

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-000133

James Provins, Employee/Deceased,
Debra Provins, Alleged Dependent, Claimants, Appellants

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the South Carolina Workers' Compensation Commission committed an error of law in finding there was no bad faith denial or delay on the part of Respondents?
- II. Whether substantial evidence supports the South Carolina Workers' Compensation Commission affording greater weight to the opinion of Dr. James Ballenger?
- III. Whether substantial evidence supports the conclusion of the South Carolina Workers' Compensation Commission that Appellant failed to meet the burden of proving a compensable death claim.
- IV. Whether the South Carolina Workers' Compensation Commission committed an error of law in declining to make a determination on permanent disability?

STATEMENT OF THE CASE

This claim was initiated upon the filing of a Form 50 hearing request in which Employee/Deceased James Provins (hereinafter “Decedent”) alleged injury to the right shoulder on January 24, 2012. Respondents, via Form 51, denied compensability. Subsequently, after an evidentiary hearing before Commissioner Gene McCaskill (hereinafter “Compensability Hearing”), the claim was found compensable. (R. pp. 49-61) Respondents timely appealed to the South Carolina Workers’ Compensation Commission Appellate Panel, and after oral arguments, an affirmation was issued. (R. pp. 39-48) Thereafter, Respondents began providing Decedent medical treatment for the right shoulder, to include a shoulder surgery.

During the course of medical treatment, Decedent filed a Motion to Compel (additional surgery). (R. pp. 58-61) Respondents also filed their own Motion to Compel, seeking execution of medical releases to obtain out-of-state medical records. (R. pp. 62-69) While a motion hearing was pending and scheduled, Decedent died on April 14, 2014. The Death Certificate lists “Acute respiratory failure and septic shock” as causes of death. (R. p. 1021)

Claimant/Alleged Dependent Debra Provins (hereinafter “Appellant”), filed a Form 50 on November 18, 2014, seeking entitlement to benefits pursuant to S.C. Code Ann. § 42-9-280. Prior to the scheduled hearing of January 22, 2015, with Commissioner Barden, and after a pre-hearing conference, the Form 50 was withdrawn. Appellant refiled the Form 50 on March 18, 2015, this time seeking permanent and total disability, as well. Subsequently, Appellant filed an Amended Form 50 on April 13, 2015, and additionally filed a Form 52 Death Claim on April 15, 2015. Respondents responded with a Form 53, denying that Decedent had sustained a compensable death. A hearing was scheduled before

Commissioner T. Scott Beck on October 21, 2015; after a pre-trial conference, Appellant withdrew the Forms 50 and 52.

Appellant refiled *only* the Form 52 Death Claim (hereinafter “claim,” “this claim,” “death claim”) on January 25, 2016. A hearing was scheduled before Commissioner Melody James on July 26, 2016. During the pre-trial conference, Commissioner James ordered the case for mediation. Mediation was held on September 29, 2016, at which time the parties did not reach a settlement.

A hearing before the Single Commissioner, Commissioner R. Michael Campbell, II, ensued. The parties were heard on December 5, 2016, in Anderson, South Carolina. At the hearing of December 5, 2016, Appellant asserted that Decedent’s death resulted from “the bad faith denial of the claim which prolonged his treatment...” (R. p. 252, line 3) Specifically, Appellant’s position was that in order to deal with his pain, Decedent became dependent on alcohol, which eventually lead to his death. To be clear, the only issue at the hearing before the Single Commissioner was whether Decedent had suffered a compensable and causally-related death as a result of his work injury.

Respondents denied that there was any “bad faith” denial of the claim. After treatment commenced, including a surgery, Respondents submitted medical releases to Decedent to further investigate causation of a subsequent/new/recurrent rotator cuff tear; however, those releases had not been executed as of the time of Decedent’s death. As to the death itself, Respondents asserted that the cause of death was multifactorial, as evidenced by the Death Certificate, with alcohol being a significant contributing factor. (R. p. 254, lines 2-6) However, abuse of alcohol—even if legitimately related to pain—would not justify a compensable death claim. Specifically, Decedent had a significant pre-existing

alcohol issue and was an alcoholic prior to the work injury. (R. p. 154, line 1) Respondents relied on the expert testimony of Dr. Ballenger, in support of the position that the work injury did not result in Decedent's death.

