 42-9-280 and 42-9-290. If you hadn't I'd like to add, hand those up.

THE COURT: I think I do. Let's see. Yeah, I have those.

MR. CAUTHEN: You do have those, okay.

THE COURT: 42-9-280 and 290.

MR. CAUTHEN: Yes, sir

THE COURT: Yes, sir.

MR. CAUTHEN: 42-9-280, of course, deals with distribution of death benefits and the right to death benefits where it's a non-work related death. 42-9-290 deals with the entitlement to and distribution of benefits where it is a work related death. Here it has been found by the commission and we contend properly so that it was a work-related death and I don't think there is really any medical evidence in the record

to the contrary. That's been affirmed by the full commission, and as long as that's supported by substantial evidence that should clearly be affirmed here on appeal. The reason for that, of course, is the autopsy, the cause of death, really the only medical evidence we have in terms of the cause of death was the coroner's report and the autopsy which found that the Claimant died of a - in 2008, September 2008 of a seizure disorder due to a cavitary lesion on his brain, right frontal lobe, I believe, due to remote blunt head trauma that's - I've read it so many times I can just about give that to you verbatim from the coroner's report. That was the cause of death, i.e., relates back to the original 2001, September 2001 injury where he sustained the injury to his head resulting in physical brain injury. No question about that, that's what he treated for and was on disability for ever since, from there in '01 all the way up until the time of, time of his death in 2008. As a result of the physical brain injury, which of course was admitted, he developed a seizure disorder. That was a previous finding of fact in an earlier case. There were two prior hearings in this case, one before, I believe, Commissioner Childs, another one before Commissioner Bass. Childs, I think, was '04, Bass was in '07, that's unquestionably the law of the case that the seizure disorder did, in fact, relate to the 2001 injury to the head to the brain. As a result of that seizure disorder the

Claimant was required to take medications to control that seizure disorder and there was problems with compliance as things went along. He had a seizure in 2004 that as Mr. Wukela already pointed out was so severe that it resulted in compression fractures to his thoracic spine and he was hospitalized for that. That was back in 2004. There was evidence at that time that he wasn't taking his medications as he should've been. At any rate, moving forward to 2008, the sad thing that happened here is that, again, there's question as to whether or not - it appears that he was not taking his medications as prescribed, that he had to take these seizure control medications. Expert, the doctors who were deposed clearly indicated that without that he could have another seizure and it could be a fatal seizure and it could lead to his death. Ultimately, that is unfortunately what happened. In September of 2008 while at home his mother found him deceased, and the cause of death, of course, was found to be a fatal seizure. Unquestionably, unquestionably, the seizure disorder and the fatal, fatal seizure relate back to the 2001 injury. So, on that basis the commission found that this was a work-related injury because the fatal seizure obviously relates back to the 2001 accident; and therefore, that the death relates back to the 2001 accident and that's important because that means 42-9-290, the work-related death statute controls, and if you look at 42-9-290 the unfortunate thing

for the Claimant in this case is that it has a requirement that when the work-related injury results in death and disability continues as it did in this case the death must occur within six years of the date of injury, of the date of accident. Here the injury, of course, occurred September 13th, '01. The death occurred 9-5-08, about one week shy of being seven years, clearly over six. Unfortunately for the Claimant, that operates as a complete statutory bar to any benefits for the work-related death per 42-9-290 and that was the ruling of the commission as fully affirmed by the full commission and I do want to hand up a copy of the only case we know of in South Carolina interpreting that particular provision. We've cited it in our brief. It's Gunnells v. Res Bestos from our Supreme Court in 1973 and it basically interprets that statute, that provision in 42-9-290 exactly that way to prior that the death must occur where it's work-related and disability continues the death must occur within six years of the date of accident and that is not a statute of limitations they point out. It is a prerequisite under the statute that just has to be satisfied; and so, the ruling of the commission was consistent with that. It was found to be all related to, of course, the death related to the 2001 accidents and thus the personal representative and mother of the Claimant was denied further benefits and we contend that that was absolutely correct. Those findings of fact by the

single and full commission are supported by substantial evidence and more those were the correct conclusions of law and that this decision should, therefore, be affirmed. I am going to let Edwin Martin, who is representing Amguard on the 2008 alleged injury, my client only had coverage in 2001. So, if the - if Mr. Wukela's theory on a possible subsequent injury in 2008 being found it would be his client who would be on the hook for that. So, I will let - I'll allow him to address that unless you have any questions of me.

THE COURT: All right, thank you very much, Mr. Cauthen.

MR. CAUTHEN: Yes, sir.

THE COURT: Mr. Martin.

MR. MARTIN, JR.: If it please the Court, as Mr. Cauthen stated, I represent Amguard as well as Ken Baker. At the time the coverage for them would have been in May of '08 through May of '09; and so, the work - the alleged work injury in September would have been during our coverage period. Four important facts: first of all, Commissioner Bass found that the Claimant sustained injury to his brain which affected, affected the frontal lobe. I don't think that's a dispute. Secondly, that as a result of the brain injury he developed a seizure disorder. Thirdly, as a result of the seizure disorder he had to take medications to keep him from having the seizure disorder, and as Mr. Cauthen summarized or

actually quoted the autopsy report the Claimant died from complications from his seizure disorder which was a result of a cavitary lesion. I mean, we're talking, you know, like a dugout part of his skull, of his brain which caused these seizures and that's what led to his death. It's our position that the commission was correct in finding that the Claimant's death was directly related to the original work injury in September 2001. As Mr. Cauthen said, there is no medical evidence to the contrary. He got hit in the head. He developed seizures. He didn't take his medication as was required and as a result of that he died. There is no evidence otherwise. There is nothing which comes in and says there's some sort of intervening accident or event which could have stopped this causal connection. It was a natural consequence of the problems that he had from the injury to his brain. So, we contend the commission was correct in finding there was no new injury in September 2008.

As he stated before the Claimant had a pre-existing or had a prior seizure episode in 2004. At that point he was not being compliant with his medications and as a result had these violent seizures which fractured part of his thoracic spine. After that, Dr. Healy testified that the Claimant was aware if he didn't take the medications here's what would happen and he knew that, but in September 2008, again, he didn't take his medications. Commissioner Bass made a previous ruling that

the 2004 episode when he had the seizures he didn't make a finding that was a new accident. He found that was related to the original work injury. Okay, the only difference between the seizures in 2004 and 2008 was the fact that Mr. Floyd died as a result of the seizures. So, using the same logic that Commissioner Bass used in the first award the commission used the same logic to make a determination there was not a second separate accident in September of 2008. Basically, they found there was no accident because it was related to the original work injury.

Mr. Wukela cites to the Shuler case. In the Shuler case the court found that the Claimant who did have a hand injury was required to go to the doctor. Not only was required by the employer to go to the doctor but the compact requires that the employer carry - provide medical care. She was - had a fatal accident on the way home, but at the time she was doing that she was - complied with medical care and giving the benefit to the employer by complying with the medical care. In this situation Mr. Floyd as I stated before Dr. Healy mentioned in his deposition that the Claimant was aware of what would happen if he did not take these medications. Obviously, he had violent seizures in 2004 and fractured his back and Dr. Healy said he was aware of what could happen and possibly, too, could cause death, and I mean we - I actually was involved in this case representing the Guaranty

Association in the very beginning. So, I had some contact with Mr. Floyd as well. He, I mean, he did, he did not take the medications according to what the record shows in 2008. As opposed to Shuler, Shuler was doing what she was required to do. She went to the doctor. In this case Mr. Floyd who knew what would happen if he did not take the medications, stopped taking the medications. So, as opposed to complying with medical care he was actually not compliant with the medical care. He also knew the ramification of what would happen. He was not inuring any benefit to the employer or the carrier by not complying with medical care. So, Shuler was doing what she was supposed to be doing. Mr. Floyd stopped doing what he was supposed to be doing, was not compliant with medical care. Furthermore, in the Shuler case, even if you do find there was an accident, the Shuler court did not find a new date of accident. They relate it back to the original accident. They said Ms. Shuler's fatal accident occurred while she was fulfilling her duty to submit to treatment for a previous compensable injury, thus her subsequent injuries arose out of and were in the scope of her employment, for the previous injury, not a new accident.

Lastly, as I stated before, Amguard didn't come onto the risk until May of 2008. The Claimant, the evidence in the record would indicate the Claimant did not return back to work for the employer after work injury. So, 2001 he got hurt, all

the way to 2007 there is no work at all. He never worked during the period of time where Amguard had coverage. The only connection whatsoever is he happened to die during Amguard's coverage. I mean that could lead to ludicrous results, say if the business, say same type situation saying Ken Baker went out of business, you know, six years after the accident. There's no coverage. There's nothing. So, I mean, it's got to go back to, to the original work injury, what actually caused the accident and that was the original work injury when the spring hit him in the head and caused him to have a brain injury. The Defendants, at least Ken Baker and Amguard, we would request that this Court affirm the findings of the commission, rely on probative and substantial evidence in the record which support the findings that the Claimant did not have a work injury September 5th, 2008, and that the result, his death resulted as a result of the 2001 accident, not any new accident or injury. Thank you.

THE COURT: Thank you, sir.

MR. WUKELA: Just one, one brief thing, Your Honor, of course your review is of two natures in this case, the one are the factual findings, where with the exception of the issue of dependency which we assert the only interpretation could be given to those facts which she was dependent at the time he died. All the other factual findings are not in dispute. The commission finding that the death was accidental not

intentional, not suicide, that's not been appealed and it's not in dispute. There's no dispute about why he died. He died because his medication wasn't properly administered. The issue before Your Honor and I think the major issue is whether that fact situation constitutes an accident. That's an issue of law, the first impression as you review it as you're reviewing the legal conclusions in this case and I believe that's the same standard that the Court of Appeals is going to look at, as a matter of law does this fact situation that we've assembled before you, basically nobody has any dispute as far as the factual issues, the issue is does this constitute legal accident under our interpretation of the statute.

THE COURT: All right, gentlemen, thank you very much. I did not have the benefit of Mr. Cauthen or Mr. Martin's briefs coming into this morning. I received those this morning. So, I'm going to take the time to go through those and I've got the Workers' Comp case file, and I'll - I'm going to take the matter under advisement and will have a decision for you shortly; okay?

MR. WUKELA: Thank you, Your Honor.

MR. CAUTHEN: Thank you very much, Your Honor.

MR. MARTIN: Thank you, Your Honor.

(Adjourned.)

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 0123790 and 0824046

Betty Jo Floyd, as Personal Representative of the Estate of Scottie Wayne Floyd, and as Dependant mother beneficiary of Scottie W. Floyd, deceased,

Employee/Claimant,

v.

Ken Baker Used Cars,

Employer,

and

Legions Insurance Company in Liquidation c/o South Carolina Property and Casualty Insurance Guaranty Association,

and

Amguard Insurance Company,

Carriers/Defendants.

COPY

FULL COMMISSION HEARING

****

Tuesday, June 22, 2010
12:19 p.m. - 12:44 p.m.

The hearing before Commissioners Susan Barden, Derrick Williams and David Huffstetler was taken at the Workers' Compensation Commission, 1333 Main Street, 5th Floor, Columbia, South Carolina on the 22nd day of June, 2010 before Suzanne R. Bryant, Court Reporter and Notary Public in and for the State of South Carolina.

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EXHIBITS

(There were no exhibits marked during the hearing.)

COURT REPORTER: Today is June 22, 2010. This is South Carolina Workers' Compensation case number 0123790. This is the case of Scottie Wayne Floyd, Claimant, versus Ken Baker Used Cars, Employer, and Legion Insurance Company and Amguard, Carriers. The Appellant is the Claimant represented by Steve Wukela, Jr. The Respondent, Legion, is represented by Mark --

COMMISSIONER BARDEN: I'm sorry, that's Pete Leventis.

MR. LEVENTIS: I'm filling in for Mark Cauthen.

COURT REPORTER: I'm sorry.

COMMISSIONER BARDEN: I know. We didn't correct that, I'm sorry.

COURT REPORTER: Okay. The Respondent, Legion, is represented by Pete Leventis and Respondent, Amguard, is represented by Edwin P. Martin, Jr. Each side is allowed ten minutes for oral argument and the Appellant three minutes in reply. You are requested to argue the grounds of exception and stay within the record.

COMMISSIONER BARDEN: Mr. Wukela.

ORAL ARGUMENT BY MR. WUKELA:

MR. WUKELA: Yes, ma'am. May it please the Commission. We have before you a 38-page

brief. I certainly don't think we're going to be able to cover all the issues raised in that brief or half an hour, for that matter. What you have before you are three pleadings, three sets of pleadings; you've got a 50 and two 52s. And you've got two different carriers depending on what day you find the accident to have been found compensable. You'll find a lot of analogies in this case, perhaps they'll help you consider the legal consequences of your decision. When I was in the Army, I didn't go to Vietnam, but I came into contact with a lot of guys who jumped out of airplanes, who were paratroopers. And when he jumped out of the airplane, they ran a risk that the parachute wouldn't open or that they would mishandle the parachute and cause it not to open appropriately. Periodically, one would die. He didn't die because he dropped down out of an airplane. That wasn't his cause of death. Cause of death was the malfunction of the parachute. Well, what's that got to do with this case? The Claimant had a bonafide brain injury, there's no question about it. He was working on a piece of equipment, taking apart

a Mercedes Benz and the spring blew up and it banged him in the head and he's got frontal lobe damage. He spent almost two years, if I'm not mistaken, in a facility out in Texas for brain damaged individuals. There's no question about that. They will admit that he had brain damage. There's really no question about the fact that it was permanent. He drew benefits for in excess of six years before he died. I don't think there's any question about him being permanently disabled. Between the time of his original injury, we've had numerous hearings in this matter. One the hearings involved the fact that he had refused to take his medication. And as a result of refusing to take the medication, he suffered severe spasms, in fact, almost died from it. And he was very much aware that he needed to take his medication. Those spasms were so severe, the seizures were so severe, that he suffered two or three compression fractures in his thoracic spine. That's the severity. He spent a good amount of time in Intensive Care. That was the severity of that injury. The employer denied that that was compensable, for whatever reason.

I believe they probably denied it because they thought it was intentional. But they'll speak to that issue. And as a result, we had a hearing on that matter and it was found to be compensable. And this was some time after the first accident. Well, he went out to Tangram and he spent two or three years out there, and was under supervision. They ensured his medical treatment; they ensured that he took his medication. Finally prevailed upon his mother and commission to allow him to come home to live in his mother's house, which he did. And there were doctors that had reservations about allowing him to come out of a structured situation, but they thought they would do it and they did. So he came home, lived with his mother for a period of time, and eventually, through the use of psychological treatment and medications -- and he was in and out of different orthopaedics and different neurosurgeons and neurologists, basically because he was such a hard person to deal with, he threatened people. Matter of fact, he went to the emergency room early on in this case with a gun and demanded treatment or he'd blow

the brains of the emergency room doctor out. That got him sent down to Columbia for a period of time, but it also got him treatment. This guy was very volatile and it was all related to his brain damage. Inevitably, finally, he was home with his mother for a period of time, and for reasons known only to himself, he stopped taking his medication. How do we know he stopped taking his medication? Because he died, then we had an autopsy, and the toxicology report revealed that he had stopped taking his medication. And it's clear from the fact that he stopped taking his medication that he went into seizures. He did not have a heart attack. He did not have a stroke. He died of the seizures because he refused to take his medication. Now, the Single Commissioner found that that was not suicide. There's a whole issue here, all kinds of argument in this case, in this brief, about whether or not suicide would have stopped him from being entitled to benefits. But be that as it may, he was on his way out the plane, he was coming toward Earth. He was unable, either because of incapacity to do it mentally or proper supervision, to ensure

that he pulled the parachute, and he crashed and he died because he did not take his medication. Same thing he had done earlier had happened. He had went into spasms, severe seizures and he died in his bedroom. Now, the question is -- several questions. First of all, was his death arising out of in the course of employment. We rely on the case of Shuler. The Defendants both claim that that's an irrelevant case, but Shuler is an interesting case in a lot of respects. This is a case where a person had an injury, I believe it was a hand injury, and they were on their way to the doctor for treatment, pursuant to their requirements under the Act. And they had an automobile accident that killed them. And the Commission found that that arose -- the court, the Supreme Court said that that injury arose out in the course of his accident -- his employment. Now, there is an issue here, and it's argued in the brief, and this is something that's really an interesting hypothesis. If his death was causally related to his impairment, then under 42-9-280 he must die within six years of the accident in order to

receive benefits. Now, this is notwithstanding the fact that he had a permanent impairment when he died and would be entitled to benefits if he died not due to the accident under 42-9-290. But the real issue in this case is which accident arose out of in the course of his employment killed him. The employer says when he jumped out of the plane, that was the accident. And we can just assume that he jumped out of that plane back when he first got injured and his death was causally related to jumping out of that plane. And since he died within -- may have been six years after jumping out of that plane which was causally -- which arose out of the course of his employment, then he's not entitled to benefits. One of our arguments -- you will note we filed one 50 and two 52s. One of our arguments is if you find as the Commissioner found, that this was not suicide, and that's unappealed; if you find, as the Commissioner found, that this was not an intentional death, then it must have been an accidental death. He did not intend to die, just like the paratrooper who's going down through the atmosphere when he pulls the

parachute, when he takes the medication like he's supposed to, or like his doctors should have ensured he did, or as his caregiver should have ensured he did, when he doesn't take that medication or it's administered to him negligently, that act was the accident that killed him. And if that's the case, then the Claimant died and is entitled to benefits. His mother, whether you determine that she's physically dependant on him or not, and we argue both ways in this case, because this case has numerous -- it really is a complicated case and probably needs more time to be thoroughly evaluated, but both parties have briefed this thing ad nauseam, that this is a very interesting case and has significant implications. If you take the position that his death was accident, that not taking his medication was not an intentional act, as the Commissioner found, that it was not suicidal --

COMMISSIONER BARDEN: Go ahead and finish your thought, and you're going to have three minutes. So go ahead and finish your thought.

MR. WUKELA: -- then you would have to find that it was accident and it was causally -- it was

arising out of in the course of his employment, namely the medical treatment that he needed pursuant to Shuler. Thank you.

COMMISSIONER BARDEN: Okay. Mr. Leventis.

ORAL ARGUMENT BY MR. LEVENTIS:

MR. LEVENTIS: May it please the Commission. Peter Leventis on behalf of the Guaranty Association, which is the reinsurer for Legion Insurance, now liquidated. There are very lengthy briefs in this case, Commissioners, but despite many arguments made by Claimant's counsel, several in the alternative, I would point out that this case is actually not that complicated of a case. Essentially, this is a tragic case. It's very unfortunate what happened. Mr. Floyd had significant and radical blunt head trauma in September of 2001. It's undisputed at this point that from that, he developed a seizure disorder, a very bad one for which he was taking medication. In approximately April of 2004, due to failure to take the medication, the seizure disorder caused spinal compression fractures. They were ultimately ruled compensable in this case. Mr. Floyd died in September 2008 due to the seizure disorder.

But the thing is Mr. Floyd is deceased at this point. The only way that anyone is going to be able to recover further benefits in this case is going to be under 42-9-290 for a work-related death or 42-9-280 for further benefits when the death was not related to work. It's never been the position of this Carrier or these Defendants that Mr. Floyd committed suicide. That was not found by Commissioner Lyndon. That was not our position and it was not appealed. So we're left with the fact that either his death was work-related relating back to his 2001 injury or that it was not work-related. At the time of his death, he had not reach MMI. In 2008, he had never been adjudicated to have reach MMI. Commissioner Bass found in 2007 that he had not reach maximum medical improvement. He had been institutionalized out in Texas, but had gotten better and had moved in with his mother and was making further progress. He was, at the time of his death, receiving temporary total disability benefits under the first paragraph of 42-9-10. The overwhelming evidence in this case is that his work -- his death was work-

related and related back to the September 13, 2001 injury. There's a significant number of APAs in this case. The only APA that I will draw your attention to is page 401, which is the Coroner's Report noting, it is the opinion of the prospector that the decedent died as a result of complications of a seizure disorder that resulted from a cavitary lesion of the right frontal cerebrum due to remote blunt head trauma. The only evidence in this case is that his death was a work-related death, related to the seizure disorder, which was from his compensable brain injury. Under 42-9-290, if his death happens six years after the date of injury that caused the death, while permanent term disability still exists, he's no longer entitled to any further benefits under the Act. That's under the statute and as interpreted by the case of Jones versus Raybestos-Manhattan that we noted in the brief. And I think that there's -- the only other possibility is that if the Claimant can prove that it was a non-work-related death, which I don't think there's any evidence in the record to show that it was a non-work-related death. I understand

Claimant's counsel's argument regarding the parachute. I think the more appropriate analogy would be that if somebody ran into a telephone pole, the argument by Claimant's counsel would be they died from failure to apply the brakes. Our argument would be that they died from blunt impact due to the wreck. The Claimant's death was from seizure disorder. The seizure disorder had been found and adjudicated to be from the work-related accident in 2001. Even if you could find that this was a non-work-related death, under 42-9-280 there's only two types of benefits that can survive -- benefits that are awarded under the second paragraph of 42-9-210, the loss of both hands, both eyes, both feet, or any combination thereof, any two thereof; or under 42-9-30 for scheduled memory injury loss. In this case, Mr. Floyd had never received any benefits under those. Maybe he would have been entitled to them; maybe he would not have. More than likely, it would have been under the third paragraph of 42-9-10 for a permanent physical brain injury once he'd reached maximum medical improvement. But the case of Floyd versus C.B.

Askins, which I know is on appeal by Claimant's counsel -- another Floyd not related to Mr. Scottie Floyd -- the South Carolina Court of Appeals has found that those benefits would abate. And in Stone versus Roadway Express, the court has found that benefits not awarded under those sections for a non-work-related death, which I don't think can be proved here, would abate. Furthermore, the second bar to benefits are going to be the fact that Mrs. Floyd was not a dependent. Under 42-9-290 for work-related death, the awards would go under 42-9-140, irrespective of dependancy. Under 42-9-280 you have to show that you are a dependent to receive any awardable benefits to you. And I don't think that's been proven in this case. I think Commissioner Lyndon was proper in finding that. The case of The State of Covington shows that if -- and that was a mother who was trying to get additional benefits for a compensable back injury when the claimant died from a non-work-related cause and the court found that she was not dependant, therefore under a 42-9-280 for a non-work-related death could receive no further

benefits. I think that's probably the clearest way to argue this case, which is a complex case to some degree, but I think it's down to his most essential terms that way shows that there are no further benefits due and Commissioner Lyndon was correct in his findings in this case, and therefore, I would ask that it be affirmed.

