

FINAL BRIEF OF APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION

Full Commission

WCC File No. 1200349
Appellate Case No. 2018-000132

RECEIVED
OCT 01 2018
SC Court of Appeals

James Provins, Employee/Deceased,
Debra Provins, Alleged Dependents/Claimants,

Appellants,

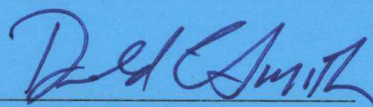
v.

Spirit Construction Services, Inc., Employer,
And Insurance Company of the State of PA, Carrier,

Respondents.

FINAL BRIEF OF APPELLANTS

September 28, 2018
Anderson, South Carolina


Donald L. Smith, (Bar#6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

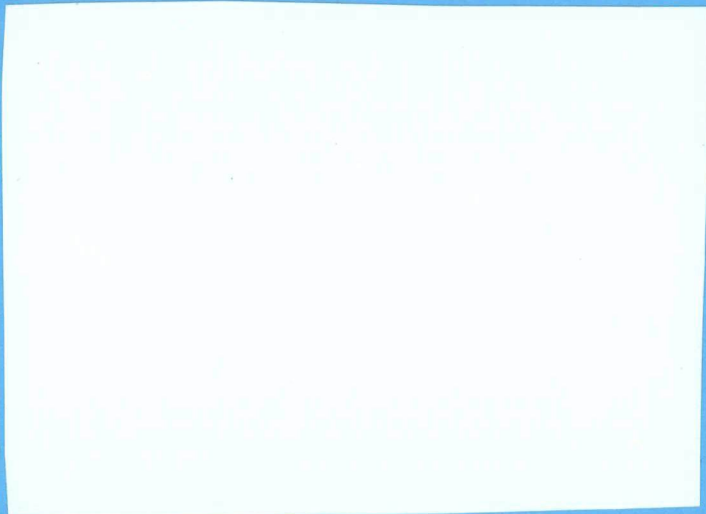


TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Facts.....	1
Arguments	
I. The Commission erred in not finding that that the Respondents were in bad faith in refusing to provide medical assistance to Appellant.....	5
II. The Commission erred in giving full credence to Dr. Ballenger's findings, to the exclusion of the other medical providers.....	7
III. The Commission erred in not finding that Appellant suffered permanent impairment to his right upper extremity prior to his untimely death.....	18
IV. The Commission erred in denying Appellants' claim for death benefits	19
V. The Commission's decision contradicted public policy by fostering and facilitating bad faith denial of benefits	22
Conclusion	23
Certificate of Counsel	24

TABLE OF AUTHORITIES

Cases

<i>Corbin v. Kohler Co.</i> , 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002)	4
<i>Estridge v. Joslyn Clark Controls, Inc.</i> , 325 S.C. 532 (1997) 482 S.E.2d 577.....	5
<i>Etheredge v. Monsanto Co.</i> , 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).....	4
<i>Gibson v. Spartanburg Sch. Dist. No. 3</i> , 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000) ..	4
<i>Gray v. Club Group, Ltd.</i> , 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000)	4
<i>Hamilton v. Bob Bennett Ford</i> , 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999).....	4
<i>Lake v. Reeder Constr. Co.</i> , 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998).....	4
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	4
<i>Lyles v. Quantum Chem. Co. (Emery)</i> , 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)...	4
<i>Mauldin v. Dyna-Color/Jack Rabbit</i> , 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).....	22
<i>Rodney v. Michelin Tire Corp.</i> , 320 S.C. 515, 466 S.E.2d 357 (1996).....	5
<i>Scruggs v. Tuscarora Yarns, Inc.</i> , 294 S.C. 473, 62 S.E.2d 319 (1987)	19
<i>Shealy v. Aiken County</i> , 341 S.C. 448, 535 S.E.2d 438 (2000).....	22
<i>Smith v. Fulmer</i> , 198 S.C. 91, 15 S.E.2d 681 (1941).....	22
<i>Sola v. Sunny Slope Farms</i> , 244 S.C. 6, 135 S.E.2d 321 (1964).....	5
<i>Stephen v. Avins Constr. Co.</i> , 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).....	4
<i>Tims v. J.D. Kitts Construction</i> , Op. No. 4840, (SC: Crt. App., June 15, 2011).....	21
<i>Whitfield v. Daniel Constr. Co.</i> , 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954).....	21

Statutes

S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001)	4
S.C. Code Ann. § 42-1-160 (1985).....	5
S.C. Code Ann § 42-1-310	22
S.C. Code Ann § 42-9-25	20
S.C. Code Ann § 42 9 220	7
S.C. Code Ann § 42 9 230.....	6

