THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
MARION COUNTY COURT OF COMMON PLEAS

Thomas A. Russo, Circuit Court Judge

Case No.: 2010-CP-33-1048

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

v.

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.

FINAL BRIEF OF RESPONDENTS LEGION INSURANCE COMPANY IN LIQUIDATION / SOUTH CAROLINA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION

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7. Did the Court below err as a matter of law 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 S.C. Code Ann. §42-9-30 (Supp. 2009), S.C. Code Ann. § 42-9-10 (Supp. 2009), and 25A S.C. Code Ann. Regs. 67-1101 (C) (Supp. 2009)?

STATEMENT OF THE CASE

The Claimant/Appellant, Scottie W. Floyd (deceased), 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. (See Gen. S.C. Code Ann. Title 38, Chapter 31)

Scottie Floyd's compensable brain injury, from an accident occurring on September 13, 2001, affected his right frontal lobe, causing him to suffer from a seizure related disorder. (R. p. 77, Comm. Bass Order, December 12, 2007). Mr. Floyd received treatment for psychological and mood disorders, emotional outrage and severe headaches resulting from his brain injury. (R. p. 99, 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 alleged by the Claimant, and subsequently found by the Commission, to be 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. (R. pp. 77-8, 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.

Mr. Floyd made improvements over the course of time, and was able to be released to the custody of his mother and guardian, Betty Joe Floyd. (R. pp. 86-8, Consent Order, June 27, 2006). At the time of the Order of Commissioner Bass dated December 12, 2007, Scottie Floyd

had still not reached maximum medical improvement, and no award of disability was ever made. (R. p. 78, Bass Order, December 12, 2007, Finding of Fact No. 6). This finding was not appealed by any party. Scottie Floyd died on September 5, 2008, due to complications from his seizure disorder. (R. pp. 1439, 1448, 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 Scottie Floyd'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 for death related work injuries) (R. pp. 126, 128) as well as a new Form 50 (Workers' Compensation Complaint and hearing request for Claimants) (R. p. 130). The decedent Claimant/Appellant asserts though 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. 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/Appellant's counsel has also made several alternative and contingent arguments as corollaries to that primary position. First, the Appellant asserts that if Mrs. Betty Jo Floyd, is not entitled to the balance of a lifetime award (the hearing commissioner ruled she

[1] In his prior brief to the Circuit Court, 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. 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 (R. p. 1445). 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 contends 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.

was not; and the full Commission affirmed; and the Circuit Court), 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. Rather, the Appellant alleges that the September 5, 2008 death was a new date of injury, for which the responsible carrier for Ken Baker in September of 2008 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, if this were a non-work related death (under S.C. Code Ann. §42-9-280), then Ms. Betty Jo Floyd would be entitled to a 500 week, or potentially more than 500 week award, by virtue of the compensable injury to the Scottie Floyd'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 due to Appellant's interpretation of 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 Appellants. The Respondents' 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 Scottie Floyd in September of 2008. Therefore, this was 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.*, 261 S.C. 106, 198 S.E.2d 535 (1973) (noting that if the death, proximately related to the work injury, does not occur both (a) within six years of the date of that injury, and (b) while total disability still persists, there is no right to additional benefits under the Act).

Respondents further contended that, secondly, even presuming for the sake of argument that compression fractures to Scottie Floyd's spine occurring 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 related seizure disorder, both 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 deceased Claimant had previously filed a Form 50 (Claimant's hearing request before the Workers' Compensation Commission) in 2006 for his back injury/compression fractures, in which he cites "September 13, 2001" as the date of accident. (R. p. 132). Respondents contend 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/Respondents assert that Betty Joe Floyd was never a dependent of the Scottie Floyd, as required by §42-9-280 (non-work related death), 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, pursuant to §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 had not been found at maximum medical improvement by the Commission prior to his

death, nor had he been awarded: (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 temporary total disability benefits being received by Mr. Scottie Floyd would have abated upon his death. Such benefits would have abated upon a non-work related death (whether pursuant to a lifetime award or otherwise) unless both of two requirements could be met. First, that Betty Joe Floyd was a dependent, and secondly that 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. Neither of these two requirements under §42-9-280 was met by the evidence of this case, for the survivability of a non-work related death award. Moreover, Respondents assert in the first instance that this case involves a "work related" death.

