

FINAL REPLY 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. 2018-000133

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

Appellants,

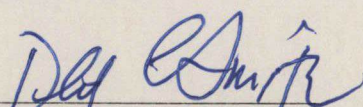
v.

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

Respondents.

FINAL REPLY 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

RECEIVED
OCT 01 2018
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Arguments	
I. THE COMMISSION ERRED IN NOT FINDING THAT RESPONDENTS ACTED IN BAD FAITH IN REFUSING AND DELAYING THE PROVISION OF MEDICAL ASSISTANCE TO DECEASED APPELLANT	2
II. THE COMMISSION ERRED IN AFFORDING GREATER WEIGHT TO DR. BALLENGER’S FINDINGS	4
III. THE COMMISSION ERRED IN FINDING THAT THERE IS SUBSTANTIAL EVIDENCE THAT APPELLANTS FAILED TO MEET THE BURDEN OF PROVING A COMPENSABLE DEATH	5
IV. THE COMMISSION ERRED IN NOT ADDRESSING APPELLANT’S PERMANENT DISABILITY	6
V. THE COMMISSION’S DECISION CONTRADICTED THE PUBLIC POLICY BEHIND WORKERS’ COMPENSATION ACT.....	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Adamczyk v. Baltimore County, No. 97-1240, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998)	6
Capers v. Flautt, 407 S.E.2d 248 (1991)	8
Cook v. Mack’s Transfer & Storage, 291 S.C. 84, 352 S. E.2d 296 (Ct. App. 1986).....	2
Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992)	7
Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941)	7

Statutes

S.C. Code §42-15-70	3
---------------------------	---

Publications/ Journals:

Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996)	6
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	6

STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to Appellant's claims for death benefits for an injury sustained in the workplace.

On January 24, 2012, while working as ironworker for Respondent Spirit Construction Company (hereinafter referred to as Respondent Employer), James Provins (hereinafter referred to as Claimant) injured his right shoulder while moving sheets of steel decking. Respondents denied Claimant's request for MRI, despite the company doctor's prescription. Claimant filed for worker's compensation benefits before the Workers Compensation Commission, (hereinafter referred to as Commission), which Respondents vigorously contested. Commissioner Gene McCaskill found the claim compensable. Respondents appealed the Commissioner's decision, which was affirmed by the Full Commission.

Due to the protracted litigation, Claimant underwent surgery more than one year after his injury. He had surgery for his rotator cuff repair, acromioplasty/ Mumford procedure, debridement of the biceps stump and labral tears and insertion of bone graft. Following the surgery, Claimant underwent a series of therapy. The surgery and therapies did not alleviate Claimant's condition. A second MRI was performed in October 2013, which revealed a large recurrent full thickness tear of subspinatus tendon, a tear of the subspinatus border affecting the rotator cuff and labrum of the right shoulder. A second surgery was recommended. Claimant's counsel filed a Motion to Compel surgery, which was delayed by Respondents' insistence on medical releases. Respondents wanted to investigate the cause for the "subsequent/recurrent" rotator cuff tear. While waiting for assistance from the Respondents, 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.

Appellant thereafter filed a Form 50 seeking permanent and total disability as well as Form 52 for death benefits under the Workers Compensation Act. A hearing was held before Commissioner Michael Campbell, II, who denied Appellants' claims. The Full Commission affirmed the Commissioner's denial, thus this Appeal.

ARGUMENTS

I.

THE COMMISSION ERRED IN NOT FINDING THAT RESPONDENTS ACTED IN BAD FAITH IN REFUSING AND DELAYING THE PROVISION OF MEDICAL ASSISTANCE TO CLAIMANT.

Respondents, in citing the case of Cook v. Mack's Transfer & Storage,¹ is misleading because the instant case was not brought as a separate tort action against Respondents. Kenneth Cook, plaintiff-appellant in the above-mentioned case, commenced his action against therein defendant-respondent Company in the circuit court. The present action was brought under the South Carolina Workers' Compensation Commission.

The intent behind the workers compensation system is to provide injured workers quick and efficient medical attention, care and benefits to which they are entitled. This system was founded on honesty and trustworthiness of all parties—employers, employees and insurance companies- involved. So, when a party reneges on its obligation to the other, then bad faith arises.