STATEMENT OF ISSUES ON APPEAL

- I. **WHETHER THE COMMISSION ERRED IN NOT FINDING THAT RESPONDENTS ACTED IN BAD FAITH IN REFUSING TO PROVIDE MEDICAL ASSISTANCE TO CLAIMANT.**
- II. **WHETHER THE COMMISSION ERRED IN GIVING FULL CREDENCE TO DR. BALLENGER'S FINDINGS, TO THE EXCLUSION OF OTHER MEDICAL PROVIDERS.**
- III. **WHETHER THE COMMISSION ERRED IN NOT FINDING THAT CLAIMANT SUFFERED PERMANENT IMPAIRMENT TO HIS RIGHT UPPER EXTERMITY PRIOR TO HIS UNTIMELY DEATH.**
- IV. **WHETHER THE COMMISSION ERRED AS A MATTER OF FACT AND LAW IN DENYING APPELLANT'S CLAIM FOR DEATH BENEFITS.**
- V. **WHETHER THE CONCLUSION OF COMMISSION DEFIED PUBLIC POLICY BY ALLOWING THE EMPLOYER TO DENY BENEFITS IN BAD FAITH.**

STATEMENT OF FACTS

On January 24, 2012, while working as an ironworker for Respondent Spirit Construction Company (hereinafter referred as Respondent Employer), Decedent James Provins (hereinafter referred as Claimant) injured his right shoulder while moving sheets of steel decking. The company doctor saw Claimant twice, the second time, suggesting an MRI due to her belief that he suffered a torn rotator cuff.¹ Despite the fact that the company doctor prescribed the MRI, Respondent Employer denied it. Respondent Insurance Company denied the claim as well. An MRI performed at the direction of the company doctor, confirmed the torn rotator cuff. He was

¹ Dr. Stephen Gordin, MD. Interpreted an MRI on February 18, 2012, and indicated that Appellant Appellant's right shoulder had a fairly extensive supraspinatus tendon, likely involving the infraspinatus. He also noted that there appeared to be a tear involving the subscapularis tendon.

initially put on light duty, but since the employer did not have light duty, he was ultimately terminated by Respondent Employer.

Claimant filed for worker's compensation benefits before the Workers Compensation Commission (hereinafter referred as Commission), which Respondents vigorously contested. A hearing was held on August 14, 2012 presided over by Commissioner Gene McCaskill, to determine whether Claimant sustained a compensable injury. Commissioner McCaskill found on September 7, 2012 that the greater weight of the evidence supported that Claimant sustained a compensable injury to his right shoulder on January 24, 2012, awarded him causally related medical treatment, TTD benefits from the date of accident, and gave Respondents a four-week credit of TTD for the period of time Claimant worked for another employer in Kentucky. Respondents filed a Form 30, Request for Full Commission Review, which was served on Claimant on November 27, 2012.²

On May 15, 2013, Dr. Frank O. Bonnarens, MD diagnosed Claimant with rotator cuff tear, impingement of the AC joint, degenerative joint disease and a tear of the long head of the bicep. A surgery was performed on Claimant: a right shoulder rotator cuff repair, acromioplasty/Mumford procedure, debridement of the bicep stump and labral tears and insertion of bone graft. Following the surgery, Claimant underwent a series of therapy. Despite the surgery and two months of therapy, Claimant experienced continuous and worsening pain. He had limited range of motion and complained of not being able to raise his hand, nor to wipe his buttocks.

² Opinion and Award of Commissioner Gene McCaskill, South Carolina Workers' Compensation Commission, filed September 7, 2012.

A second MRI was done in October 2013 after two months of physical therapy, which revealed a large recurrent full thickness tear of the subspinatus tendon, a tear of the subspinatus border affecting the rotator cuff and labrum of the right shoulder. A subspinatus muscle degenerative changes and atrophy were noted. A second surgery was recommended. On December 30, 2013, counsel for the parties had a teleconference with Dr. Bonnarens, who concluded that the injury was related to the work-related-injury. Ironically, Claimant's counsel filed a Motion to compel surgery. As done previously, Respondents delayed the surgery by requiring medical releases to investigate the causation of a "subsequent/new/recurrent" rotator cuff tear. While waiting for Respondents' assistance, Claimant died on April 11, 2014. According to his death certificate, he died of acute respiratory failure, septic shock, pneumonia, renal failure and alcohol abuse. (R., p. 1021).

Prior to his death, Claimant had exhibited excessive depression and anxiety. An indication of the progression of his depression was his significant weight gain, from 193 pounds in 2012 to 242 pounds at the time of his surgery in May 2013. He also began to drink alcohol heavily. His wife and sister informed the hospital and doctors that Claimant had been in pain for a little more than two (2) years, and exhibited a pessimistic attitude, staying in his room the whole day, and distancing himself from family and friends, including his wife. He had hypersomnia, sleeping long hours. He became hopeless and overly dependent upon alcohol as an escape and self-medication. He had at some instance, expressed the desire to commit suicide and exhibited extreme depression. Without financial resources, he could not address his physical injuries nor his deteriorating psychological and emotional states. Claimant's death was a result of the bad faith denial of Respondents to provide efficient and timely medical assistance

provided by Workers' Compensation Act. The injury sustained by the Claimant, in his workplace and while performing a task for Respondents, was causally related to his death.