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 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, and Circuit Court), 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 at that time, as defined and interpreted by S.C. Code Ann. §42-1-160.

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.

PROCEDURAL BACKGROUND

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 accident subsequent to the Claimant's original accident 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. (R. pp. 64, 66). From that order, 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. (R. p. 23).

Subsequent to that Order of the Appellate Panel, and within the applicable time period, the Claimant/Appellant, 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 had been consolidated in this matter before the Twelfth Judicial Circuit Court in Marion County. On September 8, 2011, this case was heard before the Honorable Judge Thomas Russo in the Court

[2] This 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. of 2008).

of Common Pleas in Marion County. On February 17, 2012, Judge Russo filed an Order fully affirming the Order of the Commission's Appellate Panel. (Signed January 4, 2012 and served on March 12, 2012, (R. pp. 6-20)). This Order of Judge Russo was appealed to the Court of Appeals by the Appellants on March 14, 2012 on seven (7) separate grounds.

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 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 judicial review of the Workers' Compensation Commission's appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). 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)). See also *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)).

ARGUMENT

I. Whether or Not Scottie Floyd Died from a "Work-Related" Death"

A. Requirements for Benefits for a Work Related Death Under §42-9-290

The Commission Panel 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 Scottie Floyd's death did not occur within six years of the work-related accident as required by §42-9-290, the Commission found that Betty Joe Floyd was barred from receiving benefits under the Act. (See original Order of Lyndon Commissioner, March 1, 2010, pp. 25, 26, 29 – fully affirmed by the Commission Panel and Circuit Court, (R. pp. 64, 65, 68)). The Commission'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. The report from the autopsy performed September 6, 2008 described the cause of death as follows:

> [I]t 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.
>
> (R. p. 1439).

In an unappealed prior Order of the Commission, the Claimant's seizures and resulting thoracic spinal injuries of 2004 were found to have related 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..." (R. p. 77, 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 directly from his seizure disorder.

Claimant's/Appellant's counsel asserts, in part, that the cause of the Scottie Floyd's death was not from seizures, but rather from the Floyd'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 that Mr. Floyd 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," as opposed to the blunt force trauma of the collision itself. 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 that the Claimant died from anything *other* than complications related to his compensable medical condition (seizures) arising from the September 13, 2001 head injury.

As found by the hearing Commissioner, and fully affirmed by the appellate panel, Scottie Floyd'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 Appellant mother and personal representative, Betty Joe Floyd, is not entitled to further benefits under the Act, per the plain language of §42-9-290 – having nothing to do with status a dependent or non-dependent of her son – but rather with the qualifying language of the statute itself. 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 (emphasis supplied)

Since the Claimant remained totally disabled until the time of his death, the death must have also 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, nearly seven years to the day after his September 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 [work-related death] 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 [for death benefit proceeds] 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. It is undisputed that Scottie Floyd was still on a running award of temporary total disability benefits as the time of his death in September of 2008. Therefore, no benefits had vested nor would be due to Betty Joe Floyd.

The Appellant further argues that despite the plain language of §42-9-290, the Claimant's mother, Betty Jo Floyd, 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 accident. Rather, the April 2004 spine injury related to, and stemmed from 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*. (R. pp. 77, 132). (Addressed below in argument section I. B. "Date(s) of Accident").

However, even assuming *arguendo* 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, resulting from the seizure disorder, was compression fractures 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 – rather he died of a seizure related disorder proximately caused by his head injury in 2001. Clearly the language of §42-9-290 referring to death resulting from "an accident" is indicating the accident which was ultimately causative of the death Under either factual scenario, the Claimant's mother/personal representative is not entitled to benefits under the Act for a work-related death.

B. <u>The Proper Date(s) of Accident Associated with the Death of Scottie Floyd</u>

The Claimant/Appellant 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 a September 13, 2001 date of injury would clearly bar the Claimant's surviving mother from further benefits under the Act for a work related death – per §42-9-290 as outlined above. However, the Commission and Circuit Court 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. (Lyndon Order at p. 28, fully affirmed by the Commission Panel, (R. p. 66)).

