

TABLE OF CONTENTS

Table of Authorities	ii
Certificate of Counsel	1
Question Presented	1
Statement of the Facts of the Case	1
Arguments in Granting the Petition	
The decision below runs in conflict with Rules of Court and prior rulings of appellate courts.	5
This is the proper forum a venue for the Court to consider apportionment of benefits.	12
Conclusion	14

TABLE OF AUTHORITIES

Cases

Ballard v. Worker’s Compensation App. Board (1971) 3 Cal.3d at 837	11
Citing Tanenbaum v. Industrial Acc. Com. (1935) 4 Cal.2d 615, 617 [52 P.2d 215]	12
Bartley v. Allendale Cnty. Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011)	10
Ellison II, 371 S.C. at 164, 638 S.E.2d at 666	10
Eastman v. Industrial Acc. Com., 186 Cal. 587, 594 [200 P. 17].	11
Kinsey v. Champion American Services Center, 268 S.C. 177, 232 S.E.2d 720 (1977)	5

Statutes

S.C. Code Ann. §42-9-25	6
S.C. Ann. Code §42-9-60	5

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's counsel certifies that a Petition for Rehearing was made on January 25, 2016, amended on January 26, 2021, and denied on March 26, 2021.

QUESTION PRESENTED

Whether the Court of Appeals, in affirming SC Worker's Compensation Commission's decision denying death benefit upon Petitioner, decided an important question in a way that conflicts with relevant decisions of this Court?

STATEMENT OF THE FACTS OF THE CASE

On January 24, 2012, while working as an ironworker with Respondent Spirit Construction Company (hereinafter referred as "Respondent"), James Provins (hereinafter referred as Decedent) injured his right shoulder while moving sheets of steel decking with a co-worker. The safety foreman drove Decedent to Respondent's chosen medical clinic and he was seen by its physician assistant (herein after referred as "PA"), who obtained an x-ray of his injury. He was diagnosed with a shoulder sprain; and he was prescribed medications and exercise. Decedent Employee returned to the clinic the following week with the same symptomology. The PA recognized the need for an MRI due to her belief that he suffered a torn rotator cuff. ¹ Despite the company PA's request for an MRI, the Decedent, Respondent did not authorize it. Respondent Insurance Company denied the claim as well. Decedent Employee independently obtained an MRI which showed extensive tearing of the 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 from work. With no work, he returned to his hometown Kentucky.

Decedent filed for worker's compensation benefits and treatment before the SC Worker's Compensation Commission's (hereinafter referred as "Commission") which Respondent vigorously contested. A hearing was held on August 14, 2012 to determine whether the Decedent sustained a compensable injury. On September 7, 2012, Commissioner McCaskill found the greater weight of the evidence supported that Decedent sustained a compensable injury to his right shoulder on January 24, 2012, awarded causally related medical treatment, TTD benefits from the date of accident, and awarded Decedent four-week credit of TTD for the period of time that he worked for another employer in Kentucky. Respondents filed a Form 30, Request for Full Commission Review and a brief, which was served on Appellant on November 27, 2012.² Respondents appealed the decision of the Commissioner, which was affirmed by the Full Commission. Respondents began to act in conjunction with the decision, two (2) days prior to the necessity of filing an appeal with the Court of Common Pleas.

On May 15, 2013, Dr. Frank O. Bonnarens, MD diagnosed Decedent with rotator cuff tear, impingement of the AC joint, degenerative joint disease and tear of the long head of the biceps. A surgery was performed on Appellant: a right shoulder rotator cuff repair, acromioplasty/Mumford procedure, debridement of the biceps stump and labral tears and insertion of bone graft. Following the surgery, Decedent underwent a course of physical therapy. Despite the surgery and therapy, he was never free of pain, which is documented for every visit

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

with medical personnel following the surgery. Decedent had limited range of motion and complained of not being able to raise his hand, nor to wipe his buttocks.

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 original shoulder injury. Dr. Bonnarens opined that relapses were somewhat common.