Appellant Debra Provins (hereinafter referred to as Appellant), filed a claim for death benefits, which was denied by the Commissioner Michael Campbell, II on March 6, 2017. On January 11, 2108, the Appellate Panel affirmed the denial of the single commissioner. Thus, this appeal followed.

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a Workers' Compensation decision. Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). In an appeal from the Commission, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact but may reverse where the decision is affected by an error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2001); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may reverse or modify Commission's decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law). This court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of

Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

ARGUMENTS

I.

THE COMMISSION ERRED IN NOT FINDING THAT RESPONDENTS ACTED IN BAD FAITH IN REFUSING TO PROVIDE MEDICAL ASSISTANCE TO CLAIMANT.

In a Worker's Compensation matter, for an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160 (1985). "Arising out of" refers to the origin of the cause of the injury. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." Id. at 518, 466 S.E.2d at 358. The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation. Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964).

A symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition.

Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532 (1997) 482 S.E.2d 577.

Appellant asserts that she met this burden when she proved that the Respondents did not provide immediate medical help necessary to lessen Claimant's period of disability when there was no alternative to the causation explained by him.

Under the Act, employers are mandated to provide medical treatment to an injured worker.

SECTION 42-15-60. (A) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. (emphasis added).

It was proven in the previous compensability hearing that, as soon as Claimant injured himself, he was brought to the company doctor. She diagnosed a potential rotator cuff tear. She ordered an MRI based on the explanation of the accident and the accompanying symptomology. Respondents refused to authorize MRI. Claimant was forced to litigate.

As a result of the protracted litigation and Respondents' continued bad faith refusal to approve an MRI and medical assistance, Claimant suffered irreparable damage to his right upper extremity.

To complicate matter, when Claimant was finally able to undergo surgery after the court ordered Respondents to provide benefits, the latter subjected him to a series of therapies that only worsened his condition. A second MRI was prescribed by Respondents' doctor for the Claimant due to the incessant and worsening pain in his injured shoulder. The results showed a re-tear of the rotator cuff, and that the injury had become graver. Despite their own surgeon admitting that the tear was related to the work injury, Respondents refused to authorize another surgery without medical releases. This delay eliminated the possibility of Claimant's prospective recovery, and eventually led to his death.

The Respondents also played with the payment schedule of the Claimant. He was forced to contact counsel on several occasions due to missing checks. Claimant went to his grave

knowing that they had shorted him. At the very least, Respondents changed the check date on a couple of occasions, causing great strife in his life due to his reduced income via workers' compensation. The law provides,

SECTION 42 9 220. Manner in which compensation paid. Compensation under this title shall be paid periodically, promptly and directly to the person entitled thereto, unless otherwise specifically provided.

SECTION 42 9 230. Date on which compensation payable under agreement becomes due. Installments paid weekly must be paid on the same day of the week, installments paid monthly must be paid on the same day of the month, and installments paid on some period other than weekly or monthly must be paid on the same day of each period.

The violations of these statutes went a long way into driving Claimant further and further into despair. Appellant believes that Respondents requiring him to re-prove causation each time he sought treatment for the very injury that the Commission had previously determined to be compensable was unjust and violates the duty to interpret the Act in favor of the injured employee.

II.

THE COMMISSION ERRED IN GIVING FULL CREDENCE TO DR. BALLENGER'S FINDINGS, TO THE EXCLUSION OF OTHER MEDICAL PROVIDERS.

The Commission's denial of Appellant's claim for death benefits hinged in great part on its reliance on Dr. Ballenger's interpretation of medical records. In its Decision and Order, dated January 11, 2018, the Full Commission opined:

13. We give greater weight to the expert report of Dr. James Ballenger, who has practiced clinical psychiatry and served as a forensic examiner for over 30 years. Dr.

Ballenger reviewed voluminous records and explained his opinions at his deposition. Dr. Ballenger's conclusions that Employee suffered from a progressively worsening alcoholism over the course of his adult life is consistent with the medical records, both prior to and subsequent to the work injury. We give greater weight to Dr. Ballenger's conclusion that the work injury had essentially no impact upon Employee's alcohol abuse and ultimate death.

(R., p. 11).

Appellant does not deny that Claimant had a meltdown in 2009 which concerned the use of Alcohol. This has been succinctly explained during the compensability hearing in 2012-2013. Apart from 2009, Claimant had never been found to have issues with alcohol until his injury in January 2012. When Claimant was presented to the company doctor at the time of the injury, no alcohol or substance abuse was found in his body. The human resource manager who took him to the company doctor admitted he did not sense alcohol use. He testified that he had to sign Claimant's name due to his great pain.