Furthermore, Respondents raised a Capers¹ defense, based on the documented history that Decedent had gone to the hospital even before his work injury, reporting that he was drinking himself to death; as such, Respondents contended that death due to alcohol abuse was not an unexpected or unforeseen event, and, thus, would not meet the standard of "accidental." (R. p. 254, lines 21-25, and p. 255, lines 1-3) Finally, Respondents asserted a public policy defense. (R. p. 254, lines 11-17)

On March 6, 2017, the Single Commissioner issued the Decision and Order, whereby he found Decedent's death was not proximately caused by the January 24, 2012, right shoulder injury. (R. p. 37) Thereby, pursuant to S.C. Code Ann. § 42-9-290, the Single Commissioner denied the claim for death benefits. (R. p. 37)

On March 20, 2017, Appellant timely appealed the Decision and Order via filing of a Form 30, Request for Commission Review. (R. pp. 155-157) Briefs were filed by both parties, and oral arguments were held before the Appellate Panel of the South Carolina Workers' Compensation Commission on November 14, 2017. By Decision and Order dated January 11, 2018, the Appellate Panel unanimously affirmed the Order of the Single

¹ Capers v. Flautt, 407 S.E.2d 248 (1991).

Commissioner. (R. pp. 1-15) Appellant timely filed a Notice of Appeal to this Court, and this appeal follows.² (R. pp. 169-171)

² Respondents also respectfully take the opportunity to note with particularity that this appeal and the proceedings it is based upon are grounded in the compensability of a claim for death benefits and not the compensability of the right shoulder injury from January 24, 2012.

Standard of Review

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence as found by the single commissioner. Langdale v. Harris Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). The appellate court's review of these findings of fact is limited to determining whether the findings are *clearly* unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987) (emphasis added). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. R. L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

An award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951); Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979). Therefore, an appellate court may overturn findings of fact of the Commission if there is

no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

The Appellate Panel's decision must be affirmed if it is supported by substantial evidence in the record. Wise v. Wise, 394 S.C. 591, 597, 716 S.E.2d 117, 120 (Ct. App. 2011) (citing Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005)). Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the Appellate Panel reached, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Appellate Panel's finding from being supported by substantial evidence. Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). Where there are conflicts in evidence over factual issues, the findings of the Appellate Panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002).

Section 1-23-380(A)(5) of the South Carolina Code also provides, in part:

The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007).

Thus, appellate "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

ARGUMENT

1. The South Carolina Workers' Compensation Commission correctly found there was no bad faith denial or delay on the part of Respondents.

The South Carolina Workers' Compensation Commission did not commit an error of law in finding that Respondents did not act in bad faith in their provision of medical treatment. Substantial evidence is contained within the record of the proceedings to support the Workers' Compensation Commission's finding that there was no bad faith on the part of Respondents.

As an initial matter, there is no recognizable claim for bad faith within the South Carolina workers' compensation arena. Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986). In Cook, a claimant brought suit in civil court against his employer and the employer's workers' compensation carrier for bad faith refusal to pay benefits for his workers' compensation claim. The Court of Appeals held an action for bad faith cannot be brought under the South Carolina Workers' Compensation Act because the Act provides the exclusive remedy for settling claims coming within the terms of the Act. While Cook was a civil action, it supports the proposition that the South Carolina Workers' Compensation Act provides the remedies and relief for claimants/employers/carriers, and consequently, Appellant cannot simply make a broad assertion of "bad faith" in justifying the pursuit of this death allegation.³

Appellant's assertion that there was a "bad faith" denial in providing treatment is simply unfounded. The evidence, including emails among counsel included in the record

³ Respondents further object to the repeated characterization by Appellant that they maintain a policy of "deny, deny, deny, maybe he'll die." (R. pp. 107, 126, 157, and p. 316, lines 7-8 and 21-24) Such bombast is not only untrue, but is inappropriate and not relevant to any appellate matter at hand.

on appeal, indicate that another surgery had been recommended by the authorized treating physician, Dr. Bonnarens (for a recurrent rotator cuff tear). (R. pp. 857-860) After that recommendation, Respondents requested medical releases be signed to further investigate causation of same. (R. pp. 857-860) Unfortunately, before these medical releases were signed, Decedent expired.