In April of 2014, it had become apparent Respondents would not provide the surgery recommended by their treating physician-just as they had the PA. Decedent had never offered any intervening cause to the re-tear of the rotator cuff. The treating physician had no knowledge of any alternative causation. Respondents requested HIPAA forms to further delay the prescribed treatment.

A Motion to Compel the surgery was filed on behalf of Decedent. As previously noted, Respondents delayed the surgery by requiring medical releases to investigate causation of a “subsequent/new/recurrent” rotator cuff tear. While waiting for Respondents’ assistance, Decedent died on April 11, 2014. According to his death certificate, he died of acute respiratory failure, septic shock, pneumonia, renal failure, and alcohol abuse. *App. p. 1021.*

Prior to his death, Decedent had exhibited signs of severe 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 was also diagnosed to have an alcohol abuse problem as related to his pain and suffering. His wife and sister informed the

hospital and doctors that Decedent had been in pain for a little more than two (2) years, and exhibited 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. Decedent'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 Appellant, in his workplace and while performing a task for Respondents, was causally related to his death.

Petitioner filed a claim for death benefits under the Commission, which was denied by the Commissioner Michael Campbell, II on March 6, 2017. On January 11, 2018, the Appellate Panel (hereinafter referred as "Commission") affirmed the denial of the single commissioner. The Commission concluded Decedent's death was not proximately caused by the injury he sustained during the work-related accident on January 24, 2012. *App. 37*. Petitioner appealed to the Court of Appeals.

On January 13, 2021, the Court of Appeals issued an unpublished opinion that affirmed the findings of Commission denying death benefits for herein Petitioner.

Petitioner filed a Petition for Rehearing alleging the Commission erred in denying Petitioner's claim for death benefits as she believes she has sufficiently established the protracted delay in providing medical assistance and/or benefits to Decedent was the proximate cause of his death.

Petitioner's petition for rehearing was denied by the South Carolina Court of Appeals on March 26, 2021. Petitioner contends the Court of Appeals decision was in conflict with decisions of various courts and now asks this Court to issue a writ of certiorari to review both opinions of the Court of Appeals.

**ARGUMENTS FOR GRANTING THE PETITION:
THE DECISION BELOW RUNS IN CONFLICT WITH RULES OF
COURT AND PRIOR RULINGS OF APPELLATE COURTS**

In denying Petitioner's claim for death benefits, the Commission found she failed to prove Decedent's death was causally related to the shoulder injury he sustained on January 24, 2021. The Commission opined the Decedent's alcoholism served as an independent intervening cause that broke the causal connection between the work injury and the cause of death.

Petitioner argues Decedent's alcoholism was not an independent, intervening cause. However, it is her contention Respondents' denial of Decedent's request for medical treatment and benefits at the onset of his work-related injury was. She also alleges Respondents refused to abide by the rulings made in the South Carolina Workers' Compensation Commission where there was absolutely no alternative causation provided-let alone a reasonable possibility. The baseless refusal to adhere to the Act in good resulted in Decedent developing chronic pain syndrome; and triggered his depression which led him to either turn to or increase his alcohol use.

A. DECEDENT'S ALCOHOLISM WAS NOT THE PROXIMATE CAUSE OF HIS INJURY.

Under South Carolina law, no compensation is payable if the injury or death was occasioned by intoxication of the worker. S.C. Ann. Code §42-9-60. However, for intoxication or alcoholism to be a bar to recovery, the employer must show that it is the proximate cause of the injury. Kinsey v. Champion American Services Center, 268 S.C. 177, 232 S.E.2d 720 (1977).

It was undisputed Decedent's injury was work-related. It was established that while he and Luis Carrion, a co-worker, were moving sheets of steel decking, Carrion dropped his end which created a jumping effect on Decedent's end. This incident injured Decedent's shoulder. He was brought to Respondent's clinic. On the day he was injured, no drug nor alcohol was found in his system. His post-accident drug test was negative on all accounts. *App. p. 55*. In the duration of his employment with Respondent, Decedent never had any issue with alcoholism. There was no report or claim Decedent used alcohol at work before or after the injury. Clearly, his work injury was not occasioned and/or caused by his intoxication or alcoholism. The Single Commissioner specifically found Decedent was credible, thereby recognizing his description of the subject accident and his testimony indicating alcohol was not a factor in same, were convincing.

B. DECEDENT'S WORK-RELATED INJURY AGGRAVATED HIS PRE-EXISTING CONDITION.

Petitioner posits Decedent's alcoholism should be considered a pre-existing condition which was aggravated by the injury he sustained. Respondent's own expert witness, Dr. Ballenger, described him as a chronic/lifelong alcoholic.

Under South Carolina law, an injured employee/worker is entitled to workers' compensation benefits despite having a pre-existing condition when the injury he sustained at work aggravated his pre-existing condition.

S.C. Code Ann. §42-9-25 provides:

- (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 other words, if the work-related injury worsened Decedent's health, increased his pain, caused him to incur medical bills or forced him to miss time from work, etc., then worker/employee has sufficiently proven his entitlement to benefits.

Petitioner endeavored to show the work injury sustained by Decedent had materially accelerated or aggravated his pre-existing condition. Decedent's bout with alcohol use in 2009 was documented. At that time, Decedent experienced a series of unfortunate events: his father died, and his wife kicked him out of the family house. At the lowest point in his life, he turned to alcohol for solace. Shortly after his meltdown, he turned his life around, went back to church, reconciled with his wife; and returned to his affable self. Alcohol did not necessarily disappear from his life, but issues associated with it did.

The next time he had a documented issue with alcohol use is after he sustained his shoulder injury from working at Respondent. There were no medical records, arrests, reprimands, etc., demonstrating alcohol had once again reared its ugly head in Decedent's life. While a fellow employee offered testimony regarding the significance of Decedent's alcohol use, the testimony did not surface until after Decedent's claim. It should be noted the same employee declared Decedent's work ethic was peerless. For all intents and purposes, Decedent's Alcohol consumption did not become an issue until May 15, 2013, when he started seeing Dr. Bonnarens.

Petitioner, who lived with Decedent, claimed her husband was an out-going, happy person, who loved helping people prior to his accident at work. Petitioner stated that after his injury, he became a different person. (Excerpts of Transcript of Hearing, Debra Provins, December 5, 2016, p. 19, 9.19). For the two years he was suffering in pain, he drank more, became anti-social and reclusive. Petitioner stated her husband showed signs of depression and

became anti-social and reclusive. Petitioner stated expressed a desire to die. (Debra Provins' Affidavit).

Petitioner's recollection of discussions regarding Decedent's drinking:

06. Q. Prior to the -- the injury when he came home
07. on the weekends and so forth what kind of alcohol
08. consumption did you see?
09. A. Beer.
10. Q. Okay. And with regard to the activities
11. that took place when he was home was he -- did you
12. guys go anywhere with the kids or anything like that?
13. A. We'd go to eat and stuff like that and he
14. would be drinking beer here and there, but I never
15. seen him drink any liquor then.
16. Q. Would he drink excessively during that time?
17. A. No.
18. Q. When you went to see Dr. Bonnarens was there
19. any discussion about drinking?
20. A. Not that I recall, no.
21. Q. We're talking about the surgeon, right?
22. A. The surgeon.
23. Q. Physical therapy, --
24. A. No.

Petitioner's observation was confirmed by another witness who had personally interacted with Decedent, his sister (a registered nurse), Alice Zimmerman stated:

10. A. I believe his injury did ultimately lead to
11. his death because he was in constant pain. He changed
12. from -- excuse me. He changed from the person he used
13. to be to someone who was a recluse, that was -- stayed
14. by theirself and felt like he was -- that he told me,
15. less of a man. I'm sorry. In my opinion he felt like
16. less of a man. He couldn't provide for his family and
17. that bothered him a great deal.

(Excerpts of Transcript of Hearing, Alice Zimmerman, December 5, 2016, p. 54, 10.17).

Petitioner also submitted Dr. Price's Opinion based on Decedent's medical Records. His opinion provided the following:

Mr. Provins had developed pain, 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 was also diagnosed to have an alcohol abuse problem as related to his pain and suffering. This was noted on his death certificate. The Baptist Physical Therapy noted on 06/11/13 that there were “Obvious signs of ETOH alcohol abuse in his presentation (e.g. tremors, yellow/red eyes...).

The fact he had to undergo a rotator cuff surgery and go to therapy indicate his work injury brought stress on Decedent. Furthermore, Decedent was forced to return to his hometown when Respondent refused to give him light duty. His unemployment meant he could not support his disabled wife and their two daughters. It also meant he no longer had health insurance.

Records reflect that as a result of Decedent’s work injury, physical pain and suffering, loss of income and ability to use his right arm, he was wrought with depression and anxiety. Decedent was unable to see a psychiatrist for his mental state since he had very limited resources, though the fact he was an iron worker may have “prevented” him from treating. There can be no doubt that the work injury he sustained affected his pre-existing condition. Studies have shown patients with alcohol problems either suffer needless pain or self-medicate. Petitioner has also advanced Decedent consumed alcohol to alleviate his pain brought about by his injury, delayed treatment and eventual, unsuccessful surgery.

C. THE DECISION OF THE COMMISSION CONFLICTS WITH THE RULING IN BARTLEY AND ELLISON II.

The Court of Appeals ruled to recover for aggravation of pre-existing injury, Petitioner should have presented medical evidence supporting Decedent’s drinking increased due to the accident. There can be no better historians than his wife and sister who had been around him for at least the quarter-century prior to his death. Where would medical evidence come from? Family members? Co-workers? Police Reports?

Petitioner takes issue with the Court of Appeals affirming the Commission's finding that her husband's case is not one where an alcoholic stopped his excessive drinking and returned to his alcoholic ways because of the injury. The Commission's decision relied on on Dr. James Ballenger's interpretation of Decedent's medical records. It noted that Dr. Ballenger opined Decedent "suffered from a progressively worsening alcoholism over the course of his adult life". *App. 11*. Dr. Ballenger had not treated, met, nor read the entirety of Decedent's medical records.

There were no medical records nor findings Decedent continued his drunken phase in the three-year period between his 2009 meltdown and May 15, 2013 when he started seeing Dr. Bonnarens for his rotator cuff. Dr. James Ballenger, Respondents' expert who testified Decedent continued his alcohol dependence during the interim period without any proof is illustrative of his occupation as a professional witness. When offered statements by other physicians opposing his theory of non-stop dependence on alcohol (with common uses of the English language), he boldly offered the plain meaning was not what they meant. He said he was an expert and that is what experts do.

At one point, Respondents' theory was Decedent/ Employee may have caused the re-tear of his rotator cuff when he suffered from alcohol DTS due to his alcohol withdrawal. (Court of Appeals Opinion, January 13, 2021). This would show Respondents believed Decedent had been in recovery with his alcohol abuse, and the work injury contributed to his return to his addictive behavior.

Notwithstanding this, the Court of Appeals insistence that aggravation was a requirement to recover is in conflict with the ruling in the case of *Ellison II*, where the Court of Appeals ruled "(T)here is no requirement that the pre-existing condition aggravated the injury, or that the injury

aggravated the pre-existing condition, so long as there is a greater disability simply from the 'combined effects' of the injury and the preexisting condition." *Ellison II*, 371 S.C. at 164, 638 S.E.2d at 666, as cited in *Bartley v. Allendale Cnty. Sch. Dist.*, 392 S.C. 300, 709 S.E.2d 619 (2011).

In *Ellison*, the claimant was given a 20% permanent impairment rating to his leg after injuring it on the job. *Ellison, supra at 665*. Ellison also had pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease, which, in combination with his workplace injury, rendered him physically unable to return to work after his accident. *Id.* Applying section 42-9-400, the commissioner concluded Ellison was totally disabled from the combined effect of his pre-existing conditions and the workplace injury to his leg.

In this case, the Commission failed to consider Dr. Dwight Jacobus, M.D.'s findings that Mr. Provins would have a permanent disability regardless of whether he had a second surgery because of the overwhelming damage done due to the delay in providing 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.

(APAs, p. 104).