Dr. Ballenger's report and testimony was based entirely on his reading and interpretation of records that were taken out of context. He had no personal, nor professional knowledge, of the Claimant's alcohol intake between his 2009 meltdown until January 24, 2012 (hereinafter referred as the interim period), the day of the accident. In fact, he disregarded the absence of any alcohol issues over the course of three (3) years. There was no medical record nor finding that Claimant continued his drunken phase, until May 15, 2013, after his work injury when he started seeing Dr. Bonnarens. In much the same way that the Commission rationalized that Appellant and Ms. Zimmerman (Claimant's sister), did not have personal knowledge of how much Claimant drank when he was out of town, neither can Dr. Ballenger nor the Commission conclude that Claimant continued his alcohol dependence during the interim period. The only logical assumption that can be gathered from the records presented to the Commission were that:

(1) Claimant had alcohol abuse in 2009; and, (2) he drank heavily after he sustained his work injury. Anything beyond that is mere speculation.

Furthermore, Appellant takes issue on the fact that the Commission discounted the other physicians' findings. In the appealed Order, the Commission stated:

10. Dr. Price, as a PhD and licensed clinical psychologist, is not qualified to provide a medical opinion regarding a cause of death.

11. Dr. Martin's causation affidavit is not reliable, in that it acknowledges pre-injury alcohol abuses, but then relies on subjective history included in Dr. Price's report from Employee's attorney, Employee's widow, and his sister, in opining that his alcohol consumption worsened after the work injury. However, Dr. Martin did not review the body of medical records showing issues with alcohol abuse prior to the work injury. Furthermore, Dr. Martin's opinion cannot be reconciled with the hospital admission records in April of 2014, which outline a lifelong history of alcohol abuse.

12. Dr. Martin's affidavit is further discredited by his reliance upon the report of Dr. Price, which as, detailed herein, contains factual errors and inconsistencies regarding Employee's pre-injury alcohol dependency. Therefore, we give little weight to Dr. Martin's affidavit.

(R., p. 11).

Firstly, Dr. Price's career as a clinical psychologist initially focused on treating patients for wide variety of mental illnesses. He later on focused his practice on forensic consultation, and consults on issues including Traumatic Brain Injury, Posttraumatic Stress Disorder and death penalty. He is the President of the Forensic Network which specializes in the evaluation of psychological and neuropsychological injuries.³ By all intents and purposes, he is qualified to

³ www.forensicnetwork.com

provide a medical opinion regarding a cause of death. Contrary to the Commission's ruling, Dr. Price's opinion made mention of Appellant's pre-injury encounter with alcohol. (R., p. 442). Dr. Price talked about how the failure to address the injury in a timely manner led to great depression.

Secondly, the Commission discredited Dr. Martin's affidavit for its "reliance upon the report of Dr. Price." What it failed to appreciate was Dr. Martin reviewed the very same records which were presented to Dr. Ballenger, and which the Commission itself cited in its Order. Dr. Martin reviewed and considered materials and records from the following:: BaptistWorx Physical Therapy, various affidavits, transcripts of testimony of Luis Carrion, Death Certificate of James Provins, Records from Orthopaedic Associates of Kentuckiana, P.L.L.C, Baptist Hospital Records, Records from Amin's Family Practice, Neuropsychological Examination Report by David Price, M.D., Records from High Field & Open MRI, InMed, and RediCare, Records from KentuckyOne Health Hospital Admission, SCWCC Pre-hearing Brief, dated October 2015, and a brief synopsis of events by Donald Smith, Esq. What Dr. Martin had done is to review materials relating to Claimant, in much the same way as Dr. Ballenger. To sum up Dr. Martin's efforts as "reliance upon Dr. Price" is to question his integrity and efficiency.

Thirdly, in giving less credence to Dr. Martin's causation affidavit, the Commission stated that Dr. Martin did not review "the body of medical records showing issues with alcohol abuse prior to the work injury." (R., p. 11). It did not seem to mind Dr. Ballenger's failure to review the initial finding of the company doctor, who recommended the surgery. In his testimony, Dr. Ballenger stated as follows:

18. Q. *Right. But you read the records*
19 *and the initial treating doctor said that he needed an*

20 *MRI, right? You know that?*
 21 A. *I'm not sure of that. You mean the*
 22 *absolute first doctor he saw?*
 23 Q. *Yes, the work doctor he saw after the*
 24 *injury.*
 25 A. *I'm not sure about that."*

(R., p. 909. 18-25).

6. Q. *All right. So Dr. Linder is the doctor*
 7. *there, right?*
 8. A. *I'm not sure if he's a doctor.*
 9. Q. *Is she a PA?*
 10. A. *Yeah. She's a physician assistant.*
 11. Q. *All right. So you know what the*
 12. *finding was the next week? What did she say*
 13. *the next week?*
 14. A. *I don't remember.*
 15. Q. *If I told you that she recommended an*
 16. *MRI would that surprise you?*
 17. A. *It wouldn't surprise me. I just don't*
 18. *know whether that's right or not until I see it.*

(R., p. 914. 6-18).