COMMISSIONER BARDEN: All right, thank you. Mr. Martin.

ORAL ARGUMENT BY MR. MARTIN:

MR. MARTIN: May it please the Commission. Based on this case, undisputed facts, the brain injury. As a result of the brain injury, the Claimant sustained a seizure disorder. The seizure disorder required him to take medications. The Claimant died of this seizure disorder. He read to you what the autopsy report said, he died as a result of brain injury which caused the seizure disorder. In this situation, there was no new accident. The Claimant's death was a natural consequence of his work injury. He got hit in the head pretty hard with a spring, had a cavitary lesion, so it basically knocked him out and shocked his brain. And as a result

of that, he had to take medications. And he didn't take them. For whatever reason, he couldn't find his bloodstream. But the work injury itself caused him to have these seizures, which resulted in having to take his medication. So it's our position that the Claimant's death is a natural consequence of the original work injury in 2001, as opposed to any kind of new accident. Steve pointed to the Shuler case. In that situation, the person had a motor vehicle accident while going to get medical care. Here in this situation, the Claimant actually was refusing medical care. As a matter of fact, he was supposed to be taking medication which would keep the seizure under control but didn't even take the medication. So there was no intervening act which started -- you know, he had the original work injury, but there's nothing from here to his death which broke that chain. It was a natural consequence of him having this brain injury, developing a seizure disorder and dying as a result of this seizure disorder. So it's our position there was no intervening accident. The Claimant, I don't believe, worked since the

work injury for Ken Baker. My client, Amguard, insured them in 2008 to 2009, so the Claimant never worked during the period of time of coverage for my client. So the only way to come in here and find an accident would be whoever he was working for at the time -- I mean, whoever had coverage for Ken Baker at the time of the Claimant's death, and that's why my client was brought into this action. But he never -- there was no employee-employer relationship during the coverage for Amguard. As for the suicide, as Pete mentioned, we never asserted there was a suicide defense. The treating doctors were asked, Dr. Healy, Dr. Federer were asked whether or not the Claimant committed suicide and basically they couldn't give any opinion within a reasonable degree of medical certainty. So to make a determination that it was suicide or not suicide would be purely speculation and would go outside the power of the Commission to make that determination. The autopsy also said the manner of death is best deemed an accident, so there is no evidence that the Claimant did take his life or did not. As a matter of fact, his

mother testified at the hearing, the Claimant took the medication the date of the accident. In conclusion, we'd request that the Commission affirm the findings of Commissioner Lyndon that the Claimant -- his death was a natural consequence of the original work injury from 2001. There was no intervening accident during the coverage of Amguard, and thus, this claim should be denied.

COMMISSIONER BARDEN: Thank you. Mr. Wukela.

REPLY BY MR. WUKELA:

MR. WUKELA: Let me again reiterate, as both counsels have -- this thing has been extensively briefed. There are numerous issues that we haven't discussed in full before you. They're all discussed in briefs, so we'll refer you to those. I would like you, though, to consider two phrases. Those two phrases are causally related and arising out of and in the course of. They mean different things. Arising out of and in the course of means that the accident was part of the employer-employee relationship. That relationship continues between the employer and the employee throughout the processing of this claim, from

the date it starts until it's adjudicated finally. Now, I don't know about the coverage question. That's something interesting for you all to -- or to direct your attention to, but there's no question the employer-employee relationship existed while he taking medical treatment. Shuler says that. And Shuler doesn't talk about causally related death, it doesn't talk about causally related death. It talks about arising out of and in the course of. The employee was required to submit to medical treatment and as a result of submitting to that medical treatment, everything that flowed from that medical treatment arises out of the employee-employer relationship. Now the question which is before you squarely, did the Claimant commit suicide because there's a statute that says it's not covered. We argue against the statute. And, of course, the Supreme Court has changed it's opinion about whether Thompson's good law or not. Scotty -- the other Floyd case, Stanley Floyd involved a death case, that's been decided by the Court of Appeals and the cert has been denied. So as the law of this case, as far as disabilities

that fall within 42-9-10, the court has never addressed itself to disabilities that arise out of 42-9-30 that involved brain damage or back cases. Stone stands for the proposition that the disability is what's making him disabled. As opposed to a loss of a body part, that disability ends when the Claimant dies. The other half of Stone is if the reward for back is the result of loss a body part, under 42-9-30, that award survives his death. That disability survives his death. And if he's totally disabled at the time he dies, there has to be a valuation of that --

COMMISSIONER BARDEN: Thank you.

MR. WUKELA: -- and an award. Thank you.

COMMISSIONER BARDEN: And this concludes the hearing.

(There being nothing further, the hearing concluded at 12:44 p.m.)

CERTIFICATE

This is to certify that the within hearing consisting of Twenty-Two (22) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on January 13, 2011.

Suzanne R. Bryant
Court Reporter

Notary Public for South Carolina
My Commission Expires: September 21, 2014

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 0123790 & 0824046

EMPLOYEE/CLAIMANT: **SCOTTIE FLOYD (DECEASED)**

EMPLOYER: **KEN BAKER USED CARS**

INSURER: **LEGION INSURANCE COMPANY**
AMGUARD



SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION HEARING, THE WITHIN HEARING WAS TAKEN ON THE 1ST DAY OF SEPTEMBER, 2009, COMMENCING AT THE HOUR OF 2:06 P.M., IN FLORENCE, SOUTH CAROLINA, BEFORE THE HONORABLE BRYAN LYNDON, ATTENDED BY COUNSEL AS FOLLOWS:

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BECKY MUSKOVIN
CYNTHIA GRIMLEY
MARGARET BAKER
KEN BAKER
RON BROWN

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PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN FLORENCE, SOUTH CAROLINA.

* * * * * * * * * * * * * * * *

BY COMMISSIONER LYNDON:

TODAY'S DATE IS SEPTEMBER THE 1ST, 2009. THIS ACTUALLY INVOLVES TWO W.C.C. FILE NUMBERS, AND THAT WOULD BE FILE NUMBER 0123790 WITH AN ACCIDENT DATE OF 9/13/01 AND FILE NUMBER 0824046 WITH AN ACCIDENT DATE OF 9/5/08. IT INVOLVES THE DECEASED CLAIMANT SCOTTIE FLOYD. HERE ON BEHALF OF THE DECEASED CLAIMANT AND HIS ESTATE IS ATTORNEY STEVE WUKELA VERSUS THE EMPLOYER KEN BAKER USED CARS. HERE ON BEHALF OF THE 2001 CLAIM, AND LEGION WAS THE CARRIER FOR THAT CLAIM, IS ATTORNEY MARK CAUTHEN, AND THE CARRIER FOR KEN BAKER USED CARS ON THE 9/5/08 CLAIM WAS AMGUARD, AND ED MARTIN IS THE ATTORNEY FOR AMGUARD. THE PURPOSE OF THIS HEARING IS TO DETERMINE ISSUES RAISED ON FORMS 52 AND 53. THE DECEASED AVERAGE WEEKLY WAGE WAS $375.36. HIS COMP RATE $211.77, AND I'VE READ THE DATES OF ACCIDENT INTO THE RECORD.

BY MR. WUKELA:

I'M SORRY, COMMISSIONER, THAT'S WRONG. THE

COMP RATE IS $250.54.

BY COMMISSIONER LYNDON:

I APOLOGIZE. I WILL MAKE THAT CORRECTION. THE COMP RATE SHOULD BE $250.54.

ARE THERE ANY OBJECTIONS TO APAs, JURISDICTION, VENUE, OR ANY OTHER ITEMS?

BY MR. CAUTHEN:

NO, SIR.

BY MR. WUKELA:

NO, SIR, NONE FROM THE CLAIMANT.

BY MR. MARTIN:

NO, SIR.

BY COMMISSIONER LYNDON:

THEN IF THERE ARE NO OBJECTIONS, THE COMMISSION FILE BECOMES A PART OF THE RECORD WITH THE EXCEPTION OF SELF-SERVING DECLARATIONS AND UNSTIPULATED MEDICAL REPORTS.

PRIOR TO GOING ON THE RECORD, WE HAD A LENGTHY PREHEARING CONFERENCE. THIS IS AN UNUSUAL SAD CASE, AND THERE WAS CASE LAW PASSED UP, AND I WILL JUST READ IT INTO THE RECORD. ONE OF THE CASES WAS A CASE ACTUALLY THAT I HEARD, *STANLEY FLOYD (DECEASED) VERSUS C.D. ASKINS AND COMPANY*, AND THE OTHER CASE PASSED UP WAS *MARY GUNNELLS VERSUS RAYBESTOS-MANHATTAN CORPORATION*, PASSED UP BY MR. CAUTHEN IN

SUPPORT OF THEIR POSITION, AND DUE TO THE COMPLEXITY OF THESE POSITIONS, I AM GOING TO FIRST LEAVE THE RECORD OPEN FOR 30 DAYS TO GET BRIEFS AND AN ADDITIONAL FIVE DAYS OR TEN DAYS, IT REALLY DOESN'T MATTER TO ME, WITHIN 45 DAYS BRIEFS AND THEN IF YOU WANT TO DO A REPLY BRIEF, THAT WILL BE FINE. ALSO, I FEEL FOR CERTAIN THAT WHATEVER I DO WILL GO UP. NEVERTHELESS, THIS IS KIND OF AN UNUSUAL OR REALLY UNTESTED ISSUE, AND I AM GOING TO LET EACH PARTY PUT THEIR RESPECTIVE POSITIONS ON THE RECORD STARTING WITH THE MOVING PARTY FOR THE DECEASED CLAIMANT, MR. WUKELA.

BY MR. WUKELA:

THANK YOU, YOUR HONOR. THANK YOU FOR YOUR PATIENCE WITH US IN HEARING OUR HISTORY OF THIS CASE.

BY COMMISSIONER LYNDON:

ALL RIGHT, SIR.

BY MR. WUKELA:

BUT LET ME JUST BRIEFLY REVIEW. ON THE 13TH OF SEPTEMBER OF '01, SCOTTIE FLOYD WAS CHANGING A SPRING UNDER A -- I BELIEVE IT WAS A MERCEDES. THE SPRING SPRANG LOOSE AND IT PUNCHED HIM RIGHT BETWEEN THE EYES. I BELIEVE IN THE OLD CASE IN THE OLD FILES, AND YOU'VE GOT BRIEFS -- I BELIEVE WE HAVE

HAD THREE PREVIOUS HEARINGS, BUT IN THOSE APAs THAT WERE PREVIOUSLY SUBMITTED, YOU WILL SEE PICTURES OF HIM AND THE CONDITION HE WAS IN IMMEDIATELY AFTER THE ACCIDENT. ANYWAYS, HE WAS SUBSEQUENTLY DIAGNOSED WITH HAVING A BRAIN INJURY, FRONTAL LOBE INJURY, AND HE WAS TREATED FOR THAT CONDITION AND PART OF THAT CONDITION WAS THAT HE WOULD HAVE SEIZURES; HE WAS SUBJECT TO SEIZURES. HE WAS PUT ON ANTI-SEIZURE MEDICATION. ON THE 10TH OF APRIL OF '04, APPARENTLY AFTER A CONSCIOUS DECISION ON HIS PART TO STOP TAKING ANY MEDICATION, HE HAD A MAJOR SEIZURE ON APRIL THE 10TH OF '04. HE WAS TAKEN TO THE HOSPITAL AND NEARLY DIED, AND THE SEIZURES WERE SO SIGNIFICANT THAT THE VERTEBRAE AND HIS THORACIC SPINE WERE COMPRESSED, AND HE DEVELOPED THREE -- AT LEAST THREE SPINAL COMPRESSION INJURIES IN HIS SPINE. AND THOSE CONDITIONS WERE DEEMED TO BE COMPENSABLE BY THE ORDER OF COMMISSIONER BASS ON 12 DECEMBER OF '07. ON THE 5TH OF SEPTEMBER OF '08, I BELIEVE THE TESTIMONY FROM THE CLAIMANT'S MOTHER WILL BE THAT SHE CAME INTO THE BEDROOM AND TOLD HIM TO TAKE HIS MEDICATION. HE TOOK HIS MEDICATION, SHE SAYS, AND SHE LEFT THE ROOM FOR HIM TO TAKE A NAP. SHE CAME BACK APPROXIMATELY, I BELIEVE, TWO HOURS LATER TO RAISE HIM FOR DINNER, AND HE WAS DEAD. THE

TOXICOLOGY REPORT THAT YOU HAVE AS PART OF OUR APAs WOULD DEMONSTRATE THAT HE HAD NONE OF HIS SEIZURE MEDICATIONS IN HIS SYSTEM AT THE TIME HE DIED, AND THE DOCTOR'S TESTIMONY, I BELIEVE DR. HEALY'S TESTIMONY, WAS THAT IN HIS OPINION SCOTTIE HADN'T TAKEN ANY ANTI-SEIZURE MEDICATION FOR AT LEAST A WEEK TO GET ALL OF IT OUT OF HIS SYSTEM AS THE TOXICOLOGY REPORT REVEALS. THE ISSUE IS IF SCOTTIE'S DEATH ON SEPTEMBER THE 5TH OF '08 WAS AN ACCIDENT, IF HE WAS ATTEMPTED TO START TAKING HIS MEDICATION AGAIN LIKE HE WAS SUPPOSED TO, THE TESTIMONY OF DR. HEALY IS THAT HE WENT -- THAT HE SAW THE CLAIMANT APPROXIMATELY THREE DAYS BEFORE HIS DEATH, AND AT THAT TIME, DR. HEALY WAS CONVINCED THAT SCOTTIE UNDERSTOOD THE NECESSITY OF TAKING HIS ANTI-SEIZURE MEDICATION, HOW SERIOUS IT WAS. AS A MATTER OF FACT, DR. HEALY WAS THE DOCTOR THAT TREATED HIM IN '04 WHEN HE STOPPED TAKING HIS MEDICATION BEFORE, AND DR. HEALY WAS ADAMANT, AND MAYBE THAT'S THE WRONG WORD, BUT WAS CONVINCED THAT SCOTTIE UNDERSTOOD THE MAGNITUDE OF NOT TAKING HIS MEDICATION. IN ANY EVENT, ON SEPTEMBER THE 5TH OF '08, HE DIED, AND HE DIDN'T HAVE ANY MEDICATION IN HIS SYSTEM. IF HE ACCIDENTLY STOPPED TAKING HIS MEDICATION OR IF HE HAD STOPPED TAKING HIS

MEDICATION AND THEN INTENDED TO RETAKE HIS MEDICATION, BECAUSE THE LAST TIME HE SAW DR. HEALY, HE ASKED FOR A REFILL OF THAT MEDICATION. AND IF WE ARE TO BELIEVE THAT HE INTENDED TO BE TAKING HIS MEDICATION, THEN THAT THEN ON THE 5TH OF SEPTEMBER OF '08 LIKE THE INJURY ON OCTOBER THE 10TH OF '04 WAS AN ACCIDENT. NOW, THE 10 APRIL '04 COMPRESSION FRACTURES ARISING FROM THE SEIZURES HAS ALREADY BEEN DETERMINED TO BE COMPENSABLE AND ACCIDENTAL INJURY PURSUANT TO THE ORDER OF COMMISSIONER BASS ON 12 DECEMBER. IF ON THE OTHER HAND, YOU DETERMINE THAT THE CLAIMANT INTENTIONALLY ATTEMPTED TO KILL HIMSELF AND WAS SUCCESSFUL, THEN OF COURSE THE CLAIMANT IS IN A VERY HARD POSITION TO TRY TO CONVINCE THE SUPREME COURT THAT SUICIDE HAS BECOME COMPENSABLE IN THIS STATE. IN ANY EVENT, WE WOULD STILL SAY IT WAS COMPENSABLE, BUT FOR ALL PRACTICAL PURPOSES, I THINK THE RESULT OF THAT WOULD BE FOREGONE. WE HAVE HANDED UP TO YOU THE CASE OF STANLEY FLOYD. STANLEY FLOYD, OF COURSE, IS ANOTHER CASE INVOLVING A BRAIN INJURY. THIS WAS A CASE WHERE THE CLAIMANT WAS INJURED AND ACTUALLY SUFFERED EXTRUDED BRAIN MATTER FROM HIS SKULL AS REVEALED IN THE ACCIDENT REPORT AT THE EMERGENCY ROOM AND WAS ON A PERMANENT AWARD WHEN HE DIED OF AN UNRELATED CAUSE, AND THE ISSUE WAS

WHEN SOMEBODY WHO HAS A PERMANENT AWARD FOR BRAIN DAMAGE DIES, ARE THEY ENTITLED -- DO THEIR BENEFITS START WHEN THEY DIE, OR ARE THEIR DEPENDANTS ENTITLED TO THE LIFE EXPECTANCY, THE BALANCE OF THE LIFE EXPECTANCY. THIS COMMISSION YOURSELF FOUND THAT LIFE EXPECTANCY MEANT THE LIFE EXPECTANCY NOT JUST THE LIFE. YOU WERE REVERSED BY THE APPELLATE PANEL WHO LIMITED IT TO 500 WEEKS. IT WENT TO THE COURT OF APPEALS. THEY AGREED WITH THE APPELLATE PANEL AND LIMITED IT TO 500 WEEKS, AND NOW, IT IS PENDING BEFORE THE SUPREME COURT ON CERT. THAT CERT WAS FILED ON THE 9TH OF APRIL OF 2009. WE HAVE HANDED UP THE APPELLATE COURT'S, THE COURT OF SOUTH CAROLINA COURT OF APPEALS DECISION ON THAT CASE AND ALSO OUR PETITION FOR CERT, WHICH HAS A LOT OF ARGUMENT INVOLVING THIS CASE IN IT. SO, WE ASK YOU TO REVIEW THAT BRIEF AS WELL. OF COURSE, IF THE SOUTH CAROLINA SUPREME COURT DENIES CERT, THEN THE ISSUE WILL BE CLEAR THAT LIFE AT MOST MEANS 500 WEEKS AND NOT LIFE EXPECTANCY. BUT WE SHALL SEE WHAT THE SUPREME COURT OF SOUTH CAROLINA DOES. THERE ARE AT LEAST THREE OTHER ISSUES BEFORE YOU IN THIS CASE. WHETHER OR NOT THE 5 SEPTEMBER '08 ACCIDENT OR INTENTIONAL EVENT, WHICHEVER WAY IT GOES, THAT CLAIM WOULD BE THE RESPONSIBILITY FOR THE

CARRIER THAT REPRESENTED THE EMPLOYER AT THAT TIME. WE TAKE THE POSITION JUST AS THE RULINGS HAVE BEEN BEFORE BEFORE THE COURT, IF A CLAIMANT IS RECEIVING AN AWARD OF BENEFITS AND IS TRAVELING TO THE DOCTOR OR TO THE PHYSICAL THERAPIST AND IS INVOLVED IN AN AUTOMOBILE ACCIDENT, WHETHER IT IS HIS FAULT OR NOT, THAT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. THAT IS THE OPERATIONAL PHRASE. NOT CAUSALLY RELATED TO THE ACCIDENT, AROSE OUT OF IN THE COURSE OF HIS EMPLOYMENT, AND THE EMPLOYMENT NEXUS WAS THAT HE WAS TOLD BY THE EMPLOYER OR THE EMPLOYER'S CARRIER TO GET THE MEDICAL TREATMENT. HE WAS DOING THAT WHEN THE ACCIDENT HAPPENED. THEREFORE, THAT IS A SEPARATE AND DISTINCT ACCIDENT. JUST AS SCOTTIE ON THE 10TH OF APRIL OF '04 WAS RECEIVING MEDICAL CARE, DECIDED FOR WHATEVER REASON TO STOP THE MEDICAL TREATMENT, AND THEN SUSTAINED AN ACCIDENT, ACCIDENTAL INJURY AS A RESULT THAT WAS FOUND TO BE COMPENSABLE. THE TWO STATUTES THAT YOU ARE GOING TO BE LOOKING AT ARE GOING TO BE, I BELIEVE, 42-9-280 AND 42-9-290. 280 INVOLVES CASES WHERE THE DEATH IS UNRELATED TO THE -- DOES NOT ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. THAT IS THE OPERATIONAL PHRASE, AND IN 280, MR. STANLEY FLOYD DIED OF AN ABDOMINAL ANEURYSM THAT HAS

NOTHING TO DO WITH HIS EMPLOYMENT, NOTHING TO DO WITH HIS TREATMENT BY THE EMPLOYER; IT JUST WAS AN ACCIDENT UNRELATED TO THE JOB.

BY COMMISSIONER LYNDON:

YOU MIGHT WANT TO MAKE THAT ON THE RECORD CLEAR THAT THAT MR. FLOYD IS NOT THIS SCOTTIE FLOYD.