¹ Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986)

Appellant asserts that bad faith attended Respondents denial of Claimant's initial claim for workers benefits considering that their own doctor (medical practitioner) made the diagnosis and recommendation for Claimant's MRI. Respondents continued to refuse the medical assistance despite the uncontroverted evidence of work-related injury and Commissioner McCaskill's ruling in favor of Claimant. Their actions forced Claimant to wait for almost a year before his injury was addressed.

Appellant further asserts that Respondents were in bad faith when they delayed Claimant's request for second surgery. Contrary to their assertions, Respondents' counsel admitted that they were made aware by Dr. Bonnarens that the need for second surgery was related to Claimant's work injury. (R., p. 860). Despite this knowledge, Respondents' insisted on medical releases, further delaying Claimant's medical care.

There was no hint of an intervening cause. There was no evidence of any other providers. The Respondents were simply taking a shot in the dark in the hopes of finding something. This was a red herring when the treating physician said it was related to the work injury. This was the final act of bad faith that led to the demise of Mr. Provins.

It should be noted that the company-authorized health care provider required Claimant to undergo extensive therapies right after surgery was performed upon him. It does not take a vivid imagination to conclude that Claimant's injury was aggravated by the therapies and treatment conducted upon him. Under South Carolina Code §42-15-70, the consequences of any malpractice by a physician furnished by the employer are deemed part of the injury resulting from the accident and the employer is liable for full compensation. Appellant believes that in ignoring the Commission's original Order, Respondents unreasonably continued to deny and

delay Claimant's treatment, which led to his eventual demise. Bad faith attends Respondents' non-compliance with the Commission's Order.

Appellant also avers that the allegation of intermittent delay in payment of Claimant's disability benefits was not a separate cause of action nor claim. Appellant brought this to the Commission's attention to highlight Respondents' bad faith in the management of Claimant's claims for benefits.

II.

THE COMMISSION ERRED IN AFFORDING GREATER WEIGHT TO DR. BALLENGER'S FINDINGS.

Appellant submits that while in general, it is not within a reviewing court's province to reverse findings of the Appellate Panel of the Workers' Compensation Commission, it may do so if the findings are not supported by substantial evidence. Appellant contends that the Commission erred when it applied different standards with regards to testimonies and evidence presented before it. On the one hand, it discounted the Dr. Martin's causation affidavit for factoring in the statements of Appellant and Zimmerman in his report. The Commission disregarded their testimonies for being merely "subjective history", but cited the exact same testimony to establish Appellant's alleged "significant alcohol abuse". (R., p. 9-12).

The Commission also relied heavily on Dr. Ballenger's testimony and report, despite the fact that Ballenger had not reviewed Appellant's entire records. He did not know that Claimant was diagnosed with (and had a family history of) syncope nor of the fact that the company doctor diagnosed him with a torn rotator cuff. Dr. Ballenger implied that Appellant would have died on the same day he did, regardless of his work injury. (R., p. 959. 19-25 & R., p. 956. 2-9). The Commission gave weight to Dr. Ballenger, who was retained to prove that Claimant's death was

due to alcohol abuse, rather than Dr. Martin's objective assessment of Claimant's medical records.

III.

THE COMMISSION ERRED IN FINDING THAT THERE IS SUBSTANTIAL EVIDENCE THAT APPELLANT FAILED TO MEET THE BURDEN OF PROVING A COMPENSABLE DEATH.

Appellant maintains that deceased's death was a consequence of Respondents' delay in provision of medical assistance and grant of benefits to the Appellant. Claimant's physical condition deteriorated when he was made to wait for a year before the necessary medical procedure was provided him. His mental and emotional state spiraled down, with him showing signs of increased depression. People who interacted, seen or were close to him testified having observed the following changes on Claimant: (1) abrupt physical change in weight from 192.5 at the time of the injury to 242.5 lbs. at the time of the surgery; (2) change in disposition from a happy, friendly individual to a moody, irascible recluse who avoided even the company of his loved ones; and, (3) from an active man to one who can barely clean himself.

Appellant does not deny that Claimant was unable to consult a psychologist nor a psychiatrist for his depression. He was financially constrained. From making roughly \$1,100 per week at the time of the accident, he found himself without a job. From being a sole breadwinner, he was unable to support his family. He lost hope of ever recovering. Anyone in his condition would have suffered extreme depression, documented or not.