Dr. Ballenger admitted as well that he had not read Dr. Jacobus' report, which talked about the permanent nature of Appellant's injury:

1. Q. *I'm showing you what I've marked as*
 2. *Plaintiff's Exhibit 6. It's the findings of*
 3. *Dr. Jacobus.*
 4. *Dr. Jacobus found that essentially*
 5. *since he had torn his shoulder or the rotator cuff*
 6. *once, had surgery and restore it, that he would have*
 7. *a permanent impairment. Does that sound*
 8. *reasonable?*
 9. A. *It certainly is possible and*
 10. *reasonable, yes. I have not read this report.*
 11. Q. *Do you know if there's anything in the*

12. *report talking about his coming in and smelling*
13. *like alcohol or anything of that sort?*
14. A. *Like I said, I haven't read it to*
15. *know---*
16. Mr. Killen. *Objection.*
17. A. *Whether there is or*
18. *not.*

(R., p. 934. 1-18)

In his testimony, Dr. Ballenger cited reports pertaining to Claimant's alcohol use in 2009 and 2013. His testimony did not differ from the testimonies of Appellant and Ms. Zimmerman's, which the Commission found "not reliable". (R. 11). The only variation was that both Appellant and Ms. Zimmerman testified as to their personal observation of the frequency of alcohol use. And yet, the Commission disregarded their eye witness testimonies for being merely "subjective history". (R. 11). It should be noted, however, that in establishing Claimant's alleged long history of alcoholism, the Commission considered Appellant's testimony. In its Decision and Order, it stated:

7. *Prior to the work injury of January 24, 2012, Employee suffered from a significant alcohol abuse problem. This finding is based upon the medical records which illustrate Employee was a long-suffering alcoholic, and drank excessively, to include beer and liquor, for the majority of his life. These records included history provided by Employee, as well as family members, such as the following:*
- a. *Ms. Provins, Claimant's widow, provided such a history at the time of his hospitalization/death in April 2014. "According to his wife, a long history of alcoholism..." (see APA #18, p. 374)*
 - b. xxx
 - c. *On July 7, 2009, Employee's sister, Ms. Zimmerman, called the police and Employee*

was transported to University of Louisville Hospital with chief complaint of "I'm drinking myself to death". He further reported that "I can't sleep at all unless I get drunk." It was reported that Employee was a longstanding alcoholic, who consumed 16-18 beer per day and a half pint to a pint of liquor per day. (See APA #11, pp. 121-126)"

(R., p. 9-10).

The Commission further noted in its Decision,

- e. *In none of the post-accident medical reports does it indicate that Employee's drinking habits changed or increased after his work injury or shoulder surgery, which is indicative of someone who simply has been a longstanding user of alcohol, notwithstanding the injury. xxx*

(R., p. 10).

Appellant finds this finding/conclusion problematic in that it assumes, despite absence of objective evidence, that Claimant continued to consume alcohol in excess, from his meltdown in 2009 to his injury in 2012. Again, Appellant reiterates that the only logical and objective conclusion that can be gathered from the medical records and testimonies of all witnesses in this case, is that the Claimant had an alcohol issue in 2009, and in 2012, following his injury.

Furthermore, Appellant avers that Dr. Ballenger's opinion was biased from the very beginning. He was retained for the sole purpose of establishing Appellant's alcoholism, and not to get to the bottom of Appellant's demise. His testimony was telling:

22. Q. *What did you learn prior to*
23. *your investigation or your report and so forth?*

24. *What all were you told?*
25. Mr. Killen. *Objection. By whom?*

1. THE WITNESS: *I was told—*
2. BY MR. SMITH:
3. Q. *By defense counsel.*
4. A. *I was told that they would like me to*
5. *read the records and to make sure I didn't have any*
6. *conflicts and they sent me the records.*
7. *They described that it was a workers'*
8. *comp. case and they wanted my opinion as an expert*
9. *in alcoholism to develop opinions about whether he*
10. *did or did not have alcoholism and develop opinions*
11. *that would be pertinent to this case and then*
12. *they would send me the records.*

(R., p. 925. 22-25 & R., p. 926. 1-12)

It was clear from his entire testimony, that he had set his mind on Claimant's death as a result of his alcohol intake. This is all the more highlighted on his testimony of Claimant's history of syncope. Despite records showing that Claimant's family members had syncope, Dr. Ballenger insisted that Claimant's fainting spells were brought by his alcohol abuse.