BY MR. WUKELA:

YES, SIR, BY A TRULY MARK OF FATE, BOTH OF MY CLAIMANTS IN THESE TWO DIFFERENT CASES ARE NAMED FLOYD, AND SCOTTIE FLOYD IS THE ONE WHO IS BEFORE US NOW, THE YOUNG MAN THAT APPARENTLY DIDN'T TAKE HIS ANTI-SEIZURE MEDICINE FOR WHATEVER REASON, AND STANLEY FLOYD WAS THE INDIVIDUAL WHO WAS DRIVING THE BULLDOZER, SUFFERED A BRAIN INJURY, AND IS NOW PENDING CERT BEFORE THE SUPREME COURT. THE ISSUE OF WHETHER OR NOT UNDER 42-9-290, THAT WOULD BE A SITUATION WHEN THE INJURY WAS A CONSEQUENCE OF THE ORIGINAL INJURY AND NOT AN INTERVENING ACCIDENT, NOT ARISING OUT OF THE COURSE OF EMPLOYMENT. THAT TYPE OF DEATH YOU COULD ALMOST ARGUE IT HAS TO BE DEMONSTRATED IT WAS A LOGICAL PROGRESSION THAT AROSE OUT OF HIS CONDITION. FOR INSTANCE, IF YOU HAD AN INDIVIDUAL WHO WAS QUADRIPLEGIC OR PARAPLEGIC AND BECAUSE OF THEIR INABILITY TO TAKE CARE OF THEMSELVES AND BECAUSE OF THE DETERIORATING BODY, HE

DEVELOPED BED SORES AND THEN DEVELOPED AN INFECTION AND EVENTUALLY DIED OUT OF ALMOST THE MATHEMATICAL MEDICAL PROGRESSION OF HIS ACCIDENT. NOT THE CASE WITH SCOTTIE FLOYD. THIS WAS A DIFFERENT EVENT FOR SCOTTIE FLOYD, BUT IF YOU LOOK AT 42-9-290, AND YOU MAKE A DECISION THAT NO, THE DEATH OF SCOTTIE FLOYD ON THE 5TH OF SEPTEMBER WAS A LOGICAL PROGRESSION OF HIS INITIAL INJURY AND THERE WERE NO INTERVENING CAUSES FOR THAT, THAT WAS JUST THE PROGRESSION OF HIS MEDICAL CONDITION, THEN THE EMPLOYER ARGUES THAT SCOTTIE'S DEPENDANTS MUST FILE THEIR -- WELL, ACTUALLY THE DEATH MUST OCCUR LESS THAN SIX YEARS, I BELIEVE -- LESS THAN SIX YEARS AFTER HIS INJURY, OKAY. WE TAKE TWO ARGUMENTS WE ADDRESS TO THAT. THE FIRST ARGUMENT IS THERE WILL BE TESTIMONY -- THERE IS CLEARLY TESTIMONY IN THE RECORD THAT THE ACCIDENT OF APRIL THE 10TH OF '04 HAPPENED LESS THAN SIX YEARS BEFORE HIS DEATH; THAT HE HAD A COMPENSABLE INJURY IN THAT ACCIDENT OF APRIL 10TH OF '04. THAT HE HAD A PERMANENT IMPAIRMENT OF 15 PERCENT TO THE SPINE ACCORDING TO DR. HEALY AS A RESULT OF THAT ACCIDENT, AND THAT HE ALSO HAD A PERMANENT IMPAIRMENT TO THE BRAIN AT THE TIME OF HIS DEATH THAT HAD STABILIZED. THE BRAIN AS AN ORGAN HAD STABILIZED, AND THAT THE CONDITION OF THE ORGAN

IF YOU WERE GOING TO LOOK AT THIS AS A 42-9-30 CASE UNDER THE REGS, AND YOU WILL HAVE TESTIMONY BEFORE YOU FROM DR. FEDERER AS TO THE NATURE OF THE IMPAIRMENT -- PERMANENT PHYSICAL IMPAIRMENT TO THE BRAIN AS AN ORGAN, AND I BELIEVE DR. FEDERER RATED HIM SOMEWHERE IN THE RANGE OF 70 TO 80 PERCENT LOSS OF THE BRAIN AS A RESULT OF THAT.

BY COMMISSIONER LYNDON:

AND JUST SO AS TO NOT CONFUSE ANY REVIEWING COURT, WHEN YOU MENTIONED THE '04 ACCIDENT, THAT IS ACTUALLY ADDRESSED IN COMMISSIONER BASS' ORDER ON THE 2001 CASE. I WANT TO MAKE CERTAIN THAT WHOEVER REVIEWS THIS UNDERSTANDS THERE WAS NO W.C.C. FILE SET UP FOR THAT NOR WAS THERE A 50 FILED. IS THAT CORRECT?

BY MR. WUKELA:

THAT IS CORRECT, BUT THERE WAS A 51 FILED DENYING THE COMPENSABILITY OF THAT, AND THAT'S WHY IT WAS AN ISSUE. THEY WERE DENYING THAT HE SUSTAINED AN INJURY TO HIS SPINE, AND THAT'S WHY IT WAS ALL PUT INTO THE SAME FORM 50.

BY COMMISSIONER LYNDON:

OKAY.

BY MR. WUKELA:

HE DIDN'T HAVE A BACK INJURY ON 13 SEPTEMBER

'01. HE HAD A BACK INJURY AFTER THE EVENTS OF 10 APRIL OF '04.

BY COMMISSIONER LYNDON:

ALL RIGHT, SIR.

BY MR. WUKELA:

AND THAT WAS RULED COMPENSABLE IN DECEMBER OF '07, AND THAT WAS NOT APPEALED. AND THIS WAS NOT -- THIS WAS NOT A CONSENT ORDER. THIS WAS A LITIGATED ISSUE.

BY COMMISSIONER LYNDON:

ABSOLUTELY, I'M LOOKING AT THE ORDER RIGHT NOW, AND IT WAS FILED ON DECEMBER 12TH, 2007, AND I NOTICED AND I THINK WE SAID IT, AND I THINK YOU ACTUALLY READ IT INTO THE RECORD, THAT IT SAYS IN THE ORDER PART, IT SAYS THAT "THE CLAIMANT HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT WITH RESPECT TO HIS PHYSICAL BRAIN INJURY/PSYCH INJURY NOR WITH RESPECT TO HIS SPINE INJURY," AND THAT'S ADDRESSED IN THAT '01 ORDER THAT WAS SERVED AND FILED IN DECEMBER OF '07.

BY MR. WUKELA:

SO, YOUR HONOR, BASICALLY WHAT YOU'RE FACED WITH AS I UNDERSTAND THE LAW OF THIS CASE AND OTHER MAY DEVELOP AS THE SUPREME COURT WORKS IT WILL, YOU HAVE AN ISSUE INVOLVING THE SIX-YEAR STATUTE. YOU

ALSO HAVE AN ISSUE UNDER 42-9-10 AS TO WHETHER OR NOT IF YOU ARE DEALING WITH A BRAIN DAMAGE CASE, THAT SIX-YEAR STATUTE IN ITS OWN RIGHT EVEN APPLIES, AND WHAT I WOULD LIKE TO DO IS DIRECT YOUR ATTENTION TO 42-9-10, THE THIRD PARAGRAPH WHERE IT SAYS "NOT WITHSTANDING 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, QUADRIPLEGIC, OR WHO HAS SUFFERED PHYSICAL BRAIN DAMAGE IS NOT SUBJECT TO THE 500-WEEK LIMITATION AND SHALL RECEIVE BENEFITS FOR LIFE." NOW, WE WOULD TAKE AN ADDITIONAL POSITION THAT NOT ONLY THAT 42-9-290 DOES NOT APPLY BECAUSE HIS DEATH WAS NOT THE LOGICAL PROGRESSION OF THIS INJURY, BUT EVEN IF YOU FOUND THAT IT DID APPLY IN THIS CASE, THE THIRD PARAGRAPH OF 42-9-10 OBVIATES THAT, BECAUSE IT TALKS ABOUT THE CLAIMANT'S LIFE EXPECTANCY AND NOT A PERIOD OF 500 WEEKS OR ANY OTHER WEEK LIMITATION. WE ALSO WOULD ARGUE THAT IF THIS CASE IS REVIEWED BY YOU AS IN FACT A 42-9-30 CASE, THAT THE APPLICATION OF REGULATION 67-1102 BRAIN WHERE IT SAYS "PARTIAL LOSS OR LOSS OF USE OF BRAIN, 25 TO 250 WEEKS," THAT REGULATION HAS BEEN NULLIFIED BY THE IMPLEMENTATION OF THE THIRD

PARAGRAPH OF 42-9-10, AND IN ITS PLACE SHOULD BE READ THE CLAIMANT'S LIFE EXPECTANCY, WHICH I BELIEVE IN OUR BRIEF IS IN EXCESS OF 2,500 WEEKS.

BY COMMISSIONER LYNDON:

AND CORRECT ME IF I'M WRONG, I'M LOOKING AT THE RULINGS OF LAW ON PAGE 12 OF COMMISSIONER BASS' ORDER, HE SAYS "UNDER 42-9-10 AND 42-9-200, THE CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS." I DON'T SEE AN ALLUSION TO 42-9-30.

BY MR. WUKELA:

IT WOULDN'T BE UNTIL IT WAS A PERMANENT AWARD. AS LONG AS YOU ARE FINDING THAT HE HASN'T REACHED MAXIMUM MEDICAL IMPROVEMENT, YOU WOULDN'T GET TO 42-9-30.

BY COMMISSIONER LYNDON:

RIGHT. BUT AT THIS POINT, IT WAS A 42-9-10 CASE BECAUSE IT WAS REALLY A BRAIN DAMAGE CASE, IS THAT RIGHT?

BY MR. WUKELA:

BECAUSE AT THAT POINT IN TIME, IT WAS STILL TEMPORARY TOTAL DISABILITY BENEFITS. HE HADN'T REACHED MAXIMUM MEDICAL IMPROVEMENT YET. HE WAS STILL DRAWING BENEFITS AS LONG AS THE DISABILITY PERSISTED.

BY COMMISSIONER LYNDON:

OKAY.

BY MR. WUKELA:

WELL, THERE WAS A DISPUTE ABOUT WHETHER HE WAS AT MAXIMUM MEDICAL IMPROVEMENT. WE ARGUED -- CANDIDLY, WE ARGUED THAT HE HAD REACHED MAXIMUM MEDICAL IMPROVEMENT AND WAS ENTITLED TO A PERMANENT AWARD. COMMISSIONER BASS DISAGREED WITH THIS AND SAID HE HAD REACHED MAXIMUM MEDICAL IMPROVEMENT ON EITHER THE BRAIN INJURY OF 13 SEPTEMBER '01 OR THE BACK INJURY OF 10 APRIL OF '04. JUST FOR SOME BACKGROUND, THE CLAIMANT, AND YOU WILL READ THIS IN HIS DEPOSITIONS, WAS A VERY COMBATIVE INDIVIDUAL. HE DID NOT -- HE WAS NOT A COOPERATIVE PATIENT. HE WAS NOT A COMPLIANT PATIENT. THIS WAS BECAUSE OF THE NATURE OF HIS INJURY. HE SPENT ALMOST TWO YEARS IN TANGRAM IN AN INSTITUTIONALIZED SETTING IN AN ATTEMPT TO MODIFY HIS BEHAVIOR, AND TO SOME EXTENT, THEY WERE SUCCESSFUL.

BY COMMISSIONER LYNDON:

HOW DO YOU SPELL THAT INSTITUTION FOR THE COURT REPORTER?

BY MR. WUKELA:

TANGRAM, T-A-N-G-R-A-N.

BY COMMISSIONER LYNDON:

OKAY, THANK YOU.

BY MR. WUKELA:

AND I BELIEVE THAT PRETTY MUCH PUTS OUR CASE BEFORE THE COMMISSION.

BY COMMISSIONER LYNDON:

ALL RIGHT. THEN MR. CAUTHEN FOR LEGION.

BY MR. CAUTHEN:

THANK YOU, COMMISSIONER. COMMISSIONER, IT IS OUR POSITION THAT THE MEDICAL EVIDENCE IN THIS CASE, PRIMARILY THE AUTOPSY, UNQUESTIONABLY ESTABLISHED THAT THE CAUSE OF DEATH WAS RELATED TO THE ORIGINAL 2001 ACCIDENT, AND THAT BEING COMPLICATIONS AS IT IS ACTUALLY LISTED IN THE AUTOPSY REPORT, "CLAIMANT DIED AS A RESULT OF COMPLICATIONS OF SEIZURE DISORDER THAT RESULTED FROM A CAVITARY LESION OF THE RIGHT FRONTAL CEREBRUM DUE TO A REMOTE BLUNT HEAD TRAUMA." THAT IS CLAIMANT'S APA PAGE 401. CAUSE OF DEATH WAS CERTAINLY FOUND TO BE ARISING FROM OR RELATED TO THE ORIGINAL 2001 ACCIDENT, AND WHETHER OR NOT THE DEATH COULD ALSO BE ARGUED TO RESULT IN OR TO HAVE BEEN THE RESULT OF TAKING MEDICATION, LACK OF TAKING MEDICATION COMPLIANCE, NONCOMPLIANCE OF ADMINISTRATION, THAT MEDICATION TO CONTROL SEIZURES STILL RESULTED FROM THE ORIGINAL 2001 COMPENSABLE HEAD/BRAIN INJURY, ALL RELATED TO THAT 2001 CLAIM. BECAUSE WE BELIEVE THAT THE EVIDENCE

CLEARLY INDICATES THAT THE DEATH WAS RELATED TO THE INJURY, IT'S OUR POSITION THAT THEN UNDER 42-9-290, THE BENEFICIARY MRS. FLOYD, PERSONAL REPRESENTATIVE WOULD BE BARRED FROM BENEFITS, STATUTORILY BARRED FROM BENEFITS, BECAUSE THE DEATH UNFORTUNATELY FOR HER OCCURRED ALMOST SEVEN YEARS AFTER THE DATE OF ACCIDENT IN 2001, AND 42-9-290 REQUIRES THAT THE DEATH OCCUR WHERE DISABILITY CONTINUES AS IT DID WITH SCOTTIE FLOYD, HE WAS ALWAYS TOTALLY DISABLED FROM THE DATE OF INJURY UNTIL HIS DEATH, WHERE DISABILITY CONTINUES, THEN THE DEATH HAS TO OCCUR WITHIN SIX YEARS OF THE DATE OF ACCIDENT, AND THAT STATUTE HAS BEEN INTERPRETED BY A 1973 CASE OF *GUNNELLS VERSUS RAYBESTOS-MANHATTAN*, WHICH I HAVE HANDED UP. THE SUPREME COURT IN THAT CASE DISCUSSES THE STATUTE OF A PREDECESSOR OF 42-9-290, THAT SAME OPERATIVE LANGUAGE AND HAS INDICATED THAT THAT STATUTE IS TO BE APPLIED EXACTLY AS IT IS WRITTEN. IN THAT CASE, WE HAD A 1961 INJURY, A 1969 DEATH, AND UNFORTUNATELY BECAUSE THE DEATH OCCURRED IN EXCESS OF SIX YEARS, THE BENEFICIARY WHO WAS THE WIFE IN THAT CASE, WOULD HAVE BEEN A PRESUMED DEPENDENT, WAS UNABLE TO RECOVER ANY BENEFITS FROM THAT DEATH. THE DEATH WAS FOUND TO BE NON-COMPENSABLE. AND SO, WE BELIEVE THAT STATUTE

ABSOLUTELY CONTROLS THIS CASE. NOW, IN THE EVENT HOWEVER THAT YOU DO FIND THE DEATH TO HAVE BEEN NON-WORK RELATED, WE BELIEVE THAT MS. FLOYD WOULD ALSO BE BARRED FROM BENEFITS UNDER 42-9-280, WHICH IN THAT CASE CONTROLS DISTRIBUTION OF DEATH BENEFITS WHERE THE DEATH IS DUE TO A NON-WORK RELATED CAUSE. IN THAT CASE HOWEVER, SHE WOULD HAVE TO ESTABLISH DEPENDENCY, I.E. THAT SHE WAS DEPENDENT UPON HER SON FOR SUPPORT. THE EVIDENCE IN THIS CASE, WE BELIEVE, INDICATES ABSOLUTELY THERE IS NO EVIDENCE WHATSOEVER THAT SHE WAS DEPENDENT UPON HIM AT THE TIME OF THE ACCIDENT, WHICH WOULD BE THE OPERATIVE TIME PERIOD UNDER 42-9-120, I BELIEVE -- YEAH, 120 INDICATES THAT DEPENDENCY IN ALL OTHER CASES, NOT PRESUMED CASES WHERE YOU HAVE A PRESUMED DEPENDENT, DEPENDENCY IS TO BE DETERMINED AT THE TIME OF THE ACCIDENT. IN HER DEPOSITION, SHE TESTIFIED THAT HE WAS LIVING ALONE AT THAT TIME. HE WAS IN NO WAY CONTRIBUTING TO HER IN ANY FASHION. SO, WE DON'T BELIEVE SHE CAN ESTABLISH DEPENDENCY UNDER 42-9-280. WE WOULD OF COURSE DISAGREE WITH STEVE'S POSITION THAT THERE WERE SUBSEQUENT INJURIES IN 2004 AND 2008, 2008 BEING THE DATE OF HIS DEATH, AND THE CASE, ALTHOUGH THE CASE HAS NOT BEEN IDENTIFIED, THE FACTUAL SCENARIOS FROM THE CASE HAS BEEN POSITED

THAT BY ANALOGY THAT THIS IS SIMILAR TO A SITUATION WHERE SOMEONE WHO HAS A COMPENSABLE INJURY IS DRIVING TO MEDICAL TREATMENT, HAS AN ACCIDENT DUE TO SOME EVENT, MEDICAL EVENT, IN THE COURSE OF GOING TO GET MEDICAL TREATMENT, AND THAT WAS FOUND TO BE COMPENSABLE. I DON'T KNOW WHAT CASE THAT IS AND CAN'T SPECIFICALLY DISTINGUISH THE CASE FOR THAT REASON, BUT I WOULD ARGUE THAT THE '04 AND '08 EVENTS ARE UNLIKE THAT, BECAUSE IN BOTH CASES, IN 2004, MR. FLOYD SIMPLY SUFFERED A SEIZURE OR SEVERAL SEIZURES, AND THEY WERE SO SEVERE THAT HE HAD COMPRESSION FRACTURES TO HIS THORACIC SPINE. IN 2008, OF COURSE, HE SUFFERED A SEIZURE AND DIED. IN NEITHER OF THOSE CASES WAS HE GOING ANYWHERE OR DOING ANYTHING THAT COULD EVEN BE REMOTELY ATTRIBUTED TO HIS EMPLOYMENT. THEY WERE JUST MEDICAL EVENTS. YES, THE EMPLOYER WOULD BE RESPONSIBLE, OF COURSE, FOR MEDICAL TREATMENT FOR THOSE EVENTS BECAUSE THEY ARISE FROM AND RELATE TO THE 2001 INJURY. OF COURSE, THE EMPLOYER PROVIDED MEDICAL TREATMENT FOR THE INJURY TO THE BACK COMPRESSION FRACTURES FROM '04 BECAUSE IT AROSE FROM THE 2001 ACCIDENT, AND LET ME POINT OUT THAT ON PAGE NINE OF COMMISSIONER BASS' ORDER, FINDING OF FACT FIVE, "IN ADDITION TO THE ADMITTED INJURIES, I FIND

THE CLAIMANT SUFFERED COMPRESSION FRACTURE INJURIES TO HIS SPINE PRIMARILY DUE TO SEIZURE ACTIVITY PROMPTED BY HIS BRAIN INJURY RESULTING IN THE EXTENSIVE PAIN IN HIS SPINE REQUIRING ORTHOPAEDIC TREATMENT." HE DIDN'T FIND THAT A NEW INJURY BY ACCIDENT OCCURRED. HE FOUND THAT THIS WAS PROMPTED BY AND THEREFORE RELATED TO THE 2001 ACCIDENT, NOT A NEW INJURY. I BELIEVE THE SAME WOULD BE THE CASE WITH THE 2008 DATE OF DEATH. IT WAS JUST A SEIZURE THAT UNFORTUNATELY RESULTED IN HIS DEATH, AND SO, WE DON'T BELIEVE THERE WOULD BE ANY SUBSEQUENT INJURY. THERE IS ONLY ONE INJURY HERE IN SEPTEMBER OF 2001, AND THAT'S THE DATE OF CONTROL. ALSO, IN THE EVENT THAT MS. FLOYD COULD ESTABLISH THAT THERE WAS A NON-CAUSALLY RELATED DEATH AND THAT SHE WAS DEPENDENT, WE STILL BELIEVE THAT SHE WOULD NOT BE ENTITLED TO ANY BENEFITS UNDER 42-9-10, OF COURSE THE ALLEGATION BEING THAT HE WAS TOTALLY DISABLED WITH A PHYSICAL BRAIN INJURY AND SHE IS ENTITLED TO A LUMP-SUM AWARD FOR THE LIFE EXPECTANCY OF THE CLAIMANT. UNDER THE *FLOYD VERSUS C.B. ASKINS* CASE, AND WE BELIEVE UNDER *STONE VERSUS ROADWAY EXPRESS*, AWARDS OR ENTITLEMENT TO AWARDS FOR LOSS OF EARNING CAPACITY DO NOT SURVIVE, AND IN FACT IN *FLOYD VERSUS C.B. ASKINS*, EVEN THOUGH THAT IS ON APPEAL, THE COURT DID FIND,

AND THAT IS THE LAW THAT APPLIES RIGHT NOW, THAT A LIFETIME PHYSICAL BRAIN INJURY AWARD -- IN THAT CASE, THERE WAS AN AWARD. IN THIS CASE, THERE HAS NOT BEEN AN AWARD OR A STIPULATION OF TOTAL DISABILITY ALTHOUGH THERE IS UNQUESTIONABLY A BRAIN INJURY, THERE HAS NEVER BEEN AN ADJUDICATION OR AN ADMISSION THAT THE CLAIMANT WAS TOTALLY DISABLED. IN ASKINS, THERE WAS. BUT AT ANY RATE, THE COURT RULED IN THAT CASE UNDER 42-9-10, PARAGRAPH "C," "BENEFITS WOULD TERMINATE AT THE POINT OF CLAIMANT'S DEATH FROM AN UNRELATED CAUSE," AND THAT IS BECAUSE 42-9-280 JUST DOES NOT PROVIDE THAT PARAGRAPH "C" OF 42-9-10 IS A TYPE OF AWARD THAT WOULD SURVIVE. ONLY AN AWARD UNDER THE SECOND PARAGRAPH OF 42-9-10 OR 42-9-30 IS FOUND TO SURVIVE AND WHERE IT IS LOST EARNING CAPACITY IN A NON-WORK RELATED DEATH. THE LAST THING I WANTED TO ADDRESS WAS THAT DR. HEALY'S DEPOSITION TESTIMONY, AND IT WAS TAKEN JUST LAST WEEK, SO WE DON'T EVEN HAVE THE TRANSCRIPT, DO WE?

BY MR. WUKELA:

I'VE GOT IT.

BY MR. CAUTHEN:

YOU DO HAVE IT?

BY COMMISSIONER LYNDON:

I'VE GOT IT. IT'S BEEN MADE A PART OF THE

RECORD.

BY MR. CAUTHEN:

I HAVEN'T RECEIVED IT, BUT MY UNDERSTANDING OF HIS TESTIMONY IS THAT, AND OF COURSE THERE WERE QUESTIONS YOU WILL SEE IN THERE WHEN YOU READ IT, THAT DR. HEALY DID INDICATE THAT THE FACT THAT THERE WAS NO MEDICATION IN HIS BLOOD STREAM, SEIZURE CONTROL MEDICATION DEPAKOTE AND KEPPRA IN HIS BLOOD STREAM WHEN THEY DID THE AUTOPSY, WOULD INDICATE THAT THAT CAUSED THE SEIZURE THAT CAUSED HIS DEATH. DR. HEALY ALSO TESTIFIED HOWEVER THAT IN THAT CASE MORE LIKELY, I BELIEVE, AND I'M JUST GOING FROM MEMORY, THAT MORE LIKELY THAN NOT THAT IF IT TOOK A WEEK TO TWO WEEKS FOR THAT MEDICATION TO GET OUT OF HIS BLOODSTREAM AND IF HE HAD THE MEDICATION AT THE TIME, WHICH EVIDENCE WILL INDICATE HE DID, THEN HE WOULD HAVE MADE -- MORE LIKELY THAN NOT MADE A CONSCIOUS DECISION TO STOP TAKING THAT MEDICATION. THAT WAS OF HIS OWN VOLITION; THEREFORE IT WOULD NOT BE AN ACCIDENT. IT WOULD BE IN THAT SITUATION NOT COMPENSABLE BECAUSE IT WAS NOT AN ACCIDENT, AND SO, OUR POSITION IS THAT NO FURTHER BENEFITS ARE PAYABLE IN THIS CASE, AND OF COURSE, YOU'VE GOT TO KEEP IN MIND, THIS IS NOT A QUESTION OF WHAT BENEFITS, ADDITIONAL BENEFITS, SCOTTIE FLOYD WOULD BE ENTITLED

TO; HE IS DECEASED. HE RECEIVED BENEFITS THROUGH THE DATE OF HIS DEATH. SO, THEN IT'S A QUESTION OF WHETHER OR NOT THE NEXT OF KIN, THE PERSONAL REPRESENTATIVE, THE MOTHER, WOULD BE ENTITLED TO DEATH BENEFITS, AND WE BELIEVE THAT SHE WOULD NOT UNDER EITHER 42-9-280 OR 290.

