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SC Court of Appeals

APPELLANTS' PETITION FOR REHEARING

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.

PETITION FOR REHEARING

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i) Appellant Debra Provins respectfully petitions this Court for a Rehearing of Opinion 5790, filed January 13, 2021. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

SUMMARY OF ARGUMENTS

This Honorable Court affirmed the conclusions of the Full Commission of the South Carolina Workers' Compensation Commission. The Panel disagreed with Claimant's contention the bad faith denial and subsequent delay of medical care ultimately was a significant factor in the demise of decedent. The Court concluded the weight of the medical evidence provided by Respondent's expert witness was sufficient to overcome the findings of the treating physicians

and the experts provided by Appellants. The finding of the Panel was since the single commissioner found Decedent had not reached MMI, an award related to impairment was premature. The Court also found the argument of public policy to be unavailing and did not rule on it since the Full Commission had made the conclusory statement. "There was no bad faith denial of medical treatment or unreasonable delay by [Employer]." Appellants pray for a rehearing so that misapprehension may give way to the recognition the findings below constituted error.

The Decedent in this case was originally injured on January 24, 2012. He injured his dominant right shoulder when his co-worker dropped his end of corrugated steel they were carrying. He was immediately taken for a drug test by the human resources' man who indicated he had to sign documentation for him due to his inability to write with his right hand. The treating Physician's Assistant (P.A.) stated he had strained his shoulder and to return in one week.

Decedent returned in one week offering his pain and physical limitations had gotten worse since the last visit. Based on his inability to lift his arm over his head, the P.A. deduced it was a rotator cuff injury and prescribed an MRI. Defendants refused to honor the medical advice of their chosen doctor. The only claim made by Defendants was the shoulder had been sore previously.

Decedent had the MRI ordered by Respondents' P.A performed on February 18, 2012. The MRI report illustrated tearing in the shoulder as suggested by the P.A. However, Respondents refused to follow the diagnosis of their doctor and the subsequent radiological proof of her astute observations. The legal odyssey that has continued for nearly nine (9) years began in earnest. Unfortunately, the injured employee survived only to April 14, 2014.

The light duty ordered by the P.A. ended by the beginning of March. The iron worker, who was the sole worker in his home, had an average weekly wage of $1153.37 per week. His weekly income at that point was $0.00. He returned to Louisville and attempted employment but was unable to maintain any work, given the injury to his dominant arm and the laborious nature of his occupation.

The bad faith had already been illustrated by the baseless denial of medical care, let alone the denial of the benefits for which he was entitled. Decedent won his initial hearing on September 7, 2012, wherein the sitting Commissioner found him "very credible". Respondents did not honor the findings of the Commissioner and filed a baseless appeal.

They filed the appeal despite the fact there was no evidence indicating the claim was not valid. In fact, Respondents had a Hispanic employee who struggled with the English language offer some statement which opposed Decedent's description of the accident. Of course, he offered his version of the events of that day following counsel's inquiry of whether Decedent worked hard. (R. 757, 2.4). Another gentleman who was Decedent's roommate stated he had previously seen him guarding his right arm, though he did not know where or when. He also offered information about Decedent's drinking though he could not offer whether he drank on the day of the injury. In a moment of clarity, he spoke highly of Decedent's work ethic. (R. 767, 12.18). The Human Resource Officer said he had a great work ethic; and he passed the drug test administered by the P.A. (R. 750, 2.4).

The Full Commission fully confirmed the decision of the Single Commissioner. Respondents once again refused to honor the decision of the fact-finding body. This Court found Decedent had begun to receive treatment after the September decision by the Single Commissioner. In fact, Respondents waited near the entire thirty (30) days following their loss

in front of the Full Commissioner, before finally accepting the claim. By this time, the TTD benefits he had been denied totaled nearly $42,000.00. He had begged everyone he knew for monies to survive. More importantly, his shoulder had the opportunity to deteriorate fifteen (15) months prior to surgery.

The treating surgeon found a massive tear on May 15, 2013 in Decedent's shoulder after the length delay in treatment. The tearing and "atrophying" which took place during that time had left his shoulder in a precarious position. This position was realized by Decedent by June 7, 2013, when he told his physical therapist he hurt worse than prior to the surgery. The Respondents' choices for care had Decedent complete a physical therapy regiment which lasted until August 23, 2013, when they determined he may have retorn the shoulder. An MRI completed on October 2, 2013 described a shoulder in terms similar to the initially MRI Report from over 1.5 years prior. He would never get treatment for the irreparably harmed shoulder again.

There can be no better example of bad faith. Employees and Employers have both given away certain rights they may have if their cases could be taken to Circuit Court. Unfortunately, the employees have no rights whatsoever. Decedent lost his life because of the bad faith of Respondents. The Full Commission affirmed the Single Commissioner who opined, Decedent "was still being treated by Dr. Bonnarens at the time of his death". This statement was patently absurd. He had not "treated" with the surgeon since the surgery and arguably the physical therapy which concluded on August 23, 2013. Appellants were forced to file a Motion to Compel treatment because in fact Dr Bonnarens had done nothing for Decedent but prolong his agony.

The Single Commissioner and later the Full Commission also committed an error of law

by stating “even assuming Employee had increased his alcohol intake after-and because of-the work injury, such would not constitute a compensable work ‘injury by accident’ or death.” The Supreme Court took up the issue of suicide as an intervening factor and found foreseeability was the key in ***Wickersham.***

> A plaintiff must also prove cause-in-fact. "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." Hurd v. Williamsburg Cty., 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005) (citing Oliver, 309 S.C. at 316, 422 S.E.2d at 130). This is a difficult burden in claims for wrongful death from suicide. For instance, proving causation-in-fact in this case required Mrs. Wickersham to prove the following sequence of causal events: Ford's defective design of the airbag enhanced Mr. Wickersham's injuries, which in turn caused him to suffer severe pain he would not otherwise have had, which in turn caused him to experience an uncontrollable impulse to commit suicide, which in turn caused him to take his own life involuntarily, which he would not have done but for Ford's defective design.

Crystal L. Wickersham; et al. v. Ford Motor Company, Appellate Case No. 2018-001124, 12/9/2020, Opinion No. 28003.

January 25, 2021
Anderson, South Carolina

s/Donald L. Smith

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Attorney for Appellants

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION
Full Commission

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

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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.

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PROOF OF SERVICE

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I certify that I have served a copy of Appellant's Petition for Rehearing and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and the Respondents, by and through their counsel of record, Mr. J. South Lewis, II, Esquire at 872 South Pleasantburg Drive, Greenville, SC 29607, via their respective AIS email addresses, as follows:

The Honorable Jenny Abbott Kitchings ctappfilings@sccourts.org
J. South Lewis, Esquire jslewis@wjlaw.net

The above-mentioned documents have been served on January 25, 2021.

s/Donald L. Smith
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Attorney for Petitioner

Anderson, South Carolina
January 25, 2021.

FORM 8
LETTER TO THE APPEALS COURT CLERK

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SC Court of Appeals

January 25, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: James Provins and Debra Provins v. Spirit Construction and Insurance Company of the State of PA

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

(1) Appellant's Petition for Rehearing; and,

(2) Proof of Service for same.

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Sincerely,

s/Donald L. Smith
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cc:

Mr. J. South Lewis, Esquire