9. BY MR. SMITH:
10. Q. *If you go back to it, they're*
11. *chronologically--- there's a set for everybody. I*
12. *guess what we'll do is go back to the 2001, right?*
13. A. *Yes, and I'm sure you've read my*
14. *report. That's where I—sorry. On 7/30/01*
15. *the doctor's note says: The patient comes in*
16. *saying he's passed out five times, drinks a fair*
17. *amount of beer. This does not usually occur*
18. *When he drinks heavier.*
19. *People tell them him that his eyes roll back*
20. *and he's out for one two minutes, but he*
21. *doesn't recall what happens. He has a family*
22. *history of sugar—or diabetes—and his*
23. *assessment is that he's having syncope episodes,*
24. *possibly two seizures. He refers to a neurologist.*
25. Q. *Now is that alcohol related?*

1. A. *Almost certainly.*
2. Q. *He just passes out and then comes back*
3. *seconds later?*
4. A. *No. One to two minutes later.*
5. *Alcoholics pass out almost every day.*
6. *They're called blackouts or passing out. That's going to*
7. *sleep.*
8. *Now, his first line says that he comes*
9. *in saying he's passed out five times, drinks*
10. *a fair amount of beer in these two sentences.*
11. *So reading it even then, much less*
12. *knowing what I know later—even reading this it*
13. *makes me extremely suspicious that the passing out*
14. *spells are alcohol related because he doesn't have*
15. *any-again, he doesn't have any subsequent issues*
16. *with seizures or neurological things anywhere in*
17. *the record anyway.*
18. Q. *Is it anywhere in the record?*
19. A. *If you have seizures it almost always*
20. *ends up in an emergency room visit and so forth."*

(R., p. 898. 9-25 & R., p. 899. 1-20)

And yet when presented with a record that showed that Claimant had other incidents of syncope, Dr. Ballenger states:

21. Q. *Can you tell me what this note here is?*
22. *Is this in the doctor's record as well where—*
23. MR. KILLEN. *What is that? What date?*
24. BY MR. SMITH.
25. Q. *September 30, 2001. At the bottom what*
1. *does that say?*
2. A. *This is the one we're just talking—*
3. *just reading was 7/30/01. This is the handwritten*
4. *note and the same thing. He actually adds more*
5. *information and he says: He coughed so hard he*
6. *gets dizzy and passes out. His eyes roll back*
7. *in his head. He drinks mostly beer and hard liquor at*
8. *times.*
9. Q. *So the cough—*
10. A. *Oh, here's where I got the three*
11. *blackouts. He had three blackouts. He calls them*
12. *blackouts. That's an alcoholic blackout. We use*

13. *the word blackout to mean what happens to*
14. *alcoholics.*
15. *Now, he could have called it passing*
16. *out. He could have used other words, but he chose*
17. *to use blackout which tells me that he thinks*
18. *they're alcoholic.*
19. *Q. Between those bottom lines there what*
20. *does that say?*
21. *A. Three spells. Drinks beer. States*
22. *that his eyes roll back in his head. Refer to*
23. *—at the bottom it says he diagnosed syncope episode,*
24. *possible seizure disorder.*
25. *Q. It doesn't say anything about alcohol,*
1 *does it?*
2 *A. No. I mean, in the other note it*
3 *says syncope episodes, rule out seizures. Now*
4 *this is what doctors do even though in my*
5 *reading—again, I'm an addiction doctor. When*
6 *I read "passing out three to five times" and "stays*
7 *down for a minute or two" and then I use the word*
8 *"blackout spells" it's most likely alcohol related..."*

(R., p. 899. 21-25, & R., p. 900-901).

It is apparent from the above-mentioned testimony of Dr. Ballenger that his mind was set on proving that everything that happened to Claimant was a result of his alcohol use. Even when he was presented with the fact that the Claimant had a family history of syncope (his father and sister were diagnosed to have syncope). Dr. Ballenger interpreted (more like substituted his opinion) what the doctor, who personally saw and diagnosed the Claimant, stated. He went so far as to testify as to something that is non-existent (saying that “the other note it says syncope, rule out seizures”, where there is nothing in the note, which he read out loud, that ruled out seizures).

Dr. Ballenger was asked how much he was paid for his testimony.

3. Q. *How much do you get paid for your*
4. *services?*
5. A. *I'm paid \$680 an hour in this case and*
6. *in other cases.*
7. Q. *So how much does it add up to?*
8. A. *Actually, I don't know. I don't think*
9. *I've been paid except your retainer.*

(R., p. 903. 3-9)

A subpoena response from defense counsel elicited that he was paid five thousand dollars (\$5000.00) as retainer's fee, over and above the expert's fee. (R., p. 1007). Furthermore, the following statement by Dr. Ballenger underscored how absurdly biased he was:

19. Q. *Yes sir. The denial of medical care*
20. *for his injury for 15 months, do you think that had*
21. *any effect on Mr. Provins' condition?*
22. MR. KILLEN: *Object to the form of the*
23. *question. Which condition?*
24. MR. SMITH: *His physical health.*
25. THE WITNESS: *It is possible—it's*