Respondents argue that Claimant's alleged alcoholism is an intentional act that negates his rights to death benefits. Appellant contends otherwise. Appellant maintains that the only logical and objective conclusion that can be gathered from the evidence presented in this case (medical

records and physician reports), is that Claimant resorted to alcohol in 2009 and 2012, two of the most challenging period of his life.

Laws (such as American Disabilities Act) and literature² have long considered alcoholism (and substance abuse) as a form of mental impairment, an uncontrollable cravings and loss or decreased control of behavior. If Claimant was an alcoholic, as Respondents insisted, then he did not have full control of his faculties, removing his actions from the realm of intentional acts. 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. 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 aggravated his state of decline. Appellant has presented sufficient evidence that shows 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.

IV. THE COMMISSION ERRED IN NOT ADDRESSING CLAIMANT'S PERMANENT DISABILITY

Claimant did not abandon his claim for permanent damage to his shoulder. Respondents mistakenly believed that Claimant had given up on his claim for permanent disability. This very

² Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996) ("it is well-established that alcoholism meets the definition of a disability"); Adamczyk v. Baltimore County, No. 97-1240, 1998 U.S. App. LEXIS 1331 (4th Cir. 1998) (alcoholism is covered under the Rehabilitation Act); 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.

issue was raised by Appellant in her Reply Brief which he submitted to Commission on August 21, 2017.

Claimant injured his shoulder while assisting his co-worker with hauling a long piece of iron which snapped out of his hand, yanking his arm down suddenly. Dr. Jacobus did not in any way opine that Claimant had reached MMI at the time of death. He stated that due to symptoms of the tearing, the autopsy caused in the treatment; and, second significant tear to the shoulder; his shoulder would never get any better than 10 to 13% permanent impairment. It should be noted that Dr. Jacobus did have two significant MRIs of the shoulder from when he made the observations.

V.

THE COMMISSION'S DECISION CONTRADICTED THE PUBLIC POLICY BEHIND WORKERS' COMPENSATION ACT.

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). Any doubt as to its construction should be liberally construed in favor of compensability. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992). In this case however, the Commission chose to give greater weight to Dr. Ballenger's opinion, rather than the other witnesses' more thorough account of what transpired during the last days of Claimant.

For the workers compensation system to function at its best, it requires honesty and trustworthiness of all participants. Respondents consistently failed to do so. They denied his initial claim, despite their very own doctor's recommendation and diagnosis. They continued to delay benefits, despite Commissioner McCaskill's ruling. And they refused to grant another surgery, despite Dr. Bonnarens' recommendation and the Commission's Order. Respondents'

continued disregard for their legal obligations and callous indifference to the consequences of their delays clearly showed their bad faith.

It should be noted that Respondents' insisted on having raised the Capers³ defense. In that case, Capers, who worked as a dishwasher at Holiday Inn sought benefits for contact claiming that his hands were affected by exposure to detergent and water. The single commissioner denied benefits and the Full Commission affirmed. On appeal by Capers, the circuit court affirmed the Full Commission.

The Capers doctrine does not apply to this case because Capers deliberately withheld an information when filling his application. He complained of an injury (contact dermatitis) which was already a pre-existing condition. He knew of the risk of contracting an injury because of the nature of his job. Furthermore, Capers did not divulge of his pre-existing condition to his employer. In that case, Capers came to court with "unclean hands" and expected to be compensated.

In the present case, Claimant's alleged alcoholism did not figure in his employment. There was no known incident of Claimant drinking on the job, nor was he the subject of any complaint for alleged alcoholism. The issue came up only when he got injured and claimed his benefits. And even assuming that Respondents' claim of alcoholism was considered, no evidence was shown that Claimant had taken alcohol at the time of his injury. Claimant did not injure nor die because of alcoholism. He died because the necessary medical treatment and assistance had been denied him, and he spiraled down when he lost all hope of ever recovering. Claimant was not in bad faith, unlike Capers, and herein Respondents.

³ Capers v. Flautt, 407 S.E.2d 248 (1991).

CONCLUSION

For these reasons, as well as those addressed in his Initial Brief, Appellant respectfully requests that the Commission's Order be reversed.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "D L Smith", written over a horizontal line.

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

Anderson, South Carolina
September 28, 2018

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 REPLY BRIEF OF APPELLANT

I HEREBY CERTIFY that Appellant's Final Reply 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