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, decedent Scottie Floyd previously asserted that the 2004 spinal injury resulted from seizures due to the September 2001 brain injury. (See prior Form 50 Complaint of attorney Steve Wukela for the Claimant, filed January 6, 2006, listing the date of injury as "9/13/2001," (R. p. 132)). 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, in prior proceedings in this same litigation, the SCPCIGA could have previously raised the argument that it did not have liability for coverage for the employer Ken Baker Used Cars in 2004 during the prior hearing in 2007, (to determine compensability of the 2004 spinal injuries). That is, had the Claimant chosen at that time to assert a "new" 2004 date of accident theory in the prior proceedings. The Claimant/Appellant never chose to do so, because at that time he was asserting, correctly, asserting that the 2004 spinal compression fractures were resultant from the September 13, 2001 date of accident. 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, is that 2004 was a new and separate date of accident from the Sept. 13, 2001 accident. This is diametrically opposed to the prior factual position of the claimant in previous pleadings and 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(s).

The Claimant/Appellant should also be judicially 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, (R. pp. 77-8)). 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/Appellant'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, would have no liability for an alleged injury by accident in 2008. Additionally, for the same reasons that Commissioner Bass previously found the Claimant's 2004 spinal fractures were from a seizure related disorder resulting from the 2001 accident, the Claimant's/Appellant's 2008 date of death should also be affirmed by the Circuit Court as related to, and resulting from, the 2001 injury by accident, as this finding is clearly supported by substantial evidence in the record.

The Claimant did not suffer from a seizure disorder prior to his 2001 brain injury. Moreover, 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, (R. pp. 77-9)). Further, 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 in September of 2008. (See the Autopsy of Scottie Floyd, (R. p. 1439) and Death Certificate of Scottie Floyd (R. p. 1448)). This finding is supported by substantial evidence in the case, and furthermore, there is an absence of any evidence to the contrary – to show that the Claimant died from any other cause.

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/Appellant 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, Appellant offers this case to make the argument that September 5, 2008 was a separate and distinct date of accident. However, 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. The *Shuler* decision does not even reference, address or discuss the primary issue for which the Claimant

presents it – that a finding of an updated date of accident should be made. 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, Appellant Scottie 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 – a traffic accident itself. Appellant Scottie Floyd, on the other hand, died from complications associated with his seizure disorder from his 2001 brain injury. ((R. pp. 1439, 1448). 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 and his resulting death which stemmed proximately and directly from the seizure disorder which accompanied the physical brain injury he received due to the blunt trauma on September 13, 2001.

Furthermore, as a matter of public policy, a finding by the Commission of a "new" date of accident, well into the future after an original and remote date of injury, would be a confusing practice that could work a potential hardship on Claimants. Consider, if the Respondent/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 trial Commissioner's Order, and as affirmed by the Appellate Panel and Circuit Court, was clearly correct in determining that the Claimant's death resulted proximately from his 2001 brain injury and that there was no subsequent date of accident, intervening or otherwise. The Claimant's/Appellant's attempt to argue additional/subsequent dates of accident is without merit, and legally untenable.

II. Whether the Claimant Suffered a Non-Work Related Death per §42-9-280

A. Failure to Meet Requirements of Benefits for Non Work Related Death per §42-9-280

The medical evidence in this case clearly indicates that Scottie Floyd'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 Appellant 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. First and foremost, under the applicable standard of review, whether or not the Claimant suffered a work related death (benefits arising under §42-9-290) or non-work related death (benefits arising under §42-9-280) death, is a factual question. Therefore, Respondents contend that there is substantial evidence in the record to support that factual finding, and therefore the Commissions' finding on this point should not be disturbed on appeal.

However, even assuming *arguendo* that the Claimant died from causes other than the 2001 injury, his personal representative (and mother Betty Jo Floyd) 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. Stating 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 non-work related death of the Claimant. Otherwise, the award abates and no further benefits are due.

Therefore, even hypothetically assuming 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 herein at Section II. C.) *nor* was there ever an award made to the Claimant pursuant to the second paragraph §42-9-10 or §42-9-30. Notably, in the case *sub judice* no permanency award of any kind had been made in favor of the Appellant prior to his death, and the case never reached any final adjudication of any kind before he died.