Appellant erroneously asserts that Dr. Bonnarens related the recurrent rotator cuff tear to the work injury. However, there is no medical opinion in the record that relates the re-tear to the work injury. There was a telephone conversation between Dr. Bonnarens and respective counsel; as a result of the telephone conversation, Respondents sought medical releases to further investigate the causation of the underlying shoulder claim. (R. p. 860) As this Court is well aware, obtaining medical records from an out-of-state provider generally requires execution of medical releases. Appellant, through counsel, pushed back on executing said releases—as evidenced by the correspondence submitted into the record. (R. pp. 857-860)

In addition, Appellant erroneously raises an issue that was not before the Single Commissioner, the Workers' Compensation Commission, or appealed, seemingly in an attempt to deliberately distract from the matter hand. To wit, Appellant makes much of an allegation of intermittent delay in payment of temporary disability benefits while Decedent was living. (Appellant's Brief, pp. 6-7) However, such an issue is not in the record before this Court and is irrelevant to the death claim on which this matter is based. Appellant attempts to loosely connect a delay in mail to a death due to alcoholism, which is unsupported by any medical opinion within the record. Appellant additionally did not raise such an argument in brief or in oral arguments before the Single Commissioner or the South

Carolina Workers' Compensation Commission. Thus, such an argument is considered waived. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003).

As the evidence does not establish that Respondents engaged in "bad faith," coupled with the proposition that South Carolina does not recognize a "bad faith" action in relation to workers' compensation claims, the South Carolina Workers' Compensation Commission did not err in finding that there was no "bad faith" action or inaction on the part of Respondents.

2. Substantial evidence supports the conclusion of the South Carolina Workers' Compensation Commission affording greater weight to the opinion of Dr. James Ballenger.

The South Carolina Workers' Compensation Commission did not err when it gave greater weight to the opinion of Dr. James Ballenger than to other opinions within the record because substantial evidence supports such a finding.

The South Carolina Workers' Compensation Commission is the ultimate trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence. Langdale v. Harris Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). The Commission determines the weight and credit to be given to expert testimony. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The credibility and weight of a doctor's testimony is for the trier of facts, and such evidence is weighed similarly to other evidence. Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967); McGuffin v. Shumberger-Sangama, 307 S.C. 58, 156 S.E.2d 318 (1967); Fishburne v. ATI Sys. Int'l, S.C. 76, 681 S.E.2d 595 (Ct. App. 2000). Although medical testimony is entitled

to great respect, the fact finder may disregard it if there is other competent evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. 276, 294, 599 S.E.2d 604, 613 (Ct. App. 2004); *see Tiller*, 334 S.C. at 340, 513 S.E.2d at 846 (confirming that medical testimony should not be held conclusive irrespective of other evidence).

The South Carolina Workers' Compensation Commission is the ultimate trier of fact and is in a position to weigh the evidence within the entire record. Appellant quotes the deposition of Dr. Ballenger at great length within brief; however, the Commission has been afforded the opportunity to read the entirety of the deposition and the reports of a variety of experts, including Dr. Ballenger, and concluded the most weight was properly given to Dr. Ballenger's opinion. It is not the role of this Court to weigh the evidence in this matter and supplant its judgement for that of the Appellate Panel of the Commission; rather, the determination to be made is whether or not substantial evidence exists within the record to affirm the decision of the South Carolina Workers' Compensation Commission. Without question, substantial evidence exists to support the decision of the Commission to afford the greatest weight to Dr. Ballenger's opinion.