BY COMMISSIONER LYNDON:

ALL RIGHT, LET'S GO OFF THE RECORD JUST A MINUTE.

(OFF THE RECORD)

BY COMMISSIONER LYNDON:

WE ARE BACK ON THE RECORD, AND I WILL HEAR FROM MR. MARTIN.

BY MR. MARTIN:

AND COMMISSIONER, I'M HERE ON BEHALF OF KEN BAKER AND AMGUARD. AMGUARD PROVIDED THE POLICY COVERAGE FOR THE PERIOD OF TIME MAY 3RD, '08, THROUGH MAY 3RD, '09. THE CLAIMANT, IT'S MY UNDERSTANDING, LAST WORKED ON THE DATE OF THE ACCIDENT, WHICH WOULD HAVE BEEN SEPTEMBER '01, IF NOT SHORTLY AFTER. HE NEVER WORKED FOR KEN BAKER DURING THE COVERAGE PERIOD OF AMGUARD. THUS HE COULD NOT HAVE HAD AN INJURY BY ACCIDENT ARISING OUT OF THE COURSE OF EMPLOYMENT WITH KEN BAKER DURING THEIR COVERAGE. AND THUS OBVIOUSLY THIS SHOULD NOT BE COMPENSABLE.

IT'S OUR POSITION AND ACTUALLY I WOULD AGREE WITH EVERYTHING THAT MR. CAUTHEN SAID AS WELL JUST TO REITERATE THAT. WE CONTEND THE CLAIMANT'S DEATH WAS DIRECTLY RELATED TO THE WORK INJURY. AS MARK POINTED OUT, THE AUTOPSY, IT'S RESULTS AND THE DEATH CERTIFICATE CAUSE OF DEATH IS "COMPLICATIONS OF A SEIZURE DISORDER DUE TO CEREBRAL CAVITARY LESION DUE TO A LOCAL BLUNT HEAD TRAUMA." DR. HEALY, HIS TREATING NEUROLOGIST, STATED FIRST THE CLAIMANT HAD A PHYSICAL BRAIN INJURY, AND AS A RESULT OF THAT BRAIN INJURY, HE HAD TO HAVE -- OR HE HAD THE SEIZURES, WHICH WAS EVIDENCED BACK IN 2004 WHEN HE STOPPED TAKING HIS MEDS. HE HAD TO TAKE HIS MEDICATION TO KEEP FROM HAVING THE SEIZURES. HIS CAUSE OF DEATH WAS FAILURE TO TAKE THOSE MEDICATIONS. THIS WAS ALSO BACKED UP BY DR. FEDERER WHO IS THE NEUROPSYCHOLOGIST. WE BELIEVE IT IS A NATURAL PROGRESSION. THE CLAIMANT HAD TO TAKE MEDICATIONS IN ORDER TO CONTINUE TO LIVE, AND AS A RESULT OF THE ORIGINAL WORK INJURY STOPPED TAKING THOSE, AND AS A RESULT HE PASSED AWAY. IT WOULD BE THE SAME THING IF SOMEONE HAD A HEART CONDITION AND QUIT TAKING HEART MEDICATION. IF THE HEART DISEASE WAS CAUSED BY THE WORK INJURY, THAT IS A NATURAL PROGRESSION OF THAT DISEASE OR THAT PROBLEM. I

THINK MR. WUKELA POINTED OUT THAT MS. FLOYD IS GOING TO SAY THAT THE CLAIMANT WAS TAKING HIS MEDICATION. WELL, IF HE WAS TAKING HIS MEDICATIONS AND THEN HE DIED, THEN CERTAINLY THE WORK INJURY NATURALLY FLOWED -- I MEAN, THE DEATH FLOWED FROM THE WORK INJURY ITSELF IF HE WAS TAKING THE MEDICATIONS. SO, EITHER WAY, IF HE WAS TAKING THE MEDICATIONS OR NOT TAKING THE MEDICATIONS, HIS DEATH WAS A NATURAL PROGRESSION OF HIS PROBLEMS HE HAD FROM THE WORK INJURY, AND THERE WAS NO SPECIFIC INJURY BECAUSE HE WAS NEVER IN THE COURSE AND SCOPE OF EMPLOYMENT WITH KEN BAKER DURING THE COVERAGE PERIOD OF AMGUARD, AND THAT WOULD BE OUR POSITION, COMMISSIONER.

BY COMMISSIONER LYNDON:

OKAY. LET'S GO OFF THE RECORD JUST A MINUTE.

(OFF THE RECORD)

BY COMMISSIONER LYNDON:

WE ARE BACK ON THE RECORD. MR. MARTIN.

BY MR. MARTIN:

YOUR HONOR, ON BEHALF OF AMGUARD AND KEN BAKER, WE WOULD ALSO MOVE TO BE DISMISSED FROM THIS CLAIM, AS THE CLAIMANT NEVER WORKED DURING THE PERIOD OF TIME THERE WAS COVERAGE FOR AMGUARD FOR KEN BAKER.

BY COMMISSIONER LYNDON:

AND I WOULD HEAR FROM MR. WUKELA AND MR.

CAUTHEN ON THAT.

BY MR. WUKELA:

YOUR HONOR, THE TEST OF COURSE IS NOT WHETHER HE WAS WORKING FOR HIM. IT IS WHETHER THE INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WHILE THE COVERAGE EXISTED, AND THAT CLEARLY WOULD BE THE CASE IF YOU FOUND THAT THE DEATH ON 2008 WAS AN ACCIDENTAL DEATH, AND IT AROSE OUT OF THE COURSE OF HIS EMPLOYMENT, THE CARRIER WOULD BE ON THE RISK -- WHO WAS ON THE RISK OF THE TIME OF THAT DEATH. LIKEWISE IF HE HAD HAD AN AUTOMOBILE ACCIDENT ON HIS WAY TO THE DOCTOR'S OFFICE, IT AROSE OUT OF THE COURSE OF HIS EMPLOYMENT, I.E. PROCEEDING WITH THE INSTRUCTIONS THE EMPLOYER HAD GIVEN HIM TO GO TO THE DOCTOR, THEN THE CARRIER THAT WAS ON THE RISK AT THAT TIME WOULD BE THE ONE ON THE RISK, I WOULD ARGUE.

BY COMMISSIONER LYNDON:

ALL RIGHT, SIR.

DO YOU WANT TO SPEAK TO IT AT ALL?

BY MR. CAUTHEN:

COMMISSIONER, I WOULD CONSENT TO THEIR DISMISSAL. I THINK THE ABSENCE OF STATUTORY OR CASE LAW INDICATING THAT UNDER THIS SCENARIO, THERE COULD BE AN INJURY BY ACCIDENT IN 2008, I DON'T SEE WHY

THEY SHOULD BE IN THIS.

BY COMMISSIONER LYNDON:

ALL RIGHT, I WILL NOTE YOUR REQUEST, BUT I WILL ADDRESS THAT IN MY ORDER. SO, IF YOU WOULD STAY HERE FOR THE REMAINDER OF THIS HEARING, I WOULD APPRECIATE IT.

BY MR. MARTIN:

YES, SIR.

BY COMMISSIONER LYNDON:

AND LET'S GO OFF THE RECORD JUST A MINUTE.

(OFF THE RECORD)

BY COMMISSIONER LYNDON:

WE ARE BACK ON THE RECORD, AND I BELIEVE YOU WANTED TO GET THE INVESTIGATOR IN, SIR.

BY MR. CAUTHEN:

YES, SIR. COMMISSIONER, CAN ANY OF THE OTHER PARTIES WHO HAVE COME HERE TODAY COME IN?

BY COMMISSIONER LYNDON:

ABSOLUTELY, RIGHT, ANYONE WHO IS OVER 12.

(OFF THE RECORD)

BY COMMISSIONER LYNDON:

WE ARE BACK ON THE RECORD, AND WE HAD A VERY VERY LENGTHY PREHEARING CONFERENCE, AND WE ARE IN THE DEPENDENCY PART OF THIS HEARING, AND I HAVE MADE A PART OF THE RECORD THE APAs BOTH FROM MR. WUKELA'S

FIRM AND FOR MR. CAUTHEN'S FIRM AS WELL AS MR. MARTIN, AND I NOTICED THAT I HAVE DUPLICATE DEPENDENCY INVESTIGATIONS. A COPY OF YOURS, MR. CAUTHEN, IS INCLUDED IN MR. WUKELA'S APA, AND WE DO HAVE THE INVESTIGATOR THERE. WILL THESE BE SUFFICIENT, OR DO YOU WANT THE INVESTIGATOR TO TESTIFY?

BY MR. CAUTHEN:

COMMISSIONER, IF MR. WUKELA WILL STIPULATE TO THE ADMISSIBILITY OF THE INVESTIGATION REPORT, I SEE NO NEED FOR MR. BROWN TO TESTIFY. HE WOULD TESTIFY SUBSTANTIALLY IF NOT IDENTICALLY TO HIS FINDINGS IN THAT REPORT.

BY COMMISSIONER LYNDON:

ALL RIGHT, MR. WUKELA.

BY MR. WUKELA:

YOUR HONOR, I HAVE NO QUESTIONS TO ASK OF HIM ARISING OUT OF THE REPORT. OF COURSE, WE DON'T CONCEDE TO THE CONCLUSIONS THAT HE HAS ARRIVED IN THAT REPORT, BUT THE FACTUAL ASPECTS OF HIS REPORT, WE HAVE NO NEED TO CROSS EXAMINE HIM ON.

BY COMMISSIONER LYNDON:

ALL RIGHT, SIR, IF THAT'S THE CASE, THEN YOU CAN BE EXCUSED, SIR. THANKS FOR COMING OUT. I APPRECIATE IT.

BY MR. BROWN:

THANK YOU.

BY COMMISSIONER LYNDON:

AND MS. FLOYD, IF YOU WOULD HAVE A SEAT RIGHT HERE, PLEASE, MA'AM. AND WHILE WE'RE ON THE RECORD, AGAIN, I WANT TO TELL YOU HOW SORRY I AM ABOUT THE LOSS OF YOUR SON. YOU WILL BE ASKED SOME QUESTIONS, BUT WE'VE GOT A VERY THOROUGH INVESTIGATION, SO IT WILL BE VERY FEW, AND THIS WILL BE VERY BRIEF AND FRIENDLY. WOULD YOU STATE YOUR FULL NAME FOR THE RECORD, MA'AM.

BY THE WITNESS:

MY NAME IS BETTY JO FLOYD.

BY COMMISSIONER LYNDON:

* * * * * * * * * * * * * * * * *

THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE MATTER HEREIN:

BETTY JO FLOYD,

BEING FIRST DULY SWORN, TESTIFIED ON HER OATH AS FOLLOWS:

BY COMMISSIONER LYNDON:

OKAY. MR. WUKELA.

BY MR. WUKELA:

YES, SIR.

DIRECT EXAMINATION BY MR. WUKELA:

Q. MS. FLOYD, WE'VE ALREADY TAKEN YOUR DEPOSITION BEFORE IN THIS CASE. I THINK WE MAY HAVE TAKEN IT MORE THAN ONCE. WE'RE NOT GOING TO ASK YOU A LOT OF QUESTIONS, BUT I JUST WANT YOU TO BRIEFLY TELL US IF YOU CAN AT THE TIME SCOTTIE WAS INJURED ON SEPTEMBER THE 13TH OF '01, WHERE DID HE LIVE?

A. HE WAS LIVING ON HIS OWN AT THAT TIME.

Q. WHERE?

A. IN MARION.

Q. ALL RIGHT. AND WHERE DID YOU LIVE AT THAT TIME?

A. I WAS LIVING AT MY HOME AT [redacted].

Q. OKAY. HOW OFTEN DID YOU SEE HIM?

A. I SEEN HIM ONCE IN A WHILE.

Q. NOW, AFTER HIS ACCIDENT OF SEPTEMBER 13TH OF '01, WAS HE ABLE TO GO BACK TO WORK?

A. NO, SIR.

Q. WHAT WAS HIS CONDITION, JUST BRIEFLY?

A. HE HAD BAD HEADACHES. HE CLAIMED HE COULDN'T SEE OUT OF HIS RIGHT EYE AND SPEECH THERAPIST, AND LOUD NOISE WAS BOTHERING HIM.

Q. EXCUSE ME.

A. THE LOUD NOISE WAS BOTHERING HIM.

Q. LOUD NOISE WAS BOTHERING HIM?

A. WITH HIS EARS, YES, SIR.

Q. OKAY. DID THERE COME A TIME WHEN HE CAME TO LIVE

WITH YOU?

A. YES, SIR.

Q. AND DO YOU KNOW WHEN THAT WAS?

A. IT WAS IN THE EARLY OF 2000.

Q. WELL, HE GOT INJURED SEPTEMBER 2001?

A. YES, SIR.

Q. DO YOU KNOW WHEN HE CAME TO LIVE WITH YOU AFTER THE ACCIDENT?

A. I THINK ABOUT MARCH OR MAYBE ABOUT APRIL OF 2002.

Q. OKAY. AND BETWEEN THE 13TH OF SEPTEMBER OF '01 AND MARCH OF '02, HE WAS STILL LIVING BY HIMSELF?

A. YES, SIR.

Q. ALL RIGHT. WHAT CAUSED HIM TO COME TO HAVE TO LIVE WITH YOU?

A. SOMETHING HAPPENED AND THEY SENT HIM TO COLUMBIA AT THAT TIME AND WHEN I WENT TO SEE HIM, THEY TOLD ME HE HAD TO COME HOME WITH ME OR THEY WOULD HAVE TO PUT HIM AWAY.

Q. ALL RIGHT. SO, HIS CONDUCT WAS SUCH THAT THEY DEMANDED SOMEBODY TO SUPERVISE HIM?

A. YES, SIR.

Q. OKAY. NOW, WAS HE RECEIVING WORKERS' COMPENSATION BENEFITS AT THAT TIME?

A. NO, SIR, I DON'T THINK SO.

Q. ALL RIGHT. AT SOME POINT IN TIME, DID HE RECEIVE

WORKERS' COMPENSATION BENEFITS?

A. YES, SIR.

Q. DO YOU HAVE ANY IDEA WHEN THAT WAS?

A. I THINK IT WAS ABOUT 217 AT THAT TIME.

Q. BUT WHEN DID HE START RECEIVING IT? HOW LONG AFTER HE CAME TO LIVE WITH YOU, DID HE START RECEIVING CHECKS?

A. IT'S BEEN A COUPLE OF MONTHS. IT MIGHT HAVE BEEN EIGHT MONTHS. I CAN'T REMEMBER EXACTLY, SIR.

Q. OKAY. BUT AT SOME POINT IN TIME, HE STARTED RECEIVING CHECKS?

A. YES, SIR.

Q. AND UP UNTIL THAT TIME, WHO TOOK CARE OF HIM?

A. I DID, SIR.

Q. OKAY. WERE YOU WORKING DURING THAT PERIOD OF TIME?

A. I WAS WORKING UNTIL HE WENT TO TEXAS.

Q. ALL RIGHT. AND WHEN DID HE GO TO TEXAS?

A. HE LEFT APRIL THE -- JULY THE 27TH OF 2004.

Q. OKAY. AND THAT'S WHEN HE WENT OUT TO TANGRAM?

A. YES, SIR.

Q. AND STAYED OUT THERE FOR A PERIOD OF TIME?

A. YES, SIR.

Q. OKAY. NOW, BETWEEN THE TIME THAT HE STARTED RECEIVING CHECKS AND THE TIME THAT HE LEFT FOR TEXAS, DID HE LIVE WITH YOU?

A. NO, SIR.
Q. NOW, LISTEN TO WHAT I'M SAYING.
A. OKAY.
Q. BETWEEN THE TIME HE STARTED RECEIVING CHECKS, OKAY, FOR HIS INJURY AND THE TIME HE LEFT TO GO TO TANGRAM, DID HE LIVE WITH YOU?
A. YES, SIR.
Q. ALL RIGHT. DID HE LIVE CONTINUOUSLY WITH YOU?
A. YES, SIR.
Q. ALL RIGHT. AND DURING THAT PERIOD OF TIME UP UNTIL HE WENT TO TEXAS, DID YOU WORK?
A. YES, SIR.
Q. OKAY. AND WHERE DID YOU WORK?
A. I WORKED AT A NURSERY.
Q. AND WHERE WAS THAT NURSERY AT?
A. IN MARION.
Q. OKAY. AND WHEN HE LEFT TO GO TO TEXAS, WERE YOU STILL WORKING AT THE NURSERY?
A. I WAS WORKING THERE FOR A WHILE, YES, SIR.
Q. OKAY. NOW, DURING THAT SAME PERIOD OF TIME FROM THE TIME YOU STARTED RECEIVING CHECKS UNTIL HE LEFT TO GO TO TANGRAM, OKAY, DURING THAT PERIOD OF TIME, DID HE GIVE YOU HIS CHECKS?
A. YES, SIR.
Q. ALL RIGHT. AND WHAT DID YOU USE THAT MONEY FOR?

A. I WOULD PUT IT IN AN ACCOUNT FOR HIM SO WHILE HE WAS IN TEXAS, HE COULD GET SOME STUFF HE NEEDED.
Q. NOW, LISTEN TO WHAT I'M SAYING. BEFORE 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 HOUSE PAYMENT. HE PAID FOR GROCERIES AND STUFF LIKE THAT.

Q. OKAY. DID HE HAVE ANYBODY ELSE THAT HE GAVE MONEY BUT YOU ---

A. NO, SIR.

Q. --- DURING THAT PERIOD OF TIME? ALL RIGHT. NOW, DO YOU REMEMBER THE 10TH OF APRIL '04 WHEN HE HAD SEIZURES? OF '04, I'M TALKING ABOUT BEFORE HE WENT TO TANGRAM.

A. YES, SIR.

Q. OKAY. WHERE WERE YOU AT WHEN HE HAD THOSE SEIZURES BACK IN APRIL OF '04?

A. I WAS HOME THAT DAY WITH HIM.

Q. AND WHAT HAPPENED?

A. HE HAD GOTTEN UP THAT MORNING. HE TOOK HIM A SHOWER. I WENT AND GOT HIM SOMETHING TO EAT. HE SAID HE HADN'T BEEN TO SLEEP FOR ABOUT SEVEN DAYS AND SEVEN NIGHTS AND HE THOUGHT HE COULD SLEEP. HE LAID DOWN AT 12:00. HE TOLD ME HE LOVED ME AND A QUARTER AFTER 12, I HEARD A NOISE.

Q. ALL RIGHT. AND WHEN YOU FOLLOWED YOUR INSTINCTS AND WENT TO THE NOISE, WHAT DID YOU FIND?

A. WHEN I WENT IN THERE, HE HAD THROWED UP ALL OVER HIS SELF. I GOT A TOWEL AND CLEANED HIS FACE UP. I CALLED HIS NAME THREE TIMES "SCOTTIE, SCOTTIE, SCOTTIE." THE THIRD TIME, HE STARTED HAVING THE SEIZURES.

Q. OKAY. DID YOU CALL E.M.S.?
A. YES, SIR.
Q. OKAY. NOW, PRIOR TO HIM HAVING THOSE SEIZURES, DO YOU KNOW WHETHER HE WAS TAKING HIS MEDICATION OR NOT?
A. HE TOLD ME HE WAS TAKING HIS MEDICINE. I ASKED EVERY MORNING AND EVERY AFTERNOON.
Q. NOW, THIS IS BACK IN '04 I'M TALKING ABOUT.
A. YES, SIR.
Q. ALL RIGHT. DID YOU SUBSEQUENTLY LEARN THAT HE WAS NOT TAKING HIS MEDICATION?
A. YES, SIR, AS OF THE SEIZURES.
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. WAS THAT WHAT THAT MONEY WAS BEING USED FOR?
A. YES, SIR.
Q. OKAY. NOW, WHEN HE CAME BACK FROM TANGRAM, WAS THERE A DECISION MADE THAT SOMEBODY HAD TO STAY WITH HIM?
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.
Q. OKAY. AFTER HE CAME BACK FROM TANGRAM, DID HE DECIDE THAT HE WANTED YOU TO TAKE CARE OF HIM?
A. YES, SIR.
Q. AND WERE YOU PAID TO TAKE CARE OF HIM BY THE WORKERS' COMPENSATION FOLKS?
A. YES, SIR.
Q. ALL RIGHT. HOW MUCH WERE YOU PAID?
A. I GOT PAID THE FIRST AND THE SECOND OF EVERY MONTH. IT WOULD BE $800 EVERY TWO WEEKS.
Q. ALL RIGHT. SO, ABOUT $400 A WEEK?
A. YES, SIR.
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.
Q. OKAY. NOW, LET ME ASK YOU THIS: AT SOME POINT IN TIME, DID HE HAVE TO -- WELL, LET ME ASK -- STRIKE THAT. WHEN HE CAME BACK FROM TANGRAM INITIALLY, WAS HE BETTER THAN HE WAS BEFORE HE LEFT?
A. YES, SIR.
Q. ALL RIGHT. HAD YOU ALWAYS HAD TROUBLE DEALING WITH HIM WHILE HE WAS IN YOUR HOUSEHOLD?
A. HE -- WHEN SOMEBODY WOULD TALK TO HIM, THEY WOULDN'T GIVE HIM TIME TO CONNECT WITH IT, AND HE COULDN'T GET IT ALL AT ONCE, AND HE WOULD GET UPSET ABOUT IT, YES, SIR.
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.
Q. OKAY. AND WHEN HE CAME BACK AND YOU STARTED TAKING CARE OF HIM AND WERE BEING PAID BY WORKERS' COMP TO TAKE CARE OF HIM IN YOUR HOUSEHOLD, DID YOU FORGO ANY CLAIM FOR TEMPORARY TOTAL DISABILITY BENEFITS?
A. NO, SIR.
Q. DID YOU RECEIVE ANY TEMPORARY TOTAL DISABILITY BENEFITS?
A. NO, SIR.
Q. OKAY. SO, THEN YOU DID NOT RECEIVE ANY TEMPORARY TOTAL DISABILITY BENEFITS WHILE YOU WERE RECEIVING THE $400 A WEEK FROM HIS WORKERS' COMP?
A. NO, SIR.
Q. LET ME REPHRASE THE QUESTION SO I WILL UNDERSTAND THE ANSWER. DID YOU OR DID YOU NOT RECEIVE ANY WORKERS' COMPENSATION BENEFITS FOR YOUR OWN ACCIDENT?
A. NO, SIR.
Q. ALL RIGHT. SO, YOU DIDN'T RECEIVE ANY CHECKS?
A. NO, SIR.
Q. ALL RIGHT. YOU WEREN'T ABLE TO WORK THOUGH?
A. NO, SIR.
Q. BUT YOU WERE ABLE TO STAY HOME WITH HIM AND MONITOR HIS CONDITION?
A. YES, SIR.

Q. ALL RIGHT. SO, FOR THE NEXT UP UNTIL SEPTEMBER THE 5TH OF '08, THE MONEY THAT WAS COMING INTO YOUR HOUSEHOLD WAS FROM HIS WORKERS' COMPENSATION?

A. YES, SIR.

Q. AND THE CHECKS THAT HE WAS RECEIVING DIRECTLY FROM WORKERS' COMP?

A. YES, SIR.

Q. AND THAT'S ALL YOU HAD IN YOUR HOUSEHOLD FOR INCOME?

A. YES, SIR.

Q. ALL RIGHT. SO, YOU WERE COMPLETELY DEPENDANT UPON HIM AS THE SOURCE OF INCOME FOR YOUR HOUSEHOLD?

BY MR. CAUTHEN:

OBJECT TO LEADING.

BY COMMISSIONER LYNDON:

I'LL NOTE YOUR OBJECTION. WE CAN MOVE ON.

BY MR. WUKELA:

THANK YOU, YOUR HONOR.

DIRECT EXAMINATION RESUMED BY MR. WUKELA:

Q. NOW, I UNDERSTAND ON THE 5TH OF SEPTEMBER, YOUR SON DIED?

A. YES, SIR.

Q. WERE YOU HOME WHEN HE DIED?

A. YES, SIR.

Q. FOR THE FIVE DAYS BEFORE HE DIED, DO YOU KNOW WHETHER HE WAS TAKING HIS MEDICATION?

A. YES, SIR, HE WAS TAKING HIS MEDICINE, BECAUSE I WAS IN THERE WHEN HE TOOK IT.
Q. SO, YOU PHYSICALLY WATCHED HIM TAKE THE MEDICINE?
A. YES, SIR.
Q. OKAY. DID YOU EVER ASK HIM TO OPEN HIS MOUTH SO YOU COULD LOOK INTO HIS MOUTH TO SEE IF THE PILL WAS IN HIS MOUTH?
A. NO, SIR.
Q. YOU WERE PRESENT WHEN WE TOOK DR. HEALY'S DEPOSITION?
A. YES, SIR.
Q. AND YOU WERE PRESENT WHEN WE REVIEWED WITH DR. HEALY THE TOXICOLOGY REPORT?
A. YES, SIR.
Q. ALL RIGHT. AND IT'S YOUR UNDERSTANDING THAT THE TOXICOLOGY REPORT SAID THERE WAS NO MEDICATION IN HIS BODY?
A. YES, SIR.
Q. DO YOU HAVE ANY IDEA WHY THERE WAS NO MEDICATION IN HIS BODY?
A. NO, SIR, I DON'T. I KNOW HE PUT IT IN HIS MOUTH. HE TOOK A DRINK AFTER IT AND...
Q. HOW ABOUT THE DAY BEFORE, DID YOU WATCH HIM THE DAY BEFORE?
A. YES, SIR.

Q. DID YOU WATCH HIM EVERY DAY HE TOOK HIS MEDICATION?
A. YES, SIR. THERE WAS CERTAIN TIMES IN THE MORNING AND CERTAIN TIMES IN THE AFTERNOON WHEN HE WOULD TAKE IT.
Q. OKAY. EVEN WITH YOU WAS SCOTTIE HARSH?
A. NO, SIR.
Q. ALL RIGHT. DID YOU HAVE TROUBLE DEALING WITH SCOTTIE?
A. I DIDN'T HAVE TROUBLE DEALING WITH SCOTTIE. IT'S JUST WHEN HE GOT UPSET, HE WOULD TAKE IT OUT, NOT TO ME. THAT'S THE ONLY WAY HE COULD DEAL WITH THE ANGER HE HAD.
Q. OKAY. AT ONE POINT IN TIME, DID HE PUT HIS FISTS THROUGH THE WALL?
A. HE'S NEVER MESSED UP MY TRAILER.
Q. WELL, WHAT DID HE MESS UP?
A. HE GOT UPSET BAD ONE TIME, AND HE WENT OUT THERE IN THE YARD AND HE BEAT THE SIDE OF MY TIN BUILDING UP.
Q. THE SIDE OF YOUR TIN BUILDING?
A. YES, SIR.
Q. OKAY. THAT WASN'T HIS FAULT. THAT WAS BECAUSE OF HIS BRAIN INJURY?
A. YES, SIR.
Q. HE HAD NEVER DONE ANYTHING LIKE THAT BEFORE HIS INJURY?

A. NO, SIR.
Q. DO YOU KNOW IF HIS FUNERAL BILL HAS BEEN PAID?
A. NO, SIR.
Q. WERE YOU TOLD AT ONE POINT IN TIME BY THE INSURANCE CARRIER THAT HIS FUNERAL BILL WOULD BE PAID?
A. YES, SIR.
Q. DID YOU TELL THE FUNERAL DIRECTOR THAT?
A. I TOLD MR. JERRY RICHARDSON, YES, SIR.
Q. OKAY. DID MR. RICHARDSON ALSO RECEIVE WORD FROM THE INSURANCE CARRIER THAT THEY WOULD PAY FOR THE FUNERAL BILL?
A. YES, SIR.

BY MR. CAUTHEN:

OBJECTION TO SPECULATION AND HEARSAY.

BY COMMISSIONER LYNDON:

LET'S GO OFF THE RECORD JUST A MINUTE.

(OFF THE RECORD)

BY COMMISSIONER LYNDON:

WE ARE BACK ON THE RECORD. THERE WAS AN OBJECTION, AND I WILL DEAL WITH THAT OBJECTION NOW. I WILL NOTE YOUR OBJECTION, BUT ANSWER THE QUESTION IF YOU CAN REMEMBER IT. YOUR LAWYER ASKED YOU VERY SIMPLY WAS IT REPRESENTED TO YOU OR HAS YOUR FUNERAL BILL BEEN PAID? I BELIEVE THAT WAS THE QUESTION.

BY THE WITNESS:

I WAS TOLD IT WOULD BE PAID, AND NO, SIR, IT HAS NOT BEEN PAID.

DIRECT EXAMINATION RESUMED BY MR. WUKELA:

Q. WHO TOLD YOU IT WOULD BE PAID?

A. YOU CALLED ME THAT DAY AND TOLD ME TO GO AHEAD AND CALL MR. RICHARDSON FOR MY SON TO BE CREMATED AND HAVE THE SERVICE; THAT WORKERS' COMP WOULD PAY FOR IT.

Q. HAVE YOU HEARD ANYTHING FROM THE INSURANCE COMPANY YOURSELF?

A. NO, SIR.

Q. HAS MR. RICHARDSON HEARD ANYTHING FROM THE INSURANCE COMPANY?

A. NO, SIR. HE HAS SENT ME FOUR LETTERS TELLING ME HE HAS NOT BEEN PAID.

Q. ALL RIGHT.

BY MR. WUKELA:

I BELIEVE THAT'S ALL THE QUESTIONS WE HAVE OF THE CLAIMANT, YOUR HONOR.

BY COMMISSIONER LYNDON:

OKAY. MA'AM, ANSWER ANY QUESTIONS THAT MR. CAUTHEN MAY HAVE, PLEASE.

CROSS EXAMINATION BY MR. CAUTHEN:

Q. MS. FLOYD, YOU WERE TESTIFYING ABOUT A TIME PERIOD WHEN SCOTTIE WAS LIVING WITH YOU FOR SEVERAL MONTHS,

I THINK, BEFORE HE WENT TO TANGRAM IN 2004; IS THAT CORRECT?

A. YES, SIR.

Q. AND YOU TESTIFIED ABOUT RECEIVING OR UTILIZING HIS TEMPORARY TOTAL DISABILITY CHECKS AT THAT TIME?

A. HE WAS GETTING A CHECK AT THAT TIME.

Q. OKAY. AND THAT YOU WERE UTILIZING THEM FOR SOME PURPOSES AT THAT TIME?

A. WHAT DO YOU MEAN?

Q. ISN'T THAT WHAT YOU TESTIFIED TO THAT YOU WERE USING THEM FOR SOME PURPOSE?

A. YES, SIR.

Q. WHAT WERE YOU USING THEM FOR?

A. TO PAY THE HOUSE PAYMENT AND TO BUY HIS STUFF THAT HE NEEDS OUT OF IT LIKE CIGARETTES AND CLOTHES AND STUFF.

Q. THAT WAS LIKE BACK IN 2004?

A. MM-HMM.

Q. ALL RIGHT. NOW, AT THAT PERIOD OF TIME, DID SCOTTIE -- WELL, LET ME ASK YOU THIS: WAS SCOTTIE EVER EMPLOYED AND EARNING INCOME AFTER HIS INJURY IN 2001?

A. NO, SIR. I KNOW WHEN HE GOT HURT IN 2001, HE TRIED TO GO BACK AND WORK A COUPLE OF DAYS, BUT HE COULDN'T HANDLE THE NOISE AND STUFF, AND HE WOULD

COME HOME FROM IT.

Q. OKAY. SO, EXCEPT FOR SHORTLY AFTER THE INJURY, HE HAS NOT -- HE NEVER EARNED ANY INCOME FROM EMPLOYMENT AGAIN; IS THAT CORRECT?

A. NO, SIR.

Q. SO, WHAT HE WAS PROVIDING YOU OR WHAT YOU WERE USING FROM THESE TEMPORARY TOTAL CHECKS, THAT WAS ALL FROM THE TEMPORARY TOTAL CHECKS, IT WAS NOT FROM EARNINGS ---

A. NO, SIR.

Q. --- NOT FROM INCOME EARNED BY SCOTTIE FLOYD AND PROVIDED TO YOU, WAS IT?

A. YES, SIR.

Q. IT WAS NOT? IT WAS NOT FROM EARNINGS?

A. NO, SIR.

Q. OKAY. IT WAS ALL FROM TEMPORARY TOTAL. OKAY. NOW, YOU TALKED ABOUT THE $400 A MONTH. I THINK IN YOUR DEPOSITION, YOU TOLD ME IT WAS $800 EVERY TWO -- I'M SORRY, NOT 400 A MONTH, 400 A WEEK OR $800 EVERY TWO WEEKS THAT YOU WERE RECEIVING TO BE SCOTTIE'S CARE GIVER, IS THAT RIGHT?

A. YES, SIR.

Q. YOU WERE RECEIVING THAT FROM WORKERS' COMPENSATION?

A. YES, SIR.

Q. NOW, THAT WAS YOUR COMPENSATION FOR FUNCTIONING OR

SERVING AS SCOTTIE'S CARE GIVER, WASN'T IT?

A. YES, SIR, TAKING CARE OF HIM.

Q. OKAY. IT WAS NOT MONEY SEPARATELY PROVIDED TO YOU OR PAID TO YOU BY SCOTTIE, WAS IT?

A. NO, SIR.

Q. OKAY. THIS CAME DIRECTLY FROM THE WORKERS' COMPENSATION CARRIER?

A. YES, SIR.

Q. ALL RIGHT. AS COMPENSATION FOR YOUR ROLE?

A. YES, SIR.

Q. AND SCOTTIE, HE WAS CONTINUING TO RECEIVE HIS WEEKLY TEMPORARY TOTAL BENEFITS AT THAT TIME, TOO?

A. YES, SIR.

Q. AND HE WAS ALSO RECEIVING A MONTHLY SOCIAL SECURITY DISABILITY CHECK AT THAT TIME, WASN'T HE?

A. NOT THERE AT FIRST, NO, SIR.

Q. NOT AT FIRST?

A. NOT AT FIRST.

Q. WHEN DID HE START GETTING THAT? WE'RE TALKING ABOUT AFTER HE RETURNED. WE ARE TALKING ABOUT FROM 2006 UNTIL HIS DEATH. THE TIME PERIOD IS AFTER HE RETURNED FROM TANGRAM AND THEN MOVED IN WITH YOU IN YOUR HOUSE IN MARION IN 2006.

A. YES, HE WAS GETTING IT THEN, YES, SIR.

Q. HE WAS GETTING HIS SOCIAL SECURITY CHECK THEN?

A. YES, SIR.
Q. SO, THAT WAS A ONCE-A-MONTH CHECK HE WOULD RECEIVE?
A. YES, SIR.
Q. ALL RIGHT. NOW, DURING THAT PERIOD OF TIME, THAT ROUGHLY TWO YEARS THAT SCOTTIE LIVED WITH YOU BEFORE HE PASSED AWAY, WEREN'T YOU USING THE MONEY THAT YOU WERE EARNING AS CARE GIVER, THAT $800 EVERY TWO WEEKS, TO PAY ALL THE BILLS WITH?
A. YES, SIR.
Q. AND THAT WAS SUFFICIENT TO COVER ALL OF YOUR HOUSEHOLD LIVING EXPENSES, WASN'T IT, AT THE TIME?
A. YES, SIR.
Q. NOW, AS I UNDERSTAND, SCOTTIE WOULD USE THE MONEY THAT HE GOT FROM HIS DISABILITY CHECKS TO BUY THINGS THAT HE NEEDED OR WANTED, IS THAT RIGHT?
A. YES, SIR.
Q. SUCH AS VIDEO GAMES, HIS TRUCK PAYMENT, ---
A. YES, SIR.
Q. --- HIS TRUCK INSURANCE, CIGARETTES, PAYMENT FOR HIS FALSE TEETH, THOSE KINDS OF THINGS?
A. YES, SIR.
Q. OKAY. HE DIDN'T HELP PAY THE MORTGAGE AND THINGS LIKE THAT, DID HE?
A. WE KIND OF HALF AND HALVED IT TO HELP BOTH OF US OUT. HE BOUGHT HIM A COMPUTER WHEN HE COME HOME,

TOO.

Q. I MEAN, HE DIDN'T CONTRIBUTE TO THE MORTGAGE, YOU PAID THAT OUT OF THE $800 EVERY TWO WEEKS, DIDN'T YOU?

A. YES, SIR.

Q. OKAY. NOW, MR. WUKELA ASKED YOU ABOUT AT THE TIME OF THE ACCIDENT BACK IN 2001, SEPTEMBER OF 2001, I WANT TO GO BACK TO THAT TIME PERIOD. NOW, AS I UNDERSTAND SCOTTIE WAS LIVING ALONE IN A MOBILE HOME IN MARION AT THE TIME OF HIS INJURY BACK IN SEPTEMBER 2001?

A. YES, SIR.

Q. OKAY. AND AS I UNDERSTAND IT, HE WAS HANDLING HIS OWN FINANCES AT THAT TIME?

A. YES, SIR.

Q. OKAY. AND HE DID NOT CONTRIBUTE ANY FINANCIAL SUPPORT OR INCOME TO YOU DURING THAT PERIOD OF TIME, DID HE?

A. NO, SIR.

Q. AND SCOTTIE WAS NEVER MARRIED, WAS HE?

A. NO, SIR.

Q. AND HE HAD NO CHILDREN THAT YOU ARE AWARE OF, DID HE?

A. NO, SIR.

Q. AND YOU DON'T KNOW OF ANYONE WHO WAS FINANCIALLY

DEPENDENT UPON SCOTTIE FOR SUPPORT AT THE TIME OF HIS ACCIDENT IN 2001, DO YOU?

A. NO, SIR.

Q. NOW, ONE OTHER THING I WANTED TO ASK YOU ABOUT, AND THAT'S THE MEDICATIONS THAT YOU'VE ALREADY BEEN ASKED SOME ABOUT. IS IT YOUR UNDERSTANDING THAT JUST PRIOR TO THE TIME SCOTTIE PASSED AWAY AND WHEN HE PASSED AWAY, AT THE TIME HE PASSED AWAY IN SEPTEMBER OF 2008, THAT HE WAS TAKING HIS MEDICATIONS PRESCRIBED BY DR. HEALY AS THEY WERE PRESCRIBED?

A. YES, SIR.

Q. OKAY. NOW, YOU GOT ALL OF SCOTTIE'S PRESCRIPTIONS FILLED FOR HIM, IS THAT RIGHT?

A. YES, SIR.

Q. YOU HAD C.V.S. PHARMACY IN MARION FILL THOSE PRESCRIPTIONS?

A. YES, SIR.

Q. HOW DID YOU KNOW WHEN A PRESCRIPTION NEEDED TO BE REFILLED?

A. BECAUSE HE KEPT HIS MEDICINE IN HIS ROOM, AND WHEN HE WOULD TAKE IT AND I WATCH HIM TAKE IT, I WOULD SEE HOW LOW HE WOULD GET, AND BEFORE HE RUNS OUT, I WOULD GO AND REFILL IT.

Q. OKAY. YOU WOULD CALL IT IN TO REFILL IT AND THEN GO

PICK IT UP?

A. YES, SIR.

Q. AND SCOTTIE ALWAYS HAD HIS PRESCRIPTIONS FILLED WHEN HE NEEDED THEM, DIDN'T HE?

A. YES, SIR.

Q. TO YOUR KNOWLEDGE, WAS THERE EVER A TIME WHILE SCOTTIE WAS LIVING WITH YOU THOSE LAST TWO YEARS WHEN HE NEEDED A PRESCRIPTION FILLED BUT WAS UNABLE TO GET IT FILLED?

A. NO, SIR, IT HAS ALWAYS BEEN FILLED.

Q. HE ALWAYS HAD THOSE PRESCRIPTIONS, OKAY.

BY MR. CAUTHEN:

THANK YOU VERY MUCH, MS. FLOYD.

BY COMMISSIONER LYNDON:

ANSWER ANY QUESTIONS THAT MR. MARTIN HAS, PLEASE.

CROSS EXAMINATION BY MR. MARTIN:

Q. MS. FLOYD, ON THE DAY SCOTTIE DIED ON SEPTEMBER 5TH, 2008, HE WAS NOT WORKING FOR KEN BAKER USED CARS, WAS HE?

A. NO, SIR.

Q. BEFORE THE WORK INJURY IN 2001, SCOTTIE HAD NOT HAD ANY SEIZURES BEFORE?

A. NO, SIR.

Q. SO, IT WOULD HAVE BEEN AFTER THE WORK INJURY ON

SEPTEMBER 2001 IS WHEN HE STARTED HAVING SEIZURES?

A. YES, SIR.

Q. AND AS A RESULT OF HAVING SEIZURES, HE HAD TO TAKE ANTI-SEIZURE MEDICATION, RIGHT?

A. YES, SIR.

Q. YOU MENTIONED EARLIER, YOU JUST MENTIONED MEDICATIONS. DO YOU KNOW WHETHER OR NOT AT THE TIME OF HIS DEATH HE WAS TAKING KEPPRA AND/OR DEPAKOTE?

A. YES, SIR, HE WAS.

Q. WERE THERE OTHER MEDICATIONS HE WAS TAKING AROUND SEPTEMBER OF 2008 BEFORE HE DIED?

A. HE WAS TAKING THE SAME THING.

Q. OKAY. ANYTHING IN ADDITION TO THOSE TWO, ANY OTHER MEDICATIONS?

A. NO, SIR, EXCEPT FOR THE PAIN MEDICINE THAT DR. HEALY PRESCRIBED FOR HIM.

Q. AND HE HAD AN EPISODE IN APRIL 2004 WHERE AT LEAST THE MEDICAL RECORDS INDICATE HE QUIT TAKING HIS MEDICATIONS. WERE YOU MONITORING HIS MEDICATIONS IN APRIL OF 2004?

A. NO, SIR. THAT'S WHEN I WAS WORKING AT THE NURSERY. I WOULD CALL HIM AND ASK HIM, BUT AT THAT TIME, HE WOULD TELL ME HE WOULD TAKE IT. HE WOULD SAY HE WOULD TAKE IT, BUT THE WAY HE WAS AT THAT TIME, HE COULD NOT REMEMBER HOW HE TOOK IT, BECAUSE WHEN I

COME HOME, I FOUND MY STOVE ON A COUPLE OF TIMES, AND I FOUND CIGARETTES BURNING THAT HE HAD FORGOTTEN.

Q. SO, HE MAY HAVE STOPPED TAKING THE MEDICATIONS IN APRIL 2004?

A. HE JUST COULDN'T REMEMBER, PROGRAM IT TO TAKE IT. HE WOULD TAKE IT. THEN HE WOULD FORGET TO TAKE IT.

Q. AND YOU MENTIONED THE EPISODE ON APRIL THE 10TH, 2004, WHERE YOU FOUND HIM ON THE FLOOR HAVING CONVULSIONS, RIGHT?

A. WHAT YEAR?

Q. APRIL 2004.

A. IT WAS APRIL THE 9TH OF 2004.

Q. THAT WAS THE CONVULSIONS OR SEIZURES HE WAS HAVING WERE AT YOUR HOUSE, IS THAT RIGHT?

A. YES, SIR.

Q. AND WHEN HE HAD THE SEIZURES ON THE DAY OF HIS DEATH, HE WAS ALSO AT YOUR HOME?

A. THAT DAY, I DON'T KNOW -- AT THAT TIME, HE DID NOT -- THE WAY HE WAS, HE WASN'T LIKE HE WAS WHEN HE HAD THOSE SEIZURES IN 2004.

Q. WELL, MY QUESTION WAS WHEN HE HAD THE SEIZURES ON SEPTEMBER 5TH, 2008, BOTH YOU AND HE WERE AT YOUR HOME?

A. YES, SIR.

BY MR. MARTIN:

OKAY, COMMISSIONER, THAT'S ALL THE QUESTIONS I HAVE.

BY COMMISSIONER LYNDON:

OKAY.

BY MR. WUKELA:

NONE FROM THE CLAIMANT, YOUR HONOR.

BY COMMISSIONER LYNDON:

ANYTHING ELSE?