1. *speculation—that earlier surgery could have*
2. *reduced his shoulder pain.*
3. *I do not think it had any impact on his*
4. *eventual outcome. If his shoulder had been*
5. *repaired, say, two or three months later I think*
6. *he would have continued to drink just like he had*
7. *every day since he was 16 years old and he would*
8. *have died on the same day he did die.*
9. BY MR. SMITH
10. Q. *Are you saying to a reasonable degree*
11. *of medical certainty that he would have died on*
12. *that day had he not had a torn rotator cuff for 15*
13. *months and atrophy? Is that what you're saying?*
14. A. *More or less. I'm not God. I can't*
15. *predict the date, but there's nothing that a*
16. *shoulder injury would have to do with causing*
17. *death.*

(R., p. 959. 19-25 & R., p. 960. 1-17)

In sum, Appellant contends that the Commission erred in its reliance on Dr. Ballenger's testimony and/or report, to the inclusion of the other witnesses (and evidence) in this case. Dr. Ballenger's opinion was biased and based on incomplete records.

III.

THE COMMISSION ERRED IN NOT FINDING THAT CLAIMANT SUFFERED PERMANENT IMPAIRMENT TO HIS RIGHT UPPER EXTERMITY PRIOR TO HIS UNTIMELY DEATH.

Appellant believes that the Commission erred in not considering the findings of Dr. Dwight Jacobus, M.D. who found that Claimant would have a permanent disability regardless of whether he had a second surgery because of the overwhelming damage done due to the delay in proving treatment.

"This is to confirm my opinion that the above-captioned patient, who is now Appellant, would have a 10% to 13% disability rating utilizing the shoulder regional grid border of the upper extremity on Table 15-5, page 403, of The Guides and Evaluation of Permanent Impairment, Sixth Edition. It should be noted that it is also my opinion that whether the patient was not Appellant and was able to have a second surgery, he would still have a disability percentage of at least 10% to 13% in regard to the findings of pre-operatively, surgically, and post-operatively. It is my opinion that a second surgery would not relate to a diminished percentage of disability because of the pathology that was present at the time the first surgery was completed."

(R., p. 438).

This statement does not even take into account the medicinal therapy that he would have engaged so as to reduce the pain related from his injury. It is however, the substantial evidence necessary for the Commission to find that the damage had already been done to the Claimant.

Essentially, Dr. Jacobus said that any future treatment would do no more than provide for pain relief. He would not lessen his degree of permanent disability.

In *Scruggs v. Tuscarora Yarns, Inc.*, the claimant was awarded permanent disability when she had not been released by the treating physician. She was still receiving physical therapy. While the claimant believed that her physical therapy would help her get better, her physician did not. Defendants argued that since she was still receiving treatment and, therefore, she was not at MMI. The Court found that, "She may receive physical therapy for the rest of her life, but may never attain a greater medical improvement." *Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 473, 62 S.E.2d 319 (1987). The damage done to Claimant's shoulder was substantial. The atrophy in his shoulder would not allow the surgery that was done to be effective. He could only have hoped to maintain.

IV.

THE COMMISSION ERRED IN DENYING APPELLANT'S CLAIM FOR DEATH BENEFITS.

Respondents' contention was that Claimant's work injury did not result in his death, mainly because of his pre-existing alcohol issue prior to the work injury. The Full Commission agreed with their position. What the Commission failed to appreciate was that Claimant's "pre-existing alcohol condition" occurred in 2009, when he experienced a series of unfortunate events: his father died, and his wife kicked him out of the family home. At the lowest point in his life, he turned to alcohol for solace. Shortly after, he had turned his life around, went to church, got back together with his wife, and returned to his normal affable self.

In the duration of his employment with Respondent Employer, Claimant never had any issue with alcoholism. There had been no reports, complaints or any insinuation of this alleged

alcoholism that caught the attention of Respondent Employer. The issue of Claimant's alleged alcoholism only surfaced when he filed for his benefits under the workmen's compensation in 2012. Notable is Commissioner McCaskill's findings on the issue:

"6. While the Defendants sought to impugn the Claimant's character with assertions of a drinking problem, that characterization of the Claimant is more than rebutted by testimony from another defense witness, Tony Azuenis, who describes the Claimant's work ethic as exceptional. The Claimant has never filed a Worker's Compensation claim prior to the accident. Moreover, the Claimant testifies that there were no drugs or alcohol in his system on the day of the accident. This claim was not rebutted, and his post-accident drug test was negative on all accounts."

(R., p. 55).

Thus, the issue of alcoholism or drunkenness does not negate the fact that Claimant had a work-related injury, and it is compensable.

Assuming arguendo that issue of alcoholism is relevant, pre-injury alcoholism did not impair Claimant while he was working at Respondent Employer at the time of the incident. Respondents did not mention nor raise the issue of Claimant's alcohol use, until the latter's death. His injury occurred due to a job task and, intoxication was not a factor. Alcohol did not play a role in his accident.