Regardless, it is apparent that the South Carolina Workers' Compensation Commission properly and correctly determined that Dr. Ballenger's expert opinion should be afforded greater weight for multiple reasons, including his credentials, that fact that he did an extensive review of voluminous records including Decedent's medical history, and further explained his opinions in his deposition. (R. pp. 11, 34, 751, 765) Dr. Ballenger is board certified in psychiatry and forensic psychiatry and has been practicing for approximately 40 years. (R. pp. 751, 765, 956-947) He was a professor and chairman of the Department of Psychiatry and Behavioral Sciences at the Medical University of South

Carolina in Charleston, for 17 years. (R. p. 751) He was Founding Director of the Institute of Psychiatry (1988-2000), and also founded MUSC's substance abuse clinical and research institute in 1994 (the Center for Drug and Alcohol Programs), and was its Founding Executive Director until 2000. (R. p. 751) He is internationally recognized as an expert in psychopharmacology and the anxiety disorders and depression/bipolar illness. (R. p. 751) In addition, Dr. Ballenger has authored over 350 professional papers and sixteen books. (R. pp. 751, 778-856)

Appellant seeks to impugn Dr. Ballenger's credibility based on the expert witness fee he received pursuant to agreement with Respondents as retainer. (Appellant's Brief, p. 16) When questioned at his deposition regarding his agreement with Respondents, Dr. Ballenger stated,

I was told they would like me to read the records and to make sure I didn't have any conflicts and they sent me the records. They described that it was a workers' comp. case and they wanted my opinion as an expert in alcoholism to develop opinions about whether he did or did not have alcoholism and develop opinions that would be pertinent to this case then they would send me the records.

(R. p. 925, line 22-p. 926, line 12)

In comparison to Appellant's counsel's interactions with Dr. Martin prior to his authoring a report, it is of no surprise that the South Carolina Workers' Compensation Commission afforded little weight to Dr. Martin's opinion. Specifically, correspondence from Appellant's counsel to Dr. Martin indicates,

It is by chance that I found you and could be a monumental twist of fate. I have a workers' comp case in which my guy tore his rotator cuff, and then died two years later. **I am attempting to tie them together... I need to bridge the gap between the rotator cuff and the [sic] his death.**

(emphasis added) (R. p. 878)

Quite logically, little weight was given to Dr. Price's or Dr. Martin's opinion, especially when juxtaposed to Dr. Ballenger's opinion. Dr. Price opined that Claimant had "no history of pain, anxiety, depression or alcoholism prior to the work injury." (R. pp. 33-34, 442) Clearly, this is refuted by the pre-injury medicals that demonstrate Claimant has had a long standing alcohol abuse problem for the majority of his life. (R. pp. 32-33, 113-115, 456) The opinion of Dr. Martin was correctly determined to be of little weight due, in part, to the reliance on the report of Dr. Price, but also due to significant reliance on subjective history provided by Decedent's counsel, Decedent's wife, and Decedent's sister. (R. pp. 32-34, 444-446)

Based on the grounds set forth above, substantial evidence supports the Commission's finding that Dr. Ballenger was credible, and should be afforded more deference than Appellant's experts.

3. Substantial evidence supports the conclusion of the South Carolina Workers' Compensation Commission that Appellant failed to meet the burden of proving a compensable death claim.

The South Carolina Workers' Compensation Commission correctly determined that Appellant failed to meet the burden of proving a compensable death claim under S.C. Code Ann. § 42-9-290, and substantial evidence exists within the record to support such a conclusion.

Decedent expired on April 14, 2014. His death certificate lists "Acute Respiratory Failure" and "Septic Shock" as the causes of death. (R. p. 1021) Following the death, Appellant filed numerous hearing requests, under multiple theories of recovery. (R. pp. 99-101, 864-865) It was not until a year after Decedent's death that Appellant sought a compensable death claim and it was not until over two years after the death that Appellant

proceeded to a hearing before the Single Commissioner on the issue. (R. pp. 99-101, 864-865) Substantial evidence presented to the Single Commissioner, and ultimately to the Appellate Panel, supported the conclusion that Decedent's death was not causally-related to his shoulder injury and was, therefore, not compensable.

Appellant attempts to allege that Decedent's death was a result of depression and subsequent alcohol abuse related to his right shoulder injury. However, depression has never been a causally-related allegation in this matter and has never been properly raised. There is also no medical record or other evidence that existed before Decedent's death that supports that he developed an alcohol issue only after his shoulder injury. There exists only an opinion, specifically sought by Appellant in no uncertain terms, proffered to "bridge the gap," between the shoulder injury and Decedent's death. (R. p. 878)

- a. Allegations concerning Decedent's supposed depression were not properly supported by the evidence and are not properly raised.

Given that no physicians who actually treated Decedent before his death diagnosed him with depression, to do so now posthumously would require much conjecture and speculation. Appellant admitted at the death claim hearing that she never sought to have Decedent treated for any depression after his work injury. (R. p. 280, lines 4-5) Furthermore, with Decedent's history of alcoholism, depression would not be unexpected. In fact, upon questioning by Appellant's counsel, seeking an opinion that Decedent must have been depressed, Dr. Ballenger responded:

"Well, you know, that is speculation. I can tell you as a practicing psychiatrist for 40 something years drinking a half a gallon of liquor every day is much more likely to cause depression than even being unemployed and having trouble in the bathroom. So it is just speculation, one, that it would cause depression and, two, that he was really depressed. We have no evidence. Most people who get seriously depressed find their way to the doctor to complain of depressive symptoms and yet he did not."

(R. p. 941, lines 9-19)

There was never any medical evidence provided by Appellant from personal doctors or treating physicians that would either support a depression finding, or refute Dr. Ballenger's opinion concerning the matter. Appellant only offered an affidavit from Dr. Martin, a psychiatrist who was hired by Appellant to prepare an opinion. Dr. Martin never treated Decedent, and much of his report was based on Dr. Price's report, which is considerably flawed, as previously discussed.

- b. Decedent was a lifelong alcohol abuser and no objective evidence within the record supports that his work injury affected his drinking habits.

Substantial evidence within the record supports Decedent's life-long history of alcoholism. Most notably, though not exclusively,

- Appellant provided such a history at the time of Decedent's hospitalization/death in April 2014. "According to his wife a long history of alcoholism . . ." (R. p. 709)
- An admission report from April 10, 2014, details a history of a "52-year-old male who is an alcoholic and drinks about half a pint of Vodka every day for most of his life . . ." (R. p. 569)
- On July 7, 2009, Decedent's sister called the police and Decedent 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 Decedent was a longstanding alcoholic, who consumed 16-18 beers per day and a half a pint to a pint of liquor per day. (R. pp. 456, 461)
- When Decedent initially began treating with Dr. Bonnarens, on April 15, 2013, he reported drinking 8-10 beers per day, and this was *before* his shoulder surgery. (R. p. 489)
- In none of the post-accident medical reports does it indicate that Decedent'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 work injury. The testimony of Appellant that the drinking only became a problem

after his work injury, in response to dealing with his pain, and is not supported by the history she herself provided upon Decedent's hospital admission on April 10, 2014. (R. pp. 569, 589, 599)

Substantial evidence exists to support the conclusion that Decedent suffered from a progressively worsening alcoholism over the course of his adult life and that, though he suffered a multifactorial death, alcoholism was a primary contributing factor and that the shoulder injury had essentially no impact upon his alcohol abuse and ultimate death.

c. Decedent's alcohol abuse was an intentional act and, even if causally-related to his death, would act as a bar to Appellant's claim for death benefits.

A claim for benefits is barred under S.C. Code Ann. § 42-9-60, when it involves an injury that occurs as the result of an intentional action. Here, Decedent knew, even before his work injury, that he was harming his body drinking. Again, even prior to his work injury, he reported to providers "I'm drinking myself to death." (R. p. 461) Decedent intentionally drank with the knowledge of the effect it would have on his wellbeing. In fact, when questioned specifically as to whether the act of drinking alcohol is an intentional act, even for an alcoholic, Dr. Ballenger testified that "Yes...They're the one who buys the vodka. They're the one who makes the drink. They're the one who drinks it." (R. p. 955, lines 6-14) Under Capers v. Flautt, 407 S.E. 2d 248 (1991) an injury has to be unforeseen or unexpected to be compensable. It is not unforeseen that a life-long alcohol would eventually die due in part to alcohol abuse. Dr. Ballenger also testified that Decedent's death fit into the pattern of an alcoholic who would have died, regardless of his shoulder injury at work. (R. pp. 956, lines 2-9 and pp. 926, line 23-p. 927, line 1) In fact, Decedent had been "drinking for 35, 40 years and at a rate that I'm astounded he lived as long as he did into his early 50s." (R. p. 927, lines 1-3) Tragic and foreseeable as it is, Decedent's

death and that Decedent chose to continue drinking to excess is not attributable to Respondents. Substantial evidence within the record supports the conclusion of the South Carolina Workers' Compensation Commission that Decedent's death is not compensable.

4. The South Carolina Workers' Compensation Commission did not commit an error of law in not addressing permanent disability to Decedent's shoulder as the issue was not properly preserved for appeal.

The South Carolina Workers' Compensation Commission did not commit an error of law in not issuing a finding on permanent disability to the shoulder because substantial evidence supports that the issue of permanent disability was not properly before the Commission or this Court.

It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000); Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998); *see also* Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (issue not raised to trial court is not properly before appellate court). Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error. Staubes v. City of Folly Beach, 529 S.E.2d 543 (S.C. 2000).

Appellant did not plead a permanent partial disability to the shoulder to the Single Commissioner in this claim for death benefits. (R. pp. 23-24) While Appellant asserted a § 42-9-280 claim in 2015, that Form 50 was withdrawn, and the argument abandoned, in order to pursue the Form 52 death claim upon which this matter rests. Therefore, the issue of permanent partial disability was not raised in the pleadings before the Single

Commissioner. Further, by Appellant previously withdrawing multiple Form 50s and instead pursuing a Form 52, there was a clear intention to solely pursue the compensability of the death claim.

Moreover, Appellant did not argue entitlement to any permanency benefits before the Single Commissioner or in oral arguments before the Appellate Panel of the South Carolina Workers' Compensation Commission. As such, the issue was not ruled upon by either tribunal. (R. pp. 37, 48, 252) Consequently, the issue is not preserved for appellate review by this Court, and such argument is considered waived. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 577 S.E.2d 475 (Ct. App. 2003).

Even if the issue of permanency was properly before the Commission, an award for permanency cannot be based on mere speculation when an authorized treating physician has not pronounced an individual at maximum medical improvement or assigned a permanent impairment rating prior to the individual's death.⁴ The South Carolina Workers' Compensation Act does not provide for a posthumous determination of disability.

Absent an opinion by Decedent's authorized treating physician that Decedent was at maximum medical improvement, had sustained permanent impairment prior to his death, and addressing to what extent there existed permanent impairment, an award of permanent partial disability would have been entirely speculative. An award of the Commission must

⁴ Respondents acknowledge McMahan v. S.C. Dept. of Transportation, (Opinion No. 5415 – filed June 15, 2016) in which this Court reversed the decision of the South Carolina Workers' Compensation Commission which denied permanent and total disability benefits to the estate of a deceased worker on the basis that he had not reached maximum medical improvement prior to his death. Respondents assert the case at bar is substantially and factually distinguishable from McMahan on the basis that no authorized treating physician, either prior to Decedent's death or posthumously, has opined Decedent reached maximum medical improvement or assigned a permanent impairment rating upon which permanent disability could be determined.

not be based on speculation. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951).

Appellant ultimately attempts to assert that the Single Commissioner and the Workers' Compensation Commission decided incorrectly that a claim for the death of a life-long alcoholic, brought a year after his death, is not the result of a shoulder injury sustained two years prior. Appellant has characterized this claim, intermittently, as a single scheduled member claim, a claim for permanent and total disability, and finally as a claim for death benefits. (R. pp. 99-101, 864-865) As Appellant has twice failed to prevail on an argument for death benefits, Appellant now once more asserts entitlement to permanent disability for the shoulder. In short, Appellant has erratically asserted not one, but three theories of recovery in relation to this claim and seems to hope one eventually "sticks."

CONCLUSION

Based on the foregoing, Respondents respectfully request the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,

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October 2, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-000133

James Provins, Employee/Deceased,
Debra Provins, Alleged Dependent, Claimants, Appellants,

v.

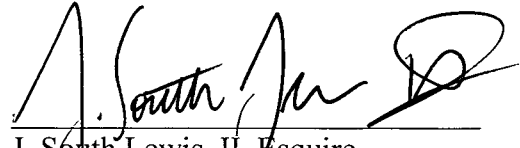
Spirit Construction Services, Inc., Employer, and Insurance
Company of the State of PA, Carrier, Respondents.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

October 2, 2018



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