BY MR. CAUTHEN:

NO, SIR.

EXAMINATION BY COMMISSIONER LYNDON:

Q. LET ME ASK ONE QUESTION, MA'AM, AND IT MAY BE IN YOUR DEPOSITION. YOU WORKED FOR THAT NURSERY HOW LONG?

A. I STARTED IN PART OF '99, AND THEN I QUIT IN 2005.

Q. IN '05, AND MAY I ASK HOW MUCH YOU MADE WORKING THERE?

A. WE FINALLY GOT UP TO SIX DOLLARS AT THAT TIME. THEY STARTED ME OFF AT $5.15 AT FIRST.

Q. RIGHT. AND DID YOU WORK A FULL 40-HOUR WEEK?

A. YES, SIR, AND OVERTIME.

Q. WITH OVERTIME?

A. YES, SIR.

Q. WAS THAT YOUR ONLY SOURCE OF INCOME THEN?

A. YES, SIR.

Q. AND HE WAS ABLE TO TAKE CARE OF HIMSELF AT THAT PERIOD OF TIME?

A. HE WAS HOME BY HIS SELF.

BY COMMISSIONER LYNDON:

AND I CAN ASK THE ATTORNEYS WAS THERE AN ORDER FOR ATTENDANT CARE TO BE PAID TO HER OR WAS THAT JUST AN AGREEMENT?

BY MR. CAUTHEN:

I BELIEVE IT WAS IN THE ORDER.

BY COMMISSIONER LYNDON:

IT WAS IN THE ORDER. I DID NOT READ IT.

BY MR. CAUTHEN:

IN THE BEGINNING OF 2006 AFTER HE WAS DISCHARGED FROM TANGRAM, IT WAS A CONSENT ORDER.

BY COMMISSIONER LYNDON:

IT WAS A CONSENT ORDER. I DID NOT FIND THAT. THAT'S THE ONLY QUESTION I HAD.

BY MR. CAUTHEN:

IT'S A TAB IN OUR PREHEARING BRIEF.

BY COMMISSIONER LYNDON:

I'M SORRY. I DID NOT HAVE A CHANCE TO LOOK AT THAT.

BY MR. WUKELA:

THANK YOU, COMMISSIONER.

BY COMMISSIONER LYNDON:

ARE THERE ANY OTHER WITNESSES?

BY MR. CAUTHEN:

NO, SIR.

BY MR. WUKELA:

NOTHING FROM THE CLAIMANT.

BY COMMISSIONER LYNDON:

IF THERE IS NOTHING ELSE, AGAIN, MA'AM, I WANT TO TELL YOU HOW SORRY I AM ABOUT YOUR SON'S PASSING, AND I HAVE AGREED TO LEAVE THE RECORD OPEN FOR UP TO 45 DAYS FOR BRIEFS AND IF NECESSARY REPLY BRIEFS, AND THAT WOULD CONCLUDE THIS PROCEEDING.

(THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS CONCLUDED AT THE HOUR OF 3:15 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 0824046 & 0123790

EMPLOYEE/CLAIMANT: **SCOTTIE FLOYD (DECEASED)**

EMPLOYER: **KEN BAKER USED CARS**

INSURER: **LEGION INSURANCE COMPANY**
AMGUARD

I, JAN L. WHITWORTH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING **59** PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF **SCOTTIE FLOYD (DECEASED)** TAKEN ON THE 1ST DAY OF SEPTEMBER, 2009.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 14TH DAY OF SEPTEMBER, 2009.

Jan L. Whitworth

JAN L. WHITWORTH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3-12-2014

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 0123790

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, -vs- Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Company, c/o SC Insurance Guaranty Assn., Carrier, Defendants.	DEPOSITION OF: R. JOSEPH HEALY, JR., M.D.
AND	
Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd, and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, -vs- Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Company, c/o SC Insurance Guaranty Assn., AND Amguard Insurance Company, Carrier, Defendants.	WCC FILE NO. 0824046

Deposition of R. JOSEPH HEALY, JR., M.D., taken before Laura W. Little, Verbatim Reporter and Notary Public in and for the State of South Carolina, at the office of R. Joseph Healy, Jr., M.D., 805 Pamplico Highway, Suite A130, Florence, South Carolina, commencing at 6:00 p.m. on the 25th day of August, 2009.

APPEARANCES OF COUNSEL:

For the Employee/Claimant:
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Florence, South Carolina 29504

For the Employer/Defendants: (Legion Insurance Company)
Mark G. Cauthen, Esquire
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Columbia, South Carolina 29202

For the Carrier/Defendants: (Amguard Insurance Company)
Adrianne L. Turner, Esquire
Hedrick Gardner
Post Office Box 11267
Columbia, South Carolina 29211

In Attendance:
Betty Joe Floyd

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EXHIBITS

NUMBER	DESCRIPTION	PAGE-LINE
NONE		

Court Reporter's Note:

-- Indicates Interruption; Indicates Incomplete Phrases or Sentences.

STIPULATIONS

Prior to the giving of any testimony by the witness, it was expressly stipulated and agreed between the parties to this action, through their respective counsel, that:

By Notice and/or Consent, said deposition is being taken in accordance with Section 42-3-160, Code of Laws of South Carolina 1976, and Rule 30 of the South Carolina Rules of Civil Procedure, which shall control the taking of said deposition and its use thereof;

Said deposition shall be taken for the purpose of discovery and/or for use as evidence in the above entitled action, or for both purposes;

That all objections would be reserved until the time of the hearing except as to the form of the question;

Reading and signing of the transcript of testimony by the witness was waived.

R. JOSEPH HEALY, JR., M.D.,

after being first duly sworn to tell the truth, was deposed and testified as follows:

EXAMINATION BY MR. WUKELA:

Q. Dr. Healy, we've taken your deposition I think two -- at least two other times in this case, but just briefly, give us your educational background as it relates to the practice of medicine?

A. Let's see, undergraduate degree is biology and chemistry and I went to graduate school in neuroanatomy, then medical school at the Medical University of South Carolina. Did residency, an Internal Medicine residency in Neurology. I'm still on the faculty of neurology there, although I've been here since -- in Florence since '86 practicing adult neurology, teaching at the Family Practice Center at McLeod and that's it.

Q. Okay. Doctor, the last time we took your deposition, I believe, was the 24th of April of 2006, and at that time just to refresh your memory, Scottie Floyd had been in Tangram for almost two years. He had come back to Florence for a practice run at being away from Tangram. You examined him and I believe you made -- gave some opinions as to his ability to be able to be managed by his mother

and to be out of a strictly institutional setting. You recall that?

A. Yes.

Q. Okay. And at that point in time, you had agreed at that point in time to treat Scottie?

A. Yes.

Q. If he was released from Tangram?

A. Yes.

Q. Okay. I want to pick up with from there and then I know there's several things happened over that next two years or so and if we could, just pick up from that point in time as far as your records are concerned, when was the first time you saw Scottie after he had been released from Tangram?

A. Well, I believe July 11 of 2006.

Q. Okay.

A. My office notes says that he's been home now for five weeks from Texas. Apparently, as soon as he got home, his air conditioner broke and this caused a lot of stress and he apparent -- but he made it through that. He does say that his headaches are a little worse since he's been at home. Looks as though he's lost some weight and actually is down twenty pounds to 251. No seizures and he has been compliant with his medications. He continues on

Keppra 750 every twelve hours, Flexeril 5 every twelve; Depakote ER, 1000 every 12 and Darvocet, PRN headache. Mother states that he sleeps poorly and that he snores very badly and that has -- that he has apneic episodes and I believe this is predictable based on his weight gain. I told him that the poor sleep is actually going to drive his headaches and I see treatment of his sleep disorder as treatment of not only his headache syndrome but also will help to prevent seizures since sleep deprivation is a potent stimulus to seizure. I told him I would check with Workers' Comp to see if we could get authorization for an NPSG. I do want to repeat his EEG as he is asking about driving, and I think the question probably depends on his encephalopathy and chances of another seizure. It has been quite a while since he had a seizure and he's compliant with his medicines and I believe, ultimately, he should be allowed to drive. I see a bit of regression today in that he's a little agitated although not anywhere near like he was, but certainly not as good as when he first came home. I'm wondering about the stressors of his new living situation, although he and his mom both say that things are doing well and he is being followed

by Dr. Federer which is important, and I think vigilance at this point is important. Lab work will be checked to make sure his medications are not a problem and further recommendation will await the above. That was July 11th of '06.

Q. Okay. Did there come a time when his violence in your office got to the point where you had to terminate the physician/patient relationship?

A. There was. I think before he went to Tangram.

Q. And when you saw him on that visit in July, was it?

A. Yes.

Q. Were you -- were you convinced at that time that you would be able to manage him?

A. Yes. As I recall, Dr. Federer called me and asked me if I would consider taking him back and I, I said yes. I didn't think it would be a problem.

Q. All right. And when did you -- when was the next time you saw Scottie?

A. We did blood work the next month and that all looked okay. His antiepileptic levels were okay, so he was taking them and he was covered. We did a EEG at the hospital in August of '06.

Q. And what did that EEG reflect?

A. I don't see a report. Yes, I don't see a report.

Q. Okay.

A. And actually, you know, that was the last time I saw him.
Q. That was when?
A. That was July or August 6th -- or July of '06, and he was supposed to come back. I sent in some medication requests in September of '06, but the last -- well, September 11th of '06, I -- no, that was not -- the last time I saw him was 7-11-06. I asked for lab, I asked for EEG, and that's the -- that was the last note.
Q. Let me --
A. He was supposed to come 9-5-06, but I --
Q. Do you have any records from June the 10th of '08?
A. No.
Q. I want to show you this. This is APA Page 36 of 394.
A. Oh? I don't -- those aren't in here.
Q. Do you have another file or another portion of this file?
A. I don't know.

MR. WUKELA: Can we go off the record for a second?

(OFF-THE-RECORD DISCUSSION)

EXAMINATION BY MR. WUKELA CONTINUES:

Q. All right, Doctor, you've apparently gone to your

staff and have gotten additional files?
A. Yes.
Q. All right. So the last time you saw the Claimant in the previous file was when?
A. 7-11-06.
Q. All right. And when was the next time you saw him?
A. Well, actually in this chart it says 9-15-06, "The patient is no longer an active patient here."
Q. Okay.
A. "No appointments. No meds." That was 9-15-06.
Q. And was that a result of some kind of altercation involving your staff and the patient?
A. Yes.
Q. Okay. And that -- so from 7-11-06 to 9-15-06, you were monitoring him. 9-15-06, because of his conduct, you were no longer having the attorney -- the physician/patient relationship. When was the next time you saw him?
A. Well, on 6-16-08, there's a note in here that I talked with Dr. Federer and that I agreed to see Scottie again.
Q. Okay. Did he also have an altercation with Dr. Evans' office?
A. I'm not sure.
Q. Okay. And Dr. Evans is another neurologist in

town?

A. Yes.

Q. Okay. All right. So the next time you saw him was 6-16-08. All right. And what was his condition at that time?

A. Well, I have a note here 6-10-08.

Q. Okay, 6-10-08.

A. "33-year-old white male status post closed head injury with frontal contusions. Taking Keppra, Depakote ER. Behavior better. Less impulsive. Sleep is better. Still using marijuana. Darvocet." And I gave him a limited number and told him that it had to last 60 days. "PT consult for physical training," and I note that "his weight had come down somewhat. Blood pressure was controlled."

Q. All right. During this period of time, was he being seen by Dr. Federer?

A. I believe, yes.

Q. All right. And one of the reasons you agreed to take patient back was because Dr. Federer had basically talked you into it?

A. Yeah. I mean, I wasn't afraid of Scottie. He had his moments, but we got along. We -- I pretty much gave it back to him the same way he gave it to me,

and he seemed to respect that.

Q. Okay. When, when was the next time you saw him?

A. 7-22-08. "He was in physical training. No seizures. On his Depakote and Keppra. Darvocet, I note that while I'd given him 30, he had used 20 in five weeks, which was pretty good. Wants to quit smoking. He's sleeping okay. I told him that his lab work was done about two weeks before that was good and that he should continue with his physical training" --

Q. When was the next time you saw him?

A. -- which I believe he did. And then 9-2-08, he was using Chantix, but he said it wasn't strong enough and so apparently that wasn't successful. No seizures. Using very little Darvocet. He listed his Depakote and his valproic acid and his Darvocet as his meds. The physical training he's -- was saying was very helpful, and we were going to check a urine, because he said his urine was very dark and he was constipated and that was 9-2-08.

Q. Okay. And when was the next time you saw him?

A. I believe that was at -- he was supposed to come back in October of '08.

Q. Okay. Up until that point in time from the time you reassumed the doctor/patient relationship up

until 9-2-08, was he making his appointments like he was supposed to?

A. Yes.

Q. Okay. And were you continuing to communicate with Dr. Federer about his stabilities and his ability to control his rages?

A. Yeah. Not a, not a great deal, but I was aware of what he was thinking and he would -- he had sent me a few notes.

Q. Okay. All right. Doctor, he apparently died on September 5th of '08. Do your notes reflect anything about that?

A. I thought it was the 12th.

Q. I don't know. Do you have the -- do you -- I believe you've got the autopsy report in your file?

A. I do. Let's see, date of death, 9-5-08.

Q. Okay. Do you know where you got the impression that it was the 12th?

A. A letter from Dr. Federer that said that he had talked to the case manager on -- "On September 12, '08, I received a call from Ms. Cynthia Grumley, which is Scottie's case manager informing me that Mr. Floyd died that day."

Q. Okay.

A. That must be incorrect.

Q. Okay. Have you had an opportunity to review the autopsy report?
A. I have.
Q. And have you had an opportunity to review the toxicology report?
A. I have.
Q. Doctor, what we're trying to establish at this point in time is what were the functional losses that he had sustained to particular body parts. I believe in your earlier deposition back on April the 24th of '06, you had indicated that because of the compression fractures from the seizures, he had a 15 percent whole person impairment because of those compression fractures. I'll let you go ahead and just review that.
A. Yes.
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 the spine of a 15 percent whole person impairment?

A. He did.
Q. Okay. Now, I would like to turn my attention to the brain as an organ. Okay. Just for your edification, there's two ways, as I understand it, we determine disability in our Workers' Compensation statue, at least two ways. One way is diminished earning capacity as affected by the injury and the other way is what we call scheduled losses. In other words, we have certain body parts that are listed and there's certain weeks assigned to those body parts and we need to know what percentage of loss there is to a particular body part. For instance, in the back, it was 15 percent to the whole man in this case. Given the nature of his injury -- and let me ask you that. What was the nature of the physical injury to his brain?
A. Frontal lobe contusions.
Q. Okay. Is that a permanent condition?
A. Yes.
Q. All right. He had had an injury back, I believe, in September the 13th of '01?
A. Yes.
Q. All right. And are you -- do you have an opinion to a reasonable degree of medical certainty that that physical injury to the brain was permanent

when you saw him on September the 2nd of '08?

A. It was.

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 injuries that Scottie had as a result of his head injury and one was an impairment of 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 his 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.
Q. All right, Doctor, now we've got another series of cases -- another series of questions involving -- you reviewed his autopsy?
A. I did.
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.

Q. Doctor, I don't know whether you are familiar with the word "intention" in the legal terminology where someone intends an act. They foresee a result and they do a -- they perform an action intending the foreseeable result. That's a type of definition of legal intent?

A. Yes.

Q. Do you have an opinion as to whether or not Scottie intended that he would die of a seizure?

MR. CAUTHEN: I'm going to object to that as calling for pure speculation. You can go ahead and answer.

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.

Q. Did you ever run any samples of his blood as far as the presence of the anti-seizure medications?

A. Yes.

Q. When was the last time you ran a sample?

A. Well, I didn't order any for when I last saw him in

'08. It was the year before, or two years before.
Q. Okay. So, you didn't run any samples in between --
A. It looks like '06.
Q. Okay.
A. August of '06.
Q. Okay.
A. The theory being that his seizures were controlled, so drawing a level really wasn't going to be of much consequence since it wasn't going to change what you were going to do.
Q. Okay.
A. But, on the same does of medicine in August of '06, he had a very good, a very good level.
Q. Okay. Do you have an opinion as to whether or not his death to a reasonable degree of medical certainty whether or not his death on September the 5th of '08 was accidental?
A. I don't know if I have enough information to answer that to a reasonable degree of certainty. Some depends on whether or not there was medication and whether or not he had medication. If he, in fact, had medication, in other words hadn't run out, I would think it highly unusual for him to end up with no antiepileptic in his blood in which case likely he caused that volitionally. If he happened

to have run out, it could have been accidental.

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.

Q. Do you have an opinion to a reasonable degree of medical certainty how long from terminating taking the medication before he would have a seizure?

A. That, that would be difficult to say, but I don't think it would be very long. He had previously had had a seizure with just his levels falling low, and so my feeling was that he didn't have much room there for error. I always tried to keep his blood levels on the higher side. As a matter of fact, you know, the toxicology report say toxic valproic acid levels are greater than 100, which I don't agree with, because Scottie's last level was 112 and I routinely get levels that high and if the patient is doing well, I don't change anything and Scottie's level were always on the higher side of normal and I kept them there because the propensity for him to have a seizure was great, and I saw it happen with just a low valproic acid level, so none would have been I think a certain seizure and I would think fairly quickly.

Q. Okay.

A. The simple act of cold-turkeying your seizure medication if that's, in fact, what happened can lead to a seizure just in and of itself.

Q. What does that phrase mean "cold-turkeying your seizure medication?"

A. Running our abruptly. Anytime you take somebody off of an antiepileptic, regardless of the

situation, you taper it slowly.
Q. Okay.
A. So if you cold-turkey a seizure medication you can precipitate a seizure.
Q. If he were trying to get off of medi -- let me -- let me rephrase that question. Is there any evidence of any medications in his system in that toxicology report?
A. No, there's -- the toxicology report suggests that there was no medication, including Darvocet.
Q. How long would it take for Darvocet to dissipate from your system?
A. Probably a week.
Q. Okay. Is there any evidence of any illicit drugs in the toxicology report?
A. Well, let me, let me rephrase what I said. There is evidence of Darvocet. There's another page here that shows that he had a small amount of Darvocet in his blood and these, these were near the limit of detection so that might suggest that they hadn't been taken for a while, but there was some evidence that there was Darvocet in the blood. There was also THC.
Q. What is that?
A. Tetrahydrocannabinol which is the active ingredient

in marijuana.
Q. Would that have contributed at all to his, to his seizures?
A. Well, probably less likely only because he had been doing that chronically, and I haven't seen evidence in the literature that marijuana is an active convulsant or precipitator unless it causes you to miss your medication.
Q. Okay. Is it a pain reliever as far as headaches is concerned?
A. Yes.
Q. Was he fixated on his headaches as being the major problem that he had?
A. I don't -- I think in the beginning yes, but after he came back from Tangram, I believe that the headaches were better and as I testified the last time I saw him three days before his death, he had taken very little Darvocet.
Q. Okay. What were the -- well, let me rephrase that question. Did he have any complaints about the effect that he thought he was receiving from the anti-seizure medication? Let me try to explain that question a little bit more. Was he -- was he at all dissatisfied with the way the seizure medication was, was affecting his moods and such as

that or did he even realize he had any effects from the anti-seizure medication?

A. I, I don't really remember him voicing any complaints about side effects of the medications. Certainly Depakote can cause you to gain weight, but I really didn't even hear him say much about the fact that he had gained so much weight. I actually figured that happened at Tangram simply because he had three meals probably that were provided and that he was a little more regular with eating, but I never heard him say anything about the side effects of his anti-seizure medicines.

Q. Were there any other illicit drugs in his system?

A. No.

Q. Okay. Okay. Doctor, I believe that's all the questions I have. Please answer any questions these counselors have.

EXAMINATION BY MR. CAUTHEN:

Q. Doctor, Mark Cauthen. You know me. Of course, I've taken your deposition a couple of times and I want to follow up on some of those. I represent, of course, the employer and Legion Insurance Company and Liquidation through the South Carolina Guaranty Association. Let me go back to some things that Steve was asking you about. With

reference to the autopsy report which you have reviewed and commented on, you -- I believe you testified it was your opinion that the cause of death was a seizure, is that correct?

A. Yes.

Q. Okay. Do you have an opinion as to the origin of Scottie Floyd's seizure that caused his death or his seizure disorder that he was being treated for?

A. His closed head injury and frontal lobe contusions.

Q. Okay. And you indicated that you were prescribing, I think, two seizure control medications, Keppra and was it Depakote?

A. Yes.

Q. Did you continue prescribing those for Scottie Floyd through or up until the time of his death in 2009?

A. Yes.

Q. Okay. But the last time that you saw him was September 2 of 2008?

A. Yes.

Q. Okay. So, you don't have any information about Scottie's compliance or noncompliance with his prescription medications for the last year of his life, is that -- is that a fair statement?

A. Not that I measured objectively.

Q. Well, I mean you didn't see him for the last year of his life, is that correct. He died in September of 2009 -- I'm sorry.

MR. WUKELA: No.

Q. You saw him in September 2008, is that correct?

MR. WUKELA: Three days prior.

A. Three days before he died, yes.

Q. Scratch that question. Did you in your last couple of visits with him then in June and September, did you talk with him, make any notes about talking with him or have any recollection of discussing with him his compliance with the prescriptions, particularly those two, the Darvocet and Keppra?

A. It had never been an issue. I'd never -- after -- and this was probably back in '04 when his levels got low and he wasn't sleeping and he had a seizure. After that, I'd never had any reason to believe that he would be noncompliant and he never -- his levels all suggested that he was taking them and as I testified, he was well aware of the power and destructive ability of a seizure and what it could do to your life, so I never had reason to suspect that he wasn't taking his medications.

Q. And you had discussed with him the danger of not taking the Keppra and Depakote and the potential

consequences of not taking them?
A. Oh, yes. Yeah.
Q. And that's how you're able to say that he understood the dangers?
A. Yes. I'm clear that he understood the dangers and I did refill both of those medications for him on 9-2-08.
Q. Okay. You did refill both of those on 9-2-08?
A. Depakote and Keppra.
Q. Okay. Now, the Depakote and the Keppra, were they both prescribed primarily or solely to control Scottie's seizures or his seizure disorder?
A. Both were for that. I would think that additionally the Depakote was for his mood. It's a mood stabilizer and Keppra probably is, too. But he did have a problem with mood, impulsive behavior. Depakote's often used for that.
Q. Okay. They were -- they were both prescribed, however, to control the seizures?
A. Predominately, yes.
Q. Predominately. Okay. And were they, therefore, prescribed -- were the prescriptions, therefore, related to his original injury being his frontal lobe, bilateral -- I think the -- I believe you described it as a bilateral frontal lobe contusion

on September 1?
A. Yes.
Q. Now, if we assume that Scottie did have -- did refill those two prescriptions, the Depakote and the Keppra, and had a ready supply of those two prescription medications leading up to the last few weeks leading up to the time of his death, if we assume that he had them and he was not out of prescription medication, do you have an opinion then as to whether the seizure was brought about by his own volition?
A. Well, I'm, I'm not sure if Scottie got his medications by physically going and filling them or if they were sent to him by a third party.
Q. Let's just assume that they were filled and he had them in the household at the, at the -- in the last few weeks leading up to the time of his death. Just for the sake of that question, let's just assume that.
A. Okay.
Q. Do you then have an opinion as to whether the seizure -- whether the seizure medication and the seizure from which he died was brought by his own volition, in other words, stopping taking the medication on purpose?