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

requirements 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, in this case, even if Scottie Floyd's death had been due to some *non-work related* cause, Betty Joe Floyd would not qualify for his workers' compensation benefits under §42-9-280 because she was not dependent upon her son for support at the time of the 2001 injury (as found by Commissioner Lyndon, and affirmed by the Appellate Panel and Circuit Court) (R. pp. 64, 66)). In such a 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 October 1999 Commission ruling providing a permanency award to Stone, he 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, Mrs. Stone, as a surviving spouse, would have been deemed wholly dependent on the decedent, Walter Stone, by a conclusive statutory provision of the Workers' Compensation Act (S.C. Code Ann. §42-9-110). Nonetheless, despite such a conclusive showing of dependency by the surviving spouse, 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.

Therefore, despite the fact that Mrs. Stone was the next of kin dependent of the deceased claimant Stone, the Supreme Court still found that the award abated up Walter Stone's non-work

related death under §42-9-280, and that no further benefits were due. The reason for this finding is because Walter Stone's original 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 or §42-9-10, nor under §42-9-30, as expressly required for the survivability of such award under §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)

Decedent Claimant Scottie Floyd was never found to have reached maximum medical improvement prior to his death on September 5, 2008, nor ever received a ruling in favor of permanent indemnity benefits (under any section of the workers' compensation Act). At the time of his September 2008 death, Scottie Floyd was still receiving ongoing *temporary* total disability benefits. As noted in the final Commission Order issued prior to the death of Scottie Floyd, that hearing Commissioner found, "[that] 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, (R. p. 78)). "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, (R. pp. 79-80)). (emphasis added).

That Order, and those findings of the Commission were unappealed. There was no pending Form 50 (Claimant's hearing request) by the Claimant nor Form 21 (Defendants' hearing request) filed by the Carrier after that Commission Order and prior to the Claimant's death on September 8, 2008 requesting a determination of, or alleging, Scottie Floyd had attained maximum medical improvement for **any** of his alleged injuries. Again, 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. As such, even if a finding were made reversing the factual determination of the Commission that this was a work related death, any remaining benefits would abate under §42-9-280 as outlined above. This would still be the case even if Betty Joe Floyd hypothetically satisfied the requirements 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 outlined above.

B. <u>Survivability of Benefits for Physical Brain Injury for a Non-Work Related Death</u>

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 point out the fact that **Scottie Floyd was never awarded lifetime benefits for permanent total disability due to a physical brain injury** during his lifetime, nor during anytime in the course of this litigation. In fact, the

Claimant/Appellant was never awarded any permanent disability at all. Scottie Floyd had previously been found to have suffered a physical brain injury in this case, but had never reached maximum medical improvement prior to his death, pursuant to Commissioner Bass' 2007 Order, and was he still receiving medical treatment and temporary total disability benefits up to the date of his death. (R. p. 81).

Furthermore, assuming *arguendo* that Scottie Floyd had reached MMI for his compensable brain injury, and again *arguendo* that he had subsequently been awarded lifetime weekly benefits for the brain injury (which was never been awarded in this case) – such benefits would have been awarded pursuant to the *third* and fourth paragraphs of §42-9-10, or §42-9-10(C). This subsection read 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." §42-9-10(C) (2007).

The determination of a deceased claimant's surviving representatives' entitlement to further benefits, for non-work related deaths 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 deceased worker would have to show she was a next of kin dependent under the Act, as required by §42-9-280. (In this case, the trial Commissioner, Appellate Panel and Circuit Court, correctly found that Betty Joe Floyd was not a dependent under the Act, R. pp. 64, 66; 34-36). Second, the Claimant's surviving representative would have to show that the permanency award - none was ever made in this case

- was awarded pursuant to the *second paragraph* of §42-9-10 or pursuant to §42-9-30, (as mandated 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. Namely because such an award would have been made pursuant to third and fourth paragraphs of §42-9-10, *not the second*, paragraph of §42-9-10 or under §42-9-30 as required. 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. Unlike here, 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 for the purposes of her asserted §42-9-280 claim for benefits.

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, conceded "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 (Stanley) *Floyd* 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. (emphasis supplied).

Notably, there is actually no basis anywhere in the Workers' Compensation Act under which the Defendant 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.
>
> (Stanley) *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 (or even requested to be made) to Scottie Floyd during his lifetime - as he never attained MMI prior to his death. Again, a request for adjudication under §42-9-30 (nor §42-9-10(C)) was not even filed or pending before the Commission at the time of Scottie Floyd's death on September 5, 2008.

But for the fact that this case actually involves a work related death, the present situation is synonymous to the example of *Stone*. In *Stone* the claimant suffered compensable back and leg injuries under the Act. However, Claimant Stone later 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/Appellant Scottie Floyd in this case 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 – or requested prior to his death. 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 impairment ratings put forth by the Claimant, or any physician. The ability to obtain second opinions, functional capacity examinations (FCE's), independent medical examination (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 permanent total disability (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** as no such award was ever made under §42-9-30 for Stone. 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 (via a suicide, or an intent to inflict self harm), is no longer before the Court for the reasons argued herein below at Section II. D.).

C. Betty Jo Floyd was not Dependant on Her Son Scottie Floyd Pursuant to the Workers' Compensation Act

Among other factual findings, Commissioner Lyndon's Order of March 1, 2010 (as affirmed in full by the Appellate Panel and Circuit Court) determined that Scottie Floyd's mother, Betty Joe Floyd was not a dependent under the Act. (R. pp. 64, 66). Defendants/Respondents assert this a proper factual finding by the Commission which clearly supported by reliable, probative and substantial evidence in the record. Therefore, it should not be overturned on appeal under the applicable standard of Review.

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 Workers' Compensation 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 (R. pp. 981-991).

The Appellant's brief makes references to a Consent Order between the parties of June 2006 and refers to Betty Joe Floyd as "Scottie's mother and sole dependent." While this language may in the Claimant's appeal, Respondents take the opportunity to point out that nowhere does any Order, or 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 if anything it was Scottie Floyd who was dependent upon his mother, not the other way around. (All Consent Orders of the parties at R. pp. 82-95).

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). As Mrs. Floyd does not fall into either of the statutorily presumptive dependent categories, her standing as a depending would be a factual determination of the Commissioner per *Adams, supra.* The Commission's finding in this matter - that Mrs. Betty Jo Floyd was not dependent on the decedent Claimant under the Act - is supported by

substantial evidence in the record. Therefore it should be affirmed on appeal. The Respondents further argue this point herein below as follows:

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," to a surviving parent. 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 certain non-dependents (such as parents) 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) (emphasis added).

As found by Commissioner Lyndon, and affirmed on appeal, 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, even if deemed a 'non-work related death,' then a person attempting to receive additional benefits under the Act (if available) pursuant to §42-9-280 would have to make s showing of dependency, in addition to other statutory requirements. 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 the Commission and affirmed on appeal. 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 (R. p. 383)). 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 own job to become a full time caregiver to her son after he moved into 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 (R. p. 399)). It is important to note that these monies, the $400.00 per week provided by the insurance company to Betty Joe Floyd, were compensation for her job as a caregiver for her son. These payments did not represent support payments from the deceased Claimant Scottie Floyd – nor were associated in any way with the weekly indemnity checks the Claimant Scottie Floyd received from the Carrier in lieu of his lost wages as a part of his workers' compensation claim. (See Consent Order of the parties dated June, 2006 (R. p. 88)).

There is an absence of factual 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. If anything, the record would tend to indicate that Mr. Scottie Floyd was living with and dependent on his mother Betty Joe Floyd at some point *after* he was debilitated by his work injury, and 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 Commission on this point should be affirmed.

D. Whether Scottie Floyd's Death Constituted an Intentional Act or Suicide

The issue of suicide or intentional death is completely moot at this point, and not before the Court of Appeals on appellate review as this issue has been abandoned on appeal. 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)(later vacated and withdrawn) that the Claimant would not be entitled to benefits under this alternatively theory of death either. Neither of the co-Defendants/Appellants in this case have ever alleged that Scottie Floyd's death was a result of an intentional action or suicide.

Most importantly on this point, the trial Commissioner for these proceedings 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 No. 12 (R. p. 63)). This finding was not

appealed by the Claimant and neither of the defendant carriers contended that the death was a suicide.

Therefore, this issue is not before the Court of Appeals, as this finding was never appealed to the Appellate Panel of the Commission for review, and therefore has been abandoned as an issue in controversy. Despite this fact, Claimant's/Appellant's counsel goes on to belabor this argument involving suicide and intentional death in several pages of his appeal brief to the Commission panel. Nonetheless, for the reasons stated in the trial Commissioner's order at pp. 21-23 (R. pp. 59-61), these Defendants/Respondents deny that Ms. Floyd would be entitled to benefits even if the Claimant's death had been intentional. (See S.C. Code Ann. §42-9-60). Again, however, it is not the position of the Respondents that Scottie Floyd's death was a suicide or intentional.

III. Whether the 500 Week Limitation for Death Benefits is Applicable to this Claim

S.C. Code Ann. §42-9-10(C) and (D) provides 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 workers' compensation 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. Appellant 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 500 week limitation for death benefits under §42-9-290, covering work-related death, and any 500 week limitation for benefits available under §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 in September of 2008 – and had not been awarded any permanency benefits or lifetime permanent disability benefits of any kind. He had never even been found to be at maximum medical improvement by the Commission prior to 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 permanently totally disabled. "The statute conditions the lifetime award of benefits upon a finding of total and permanent disability." [Stanley] *Floyd* 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009).

Respondents contend that 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), as opposed to permanent disability benefits – presumably for a living person who has become PTD occasioned by some condition or injury other than death (§§42-9-10, 42-9-30). Once a 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 workers' compensation claimant's death then becomes whether the death was work-related or not work related. It is of no consequence at the point of death whether the

Claimant's speculative permanent total disability might have been predicated on a brain injury or not, other than for the issue of *survivability* of his award under §42-9-280. The differentiation between the two is illustrated by the follow hypothetical examples:

Two 30 year old employees, (covered under the Workers' Compensation Act), 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 B died from internal bleeding within a matter of hours after the accident. Under the legal reasoning of the Appellant, claimant A's survivors would be entitled to "lifetime" weekly benefits for the balance of his life expectancy under §19-1-150 (in excess of 47 years or 2400 weeks of indemnity benefits), while Claimant B's survivors would be entitled to only 500 weeks (approximately 9.6 years) of indemnity of benefits, each pursuant to §42-9-290. Defendants/Respondents, however, would contend that in this example, both claimant A's and B's survivor's would be entitled to 500 weeks benefits for a work-related death per §42-9-290 assuming all other requirements under the Act were met for awarding such benefits.

Conversely, consider if two 90 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 (undeniably physically injuring his brain in the accident), Claimant Y's head was unscathed but he died from internal bleeding within a matter of hours from the accident. 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 (3.81 years, or approximately 198 weeks of indemnity benefits), 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 died. The interpretation requested by Claimant's counsel, in conjunction with the language of §42-9-10 sub part (D) would mean Betty Joe Floyd would be receiving weekly benefits for the next 2300 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 burden of 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 Scottie Floyd in the instant

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 the Circuit Court in this matter, affirming prior Orders of the South Carolina Workers' Compensation Commission's Appellate Panel and the trial Commissioner, be affirmed in full.

Respectfully Submitted,

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October 4, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
MARION COUNTY COURT OF COMMON PLEAS

Thomas A. Russo, Circuit Court Judge

Case No.: 2010-CP-33-1048

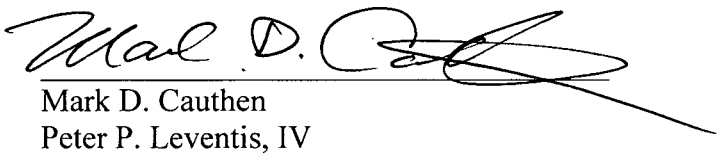
Betty Joe Floyd as Personal Representative of the Estate of
Scottie W. Floyd, deceased, Employee,.....Appellant,

v.

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.

CERTIFICATE OF COUNSEL

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



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