Assuming that Respondents' arguments hold true, just because Appellant had a pre-existing condition (alcoholism) does not mean that he cannot get worker's compensation benefits if another work-related injury aggravated that condition.

Under South Carolina Code Ann. §42-9-25-

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

*(1) The subsequent injury aggravated the preexisting condition or permanent physical impairment; or
(2) The preexisting condition or the permanent physical impairment aggravates the subsequent injury.*

In this scenario, Claimant would still be entitled to workers' compensation despite having a preexisting condition when the injury he sustained at work aggravated his preexisting condition, which led to his demise.

It is well established that every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation. Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954); see also 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 10.01, 10-1 (2010) (stating that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the claimant's own intentional conduct) cited in Tims v. J.D. Kitts Construction, Op. No. 4840, (SC: Crt. App., June 15, 2011).

Appellant contends that Claimant's alcohol use was not the proximate cause of his death, but rather the delay in the medical assistance and granting of benefits. And, assuming that Respondents theory holds true, Appellant contends that alcoholism cannot be considered an intervening cause, because it is not a supervening cause that is responsible for the injury. Furthermore, it contradicts Dr. Ballenger's expert opinion that Claimant's death is attributable to his own intentional conduct. Alcoholism, which has long been recognized as an illness, is characterized by, among others, the uncontrollable cravings and loss or decreased control of

behavior.⁴ If Claimant is indeed an alcoholic, as Respondent insisted, then he did not have full knowledge of the probable consequences of his action.

Records reflect that subsequent to Claimant's work injury, he suffered physical pain and suffering, coupled with loss of income and ability to use his right arm, led to extreme depression and anxiety. Claimant was unable to see a psychiatrist for his mental state since he had no financial resources, because he was denied his benefits under the Act. While his death, may have been facilitated by his use of alcohol as self-medication, his work injury and Respondents' continued refusal to provide the necessary and timely medical assistance, triggered and/or aggravated his state of decline. There is sufficient evidence that shows the causal relationship between Claimant's injury and his eventual death. But for the work-related injury, there would have been no continuous decline in the man's physical and emotional health for over two (2) years.

V.

THE COMMISSION'S DECISION CONTRADICTED PUBLIC POLICY BY FOSTERING AND FACILITATING BAD FAITH DENIAL OF BENEFITS.

§ 42-1-310 of the S.C. Code Ann, workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment. The primary purpose of this Act is for the protection of workers. Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941). As such, it should be liberally construed toward the end of providing coverage rather than denying the coverage, to accomplish the ends and purpose for which it was enacted. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438

⁴ Kathy Bettinardi-Angres, MS, RN, APN, CADC, and Daniel H. Angres, MD, Understanding the Disease of Addiction, Vol. 1, Issue 2, appearing in https://www.ncsbn.org/Understanding_the_Disease_of_Addiction.pdf. Last accessed on June 4, 2018.

(2000). Any doubt as to its construction should be resolved in favor of compensability. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).

Employer shall provide benefits. It is indisputable that Claimant's injured his shoulder while moving sheets of steel decking. Company doctor diagnosed torn rotator cuff, which was corroborated by the MRI, which had been denied in bad faith by Respondent Employer. Respondents also appealed the decision of Commissioner McCaskill, who found for the Claimant and said he was credible. Respondents continued to delay Claimant's benefits, until he lost hope of ever recovering. The original work-related injury is regarded as the proximate cause of Claimant's death. Any reasonable person would conclude that Claimant's death was caused by Respondents denial of immediate treatment/benefits for his injury. Appellant calls for this Honorable Court to put a stop to Employer's mantra: "Deny, deny, deny maybe he'll die!"

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that the Commission's Decision and Order, filed January 11, 2018, denying Appellant's death benefits claim be reversed, and to remand the issue for the Commission to make specific findings of fact as to entitlement to recover for Claimant's death.

Anderson, South Carolina
September 28, 2018

Respectfully submitted by:



Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION

Full Commission

WCC File No. 1200349
Appellate Case No. 2018-000133

RECEIVED
OCT 01 2018
SC Court of Appeals

James Provins, Employee/Deceased,
Debra Provins, Alleged Dependents/Claimants,

Appellants,

v.

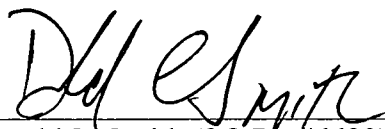
Spirit Construction services, Inc., Employer,
And Insurance Company of the State of PA, Carrier,

Respondents.

**CERTIFICATE OF COUNSEL
FOR FINAL BRIEF OF APPELLANTS**

I HEREBY CERTIFY that Appellants' Final Brief in the above-captioned case complies
with Rule 211 (b) SCACR.

September 28, 2018


Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants