

APPENDIX F

APPELLANTS' AMENDED PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 26 2021

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION

Full Commission

RECEIVED

Apr 27 2021

S.C. SUPREME COURT

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.

AMENDED 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 return 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.

Dr. James Ballenger’s opinions follow his checkbook. In this particular matter, he opined the Decedent would have died on the same exact day, regardless of whether he had been hurt on the job. While this case is important, he is probably more well known for his findings that Jesse Osborne, who killed his father and a boy in kindergarten, was simply a bad kid-free of mental psychoses. (State v. Osborne; C.A. No.: 2016-JU-04-236-245). Dr. Ballenger’s intent was clear in the fact he had a way of making every fact meant he died from alcohol poisoning solely.

Fainting is a temporary loss of consciousness that happens when the brain does not receive enough oxygen. It comes on suddenly, only lasts for a short time and you recover fully within a short time. It is also often called a blackout. (Patient, Fainting Collapse, Authored by Dr Colin Tidy, Reviewed by Dr Adrian Bonsall, June 13, 2018). SYNCOPÉ (sin-co-pee) is a medical term for a blackout that is caused by a sudden lack of blood supply to the brain.

Ballenger said Decedent’s treating physician who diagnosed Syncope after the

explanation he had coughed to the point of blacking out; and had returned as if nothing had happened in two minutes, meant that he blacked out because he was drunk. The records said nothing about alcohol being a factor. Ballenger said he was an expert and he knew that is what he meant.

- 17 Q. Right. Thank you, sir. He suffered
18 from syncope?
19 A. Syncope.
20 Q. Syncope. What is that?
21 A. Yes, sir, in 2001.
22 Q. Yes, sir. What is that?
23 A. Passing out.
24 Q. And that is related to what?
25 A. The doctor then thought it was related
1 to alcohol.
2 Q. But isn't it like a seizure?
3 A. No. It's passing out. The doctor
4 wanted him to see a neurologist to work it up, but
5 Mr. Provins thought about it and said, no, I don't
6 want to see a neurologist.
7 Q. passing out?
8 And so where does it say that he's just
9 A. That's what the word syncope -- he had
10 three syncope episodes. That's what that means.
11 He also that you talked a lot about how Mr. Provins
12 was drinking and that he thought these things were
13 related to his alcohol consumption.
14 Again, a doctor and an expert reading
15 this concludes that the most likely cause of the
16 passing out spells is alcohol, not the unlikely
17 cause of seizures because Mr. Provins never had
18 another thing that looked like a seizure even
19 though he never got it worked up.
20 Q. I believe that would be in the notes.
21 Is that right?
22 A. I don't remember the doctor's notes. If you could show that to me,
please.
23 Q. This is 2012, not 2001.
24 A. This is 2009.
25 MR. KILLEN: Identify what record
1 you're showing to the witness, please. What

2 records?
3 THE WITNESS: For visits and - -
4 MR. KILLEN: What is the date on the
5 records? Can I see them as well?
6 MR. SMITH: Certainly.
7 THE WITNESS: The first encounter was
8 4/3/12. The next one is 10/22/09.
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 when
18 he drinks heavier.
19 People tell them him that his eyes roll
20 back 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. They're
6 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 a fair
10 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.
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 in
7 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 has 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.
9 It could be seizures for one reason,
10 one, because it could just be plain old seizures.
11 Two, alcoholics have seizures because of withdrawal
12 issues. It doesn't say except it does say -- to me

13 it says it. If you want to be technical the doctor
14 doesn't say he thinks these are related to alcohol.
15 He has said it by using the words "blackout
16 spells."
17 Q. Isn't the passing out, though,
18 proceeded by coughing where he's not being able to
19 breathe?
20 A. Sometimes. Sometimes.
21 I mean, that's in that handwritten note.
22 Q. What I'm showing you now is
23 A. You wouldn't call them blackout spells
24 from coughing from passing out from coughing.
25 Q. No?
1 A. You would call them
2 Q. Do you know him?
3 A. No. I'm just saying, the average
4 competent doctor wouldn't do that.
5 Q. So he would be incompetent from passing
6 out from a
7 MR. KILLEN: Objection.
8 THE WITNESS: I didn't say that. I'm
9 saying he's probably competent because he calls
10 them blackouts.
11 BY MR. SMITH:
12 Q. Let me show you what's marked as March
13 21st, 2009. Is there anything in there related to
14 alcohol?
15 A. No. Coughing up phlegm, chest is
16 congested. Has a fever. Spitting up mucus. Can't
17 get any sleep. Maybe from the coughing. He has
18 hypertension for four years, does dip. He doesn't
19 smoke cigarettes.
20 Back on March 21st, 2009 he does not
21 mention alcohol, but, again, it's consistent
22 with doesn't prove it. It's consistent with
23 what happens to alcoholics is they get a lot of
24 infectious diseases, particularly lung diseases,
25 and it's consistent with that.
1 Q. Isn't that consistent with COPD?
2 A. Yeah, it is.
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.

He also said Dr. Tom Martin, who testified on Decedent's behalf meant he was drinking more than ever when he said,

10. There's no record or evidence provided
11 to suggest that Mr. Provins suffered from ongoing
12 alcohol or mood-related issues and at the end of
13 the next sentence he reintegrated with his family
14 and the community unfettered by his 2009 bout with
15 alcohol.
16 Q. Right, which means he recovered and
17 kept on moving. Right?
18 Does that mean he stopped drinking
19 alcohol? It said that he wasn't getting in
20 trouble. Isn't that your perception?
21 A. No.
22 Q. Which record in there tells us he said
23 he stopped drinking?
24 A. Well, the totality of the evidence in
25 those two sentences tells me that. Dr. Martin's a
1 psychiatrist and he knows that Mr. Provins was a
2 longstanding severe alcoholic. So these sentences
3 convey clearly to me that he was saying that he was
4 not having any trouble with alcohol and he is really
5 implying he was not drinking.

Appellants, in fact, withdrew their Form 50 regarding the permanency sustained by Decedent. A pre-hearing conference held by Commissioner Susan Barden paved the way for same. Commissioner Barden instructed Appellants' counsel it would be unnecessary to try the case because they would lose. She said this despite the fact there was no opposition to Dr. Jacobus's review of the medical records relating to Decedent's shoulder, and subsequent finding irreparable damage had been done with the treatment offered by Respondents. In review, fifteen months of continued tearing and atrophying, plus the failed surgery, had left a mess of a shoulder. Dr. Jacobus did not say he reached MMI, but he did say the best he could do would be

87 to 90%, regardless of any further treatment. The Commission was unable to see the deduction because the assessment did not have the magic letters-MMI.

The pain and misery Decedent was forced to deal with based on Respondents' absolute refusal to abide the Act cannot be ignored. The adage, Deny, Deny, Deny-he might die, was an extremely successful venture for Respondents. South Carolina is a better place because they, and others like them, are willfully and wantonly making baseless denials, reaping the benefits of the South Carolina Employers' Savings Commission.

January 25, 2021
Anderson, South Carolina

s/Donald L. Smith
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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jan 26 2021

SC 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.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Amended 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

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Attorney for Petitioner

Anderson, South Carolina
January 26, 2021.

FORM 8
LETTER TO THE COURT OF APPEALS' CLERK

RECEIVED

Jan 26 2021

SC Court of Appeals

January 26, 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 Amended Petition for Rehearing and
- (2) Proof of Service for same.

Sincerely,

s/Donald L. Smith

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Attorney for Appellants

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Mr. J. South Lewis, Esquire