A. That -- you know, the fact that there's no seizure medicine in his blood is not consistent with his behavior in the years before that. I never once saw that happen.

Q. Okay. But what if -- now, you have already testified that Scottie was well aware of the, of the danger of not taking the medication?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And if we also assume for the purpose of this question that he had the medication, the prescriptions were filled and he had the medication in his possession in the weeks leading up to the death in September of 2008, would that not indicate to you that he most likely stopped taking that medication on purpose?

A. Well, it would indicate that he stopped taking it. Whether it was on purpose, I'm not sure, but it clearly was different than his behavior and, you know, the day that he was here in my office when I saw him 9-2-08, if those reports are correct, he wasn't taking it then.

Q. If those reports are correct?

A. Right, because I would think that there would be a

week or two that that medication would be detectable and there was none detectable three days later, four days later.

Q. Uh-huh.

A. That would seem to indicate that he wasn't taking it on the day he was here, which he asked for refills so.

Q. Uh-huh. Well, would, would you -- would you have an opinion as to whether he made a -- likely made a decision on his own to stop taking those two medications, Depra -- Dep -- Dep -- I'm sorry, Keppra and Depakote, a week -- a week or two weeks prior to the seizure from which he died, assuming that he did have those prescriptions in his possession?

A. Well, it would appear. He was the only one who took them. I don't think his mom administered his medications, so if there was none in his blood, he would be the one who would be responsible for that.

Q. Okay. So if -- and it was your understanding that he self-medicated? That he kept those prescriptions in his own possession and he took them or he didn't take them on his own?

A. Yes.

Q. Is that your understanding?

A. Yes.
Q. Would the -- would the fact that he, as you have already indicated, he didn't have any other prescription medication in his bloodstream in the Tox report other than a small amount of Darvocet. I believe you had -- you testified earlier that that would indicate that, that he had stopped taking that, as well, because there was such a small amount in his bloodstream?
A. Well, I don't know. My last note of 9-2-08 says that he was using very little Darvocet, so the amount that was detected in his blood may have been consistent with the fact that he was using very little. It doesn't necessarily mean that he was running out or that he had ran out. But he told me that day, three days earlier that he was not using very much Darvocet.
Q. So the very small amount that they, that they detected in the, in the blood work, that wouldn't indicate to you that he had stopped taking Darvocet prior to this death, altogether?
A. Not necessarily. It's difficult to say, but it would appear to me that there was -- there was definitely still Darvocet there.
Q. And as I understand it, you feel like you do not

have enough information to render an opinion to a reasonable degree of medical certainty as to whether the death was an accident or not?

A. I don't -- I don't know if he ran out and if that was the reason or if he volitionally didn't take it.

Q. Assuming that he did not run out, can you answer that question or do you have an opinion?

A. If he didn't run out, then he volitionally made a decision to not take his medication.

Q. Okay. Let me, let me back up and change subjects on you. Talking about the impairment ratings that you rendered earlier, the 55 percent that you indicated for the behavioral disorder and then the 30 percent whole person due to the seizure disorder, is there anything in the AMA Guidelines, 5th Edition, that you referred to that would indicate that those two impairment ratings would be added together to determine his total impairment to the brain?

A. I don't -- I don't see that in there. The reason I said they would be additive is because they are each independent problems that affected his brain that are not dependent on each other. The behavioral disorder was a constant problem for him

and the seizure was more of a potential problem since he was controlled, but they were separate issues.

Q. So he was -- in your opinion, he was left with only 15 percent of the use of his brain as a result of the combination of these two impairments?

A. I'm not sure that that's the way that that would be interpreted. It seems to me that those impairment ratings are an attempt to establish how much in a behavioral way he was impaired and how much in a seizure way he might be impaired, but that's not all of the brain function. He was still walking around and talking and interacting, but I believe that relative to the seizure and relative to the behavioral disorder that he was that impaired.

Q. But it wouldn't be accurate to say he only had 15 percent of the use of his brain left?

A. No, I don't -- I don't think that's a logical conclusion from those two impairment ratings.

Q. Okay. Now, one thing you weren't asked that I wanted to ask you. Do you have an opinion as to whether Scottie had reached maximum medical improvement for the injury to his brain as of the last time you saw him in September '08?

A. Well, I hadn't said that, but it seemed to me that

we were on a pretty steady course that probably was not going to change in terms of having the study again, having to change medicines, and so I would have to say looking back that he probably was at MMI then.

Q. Okay, Doctor, that's all I have. Thank you very much.

A. Thank you.

EXAMINATION BY MS. TURNER:

Q. Doctor, I'm Adrianne Turner. I represent Amguard Insurance. I have just a couple of follow-up questions. You had testified earlier that if taken as prescribed, you thought that Mr. Floyd's anti -- or his seizure medications would be detected in the toxicology report. Is that an opinion that you made to a reasonable degree of medical certainty?

A. Yes.

Q. Okay. And on -- at this last visit on September 2nd of 2008, what, if any, significance is there to the fact that he had dark urine -- urine at that point?

A. Good question. Considerations were that he might have had a urinary infection. His lab from a month before or possibly six weeks before did not suggest any liver problems that would have been an issue.

So the question was was he dehydrated, did he have a urine infection, but I never did see and I don't know that he had a chance to do it. I never saw a result of that. I gave him a slip 9-2-08 to get the urine, and I don't know if it was ever done.

Q. Okay. In 2004, I think you testified that he was noncompliant with taking his medications in 2004 which caused him to have a seizure back then and end up in the hospital, is that --

A. I don't know -- I don't know if I testified -- today?

Q. Yes, sir.

A. I don't know that I testified that he was noncompliant. It was my recollection that his blood level dropped.

Q. Okay. And, I'm sorry, Doctor, I certainly don't mean to misstate what your testimony was. I am going to show you a record here. It is from 4-9-04, I believe, and I think this is your note, although it's not signed. It's APA Page 211.

A. Okay. Seizure secondary to medication withdrawal.

Q. Okay. Well, does that indicate that he was -- he had stopped taking his medication at that time?

A. Yeah, although -- I don't know. He was on Xanax also, and so I'm not clear. "Stopping his Keppra."

I'm not sure. I didn't admit him that particular time, but I did pick him up after he was in the hospital.

Q. Okay.

A. But that is my discharge summary, but I don't know if I would be able to say because Xanax, if you stopped your Xanax, that's a guaranteed seizure in anybody and the Keppra can cause a seizure if you cold-turkey it. So, I don't exactly know what the situation was there.

Q. Okay.

A. But, I did -- that is my discharge summary.

Q. Okay. And on the same discharge summary, you note that he's got some acute renal failure, is that right?

A. His seizure was bad enough that the muscle enzymes impaired his renal function for a week or so.

Q. Okay. Does that have any implications as far as him having or any possible indication as far as him having dark urine on September the 2nd of 2008?

A. No. His renal function in July of '08 was perfectly normal.

Q. Okay. And by September the 2nd of 2008, which is when he presented with dark urine, is that -- is that not -- is it -- when you say that his renal

function was normal in July, --

A. Yes.

Q. -- would or could a failure to take his medication cause a reoccurrence of the acute renal failure?

A. Only if he had a seizure which I think somebody would know.

Q. Okay.

A. If he had had a seizure and, you know, survived it, somebody would know I think that that happened.

Q. Okay.

A. Because after his seizures, he was very impaired postictal for a short period, and I think he would know, his mom would know, somebody would know. But, all I can actually say is that his renal function was normal in July of '08 meaning that it went back to normal from what it was in the hospital in '04 which was very abnormal. My recollection was that he came pretty close to having to go on dialysis temporarily.

Q. Okay. Okay. And I do have one more question if I can formulate it correctly. I think the toxicology report and you through your testimony there was some Darvocet left in his system?

A. Yes.

Q. Which would indicate that -- and tell me, please,

if I'm, if I'm wrong or is it your opinion that that indicates that at some point during the week before that he had taken Darvocet?

A. Well, probably within a few days.

Q. Okay.

A. But there was Darvocet in his blood that was detected and it's hard for me as a non-toxicologist to say whether that means that those numbers reflect he was actively taking it or they might reflect a waning level in his blood because he had stopped it.

Q. Okay.

A. He told me that, three days before that he wasn't taking very much.

Q. Okay.

A. Very little Darvocet he said.

Q. And is there any implication as far as the -- as to whether he stopped taking his seizure medications voluntarily? Is there any implication that flows from the fact that he apparently had more recently taken Darvocet but was not taking his seizure medications?

A. I would think that these numbers imply that he was taking Darvocet and not taking seizure medication.

Q. Okay. And does that in turn imply that he was

being conscious and selective of the medications that he was taking?

A. He was definitely conscious of his medicines. I mean he -- when he would come in, he would tell me what he needed and what he didn't and what he wanted. And as I say, that particular day, 9-2-08, the last visit, he asked for refills.

Q. Okay. Did that indicate -- well, did you ask him or did you directly discuss at that point whether or not he was actually taking the medication?

A. I don't have recollection of that, but my feeling would be that it hadn't been an issue after what happened to him back there in '04.

Q. Okay.

A. I mean, I, I have recollection of Scottie telling me that will never happen again. But, as I say, he was well aware of the consequences of not taking his seizure medication.

Q. Do you recall or is it reflected in your notes, did he ever give a reason as to why he stopped taking his medication in 2004?

A. I don't -- I don't have recollection. That was his pre-Tangram days, and I think that this was an impulsive act on his part. Back at that point in his history, he was always very frustrated. The

medicines weren't helping. They weren't doing what they were supposed to do. He was -- and he was just very impulsive then, and it was totally within his capacity back then to just stop these things impulsively if he didn't think they were working or helping or doing what he thought they should do.

Q. Okay. And again, this impulsive behavior stems back to his original head injury accident?

A. Yes.

Q. Thank you. I don't have anything further.

RE-EXAMINATION BY MR. WUKELA:

Q. Doctor, I just have -- I won't belabor this long. I have one question I want to ask. He asked you on September the 2nd of '08 to give him prescriptions for refills of his anti-seizure medications?

A. Yes.

Q. If it had been his intention to restart taking the medication, how long -- how many tablets would he have to take before it would start showing up in his blood, over what period of time?

A. It would be immediate. If he just took one dose, three days later it would have shown.

Q. Okay. If he had taken medication say an hour before the seizure that killed him, would that show up in his blood?

A. Possibly not. It might not have had time to be absorbed.
Q. And how long do you think he would have to continue to take the medication before he would be out of the danger zone? Are we talking day, two days, three days?
A. How long would he have to take his seizure medicine in order to be protected?
Q. Yes, sir.
A. Probably one dose. Probably -- neither one of these drugs are ones that have to build up in your system.
Q. Okay. So if there's testimony that he, in fact, took a pill or his anti-seizure medications and then went to sleep and when his mother came back, he was dead, he just took the pill too late, would that be a correct assumption?
A. Well, if he took the pill too late, --
MR. CAUTHEN: Objection to speculation.
A. If he took the pill too late, certainly he could have had a breakthrough seizure that could have killed him, but I would think there would have been seizure medicine detected in his blood.
Q. Okay. From your review of that autopsy, can you determine whether there's any indication that there

was any residual evidence of the medication in his stomach?

A. No pills are identified within the gastrointestinal loom. There was 600cc's of partially digested food. He would have had to have run a toxicology on that liquid to know whether medicine was present or if none was present.

Q. Okay. Thank you, Doctor. Appreciate it.

MR. WUKELA: No other questions from us.

MR. CAUTHEN: No further questions.

MS. TURNER: I'm done.

(THERE BEING NO FURTHER QUESTIONS, DEPOSITION CONCLUDED AT 7:20 P.M.)

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON) CERTIFICATE

I, Laura W. Little, Verbatim Reporter and Notary Public in and for the State of South Carolina, certify that I did have R. Joseph Healy, Jr., M.D., appear before me at 6:00 p.m. on the 25th day of August, 2009, at the office of R. Joseph Healy, M.D., 805 Pamplico Highway, Suite A130, Florence, South Carolina, and that the witness was duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth; that the foregoing pages constitute a true and accurate transcript of his testimony given at that time and place.

I certify that I am not of counsel or kin to any of the parties, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand and seal this the 27th day of August, 2009.

Laura W. Little

Laura W. Little, Verbatim Reporter
Notary Public, State of South Carolina
My Commission Expires September 21, 2015.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 0123790

Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, -vs- Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Company, c/o SC Insurance Guaranty Assn., Carrier, Defendants.	DEPOSITION OF: ALEXANDER M. FEDERER, PhD
AND Betty Joe Floyd as Personal Representative of the Estate of Scottie Wayne Floyd, and as dependent mother beneficiary of Scottie W. Floyd, deceased, Claimant, -vs- Ken Baker Used Cars and Body Shop, Employer, and Legion Insurance Company, c/o SC Insurance Guaranty Assn. AND Amguard Insurance Company, Carrier, Defendants.	WCC FILE NO. 0824046

Deposition of ALEXANDER M. FEDERER, PhD, taken before Laura W. Little, Verbatim Reporter and Notary Public in and for the State of South Carolina, at Carolinas Psychological Services, 1925 Hoffmeyer Road, Florence, South Carolina, commencing at 10:25 a.m. on the 21st day of August, 2009.

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In Attendance:
Betty Joe Floyd

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Court Reporter's Note:

-- Indicates Interruption; Indicates Incomplete Phrases or Sentences.

STIPULATIONS

Prior to the giving of any testimony by the witness, it was expressly stipulated and agreed between the parties to this action, through their respective counsel, that:

By Notice and/or Consent, said deposition is being taken in accordance with Section 42-3-160, Code of Laws of South Carolina 1976, and Rule 30 of the South Carolina Rules of Civil Procedure, which shall control the taking of said deposition and its use thereof;

Said deposition shall be taken for the purpose of discovery and/or for use as evidence in the above entitled action, or for both purposes;

That all objections would be reserved until the time of the hearing except as to the form of the question;

Reading and signing of the transcript of testimony by the witness was waived.

ALEXANDER M. FEDERER, PhD,

after being first duly sworn to tell the truth, was deposed and testified as follows:

EXAMINATION BY MR. WUKELA:

Q. Doctor, I think we've taken your deposition at least one other time before in this case, but just briefly, give us your educational background as it relates to the practice of psychology?

A. I am a PhD, licensed clinical psychologist. I have been licensed in State of South Carolina. My business -- my license number is 569. I have practiced as a licensed clinical psychologist since, I believe, '73. Sorry, '93, '90 or '93. I have worked with clients with head injury for last twenty, twenty-five years in different facilities, in New Hampshire, in California, and here in South Carolina.

Q. All right. You've been in South Carolina how long?

A. Fifteen years.

Q. Okay. And in your -- prior to coming to South Carolina, were you involved in some prison systems dealing with people who had head injuries?

A. No, I was involved -- in California, there was a specialized treatment for head injury where I worked for a couple of years. It was a facility

that specialized with people with head injuries that sustain some behavior problem as a result of head injury and I work in the same capacity in New Hampshire in a new medical facility. Again, did specialized working with people with head injury that had behavioral problems that nobody else was able to work with.

Q. All right. What causes behavioral problems? Well, let me rephrase that question. How does a brain injury result in behavioral problems?

A. It depends on -- with head injury you have changes of cognition and you also have changes in ability to manage, to cope. You have some cognitive deficits, namely usually it's the short-term memory issues, speed of thinking, ability to concentrate, ability to process information. That's on -- on one side. The other side is that depending on the site of the injury, what part of the brain gets injured, there also is difficulties managing anger and managing frustration, sustaining effort and specifically in the case of Mr. Floyd when the frontal lobe injury got, got hurt, that's the part of the brain that controls planning, it controls emotions, it controls social graces, and it also helps to control whatever impulses, being

aggressive impulses that one may have and that's probably what makes us civilized, our frontal lobes. So it depend -- it depends on the site of the injury and on the extinct of the injury.

Q. All right. How long -- when was the first time you saw Scottie Floyd?

A. I saw him first time on May 5th of '06.

Q. All right. And what was his condition when you saw him then?

A. Scottie just returned from a treatment center in Texas where he was, I believe, for a couple of years and when he came the first time, he was distrustful. He tried to present himself and talked about his, his issues. I had prior to that conference, I believe, with his case manager and I had an opportunity to read the notes about him, so I had some information prior to meeting with him and so the first was -- the first meeting, we tried to establish some treatment goals, yeah.

Q. All right. Now, did there come a time when he was involved with Dr. -- is it Dr. Evans?

A. Dr. Evans, yes.

Q. Dr. Evans is a neurologist?

A. That's correct.

Q. All right. And was there a -- were you familiar

with that relationship?

A. Yes.

Q. And what was that?

A. Dr. Evans is an experienced neurologist. He was a professor of neurology and is a gentleman who has been very qualified and he worked with Scottie especially managing his seizures and managing his headaches which was a major concern for Scottie and at some point after he examined Scottie, he prescribed a medication that Scottie was on before and Scottie noted when he was looking at the paper it's the same medication that he had sometime previously and became very angry, explosive, thought that Dr. Evans doesn't care, that he is incompetent and refused to go back. I think, as a matter of fact, it has always been a challenge of having a physician that would accept Scottie, because Scottie would, would explode. I think at some point his initial neurologist, Dr. Healy, refused to treat him because of the threats that Scottie made toward Dr. Healy when he was his neurologist. So we were looking at -- we have spent part of the time looking for a physician that would be able and willing to treat Scottie with his cognitive -- with his behavior problems.

Q. Okay. At some point in time, did Dr. Healy suspend his relationship with Scottie?
A. Yes.
Q. And were you able to reestablish that relationship between them?
A. It was not -- sometime before Scottie's death, he has made improvements. I started to communicate when we -- after Dr. Evans was no longer able to treat him and also Scottie did not see Dr. Lorenz, because he thought that, that he was not the doctor for him. I was looking for a physician. I tried to find out contacting Dr. Gualtieri who is a specialist in head injury in North Carolina, and then I talked to Dr. Healy, sent him my reports. Reported how Scottie made, made progress and that he no longer consider him a threat to Dr. Healy, and he was fortunately willing to accept him back as a patient.
Q. Okay. Now, if we can divide Scottie's condition into two parts, okay? The one part I'm going to call the psychological behavioral problems that he has and the other part I'm going to call the actual functional damage to the brain, okay? Do you have an opinion to a reasonable degree of psychological certainty that the functional issues involving his

brain were causing his behavioral problems?
A. Yes.
Q. And what is your opinion?
A. Opinion that his behavior, the way he function in the world following the head injury was the result of the head injury.
Q. All right. Now, the actual head injury itself, what's -- what was the nature of the physical injury?
A. Well, it's injury to the frontal lobe, and I think that was a bilateral frontal lobe contusion.
Q. Okay. Now, that accident initially happened?
A. September 13th, '01.
Q. That's right. Was his condition as far as the nature of that injury stabilized? The physical injury, was it deteriorating, was it stabilized or was it improving?
A. At the time when I met him?
Q. No. The last time you saw him?
A. The last time I -- explain your question.
Q. Okay. He's had this injury since '01?
A. Yes.
Q. All right. And he died last year?
A. Correct.
Q. Between the time of the injury and the time that he

died on September 5th of '08 -- let me rephrase it. Most biological injuries I would expect whether it's a broken arm or an injury to your back or an injury to a nerve, you have a trauma, you have a period of healing, you reach a certain plateau, and then you're left with that condition of the organ or the body part, okay? You may continue to improve over time or you may continue to deteriorate or you may maintain that plateau. Would that be a fairly good --

A. Yes.

Q. -- physiological statement of injuries?

A. Yes.

Q. Applying that methodology to Scottie's brain, had he reached a plateau of physical recovery?

A. Not being neurologist, I'll have to go, so I'm going on the reports that I have received from the physician from where he was treated in Texas, from Dr. Healy and from the report that was available from Dr. Evans, which is like eighteen pages, fairly extensive. From that, it is my impression that the condition of the brain has stabilized, the damage was caused, contusion was there, but there was not spreading, there was no further -- when I saw him, there was no further swelling that would

effect he condition. There was no deterioration of the tissue that, that would effect the condition. So neurologically or anatomically as far as I can understand from the report available to me was stable. With head injury, the difference is then it depend. Even though the condition of the brain is stable, it leaves impairment of function, impairment of cognition, impairment of behavior, and then the person has to make an adjustment to the, to the changes in his functioning. So you have condition of decreased memory, decreased behavior control. In Scottie, rage, explosive behavior, and so that, that process is sort of ongoing. So even though physiologically you have what you have and there is from a neuropsychological point of view that condition is ongoing and either gets better or it gets worse, so you may end up with injury that gets stable neurologically, but the consequence of the sequela of that injury can go either way. It can either improve or it can get worse.

Q. Okay. Let me draw another parallel. If I have an individual who has an arm injury and he has loss of muscle mass, he has damage with the nerves in his arms. He arrives at some point where there's no

more physiological improvement in the body part, but through the use of exercise, through the use of retraining muscles, maybe using his index finger where he used to use his little finger or whatever, he copes with the loss of that body part in order to --

A. Yeah.

Q. -- to engage himself in useful endeavors. When a person has a stroke and they have damage to the brain, say, for instance, they have damage to the area of the brain where, where speech is, am I correct that part of the brain can be retrained to do the functions that that area that's been destroyed or damaged was doing?

A. In a case of stroke, I think that's the theory. It's what's called sprouting. There is a theory that the connections, that the brain sort of builds a detour around some of the damaged area, and I think like with an arm and the analogy of the stroke, there is some -- that's the theory and I think that's what rehabilitation aims at rebuilding that because once that area of the brain is damaged, it stays damaged, so there is a -- there is no -- that part doesn't heal. It's just the new connections are made, but it's depending how big

area of the brain gets injured and that sort of partially determine the amount of the recovery that person can make.

Q. Okay. Now, in dealing with the frontal lobe of the brain, do you have the same capability to rewire the frontal lobe or are we dealing with a different type of injury?

A. Yeah, I think the frontal lobes are so central. We are dealing with different kind of injury. I think in a case of Scottie, he was able to function in very restricted condition. He would have -- he was able to function in an environment that did not provide stress or a minimal amount of stress, and I think Ms. Floyd was the person who provided him with environment where minimal amount of demands were placed on him, minimal amount of stress except maybe some family hassles, but there was not a stress like a job requirement. He would go to a store and if there was any amount of conflict, he would become potentially explosive. So he was able to function in a very structured, limited setting. The environment had to be designed for him in a way in order to be able to function. In my opinion, Scottie would have never, after the injury, been able to return back doing what he was doing or any

kind of job because of the injury to the frontal lobes was such that he would not -- wouldn't have been able to function in an environment that was not specifically designed for him.

Q. And was that a permanent condition as far as --

A. Yes.

Q. Okay. Now, from the time that you first came in contact with him in May of '06 until he died in September of '08, how often do you think you saw him?

A. Once a week. There were sometimes when he would miss, miss a session, but I think it was on average, it was once a week.

Q. Okay. And was he in need of that, those visits?

A. Yes.

Q. And if he hadn't had those visits, would his condition have deteriorated?

A. His behavior would have deteriorated, yes.

Q. All right. Did you see any improvement in his condition over that period of time?

A. Yes, I have.

Q. All right. What was the nature of the improvement?

A. I think his ability to handle anger has improved. I think initially if you'll remember when he perceived that, that he was threatened or that

people -- when he misread information given to him like when he was given information that if he doesn't attend, his benefits may not be there and he saw it as a threat, so he responded threatening to kill his attorney, his treating physician and everybody around him, and so Scottie initially was very distrustful, misread information, would respond with threat of extreme aggression, would have increased number of headaches, would have extremely violent fantasies that he involved himself in and when over the period of time, he develop a relationship with me that I think he start to depend on me to be his reality check, he was able to go out more. He was able to go to do some shopping with his mom. He was able to participate in therapy in more meaningful way instead of just spending an hour making threats. He was able to start learning more about head injury. He started to learn more about coping, about relationships, and so he was able to take in information. He was able to use information more constructively and he was able to deal better with the conflict that he, for instance, had with his sister and started to consider different external activities, he started to think about future, what

the future holds for him. So he started to move toward being more independent, and so that was the direction and so in that he made -- he made significant progress in the two years that I have treated him.

Q. Okay. As far as medication and just general medical compliance, what was your observations of his being a compliant patient?

A. He was not the most -- he was not the most compliant patient. Like I say, sometimes it was difficult because it was difficult for him to follow instructions and if he -- if some medication that he had the impression that it either gave him problems with his stomach or increase his headaches, which were one of the major obstacles to his recovery was his post-traumatic headaches, headaches that were caused by the head injury and that were extremely severe that put him in bed sometimes for two or three days, that he was not able to function, and so those -- that was -- there was an issue for him taking the medication as prescribed. I think sometimes he wouldn't -- did not take the seizure medication as prescribed and I guess it all depended where he was at at that point and so.

Q. Well, would it -- and I hate to use this type of word. Were these intentional acts on his part or were they related to the injury?

A. They are related to the injury. I think it was related to the frustration that he felt that he was not -- when he felt that he was not getting better or when he would have -- he could not sometimes tolerate the side effects of the medication and as you know, the seizure medication, they all have side effects and when he thought those are the side effects of the medication, he just was not able to tolerate them and then we have to work on it and work on it and he would go back on his ability to comply, but I think it's a -- whenever the side effects became stressful to him, then he would stop taking the medication even though he sort of knew that that's -- that it is -- that's something that he needed to do.

Q. Okay. I know we've got his mother here during this deposition, but I want you to be as candid as you can with this deposition, I'm sure you will, and I understand it's unique that she would be here, but in her relation to him as far as the person that was supplying the environment --

A. Uh-huh.

Q. -- for him to survive in, was he the -- was he the dominating character or was he a submissive character in that relationship?
A. Dominating.
Q. Okay. Do you know what medications he was under immediately before his death?
A. If I remember correctly, I think it was Keppra and Depakote. I think those -- if I remember correctly, those are the two, Keppra and Depakote. Those are seizure medication I think that he was prescribed, but I, I am not abso -- I'm not 100 percent sure.
Q. Is there anything I can supply you to give you more information as to exactly what medication he was on?
A. Yes, it would have to be somewhere I think. I don't -- I would have to look up. I don't -- I truly don't recall. I would have to look up at the nurses notes or somewhere to provide me with that information. I don't have it in my head.
Q. Let me just see for a second, see if I've got something.
A. There's a note, the closing report from September '08 from his case manager. I don't think it indicates -- no, it doesn't indicate. All of them

before indicated medication but this one does not. I guess he was on Chantix to quit smoking.

Q. What were the nature of those medications?

A. I think -- I know that he was on seizure medication and he was on medications to control his headaches that were disabling.

Q. Okay. You have the toxicology report in front of you?

A. The death?

Q. From the autopsy?

A. Yeah. Yes, I do.

Q. Those types of medications, would they appear in a toxicology report?

A. I feel a little bit uncomfortable not being an M.D. to talk about what would and would not appear in toxicology report. So I --

Q. Okay. Could you look through -- could you look through the toxicology report and see if there's any indications of anything in the, in the -- in that report?

A. I'm not sure what you are asking?

Q. Were there -- were there any evidences of any medications in this toxicology report?

A. I think if I remember when I read this earlier, it says that there was no evidence of Keppra or

Depakote. It is mentioned somewhere here. I'm not -- okay. It says here the analysis of Keppra and Depakote were negative. That means they were not in his blood.

Q. They were -- that was a specific test that was done?

A. Yeah, that's it.

Q. Were there evidences of anything in his blood of a pharmaceutical nature?

A. Cannabidiol and propoxyphene and I am not sure what that is, so I'm --

Q. Okay. All right. Do you have an opinion to a reasonable degree of psychological certainty that at the time of his death, he had a permanent functional injury to the brain?

A. Yes.

Q. All right. Do you have an opinion to a reasonable degree of psychological certainty that as far as that functional injury to the brain, he had reached maximum medical improvement?

A. After seven years -- when he died seven years post-injury, so in my opinion that injury has stabilized, was chronic, was permanent.

Q. Okay. Now, looking at the brain as an organ, can you tell us what was the extent of the loss of use

of the brain as a result of that injury?
A. The extent was some that Mr. Floyd was unable to work, unable to participate in most other activities, required special environments, structured environment to function, required medical care to function and to maintain his health and it required ongoing therapy to manage his rage and violent behaviors.
Q. Do you have a percentage that you can assign to the loss of the use of the brain?
A. I do not assign percentage, so I don't do the ratings, so it's not in purview of my profession to assign percentages.
Q. Okay.
A. It's just -- it was permanent, moderate to severe.
Q. All right.
A. Disabling.
Q. Who would be or what type of specialist in your opinion would be able to training to assign a percentage of loss of use of the brain in Scottie's case?
A. It would be his treating neurologist. It would be somebody like Dr. Lorenz, a physiatrist, who is a rehabilitation doctor, and they have -- they specialize in assigning percentages of disability

and that's something that's a part of their training.

Q. Now, remember if you would, Doctor, we're looking at two different systems of evaluating this claim, the one system is percentage of loss of use of the body part?

A. Right.

Q. The other is the nature of the diminished earning capacity, okay, a percentage --

A. Yeah.

Q. -- of loss of earning capacity. Do you have an opinion as to the impact of this injury on his ability to earn a living?

A. I don't believe that Mr. Floyd would have been able to earn living. I don't believe that he would have been able to be gainfully employed.

Q. As far as his ability to continue or at some point in the future to have been able to live without supervision, do you have an opinion as to that or do you think he had stabilized as of the last time you had seen him?

A. At the time when I saw him, I think he still required assistance of his mother in most of the things that he did at home. He started to be a little bit more independent, he started to be a

little bit more helpful, but I think still he spent 90 percent of his time in his room and not being able to go outside. He only came to go out for medical appointments and occasionally to go to a store. So, I think at that -- when I -- the last time that I saw him, he's still dependent on his mother, and I think should Ms. Floyd been unable to take care of him, I think he probably would have had to gone to some kind of a facility that would have provided for him.

Q. And would that in your opinion have been a permanent condition for him that he re -- that would be a permanent way he would have to live the remainder of his life?

A. I think after seven years and the progress that he made in the two years that I met him was progress but still not sufficient to, to assume that he would be one day able to function on his own independently. It's not in my experience.

Q. Okay.

A. So in my experience, he would always require some form of assistance, some structured environment that would allow him to, to function within the limits of the structured environments.

Q. All right. And is that to a reasonable degree of

psychological certainty?
A. Yes.
Q. Doctor, in your treatment of him, say, has he ever in the period of time that you've had your weekly contacts with him, has he ever indicated to you that he was contemplating suicide?
A. He was -- he -- Scottie would talk about not wanting to be here, that the pain was unbearable, life was miserable, but I was never felt that he was acutely suicidal to the point that I would have to psychiatrically-hospitalize him.
Q. All right.
A. I seen the thoughts were there. I seen the unhappiness was there. The depression was present, and when the pain was -- the headaches were such that, that were unbearable then he would think about not being here, but as I said as far as I recall, there was never firm intent to the point that I would say you have to go, that I would have to hospitalize -- involuntary hospitalize him.
Q. Do you know if Scottie was cognitively aware that if he stopped taking his medication he ran the risk of having seizures and possible death?
A. Yes.
Q. Do you think that he would have intentionally

stopped taking his medication to kill himself?

A. I'm not certain. I don't know. I think -- I think when he would -- sometimes he wouldn't take medications because when he thought that it's not helping and -- but I think it -- I'm not -- I don't know if he would decide not to take medication as a way of killing himself. It's -- he had -- he did have problem with depression. It's a possibility that he would become despondent, that it may have crossed his mind, but he knew the importance of seizure medication and he knew that there is a possibility that if he stopped taking that it may -- he may have a massive seizure.

Q. Were, were instructions given that his taking of medication should be monitored, actively monitored?

A. I believe so. But I am not - I cannot say with 100 percent certainty. It will have to be given by Dr. Healy who prescribed the medication.

Q. Okay. Beyond just speculation, in other words, I don't want speculation, but do you have a medical opinion or a psychological opinion that if he had intended to commit suicide, he would have used some type of instrumentality that would have been more violent than the use of just depravi -- depravation of medical -- of medicine?

A. I think he would have used gun.
Q. Was he -- did he have a fascination with guns?
A. Yes. He would have used weapon. He had -- Scottie had fascination with weapons.
Q. So can we say -- do you have an opinion to a reasonable degree of medical certainty if he had intentionally wanted to end his life, he would have used a weapon and not just --
A. Yes.
Q. Excuse me?
A. Yes.
Q. And what -- what is your opinion?
A. That is my opinion that he would have used weapon and my opinion that he would have used gun.
MR. CAUTHEN: I just want to object to the form of that question as speculation as far as the answer.
Q. What would --
MR. CAUTHEN: I'm sorry, to the answer. I would rather he answer the question.
Q. Well, I want -- I want to make sure that we establish that, Doctor. What are you basing that opinion on?
A. He talked about violent fantasies and that included, always included some form of weapons and

I think from the way I know, have known Scottie. If I heard that Scottie died and that it was a possible suicide, my first assumption from the couple years of knowing him was that he shot himself, and I, I cannot give you a specific instant that he would say if I'm going to die, I'm going to shoot myself in the head but that would have been from the way I've known him that would have been my assumption.

Q. Doctor, do you have an opinion to a reasonable degree of psychological certainty that if Scottie had not taken his medication whether it would have been in an attempt to commit suicide or just a rebellion against the use of medicine?

A. I truly don't know. I, I know at sometimes he wouldn't take the medication when his headache was so bad that he just slept for three days. He took medication only for pain for headaches and then he would sleep and sleep and sleep. So, I really cannot tell if it would have been rebellion or if it would have -- it would -- I would speculate.

Q. Okay. Okay. In the time that you were treating Scottie, I know that he, he was boisterous and confrontational with people, but had you ever known him to be violent and actually put hands on anybody

or actually attempt to hurt anybody?

A. Not in the time that, that I knew him. I think that he made threats and he dreamt about it, he thought about it, but I -- as far as I recall, there has not been a time that he would go and shove somebody. There were a time when he asked me to leave the room because he was thinking about hurting me and asked me to just let me go, and so I can hold it together and so I let him go. So he had that amount of control that he knew that he is about ready to explode.

Q. Okay. And these struggles that he was having with violence, do you have an opinion to a reasonable degree of medical certainty that they were related to the brain injury?

A. Yes.

Q. Very well. I believe that's all the questions I have, Doctor. Please answer any questions the other attorneys have.

EXAMINATION BY MR. CAUTHEN:

Q. Dr. Federer, you know me, Mark Cauthen.

A. Yeah.

Q. I have taken your deposition before --

A. Yes.

Q. -- and I represent the employer and Legion

Insurance Company and Liquidation and the SCE Property and Casualty Insurance Carrier Association. They are the entity that who provided medical treatment and care or the financial care for Scottie for a period of a little over seven years, I think.

A. Yes.

Q. Let me just follow up on some of the questions that Steve asked you. Did you perform a complete neuropsychological evaluation of Scottie --

A. Yes, I did.

Q. -- during the period of time that you were treating him?

A. Yes.

Q. And, as I understand, you treated and counseled Scottie and Ms. Floyd, --

A. Yes.

Q. -- not treated Ms. Floyd but counseled her, as well, from June of 2006?

A. May -- May 5th.

Q. May of 2006? Okay. Up until September of 2008, is that correct?

A. That's correct.

Q. Okay. All right. And the neuropsychological evaluation, I do have a report. It looks like it

was performed or completed around February of 2007, is that correct?

A. I got that somewhere in here. Yes.

Q. Okay. What, what IQ did you determine from, from that testing?

A. 100. IQ of 100.

Q. A 100?

A. A 100, yes.

Q. Okay. How would that fit within, within the range of the --

A. It's average. Average range --

Q. Average range?

A. -- of intellectual functioning, yes.

Q. Okay. So his IQ didn't, didn't prevent him from returning to some type of function outside or, you know, some type of functioning outside of the home, did it?

A. No.

Q. His IQ would not have prevented him from some type of wage earning or employment activity? In other words, he had the intelligence?

A. He had the intelligence.

Q. He had the necessary intelligence, didn't he?

A. That's correct.

Q. Okay. How about -- how about his speech, his

ability to -- his speech vocabulary, his ability to express himself?

A. You know, he had a good ability to express himself.

Q. Okay. So the things as I understand it that were preventing him from some level of functioning outside of the home setting were, number one, the headaches and then, number two, the propensity to an explosive, unpredictable personality, is that correct?

A. That was part of it, yes.

Q. What other things would have prevented him from functioning outside of the home setting that you determined from your evaluation?

A. I think part of it that his learning curve was flat. I think learning new material would have been difficult for him. Processing information was difficult for him. When -- that is when he was given information, he tend to frequently misunderstand the information. He saw information that was given to him that was sort of a neutral in content, he perceived it as being threatening and then he misunderstood the information. When he would talk to you, he would take the information from the beginning of the sentence and then he would not process the rest of the information and

it would make -- that made it very difficult for him to respond to new stimuli and new information, any kind of a demand, because he would take only the beginning of the sentence and that was all that he processed and the rest of it, he would not hear or he would not -- he would hear it, but he would not process it, so that would be sort of a one part of it that would have make it very difficult for him to be in any kind of an interactive situation with another, another person. That was part of and sort of demonstrated difficulties maintaining a physician and physician on most parts are more cooperative than regular folks in a job situation.

Q. Now, is it -- is there any way to tell whether that was related in some fashion to his head injury?

A. That is typical front -- excuse me, from the frontal lobe injury because the frontal lobes, one of the thing that it help us to do is to plan, organize, retain and maintain control over the emotional impulses and sort of to keep us in check. Not to say necessarily what's in our mind but being able to suppress the response that's a function of frontal lobes and I see those are typically the behaviors. The impulsivity is a typical problem with, with frontal lobe depending on the degree.

Q. Okay. Were, were there any other factors that you identified in your, in your testing in addition to those that would have prevented his return to some type of normal or seminormal functioning?
A. I think it -- you know I saw it from physical problem. I see that the balance -- the balance sometimes was, was an issue and I said that --
Q. But as far as -- as far as --
A. Yeah, as far as psychological, yeah, yeah.
Q. As far as psychologically or neuropsychologically?
A. Yeah. I think just that as the decrease social graces, the frustration turns and inability to respond to demands and stressors.
Q. Did you -- did you or were you able to establish any kind of a premorbid state for Scottie? What was his -- what were any of these characteristics like before his injury as opposed to after the injury?
A. I think the current -- the information that I have was provided from him and from his, from his mother.
Q. Uh-huh.
A. I think there was an instance of violent father and I think -- you know, I mentioned in my report that there is some possibility and it was just an

assumption on my part that there may be some possibility of PTSD or some response to his father being, being violent, and so there was -- there were some issues prior to that; however, he was able to function, to hold a job, to date and sort of lead a regular life.

Q. Okay. Now, could you tell me what goals -- you mentioned goals earlier that you established early on for Scottie in connection with -- you worked with Cindy Grumley, --

A. Yeah.

Q. -- her involvement, as well, --

A. Yeah.

Q. -- as the case manager. What, what were the goals that were outlined for him at the, at the beginning?

A. I think the goals were for him to increase his independence, increase his anger control, improve his social functioning. So those were -- those were the initial -- I'm sorry -- I think those were -- those were the major -- the major goals.

Q. Okay. And did you see -- well, let's just take them one at a time. Did you see improvement over the course of the two plus years that you treated Scottie? Did you see improvement in his ability to

function independently or did you, did you see that he was moving in the right direction in that area?

A. I saw some improvements. I think that Ms. Floyd reported that Scottie is becoming more helpful around in the household. He was able to tolerate to go, to go shopping more.

Q. Okay.

A. And then he was able to cooperate with his physician. He was able to make more decisions about how to choose a physician, how to maintain a physician. That was sort of a life-threatening or life important issue.

Q. Okay. How about anger control, was he making -- did he make progress?

A. He did make progress and he, himself, verbalized the fact that he was able to control his anger. That he did not destroy his room. He did not become physically aggressive. When he felt that he was provoked, he no longer made death threats to his attorney and started to appreciate what his attorney was doing and was working with him. The same thing toward me. He started to appreciate the fact that I stayed with him in spite of all the behavior that he demonstrated. He sometimes would call when things would be an issue for him, which

is sort of a issue of a trust, and so he started to demonstrate these. These are small steps, but are significant steps given from where he was, and so that -- those were on the good days.

Q. Okay.

A. Now, the days when, when the headaches become severe, then he was unable to come and the depression would become more. But on the good days he did -- he made progress and he was aware of it and he said, he stated that, that he feels that he is getting better control and he was proud of when he felt provoked, especially by his sister, that he did not punch her out.

Q. Okay. I believe there was a -- there was an occasion or a period of time as I remember where he did have -- there was some type of, I guess in -- maybe was it 2007 where he had some type of outburst threatening you or threatening Steve and was fired --

A. Everybody.

Q. -- by Dr. Evans, did that all kind of occur at one time?

A. No, it don't occur. I think with Dr. Evans it came later. I think with Steve and I and everybody involved with him that was earlier, earlier on but

by then, and that, that improved. Even though to the end when Scottie was not feeling well or doing well, sometimes he would say nobody is going to come and take me, but he was able to, to deal with it better. That with Dr. Evans it came later on and it came because as I said he read and it was all because he read one word that was the same medication as the one he was on before and he put two and two together and it was became eight for him.

Q. Okay.

A. And also the fact that, that Dr. Evans talked to him only for short period of time and so Scottie assumed that Dr. Evans did not read through all of the stacks of information, so he must be a lousy doctor and he was not going to go there and I think that it was a potential explosive situation in Dr. Evans' office, but fortunately, he walked out. I think his mom was there and his case manager, and he was able to walk out without attacking anybody. So the rage was always under the surface and I think that was always something to deal with and I think the fact that I have been working with head-injured folks for last twenty-five years, especially with the one that had propensity toward

violence as a result of head injury, I think allowed me to be able to make him feel safe with me.

Q. Okay. Well, after those events, was he able to get his anger under control to where we didn't have anymore incidences of threats, outbursts, temper tantrums? Was he able to get it under control and eliminate the actual occurrences of those things after the incident --

A. I think -- I think the --

Q. -- with Dr. Evans?

A. Yeah. I don't think that we -- there was -- there was another incidence, and I'm not sure if it was before Dr. Evans or when, he decided to fire Dr. Lorenz because Dr. Lorenz didn't do it just right. And I think -- let me double-check. I think in June '07, that was -- that was the year before. So, my note, I guess, indicate that, that he started making progress toward controlling his violent impulses and trying to benefit from therapeutic sessions. He reported that he is afraid of being overwhelmed by his aggressive impulses and sometimes dreams that I feel it's personalized violence. And at that point of his -- of his death, I think that he was able to control

them that is -- that I think that he was aware that the violence that he's experiencing relates to his own internal state, that it's not respond to the external conditions, and I think that again was a significant, significant realization. However, I do believe that it all happens in sort of a greenhouse situation where he was protected from somebody being rude to him, somebody stepping on his toe, or somebody doing something that may irritate you and I but it can cause a violent outburst in him, and I think that's why I believe that, that for Scottie to be in his best, he would have to be in a structured environment that prevents or potentially protects from something that would trigger it.

Q. Okay. Did it seem like -- did it seem to you like as far as Scottie's threats or, you know, verbalization of threats, feeling of -- feelings of anger that he expressed to you during the counseling sessions, did it seem to you like he knew how far he could push things and that once he got to the level of -- got to a certain level, he knew that he had to back off in order to keep his treatment team or part of his treatment team intact?

A. I think that he was always afraid that at that point he will not care. That he always afraid that there will come a point where he just will get so angry that the violence will overwhelm him and that he will not care about the consequences. I think that too in his mind there was always a possibility that it will all blow. That it will always -- that there will be -- something may happen and that he will lose it and there is some provocation. You could see the rise in his violent fantasies and he would start talking about doing damage to a specific person, to his sister's boyfriend and he would perseverate on the amount of the ways to kill him, dismember him, dislodge every bone in his body and would become so agitated and so aroused by it that it was difficult for him to keep it under control, and he was aware of that rage and that's why he was before given -- after the injury, it's a organic personality or intermittent explosive disorder because there was -- that was always -- that was always there. So I think he probably knew when to -- sometimes when to back out but also knew that if he's -- that he cannot control the situation that he may become homicidal and at that point he wouldn't care.