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

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

The Ellison II and Bartley cases presented two standards in determining the effects and/or consequence of pre-existing conditions with a work-related injury: the “aggravation provisions” and the “combined effects” standards. While these standards have been used to determine issues that relate to compensation benefits, the same are silent on death benefits. Petitioner believes the instant case would provide the opportunity for this Court to resolve whether the “combined effects” standard may be used in death benefits claims.

D. THIS IS THE PROPER FORUM FOR THE COURT TO CONSIDER APPORTIONMENT OF BENEFITS.

A consequence of the “no-fault” principle of South Carolina worker’s compensation system is “that an employer takes the employee as he finds him at the time of the employment.” Ballard v. Worker’s Compensation App. Board (1971) 3 Cal.3d at 837. It has been established the acceleration, aggravation or “lighting up” of a preexisting disease is an injury in the occupation causing the same. Eastman v. Industrial Acc. Com., [186 Cal. 587, 594](#) [[200 P. 17](#)].

The underlying theory is that the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience. In such cases full compensation for the entire disability suffered is recoverable although the physical condition of the employee contributed to and increased the disability caused by the injury or prolonged and interfered with healing and recovery.

Tanenbaum v. Industrial Acc. Com. (1935) 4 Cal.2d 615, 617 [52 P.2d 215] as cited in Ballard, supra.

In *Ballard*, a secretary suffered a back injury at work and was prescribed pain medication. Having a “low tolerance for pain of any kind,” she took more than her prescribed dosages and became

addicted. (*Ballard, supra*, 3 Cal.3d at p. 835.) Further, she sought out illegal drugs and became addicted to those as well. The referee denied her workers' compensation claim, concluding that "[t]he most likely cause of her addiction is the obvious life-long neurotic personality problems and the injury simply serves to provide a rationalization for her recourse to drugs." (*Id.* at p. 837.) *Ballard* reversed, reasoning that the referee's findings did not "serve to warrant denial of recovery if the addiction resulted *in part* from the prescribed drugs. The employer takes the employee as he finds him at the time of employment. Similarly, the finding that her problems would have culminated in addiction `even in the absence of this trauma and the treatment rendered thereafter' do[es] not furnish a basis for denial for all recovery because even in cases where disability would follow from the normal progress of the preexisting disease[,] apportionment is proper where the industrial injury has contributed to the disability. There is no finding that the prescribed drugs did not, along with the personality problems and the illegally obtained drugs, *contribute* to any part of the disability, and the findings do not support the denial of recovery."

Id. at p. 838, italics added.

In applying the *Ballard* ruling in the instant case, considering the Respondent had prior knowledge of his alcoholism, they should have foreseen that their initial denial of medical benefits and prolongation of treatment for a work-related injury would lead to Decedent's return to and/or continuation of his alcohol abuse. Therefore, an outright and complete denial of benefits is improper where the work-related injury contributed to or exacerbated Decedent's alcoholism.

Petitioner believes that "but for" the injury, and the subsequent bad faith denial of the claim which prevented Decedent from getting the necessary treatment in a reasonable time, caused his shoulder injury to deteriorate to the point his surgery was bound to fail. The deterioration of his dominant right shoulder from the point the "company doctor" diagnosed the rotator cuff tear and prescribed an MRI to the point of surgery, could only be viewed as significant. The natural continued tearing of the shoulder, combined with the atrophy associated

with the lack of consistent use, left the relapse of the injury a forgone conclusion. The physical therapy notes following the surgery contain Decedent's incessant complaints of pain. The re-tear in turn prevented him from improving to the plateau of MMI and a subsequent return to work-ever.

It is Petitioner's contention that her husband died as a result of the injury, based on the "but for" analyses which are numerous throughout this case. Respondents are showing the insurance industry how easy it is "just say no" to their employees' requests for treatment after suffering work-related injuries. Based on the "workers'" inability to pursue litigation for their injuries, it is essential for the remaining participants to act in good faith. Public policy mandates entities such as Respondents herein match their insulation from lawsuits with a no-fault, sincere application of the Workers' Compensation Act.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Anderson, South Carolina
April 26, 2021

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